EMPLOYEES' COMPENSATION ORDINANCE

(CAP. 282)

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To provide for the payment of compensation to employees who are injured in the course of their employment. **Q1/0/2**

(Amended 44 of 1980 s.2)

[1 December 1953] *G.N.A. 160 of 1953*

PART I

PRELIMINARY

(Added 19 of 1964 s.2)

Short title

1. This Ordinance may be cited as the Employees' Compensation Ordinance. **Q1/1**

(Amended 44 of 1980 s.15)

Introduction—The commentary to the Employees Compensation Ordinance (Cap. 282), and its subsidiary legislation (the Employees Compensation (Rules of Court) Rules and the Employees Compensation Regulations), is not intended to address the substantive provisions of the legislation. The commentary addresses the practice and procedure in so far as proceedings are brought in the District Court and the High Court concerning claims under the Ordinance. **Q1/1/1**

A full analysis of the substantive provisions of the legislation would be a lengthy exercise for a number of reasons. First, the legislation has a considerable history. It was originally enacted in Hong Kong in 1953 and has been the subject of a significant number of amendments. It is based on earlier English legislation which also had a considerable history, albeit that it is no longer in force in its original form, namely the English Workmen's Compensation Acts of 1897, 1906 and 1925. (The English legislation was subsumed within the National Insurance and Social Security legislation enacted after the Second World War.) Secondly, the legislation has equivalents in a considerable number of jurisdictions: Australia, New Zealand and South Africa to name but three. There is a considerable amount of analysis and guidance to be found in the decisions in these jurisdictions as well as in England and Wales and Hong Kong on the substantive issues of law that arise under the legislation. Thirdly, in the words of Barwick C.J. of the High Court in Australia in *Ogden Industries Pty Ltd v. Lucas* (1967) 116 C.L.R. 537, who was addressing a particular question of construction of the equivalent legislation in the State of Victoria, the "construction of workers' compensation statutes ... in any case are rarely notable for clarity". (See also the comments of Toohey and Morling JJ. of the Northern District Federal Court in *Watkins Ltd v. Renata* (1985) 8 F.C.R. 65 and see also the comments of Yuen JA in *Lau Suet Fung v. Future Engineering Co.* (unrep., CACV 110/2003, [2004] H.K.E.C. 150.)

Further, the commentary in this edition focuses on the procedural provisions of the Ordinance itself, rather than a detailed analysis of the application of the Employees Compensation (Rules of Court) and the District Court Rules themselves.

Q1/1/2 **Overview of the scheme of legislation**—However, although the commentary addresses the courts' practice and procedure under the Employees Compensation legislation and not the substantive law, it is necessary to have an understanding of the scheme of the legislation in order to understand the commentary. For a general overview of the scheme of the legislation and the structure of the Ordinance, see paras Q1/5/1 *et seq*. For a useful judicial summary of the scheme of the legislation (as it stood in 1996) see the judgment of Godfrey J.A. in *Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49.

Q1/1/3 **Key issues of substantive law**—The key substantive issues of law that tend to arise are:

(1) Is the claimant an employee, and of the employer in question?
(2) Was the injury sustained in the course of the employee's employment?
(3) Had the employee knowingly misrepresented the prior existence of an injury?
(4) Was the injury due to the employee's serious and wilful misconduct or deliberately aggravated by the employee?
(5) What is the applicable percentage of loss of earning incapacity in cases that do not fall within the prescribed categories?
(6) The application of the prescribed method of calculating earnings?
(7) Is there liability on the part of a third party either to the employee (for example by a principal contractor or an insurer) or to the employer by way of an indemnity (for example, in cases where the accident was not due to any fault of the employer but was caused by one or more third parties).

Q1/1/4 **Relevance of decisions from other jurisdictions**—For the reasons mentioned above, the procedural law in a number of other jurisdictions may well be of use in interpreting and applying the Ordinance and its subsidiary legislation. This commentary draws primarily on decisions of the courts of Hong Kong, England and Wales and Australia. It is not based on an exhaustive review of Australian decisions, but draws on certain key decisions concerning matters of procedure where the relevant procedure in Hong Kong and Australia is substantially the same. In *Wong Hoi Chung v. LKK Trans Ltd* (unrep., DCEC 153/1999, [2004] H.K.E.C. 369), C.B. Chan DCJ, in dealing with a question of causation in the context of an application under s.9 of the Ordinance observed that there were significant differences between the Hong Kong framework and the UK framework, such that it may not be helpful to refer to the UK authorities. The main differences noted were: (1) the absence in the UK of a comparable lump sum compensation scheme as provided for by ss.7 and 9 of the Ordinance in respect of permanent total and permanent partial incapacity respectively; (2) the background to the UK legislation of the UK Government's social security and unemployment benefit systems; (3) the absence in the UK of the equivalent of the First Schedule to the Ordinance, providing a scale of percentages for use in assessing compensation for bodily impairment, even in the case of non-scheduled injuries, and (4) the existence in the Ordinance of s.10(5).

This view was upheld on appeal, the Hon. Reyes J opining that he did not consider jurisprudence on the [Workers Compensation Act 1925 (UK)] to be any safe guide to the interpretation of the Ordinance. He noted: "Case law on the WCA can at best be indicative of the correct approach in Hong Kong. It cannot be compelling. Ultimately the [Ordinance] must be read in light of local circumstances and needs, not those of the UK.": *Wong Hoi Chung v. LKK Trans Ltd* [2005] 2 H.K.L.R.D. 444, (CA).

Q1/1/5 **Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance 2006**—Most amendments contained in Pt 3 have come into effect and shall apply to accidents that happened on or after September 1, 2008. With respect to those work accidents

that happened before that date, the old provisions as were in force immediately before that commencement shall continue to apply with respect to claims for compensations or other rights obligations or liabilities in respect of accidents happening before that commencement (September 1, 2008): See *Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance 2006 Commencement Notice 2008*, gazetted on May 9, 2008.

One of the major objectives of the amendment Ordinance is to provide for recognition of certification given by, and medical examination and treatment conducted or given by, a registered Chinese medicine practitioner for the purposes of entitlement to certain employee benefits.

Since the old provisions are still applicable in relation to accidents which happened before September 1, 2008, the amended versions are produced in the annotation with explanatory notes.

Meaning of "employee"

2.—(1) In this Ordinance, unless the context otherwise requires, the expression "employee" (僱員), subject to section 4 and the proviso to this subsection, means any person who has, either before or after the commencement of this Ordinance, entered into or works under a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing: *(Amended 11 of 1958 s.2)* **Q1/2**

Provided that the following persons are excepted from the definition of "employee" (僱員)—

(a) *(Repealed 44 of 1980 s.3)*

(b) any person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club and not being a part-time domestic helper; or *(Amended 63 of 1992 s.2)*

(c) an outworker; or

(d) a member of the employer's family employed by such employer and who resides with the employer. *(Amended 55 of 1969 s.2)*

(2) If, in any proceedings for the recovery of compensation under this Ordinance, it appears to the Court that the contract of service or apprenticeship under which the injured person was working, at the time when the accident causing the injury happened, was illegal, the Court may, if having regard to all the circumstances of the case it thinks proper so to do, deal with the matter as if the injured person had at the time aforesaid been a person working under a valid contract of service or apprenticeship.

(3) In this Ordinance, unless the context otherwise requires, any reference to an employee who has been injured shall, where the employee is dead, include a reference to his legal personal representative, or to the members of his family or any of them or the Official Administrator or such other officer as the Chief Executive may appoint to act on behalf of the members of the family of the employee. *(Amended 36 of 1996 s.2; 52 of 2000 s.2; 56 of 2000 s.3)*

(4) Where, in any employment, personal injury by accident arising out of and in the course of the employment is caused to any person, and at the time of the accident—

(a) that person would, but for paragraph (d) of the proviso to subsection (1), have been an employee within the meaning of that subsection; and

(b) there is in force in relation to that person a policy of insurance which indemnifies the employer against liability in respect of such injury whether or not the indemnity is for an amount which is less than the full amount of the liability in respect of which the employer would, under section 40(1), be required to be insured if such person were an employee within the meaning of subsection (1),

this Ordinance shall, notwithstanding paragraph (d) of the proviso to subsection (1), apply in relation to that person for all purposes as if he were an employee within the meaning of the subsection. *(Added 76 of 1982 s.2)*
(Amended 44 of 1980 s.15)

Q1/1 **"Employee"**—The definition of "employee" (s.2) and "employer" (s.3) are fundamental to the operation of the Ordinance, and inextricably tied together. Section 2 requires a person to have entered into or worked under either a contract of service or apprenticeship with an employer in any employment. A distinction is to be drawn between an employee and an independent contractor. The well-established formulation of the distinction between the two is the test set out by Cooke J. in *Market Investigations Ltd v. Minister of Social Security* [1969] 2 Q.B. 173, approved by the Privy Council in *Lee Ting Sang v. Chung Chi-keung* [1990] 2 W.L.R. 1173:

> "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his account?' If the answer is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

The question of whether a person is an employee or an independent contractor is to be determined at trial as a matter of fact, in accordance with this fundamental test (*Poon Chau Nam v. Yim Siu Cheung* (unrep., CACV 86/2005, [2006] H.K.E.C. 891). See *Chitty on Contracts* (29th edn) Vol.2, paras 39–010—39–028 at pp.943–955, which set out some helpful considerations.

As to whether an injury happens in the course of employment, see para.Q1/5/22.

Q1/2/2 **Illegal contracts of employment**—The discretion under s.2(2) is in the widest possible terms and is necessarily to be exercised on the facts of each case, involving its own mixture of discretionary factors. It was inappropriate to seek to prescribe what factors should be taken into account by the court in the exercise of its discretion. As a general matter, having regard to the public policy regarding unemployable persons performing lawful work, allowing compensation claims by illegal employees was more conducive to serving such policy. In order to stop illegal employment, it was important to target and deter greedy employers, by hitting them in the pocket. If a claim is allowed against an illegal employer, it may make the employer more likely to surface rather than remain hidden, either due to more serious efforts to trace the employer or a bankruptcy petition freezing the employer's bank accounts. Given that an illegal employer will be almost invariably uninsured, the Fund Board's potential liability is relevant to the exercise of discretion, but it is only a factor the weight of which must be balanced against all other considerations. The Fund Board could help fight illegal employment by actively enforcing its right of subrogation against employers under s.37 of the Employees' Compensation Assistance Ordinance (Cap. 365). *Yu Nongxian v. Ng Ka Wing* [2007] 4 H.K.L.R.D. 159, CA (leave to appeal refused by the Court of Final Appeal which concluded that no basis had been shown in any event for interfering with the exercise of the Court of Appeal's decision: (unrep., FAMV 64/2007, [2008] H.K.E.C. 99), CFA).

Q1/2/3 **Member of the employer's family employed by such employer and who resides with the employer**—The exception cannot apply when the employee is employed by a company or a partnership (see *Wood v. Wood* (1923 B.W.C.C. 208)).

Interpretation

Q1/3 **3.**—(1) In this Ordinance, unless the context otherwise requires— *(Amended 52 of 2000 s.3)*

"accident insurance business" (意外保險業務) means the business of effecting contracts of insurance against the liability of an employer for personal injury by accident to any employee in his employment arising out of and in the course of such employment; *(Added 55 of 1969 s.3)*

"Certificate for Funeral and Medical Attendance Expenses" (殯殮費和醫護費證明書) means a certificate issued under section 6E(1)(b); *(Added 52 of 2000 s.3)*

"Certificate of Compensation Assessment for Fatal Case" (致命個案補償評估證明書) means a certificate issued under section 6B(1)(b); *(Added 52 of 2000 s.3)*

"Certificate of Interim Payment" (臨時付款證明書) means a certificate issued under section 6C(1)(b); *(Added 52 of 2000 s.3)*

"cohabitee" (同居者), in relation to an employee, means any person who at the time of the accident concerned was living with the employee as the employee's wife or husband; *(Added 52 of 2000 s.3)*

"Commissioner" (處長) means the Commissioner for Labour; *(Replaced 13 of 1966 Schedule. Amended 55 of 1969 s.3; L.N. 142 of 1974)*

"compensation" (補償) means any of the following—

(a) compensation payable under section 6, 7, 8, 9 or 10, including the expenses of the funeral and medical attendance payable under section 6(5); *(Amended 52 of 2000 s.3)*

(b) medical expenses payable under section 10A;

(c) wages or salary payable under section 16I(3) or 36MA; *(Amended 36 of 1996 s.3)*

(d) the cost of the supplying and fitting of a prosthesis or surgical appliance payable under section 36B, and the probable cost of repair and renewal thereof payable under section 36I;

(da) interim payment; *(Added 52 of 2000 s.3)*

(e) any surcharge or interest payable under this Ordinance on the compensation referred to in paragraph (a), (b), (c), (d) or (da); *(Replaced 76 of 1982 s.3. Amended 52 of 2000 s.3)*

"contract of apprenticeship" (學徒訓練合約) includes a contract of improvership or learnership; *(Added 55 of 1969 s.3)*

"Court" (法院) means—

(a) in relation to any proceedings for the recovery of compensation in or required to be in the District Court, the District Court; or

(b) in relation to any proceedings for the recovery of compensation in any other court or tribunal, or to be determined by the Commissioner, that court or tribunal, or the Commissioner, as the case may be; *(Replaced 76 of 1982 s.3)*

"damages" (損害賠償) means any damages recoverable by an employee independently of this Ordinance in the case of personal injury to the employee by accident arising out of and in the course of his employment, and any interest payable on such damages; *(Added 55 of 1969 s.3. Amended 54 of 1991 s.47)*

"earnings" (收入) means any wages paid in cash to the employee by the employer and any privilege or benefit which is capable of being estimated in money and includes the value of any food, fuel, or quarters supplied to the employee by the employer if as a result of the accident the employee is deprived of such food, fuel or quarters; and any overtime payments or other special remuneration for work done, whether by way of bonus, allowance or otherwise, if of constant character or for work habitually performed and including tips if the employment be of such a nature that the habitual giving and receiving thereof is open and notorious and is recognized by the employer: but shall not include remuneration for intermittent overtime, or casual payments of a non-recurrent nature, or the value of a travelling allowance, or the value of any travelling concession or a contribution paid by the employer of an employee towards any pension or provident fund,

or a sum paid to an employee to cover any special expenses entailed on him by the nature of his employment;

"employer" (僱主) includes the Government and any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of an employee are temporarily lent or let on hire to another person by the person with whom the employee has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Ordinance, be deemed to continue to be the employer of the employee whilst he is working for that other person; and in relation to a person engaged, employed or paid through a club or hostel, the manager or members of the managing committee of the club or hostel shall, for the purposes of this Ordinance, be deemed to be the employer; *(Amended 76 of 1982 s.37; 68 of 1995 s.2; 56 of 2000 s.3)*

"ECAFB" (管理局) means the Employees Compensation Assistance Fund Board constituted by section 3(1) of the Employees Compensation Assistance Ordinance (Cap. 365); (Added 16 of 2002 s. 33)"

"hospital" (醫院) means any hospital registered under the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165), any hospital maintained by the Government, any military hospital or any public hospital within the meaning of the Hospital Authority Ordinance (Cap. 113); (Added 74 of 1977 s. 2. Amended 82 of 1991 s. 2; 2 of 2012 s. 3)

"insurance company" (保險公司) and "insurer" (保險人) mean a person carrying on accident insurance business in Hong Kong and include—

(a) a company authorized under section 8 of the Insurance Companies Ordinance (Cap. 41) to carry on class 13 of the classes of insurance business specified in Part 3 of the First Schedule to that Ordinance;

(b) an association of underwriters approved by the Governor in Council before 1 July 1994 or by the Insurance Authority on or after 1 July 1994 under section 6 of that Ordinance; *(Amended 47 of 1995 s.2)*

(c) the society of underwriters known in the United Kingdom as Lloyd's; *(Replaced 33 of 1990 s.31)*

"interim payment" (臨時付款) means an interim payment of compensation the subject of a determination under section 6C(1)(a); *(Added 52 of 2000 s.3)*

"medical expenses" (醫療費)—

(a) in relation to medical treatment given in Hong Kong, means all or any of the following expenses incurred in respect of the medical treatment of an employee—

(i) the fees of a registered medical practitioner, registered Chinese medicine practitioner, registered dentist, registered chiropractor, registered physiotherapist or registered occupational therapist; (Replaced 16 of 2006 s. 12)

(ii) the fees for any surgical or therapeutic treatment;

(iii) the cost of nursing attendance;

(iv) the cost of hospital accommodation as an in-patient;

(v) the cost of medicines, curative materials and medical dressings;

(b) in relation to medical treatment given outside Hong Kong, means such expenses incurred in respect of the medical treatment of an employee as the Commissioner, by certificate in

writing issued under section 10B(1)(b), determines to be medical expenses; *(Replaced 1 of 1995 s.2)*

"medical treatment" (醫治), in relation to an employee to whom a personal injury is caused by accident arising out of and in the course of his employment, means medical treatment of any kind whatsoever given to the employee—

(a) in the case of medical treatment given in Hong Kong, by, or under the supervision of, a registered medical practitioner, registered Chinese medicine practitioner, registered dentist, registered chiropractor, registered physiotherapist or registered occupational therapist; (Amended 16 of 2006 s. 12)

(b) in the case of medical treatment given outside Hong Kong, by, or under the supervision of, a person who is allowed to practise medicine, surgery, dentistry, chiropractic, physiotherapy or occupational therapy in the place where such medical treatment is given,

in a hospital, whether as an in-patient or other than as an in-patient, or elsewhere; *(Added 74 of 1977 s.2. Amended 1 of 1995 s.2)*

"member of the family" (家庭成員), in relation to an employee, means a person who has any of the following relationships in respect of the employee, whether by blood or an adoption specified in subsection (2)—

(a) a spouse or cohabitee;

(b) a child;

(c) a parent or grandparent; or

(d) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a brother or sister of the whole blood, any of whom has been living with the employee as a member of the same household and has been so living for the period of 24 months immediately preceding the accident concerned; *(Replaced 52 of 2000 s.3)*

"occupational disease" (職業病) means any of the diseases specified in the second column of the Second Schedule and any recurrence or sequelae thereof; *(Added 19 of 1964 s.3)*

"Ordinary Assessment Board" (普通評估委員會) means an Employees' Compensation (Ordinary Assessment) Board appointed under section 16D; *(Added 76 of 1982 s.3)*

"outworker" (外發工) means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the materials or articles;

"partial incapacity" (部分喪失工作能力) means, where the incapacity is of a temporary nature, such incapacity as reduces the earning capacity of an employee in any employment in which he was engaged at the time of the accident resulting in the incapacity, and, where the incapacity is of a permanent nature, such incapacity (which may include disfigurement) as reduces his earning capacity, present or future, in any employment which he was capable of undertaking at that time; *(Amended 55 of 1969 s.3; 49 of 1985 s.2)*

"principal contractor" (總承判商) means a person referred to as a principal contractor in section 24; *(Added 76 of 1982 s.3)*

"registered Chinese medicine practitioner" (註冊中醫) has the meaning assigned to it by section 2 of the Chinese Medicine Ordinance (Cap. 549); (Added 16 of 2006 s. 12) 74

"registered chiropractor" (註冊脊醫) has the meaning assigned to it by section 2 of the Chiropractors Registration Ordinance (Cap. 428); (Added 16 of 2006 s. 12)"

"registered dentist" (註冊牙醫) means a dentist who is admitted to the register of dentists under section 9 of the Dentists Registration Ordinance (Cap. 156); (Added 74 of 1977 s.2) 76

"registered medical practitioner" (註冊醫生) means a medical practitioner who -- 77 (a)is registered under the Medical Registration Ordinance (Cap. 161); or 78 (b)is deemed to be a registered medical practitioner by virtue of section 29(a) of that Ordinance; (Added 16 of 2006 s. 12) 79

"registered occupational therapist" (註冊職業治療師) means a person who is an occupational therapist and is registered in respect of that profession under the Supplementary Medical Professions Ordinance (Cap. 359); (Added 16 of 2006 s. 12) 80 "registered physiotherapist" (註冊物理治療師) means a person who is a physiotherapist and is registered in respect of that profession under the Supplementary Medical Professions Ordinance (Cap. 359); (Added 16 of 2006 s. 12)"

"Review Certificate for Funeral and Medical Attendance Expenses" (殯殮費和醫護費審核證明書) means a certificate issued under section 6E(12)(c); *(Added 52 of 2000 s.3)*

"Review Certificate of Compensation Assessment for Fatal Case" (致命個案補償評估審核證明書) means a certificate issued under section 6D(6)(c); *(Added 52 of 2000 s.3)*

"Review Certificate of Interim Payment" (臨時付款審核證明書) means a certificate issued under section 6C(11)(c); *(Added 52 of 2000 s.3)*

"Special Assessment Board" (特別評估委員會) means an Employees' Compensation (Special Assessment) Board appointed under section 16E; *(Added 76 of 1982 s.3)*

"sub-contractor" (次承判商) means—

(a) any person who enters into a contract, express or implied, with a principal contractor to perform all or any part of the work which the principal contractor has undertaken to perform; and

(b) any other person who enters into a contract, express or implied, to perform all or any part of the work which a sub-contractor within the meaning of paragraph (a) has undertaken to perform; *(Added 76 of 1982 s.3)*

"total incapacity" (完全喪失工作能力) means such incapacity whether of a temporary or permanent nature as incapacitates an employee for any employment which he was capable of undertaking at the time of the accident resulting in such incapacity. *(Amended 49 of 1985 s.2)*

(Amended 44 of 1980 s.15; 52 of 2000 s.3)

(2) For the purposes of the definition of "member of the family" (家庭成員)—

(a) an adoption means an adoption—

(i) made under an adoption order made in accordance with the Adoption Ordinance (Cap. 290);

(ii) to which section 17 of the Adoption Ordinance (Cap. 290) applies; or

(iii) made in Hong Kong in accordance with Chinese law and custom before 1 January 1973; and

(b) any person so adopted shall be treated as the child of the adopter, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly.

(Added 52 of 2000 s.3)

"Employer": employee temporarily lent or let on hire to another person—Consider the situation where A employs B and A lends or lets on hire B to C. Section 3(1) deems the employee, B, to continue to be the employee of A, even whilst he is working for C. The deeming provision is a conclusive deeming provision. It is not rebuttable by evidence to the contrary. Where the employee is injured in an accident which arises out of and in the course of his employment with his temporary employer, whilst by definition he will not have been injured in the course of his employment directly with his original or primary employer, the injury will be deemed to have occurred in an accident which arises out of and in the course of his employment by his original or primary employer for the purposes of s.5(4). The effect of s.3(1) is to produce a joint and several liability on the part of both the original or primary employer and the borrower, i.e. both A and C. See *Wong Wing Cheung v. Interlite (Asia) Ltd* (unrep., DCEC 893/2001, [2003] H.K.E.C. 918). **Q1/3/1**

"Principal contractor"—Section 3(1) defines a principal contractor as a person referred to in s.24. Section 24(1) refers to the principal contractor, *vis-à-vis* the injured employee, as "any person ... in the course of or for the purpose of his trade or business, contracts with a sub-contractor for the execution by or under the sub-contractor of the whole or any part of the work undertaken by the principal contractor ...". Whether a party's capacity is that of the employer of the works or a principal contractor will turn on the true nature of the business undertaken by the party and his relationship with the contractor in all of the circumstances, notwithstanding any labels or descriptions used (*Chan Po Kai v. Ng Moon Sum* (unrep., DCEC 820/2004, [2006] H.K.E.C. 346 and 531 (corrigendum), M Ng D.J.). **Q1/3/2**

For accidents which happened on or after September 1, 2008—Section 3 shall read as follows: **Q1/3/3**

(1) In this Ordinance, unless the context otherwise requires— *(Amended 52 of 2000 s.3)*

"accident insurance business" (意外保險業務) means the business of effecting contracts of insurance against the liability of an employer for personal injury by accident to any employee in his employment arising out of and in the course of such employment; *(Added 55 of 1969 s.3)*

"Certificate for Funeral and Medical Attendance Expenses" (殯殮費和醫護費證明書) means a certificate issued under section 6E(1)(b); *(Added 52 of 2000 s.3)*

"Certificate of Compensation Assessment for Fatal Case" (致命個案補償評估證明書) means a certificate issued under section 6B(1)(b); *(Added 52 of 2000 s.3)*

"Certificate of Interim Payment" (臨時付款證書) means a certificate issued under section 6C(1)(b); *(Added 52 of 2000 s.3)*

"cohabitee" (同居者), in relation to an employee, means any person who at the time of the accident concerned was living with the employee as the employee's wife or husband; *(Added 52 of 2000 s.3)*

"Commissioner" (處長) means the Commissioner for Labour; *(Replaced 13 of 1966 Schedule. Amended 55 of 1969 s.3; L.N. 142 of 1974)*

"compensation" (補償) means any of the following—

(a) compensation payable under section 6, 7, 8, 9 or 10, including the expenses of the funeral and medical attendance payable under section 6(5); *(Amended 52 of 2000 s.3)*

(b) medical expenses payable under section 10A;

(c) wages or salary payable under section 16I(3) or 36MA; *(Amended 36 of 1996 s.3)*

(d) the cost of the supplying and fitting of a prosthesis or surgical appliance payable under section 36B, and the probable cost of repair and renewal thereof payable under section 36I;

(da) interim payment; *(Added 52 of 2000 s.3)*

(e) any surcharge or interest payable under this Ordinance on the compensation referred to in paragraph (a), (b), (c), (d) or (da); *(Replaced 76 of 1982 s.3. Amended 52 of 2000 s.3)*

"contract of apprenticeship" (學徒訓練合約) includes a contract of improvership or learnership; *(Added 55 of 1969 s.3)*

"Court" (法院) means—

(a) in relation to any proceedings for the recovery of compensation in or required to be in the District Court, the District Court; or

(b) in relation to any proceedings for the recovery of compensation in any other

court or tribunal, or to be determined by the Commissioner, that court or tribunal, or the Commissioner, as the case may be; *(Replaced 76 of 1982 s.3)*

"damages" (損害賠償) means any damages recoverable by an employee independently of this Ordinance in the case of personal injury to the employee by accident arising out of and in the course of his employment, and any interest payable on such damages; *(Added 55 of 1969 s.3. Amended 54 of 1991 s.47)*

"earnings" (收入) means any wages paid in cash to the employee by the employer and any privilege or benefit which is capable of being estimated in money and includes the value of any food, fuel, or quarters supplied to the employee by the employer if as a result of the accident the employee is deprived of such food, fuel or quarters; and any overtime payments or other special remuneration for work done, whether by way of bonus, allowance or otherwise, if of constant character or for work habitually performed and including tips if the employment be of such a nature that the habitual giving and receiving thereof is open and notorious and is recognized by the employer: but shall not include remuneration for intermittent overtime, or casual payments of a non-recurrent nature, or the value of a travelling allowance, or the value of any travelling concession or a contribution paid by the employer of an employee towards any pension or provident fund, or a sum paid to an employee to cover any special expenses entailed on him by the nature of his employment;

"ECAFB" (管理局) means the Employees Compensation Assistance Fund Board constituted by section 3(1) of the Employees Compensation Assistance Ordinance (Cap. 365); *(Added 16 of 2002 s.33)*

"employer" (僱主) includes the Government and any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of an employee are temporarily lent or let on hire to another person by the person with whom the employee has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Ordinance, be deemed to continue to be the employer of the employee whilst he is working for that other person; and in relation to a person engaged, employed or paid through a club or hostel, the manager or members of the managing committee of the club or hostel shall, for the purposes of this Ordinance, be deemed to be the employer; *(Amended 76 of 1982 s.37; 68 of 1995 s.2; 56 of 2000 s.3)*

"hospital" (醫院) means any hospital registered under the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165) or maintained by the Crown or which is a public hospital within the meaning of the Hospital Authority Ordinance (Cap. 113); *(Added 74 of 1977 s.2. Amended 82 of 1991 s.2)*

"insurance company" (保險公司) and "insurer" (保險人) mean a person carrying on accident insurance business in Hong Kong and include—

(a) a company authorized under section 8 of the Insurance Companies Ordinance (Cap. 41) to carry on class 13 of the classes of insurance business specified in Part 3 of the First Schedule to that Ordinance;

(b) an association of underwriters approved by the Governor in Council before 1 July 1994 or by the Insurance Authority on or after 1 July 1994 under section 6 of that Ordinance; *(Amended 47 of 1995 s.2)*

(c) the society of underwriters known in the United Kingdom as Lloyd's; *(Replaced 33 of 1990 s.31)*

"interim payment" (臨時付款) means an interim payment of compensation the subject of a determination under section 6C(1)(a); *(Added 52 of 2000 s.3)*

"medical expenses" (醫療費)—

(a) in relation to medical treatment given in Hong Kong, means all or any of the following expenses incurred in respect of the medical treatment of an employee—

(i) the fees of a registered medical practitioner, registered Chinese medicine practitioner, registered dentist, registered chiropractor, registered physiotherapist or registered occupational therapist; *(Replaced 16 of 2006 s.12)*

(ii) the fees for any surgical or therapeutic treatment;

(iii) the cost of nursing attendance;

(iv) the cost of hospital accommodation as an in-patient;

(v) subject to section 10AB, the cost of medicines, curative materials and medical dressings; *(Amended 16 of 2006 s.12)*

(b) in relation to medical treatment given outside Hong Kong, means such expenses incurred in respect of the medical treatment of an employee as the Commissioner, by certificate in writing issued under section 10B(1)(b), determines to be medical expenses; *(Replaced 1 of 1995 s.2)*

"medical treatment" (醫治), in relation to an employee to whom a personal injury is caused by accident arising out of and in the course of his employment, means medical treatment of any kind whatsoever given to the employee—

(a) in the case of medical treatment given in Hong Kong, by, or under the supervision of, a registered medical practitioner, registered Chinese medicine practitioner, registered dentist, registered chiropractor, registered physiotherapist or registered occupational therapist; *(Amended 16 of 2006 s.12)*

(b) in the case of medical treatment given outside Hong Kong, by, or under the supervision of, a person who is allowed to practise medicine, surgery, dentistry, chiropractic, physiotherapy or occupational therapy in the place where such medical treatment is given, in a hospital, whether as an in-patient or other than as an in-patient, or elsewhere; *(Added 74 of 1977 s.2. Amended 1 of 1995 s.2)*

"member of the family" (家庭成員), in relation to an employee, means a person who has any of the following relationships in respect of the employee, whether by blood or an adoption specified in subsection (2)—

(a) a spouse or cohabitee;

(b) a child;

(c) a parent or grandparent; or

(d) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a brother or sister of the whole blood, any of whom has been living with the employee as a member of the same household and has been so living for the period of 24 months immediately preceding the accident concerned; *(Replaced 52 of 2000 s.3)*

"occupational disease" (職業病) means any of the diseases specified in the second column of the Second Schedule and any recurrence or sequelae thereof; *(Added 19 of 1964 s.3)*

"Ordinary Assessment Board" (普通評估委員會) means an Employees' Compensation (Ordinary Assessment) Board appointed under section 16D; *(Added 76 of 1982 s.3)*

"outworker" (外發工) means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the materials or articles;

"partial incapacity" (部分喪失工作能力) means, where the incapacity is of a temporary nature, such incapacity as reduces the earning capacity of an employee in any employment in which he was engaged at the time of the accident resulting in the incapacity, and, where the incapacity is of a permanent nature, such incapacity (which may include disfigurement) as reduces his earning capacity, present or future, in any employment which he was capable of undertaking at that time; *(Amended 55 of 1969 s.3; 49 of 1985 s.2)*

"principal contractor" (總承判商) means a person referred to as a principal contractor in section 24; *(Added 76 of 1982 s.3)*

"registered Chinese medicine practitioner" (註冊中醫) has the meaning assigned to it by section 2 of the Chinese Medicine Ordinance (Cap. 549); *(Added 16 of 2006 s.12)*

"registered chiropractor" (註冊脊醫) has the meaning assigned to it by section 2 of the Chiropractors Registration Ordinance (Cap. 428); *(Added 16 of 2006 s.12)*

"registered dentist" (註冊牙醫) means a dentist whose name is entered in the General Register under section 9 of the Dentists Registration Ordinance (Cap. 156); *(Replaced 11 of 2006 s.38)*

"registered medical practitioner" (註冊醫生) means a medical practitioner who—

(a) is registered under the Medical Registration Ordinance (Cap. 161); or

(b) is deemed to be a registered medical practitioner by virtue of section 29(a) of that Ordinance; *(Added 16 of 2006 s.12)*

"registered occupational therapist" (註冊職業治療師) means a person who is an occupational therapist and is registered in respect of that profession under the Supplementary Medical Professions Ordinance (Cap. 359); *(Added 16 of 2006 s.12)*

"registered physiotherapist" (註冊物理治療師) means a person who is a physiotherapist and is registered in respect of that profession under the Supplementary Medical Professions Ordinance (Cap. 359); *(Added 16 of 2006 s.12)*

"Review Certificate for Funeral and Medical Attendance Expenses" (殯殮費和醫護費審核證明書) means a certificate issued under section 6E(12)(c); *(Added 52 of 2000 s.3)*

"Review Certificate of Compensation Assessment for Fatal Case" (致命個案補償評估審核證明書) means a certificate issued under section 6D(6)(c); *(Added 52 of 2000 s.3)*

"Review Certificate of Interim Payment" (臨時付款審核證明書) means a certificate issued under section 6C(11)(c); *(Added 52 of 2000 s.3)*

"Special Assessment Board" (特別評估委員會) means an Employees' Compensation (Special Assessment) Board appointed under section 16E; *(Added 76 of 1982 s.3)*

"sub-contractor" (次承判商) means—

(a) any person who enters into a contract, express or implied, with a principal contractor to perform all or any part of the work which the principal contractor has undertaken to perform; and

(b) any other person who enters into a contract, express or implied, to perform all or any part of the work which a sub-contractor within the meaning of paragraph (a) has undertaken to perform; *(Added 76 of 1982 s.3)*

"total incapacity" (完全喪失工作能力) means such incapacity whether of a temporary or permanent nature as incapacitates an employee for any employment which he was capable of undertaking at the time of the accident resulting in such incapacity. *(Amended 49 of 1985 s.2)*

(Amended 44 of 1980 s.15; 52 of 2000 s.3; 16 of 2006 s.12)

(2) For the purposes of the definition of "member of the family" (家庭成員)—

(a) an adoption means an adoption—

(i) made under an adoption order made in accordance with the Adoption Ordinance (Cap. 290);

(ii) to which section 17 or 20F of that Ordinance applies; or *(Amended 28 of 2004 s.35)*

(iii) made in Hong Kong in accordance with Chinese law and custom before 1 January 1973; *(Amended 28 of 2004 s.35)*

(b) subject to paragraph (c), any person so adopted shall be treated as the child of the adopter, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly; and *(Added 52 of 2000 s.3. Amended 28 of 2004 s.35)*

(c) any person adopted under an adoption order granted under paragraph (c) of section 5(1) of the Adoption Ordinance (Cap. 290) shall be treated as the child of the adopter and the parent referred to in that paragraph, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly. *(Amended 28 of 2004 s.35)*

Q1/3/4 **For accidents happened on or after September 1, 2008—Registered Chinese Medicine Practitioner**—The professionalism of registered chiropractor, registered occupational therapist, registered physiotherapist, registered Chinese medicine practitioner is recognised under the new regime, but not that of Listed Chinese Medicine Practitioner. The treatment and sick leave certificates issued by Listed Chinese Medicine Practitioner are not legally recognized for the purpose of this Ordinance. A list of Registered Chinese Medicine Practitioners can easily be found in the website of Chinese Medicine Council of Hong Kong.

Application to certain employees

Q1/4 **4.**—(1) This Ordinance shall apply to employees employed by or under the Crown in the same way and to the same extent as if the employer were a private person, except in the case of—

(a) members of the Chinese People's Liberation Army; and

(b) persons in the civil employment of Her Majesty, otherwise than in Her Government of Hong Kong, who have been engaged in a place outside Hong Kong:

Provided that this Ordinance shall not apply in the case of an employee in the service of the Government of Hong Kong where, in consequence of injury received by any such employee in the discharge of his duties, a pension or gratuity which would not be payable if such injury were received otherwise, is paid to him or, in the case of his death, to any of the members of his family as defined in this Ordinance, under any Ordinance or regulation providing for the grant of such pension or gratuity. *(Replaced 50 of 1954 s.3. Amended 11 of 1958 s.4; 55 of 1969 s.4; 44 of 1980 s.15; 76 of 1982 s.37; 52 of 2000 s.4)*

(2) The exercise and performance of the powers and duties of any public body shall for the purposes of this Ordinance, unless a contrary intention appears, be deemed to be the trade or business of such public body. *(Added 55 of 1969 s.4)*

References to the Crown—By virtue of s.6 of the Hong Kong Reunification Ordinance, references to the "Crown" and to "Her Majesty" are to be construed as references to the Government of the Hong Kong Special Administrative Region for the purpose of this Ordinance. Q1/4/1

PART II

COMPENSATION FOR INJURY

(Added 19 of 1964 s.4)

Employer's liability for compensation for death or incapacity resulting from accident

5.—(1) Subject to subsections (2) and (3), 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. Q1/5

(2) No compensation shall be payable under this Ordinance in respect of—

(a) any injury, other than an injury which results in partial incapacity of a permanent nature, which does not incapacitate the employee from earning full wages at work at which he was employed; *(Amended 67 of 1996 s.2)*

(b) any incapacity or death resulting from a deliberate self-injury;

(c) any incapacity or death resulting from personal injury if the employee has at any time represented to the employer that he was not suffering or had not previously suffered from that or a similar injury, knowing that the representation was false; or

(d) any injury, not resulting in death or serious and permanent incapacity, caused by an accident which is directly attributable to the employee's addiction to drugs or his having been at the time of the accident under the influence of alcohol.

(3) In any proceedings under this Ordinance where it is proved that the injury to an employee is attributable to the serious and wilful misconduct of that employee, or that an injury by accident arising out of and in the course of his employment is deliberately aggravated by the employee, any compensation claimed in respect of that injury shall be disallowed; except that where the injury results in death or serious incapacity, the Court on consideration of all the circumstances may award the compensation provided by this Ordinance or such part thereof as it shall think fit.

(4) For the purposes of this Ordinance—

(a) 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;

(b) an accident to an employee shall be deemed to arise out of and in the course of his employment, notwithstanding that the employee was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the employee for the purposes of and in connection with his employer's trade or business;

(c) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens—

(i) while, with the consent of his employer, the employee is being trained in first aid, ambulance or rescue work or engaged in any competition or exercise in connection therewith;

(ii) in, at or about any premises other than his employer's while, with the consent of his employer, the employee is engaged in any first aid, ambulance or rescue work or in any competition or exercise in connection therewith; or

(iii) in, at or about his employer's premises while the employee is engaged in any first aid, ambulance or rescue work,

notwithstanding that in the case of rescue work the employee was acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if when such act was done the employee reasonably acted in order to rescue, succour or protect any other person who had suffered, or who was reasonably believed to be in danger of, injury, or to avert or minimize serious damage to property of the employer;

(d) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens to the employee while he is, with the express or implied permission of his employer, travelling as a passenger by any means of transport to or from his place of work and at the time of the accident, the means of transport is being operated—

(i) by or on behalf of his employer or by some other person pursuant to arrangements made with his employer; and

(ii) other than as part of a public transport service;

(e) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens to the employee while he is driving or operating any means of transport arranged or provided by or on behalf of his employer or by some other person pursuant to arrangements made with his employer between his place of residence and his place of work, travelling by a direct route—

(i) to his place of work for the purposes of and in connection with his employment; or

(ii) to his place of residence after attending to those purposes;

(f) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens to the employee when, within the duration of a gale warning, or of a rainstorm warning, he is travelling between his place of residence and his place of work— *(Amended 24 of 2000 s.2)*

(i) to his place of work, by a direct route within a period of 4 hours before the time of commencement of his working hours for that day or to his place of residence, within a period of 4 hours after the time of cessation of his working hours for that day, as the case may be; or

(ii) in such other circumstances as the Court thinks reasonable, and for the purposes of this paragraph— *(Amended 24 of 2000 s.2)*

(A) "gale warning (烈風警告) means a warning of the occurrence of a tropical cyclone in, or in the vicinity of, Hong Kong by the use of the tropical cyclone warning signals issued by the Director of the Hong Kong Observatory to the effect that any of the tropical cyclone warning signals commonly referred to as No. 8NW, 8SW, 8NE, 8SE, 9 or 10 is in force;

(B) "rainstorm warning" (暴雨警告) means a warning of a heavy rainstorm in, or in the vicinity of, Hong Kong by the use of the heavy rainstorm warning signals issued by the

Director of the Hong Kong Observatory to the effect that any of the heavy rainstorm warning signals commonly referred to as Red or Black is in force; *(Added 24 of 2000 s.2)*

(g) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens to the employee while he is, with the express or implied permission of his employer, 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.

(Replaced 1 of 1995 s.3)

Q1/5/1

General—Section 5 is the primary operative provision in the Ordinance. Subject to the various provisos and exceptions contained in s.5 and other sections of the Ordinance, it imposes liability on an employer to pay compensation to an employee who is injured by an accident arising out of and in the course of employment. The result of application of the detailed provisions of the Ordinance is that the employee should be compensated in respect of the majority of the injured employee's loss of earnings which are a consequence of the accident. Sections 10A and 10AA are related operative provisions which impose liability on the employer to pay expenses for medical treatment in respect of the injury. Section 8 is also a related provision intended to compensate the employee in appropriate cases (in practice, cases involving serious injury) for the cost of attendance of another person to assist the employee in performing "the essential actions of life". By s.32, the employee (or the eligible members of family of the employee in the case of a fatality) is entitled to claim compensation for incapacity or death arising from an occupational disease in the same way as for injury caused by accident, subject to the additional or modified requirements set out in ss.32 and 34 in particular. The entitlement of family members to compensation arising from the death of an employee is to be contrasted with the question of what happens if the employee dies subsequent, and for reasons unconnected, to the accident. The claim to compensation by the employee for loss of earning capacity is a personal one, and will be extinguished by the employee's death if unrelated to the accident.

Sections 6 to 16I include many provisions incorporated by amendment. They set out the main structure of the statutory scheme whereby claims are administered by the Commissioner of Labour and two types of Assessment Board—the Ordinary and Special Assessment Boards.

Sections 18 to 23 set out the primary elements of the court's role in the statutory scheme.

Sections 24 to 27 and 42 to 44 address the relationship between claims for compensation made under the Ordinance on the one hand and other remedies, including claims against third parties. The claims against third parties are either claims of the employee (against the primary contractor where the employer is a sub-contractor and insurers) or claims by a party liable to pay compensation, by way of a right of indemnity provided for by the Ordinance.

Q1/5/2

Causation—Plainly, s.5 requires a causal connection first, between the employment and the accident, so that the accident arises out of the employment, and between the accident and the injury suffered the accident must cause the injury. To determine liability under this statutory regime, the Court would not be concerned with how the accident actually happened, and in particular, whether the accident was caused by the alleged negligence on the part of the employer: *Amjad v. Wong Yui Cheong* (unrep., HCPI 943/2007, [2011] H.K.E.C. 574). The expression "injury by accident" under s.5(1) encompasses cause and effect, with accident as the cause and injury as the effect. The accident must be distinct from the injury, with the accident being at least a contributory cause and the injury being the effect. The question of whether the injury was by accident is distinct from, and logically anterior to, any question of whether what has happened arose out of or in the course of the employment: *Sit Wing Yi Sibly v. Berton Industrial Ltd* (unrep., FACV 3/2012, [2013] H.K.E.C. 701). However, beyond that, at least so far as matters occurring before the accident which may contribute to an employee's death or incapacity, whether permanent, temporary, total or partial, there is no exercise of apportionment (*LKK Trans Ltd v. Wong Hoi Chung* (2006) 9 H.K.C.F.A.R. 103). In approaching the issue of causation, the judge has to use his commonsense in the same way as a juror would do. The judge will no doubt be assisted by the medical evidence but he is not dictated to by it (*Lee Kin Kai v. Ocean Tramping Co. Ltd* [1991] 2 H.K.L.R. 232, followed and applied in *Wong Yuet Yung v. Wah Fung Hong Gas Engineering Co. Ltd* (unrep., DCEC 1315 of 2003, [2007] H.K.E.C. 75, D.J. Poon). See para.Q1/9/3. In *Sit Wing Yi Sibly v. Berton Industrial Ltd* [2011] 4 H.K.L.R.D. 91, the Court of Appeal was asked to construe the meaning of "personal injury by accident" under section 5(4), and in following the English approach, ruled that the Applicant would be required to prove an accident in the sense of a separate event which caused the injury, and rejected the contention that the term "personal injury by accident" meant simply accidental injury. The unexpected nature of the "injury" itself does not constitute the act or event or occurrence of a mishap which

is the "accident". Death caused by disease alone would not qualify for compensation even if the disease was unknown (and thus unexpected). There would have to be an acceleration of the death by a particular (even if not unusual) act of exertion in the course of employment – in which case the death may be said to have been caused by an accident (*Ormond v. C D Holmes & Co Ltd* (1937) 30 B.W.C.C. 254, 800). Even if there was an "internal accident", i.e. a physiological change invisible from outside the body (such as a rupture of an aneurysm), it must still have been brought about by "an un-designed untoward event happening in the employment". It is however important to note that the mere payment of an amount alleged to be due under the Employees' Compensation Ordinance would not necessarily operate as a bar to a subsequent denial of liability on the basis that the accident did not occur at all (see *Li Kwai Fong Ah Pat v. Bachy Soletanche Group* (unrep., CACV 30/1998, [1990] H.K.L.Y. 925)).

Q1/5/3 **Starting point for claims for compensation**—The starting point in the administrative procedure for dealing with claims is found in s.14: as soon as is practicable after the occurrence of the accident giving rise to the employee's injury, the employee (or someone on the employee's behalf) must give notice of the accident to the employer. There is no prescribed format for the notice: it can be given either in writing or verbally. The required contents of the notice are the cause, date and place of the injury (see s.14(2) at para.Q1/14).

Q1/5/4 **Employer's notice**—The employer must give notice in the prescribed form to the Commissioner of Labour of any accident which causes the death or the incapacity of an employee. (See s.15 at para.Q1/15 which sets out the detailed procedure for notice to be given to the Commissioner.)

Q1/5/5 **Medical examination**—Where an employee has given notice of an accident under s.14, the employer can request that the employee attend a free medical examination, subject to the requirement of reasonableness. (See s.16 at para.Q1/16 which sets out the detailed procedure for the medical examination.)

Q1/5/6 **The role of the Commissioner for Labour and the Assessment Boards**—Very broadly, the Commissioner will deal with claims (or aspects of claims) which are relatively speaking more minor, and the Assessment Boards will deal with the more complex matters:

(1) Pursuant to s.16A(1)(a), the Commissioner has power to assess the periodical payment or lump sum due in respect of claims in respect of total or partial *temporary* incapacity. (The periodical payments shall be calculated as 80 per cent of the loss of monthly earning capacity of the employee caused by being incapacitated.)

(2) Pursuant to s.16D(4), the Commissioner has power to refer to the Ordinary Assessment Board any claim for compensation for an injury which appears likely to result in *permanent* incapacity, whether total or partial. The Ordinary Assessment Board will then either refer the matter to the Special Assessment Board under s.16D(4) or deal with the claim entirely itself.

(3) Claims for an injury which appears likely to result in permanent incapacity should be referred to the Special Assessment Board where they appear to fall within s.9(1A), namely where the special circumstances of the employee mean that the actual percentage of loss of earning capacity that the employee will suffer as a result of the permanent incapacity will be substantially greater than the percentage which would be arrived at if the normal provisions of the Ordinance are applied. Calculation of the applicable percentage of loss of earning capacity absent special circumstances of the employee is undertaken by references to predetermined percentage figures set out in the First Schedule to the Ordinance, and the Note to that schedule (s.9(1)).

(4) In the case of the Ordinary Assessment Board and the Special Assessment Board, their duty is to assess the percentage of the loss of earning capacity permanently caused by the injury (s.16D(5)(a) and s.16E(8)).

(5) The Ordinary Assessment Board has the additional duty, both in cases it considers and in cases referred to the Special Assessment Board (to allow the latter to determine the percentage loss of earning capacity), to assess the period of absence from duty necessary as a result of the injury (s.16D(5)(b)).

(6) Following the assessment by the Assessment Boards of the percentage loss of earning capacity and period of absence from duty necessary as a result of the injury, the Commissioner is empowered pursuant to s.16A(1)(b) to assess the actual compensation payable in accordance with ss.9 to 11. Section 11 sets out the method of calculating monthly earnings of the employee for the purpose of calculating compensation for loss of earnings.

(7) The Commissioner is primarily responsible for dealing with the question of compensation payable in cases of fatality. In such cases, the compensation payable to family members is determined in accordance with ss.6 and 6A and the Sixth and Seventh Schedules to the Ordinance. Under s.6B, provided that the employer agrees in writing, and does not at any stage in the process withdraw his agreement and all eligible family members also agree, the Commissioner has power to determine amounts of compensation payable to family members. The process of deter-

mination by the Commissioner is concluded by the issue by him of a certificate of compensation assessment for fatal case, which is provided to each person named in the certificate and the employer, and notice of the decision is given to the District Court. Section 6C empowers the Commissioner to determine, on an application by the spouse of the deceased employee, pending the conclusion of a s.6B determination, that interim payments should be made by the employer to the spouse. If the Commissioner makes such a determination, he must issue a certificate of interim payment. Also in fatal cases, under s.6E, again with consent (not withdrawn) of the employer and the parties to the claim, the Commissioner has power to determine an application by any party for reimbursement of funeral expenses and the expenses of medical attendance on the deceased.

(8) The Commissioner is also responsible for dealing with the calculation of medical expenses payable by the employer to the employee pursuant to s.10. Under s.10B, the Commissioner shall determine the amount of medical expenses payable on an application by either the employee or the employer. For this purpose consent of the employer is not required for the Commissioner to proceed with a determination of the amount payable. If liability to pay is disputed, the Commissioner shall determine the question of liability, as well as the amount payable. The process is concluded by the issue of a certificate to the employee and employer.

(9) There is a separate procedure whereby the Director of Health of the Government will make claims against an employer (or in appropriate cases directly against the employer's insurer) in respect of the cost of fitting prostheses and surgical appliances to an employee injured by an accident at work. See ss.36B to 36O at paras Q1/36B to Q1/36O.

Q1/5/7 **Dealing with matters by agreement**—Consistent with the policy enshrined in the Ordinance of providing as simple as possible a procedure for claims for compensation, the Ordinance encourages matters to be dealt with by agreement, whilst ensuring safeguards are in place that will allow all matters, if necessary, to be reviewed and/or come before the District Court.

(1) As to compensation for the cost of attendance by another person to assist the employee perform the essential functions of life, under s.8 these will be dealt with either by agreement (subject to the approval of the agreement reached by the Commissioner) or by the District Court.

(2) In the case of short-term temporary capacity (between four and seven days, inclusive), the employee and the employer can enter into an agreement as to the compensation payable (although, note, not the medical expenses). See s.16CA at para.Q1/16CA. However, this is subject to cancellation by the Commissioner on the grounds set out in s.16CB on application by either party within six months (or such longer period as the Commissioner permits) after the date of the agreement.

(3) Whilst different claims may require consideration and approval by the Commissioner, one of the assessment boards or the District Court, there is nothing to prevent the employer and employee having discussions and reaching a non-binding agreement as to the amount of compensation payable, and submitting details of the agreement to the Commissioner, assessment board or the court as the case may be.

Q1/5/8 **Review of assessments**—In most categories of claim under the Ordinance there is at least one opportunity for review. Review in this context means an administrative review, as contrasted with an application to the court by way of original determination, review or appeal. These opportunities for review, i.e. excluding applications for review that must be made to the court, are:

Q1/5/9 *(1) Determinations by the Commissioner that interim payments be made to the spouse of a deceased employee under s.6C(1)*—These are reviewable by the Commissioner of his own initiative (under s.6C(10) and (11) or following objection by any person (in practice either the employer or spouse) on written signed notice within 14 days from the date of issue of a certificate of interim payment or such longer period as the Commissioner thinks fit (under s.6C(9) and (11)).

Q1/5/10 *(2) Determinations by the Commissioner by agreement of claims for compensation in fatal cases under s.6B*—These are reviewable by the Commissioner of his own initiative (under s.6D(5) and (6)) or following objection by the employer or any person who made the application under s.6B, on written signed notice within 30 days of the date of issue of the certificate of compensation assessment for fatal case or such longer period as the Commissioner thinks fit (under s.6D(4) and (6)).

Q1/5/11 *(3) Determinations by the Commissioner of entitlement to payment in respect of funeral expenses and medical attendance expenses under s.6E(1)*—These are reviewable by the Commissioner of his own initiative (under s.6E(11) and (12)) or following objection by the employer or any person who made the application under s.6E(1), on written signed notice

within 30 days of the date of issue of the certificate for funeral and medical attendance expenses (under s.6E(10) and (12).There is no provision for the Commissioner to allow an objection to be filed later than the 30-day period).

Q1/5/12 *(4) Determinations by the Commissioner of claims in respect of minor injuries under s.16A*—These are reviewable by the Commissioner, with the involvement of the Ordinary Assessment Board or the Special Assessment Board where the objection relates to the assessment of percentage loss of earning capacity, on written objection by either the employer or employee within 14 days after the date of issue of the certificate issued under s.16A(2) or such longer period as the Commissioner thinks fit (under s.16A(3) and (4) and s.16G(2)).

Q1/5/13 *(5) Determination of compensation by agreement under s.16CA*—These are reviewable by the Commissioner in the circumstances set out under s.16CB(1) on application by either party to the agreement for its cancellation within six months after the date of the agreement or such further time as the Commissioner thinks fit (under s.16CB).

Q1/5/14 *(6) Assessments by the Ordinary Assessment Board or the Special Assessment Board under ss.16D(5) and 16E(8) and (9) respectively*—These are reviewable on written objection by the employer or employee within 14 days after the date of issue of a certificate under s.16F or such longer period as the Commissioner thinks fit (under s.16G).

These are also reviewable by the respective assessment boards of their own initiative (on prior written notice to the employer, the employee and the Commissioner) within three months of the date of issue of a certificate under s.15F or such longer period as the assessment boards think fit on the grounds set out in s.16GA(1).

Q1/5/15 **Jurisdiction of the District Court**—The major provisions addressing the jurisdiction of the District Court are to be found in ss.6B(3), 6H, 8(1)(a), 8(10), 10(3), 10(5), 10(6), 10(8), 10(11), 10(12), 10A(7), 10A(8), 10B(4), 13(1), 13(2), 13(3), 14(4), 16(5), 16A(8), 16B(1), 16I(5), 18, 18A, 19, 21, 22, 36F, 36G and 50. These provisions may be categorised in four different ways, each of which is dealt with separately in the following notes.

Q1/5/16 **General provisions as to procedure**—Sections 21, 22 and 50 provide generally for the manner in which the District Court shall deal with proceedings before the District Court. See paras Q1/22/1 *et seq*.

Q1/5/17 **General jurisdiction of the District Court, save where the Ordinance provides otherwise**—The Ordinance contains a multiplicity of provisions addressing the specific aspects of the District Court's jurisdiction (see paras Q1/5/18 to Q1/5/20 below).The Ordinance also gives the Commissioner or the assessment boards power to determine specific matters (see paras Q1/5/8 to Q1/5/13 above). Section 18A is a "sweeping-up" provision. It provides that, save where otherwise provided for in the Ordinance (see, for example, the jurisdiction of the Small Claims Tribunal under s.10(11)(a)), and specifically except where claims have been determined in certain instances by agreement or the issue of a certificate, all claims for compensation shall be determined by the District Court. See paras Q1/18/1 *et seq*.

Q1/5/18 **Appellate jurisdiction of the District Court**—Section 18 provides for the right to appeal to the District Court in respect of decisions made under the Ordinance by the Commissioner or the assessment boards, as specified in s.18A. See paras Q1/18A/1 *et seq*.

Q1/5/19 **Review jurisdiction of the District Court**—Section 19 provides a general jurisdiction for the District Court to review any periodical payment payable under the Ordinance, whether that payment is due under an agreement or pursuant to an order of the District Court. See paras Q1/19/1 *et seq*.

Q1/5/20 **Other provisions providing specifically for the District Court's jurisdiction**—The other provisions of the Ordinance listed above establish the specific jurisdiction of the District Court in respect of various categories of claim. The provisions dealing with the specific jurisdiction are listed below in the order in which they appear in the Ordinance:

(1) Section 6B(3)—Where the Commissioner has proceeded to determine a claim for compensation in fatal cases under s.6B(1), but prior to the issue of the certificate of compensation assessment for fatal case, the process of determination stops under s.6B(2), the claim shall be determined by the District Court under s.18A(1).

(2) Section 6H—A right of appeal within 42 days (or such longer period as the District Court thinks fit) of the issue of a certificate in respect of a decision against either original determinations or determinations on a review of compensation payable to family members in fatal cases (under ss.6B(1)(a) and 6D(6)(b)); interim payments to a spouse of a deceased employee (under ss.6C(1)(a) and (11)); and claims for funeral and medical attendance expenses (under ss.6E(1)(a) and (12)).

(3) Section 8(1)(a)—Unless dealt with by an agreement approved by the Commissioner, the District Court shall determine the amount payable (either as a lump sum or as periodical payments covering a period not exceeding in total two years together with a lump sum, if any, payable for the period of probable attention required thereafter) in respect of the cost of attendance of another person to assist the employee perform the essential functions of life.

(4) Section 8(8)—Power, on application of the employer or employee, to make as an order of the District Court any agreement made under s.8, namely an agreement in respect of the costs of attendance by another person to assist the employee in performing the essential actions of life.

(5) Section 10(3)—Power to order that periodical payments of compensation in respect of temporary incapacity be made at shorter intervals than the intervals between payment of wages to the employee under his contract of employment at the time of the accident.

(6) Sections 10(5) and (6)—Power to extend the period (by up to a further 12 months beyond the statutory 24 months) for which periodical payments may be made in respect of temporary incapacity before the employee is deemed to have been permanently incapacitated and to fix the amount of the periodical payments for the extended period.

(7) Section 10(8)—Power in the case of an employee receiving periodical payments who intends to leave Hong Kong to reside outside Hong Kong to order that the periodical payments be redeemed for a lump sum payment to the employee.

(8) Section 10(11)—Where the limit of the Small Claims Tribunal is exceeded (if not, the claim must be brought in the Small Claims Tribunal), to hear proceedings for recovery as a civil debt of the compensation which an employer has failed to pay as required in respect of temporary incapacity not exceeding three days. Section 10(12) provides that the claim under s.10(11) may be brought in conjunction with or independently of any other claim made under the Ordinance to be brought in the District Court.

(9) Section 10A(7)—Where the limit of the Small Claims Tribunal is exceeded (if not, the claim must be brought in the Small Claims Tribunal), to hear proceedings for recovery as a civil debt of the medical expenses which an employer is liable to pay under s.10A(1) but has failed to pay within 21 days of receipt of a request for payment. Section 10A(8) provides that the claim under s.10A(7) may be brought in conjunction with or independently of any other claim made under the Ordinance to be brought in the District Court.

(10) Section 10B(4)—An application for review of a determination by the Commissioner as to liability to pay medical expenses under s.10B(1) shall be heard by the District Court on the application of either the employer or the employee within 14 days of the issue by the Commissioner of a certificate under s.10B(1)(b), 10B(2)(i)(B) or 10B(2)(ii) or within such further time as the court may think fit.

(11) Section 13(1)—Where compensation is payable in fatal cases, and that compensation has not been determined in a manner which would give rise to a right of appeal under s.6H, i.e. it has not been determined by the Commissioner but by an application to the District Court, the compensation shall be paid to the District Court which shall have power to order its apportionment between family members, direct that it be invested, order a variation of the payment, order its repayment (in the case of fraud, impersonation or other impropriety).

(12) Section 13(2)—Generally, any compensation payable under the Ordinance shall, unless provided otherwise, be paid to the District Court and the District Court may pay it to the person entitled thereto, or invest it or apply it as it thinks appropriate. Periodical payments in respect of the cost of another person assisting the employee to perform the essential functions of life which is paid pursuant to a District Court order, or as compensation for temporary incapacity or lump sum compensation payable by agreement in respect of the cost of another person assisting the employee to perform the essential functions of life may be paid direct by the employer to the employee or may be paid to the District Court.

(13) Section 13(3)—Where compensation is paid to the District Court, and payments have been made by an employer direct to an employee or family members on account of a claim under the Ordinance, the District Court may order that the whole or any part of the amount of the payments on account should be deducted from the amount payable to the employee or family members.

(14) Section 14(4)—Power of the District Court in any proceedings involving an application under the Ordinance before it to receive and determine the application notwithstanding that no notice under s.14(1) has been filed by the employee with the employer or that the application (if it is an application under s.18A(2)) has not been made within 24 months from the occurrence of the accident causing the injury or within 24 months from the death of the employee whichever is applicable or that the application is in respect of compensation payable in a fatal case but it has not been made prior to a determination by the Commissioner under s.6B(1)(a). The District Court is to exercise its discretion under s.14(4) by reference to the question

of whether it is satisfied that there was "reasonable excuse" for non-compliance with s.14(1).

(15) Section 16(5)—Power of the District Court to permit a claim for compensation notwithstanding a failure by the employee to submit himself for a medical examination offered by the employer, if the court is satisfied that there was a reasonable cause for the failure.

(16) Section 16A(8)—Power on application by the employer or the employee to make as an order of the District Court any certificate issued by the Commissioner either on original determination or on review for compensation payable in respect of minor injuries, under s.16A.

(17) Section 16B(1)—Power on application by the employer, employee or Commissioner within six months of the date of issue of the certificate, or such longer period as the District Court thinks fit, to cancel a certificate issued by the Commissioner either on original determination or on review for compensation payable in respect of minor injuries, under s.16A. On ordering the cancellation of the certificate the District Court may make such orders as it thinks fit, including in respect of any sums already paid under the certificate.

(18) Section 16I(5)—Where, as a result of a requirement for an employee to attend an examination or assessment at the request of the Commissioner or an assessment board an employer becomes liable to pay the employee wages in respect of the necessary leave of absence, the wages, where the limit of the Small Claims Tribunal is exceeded (if not, the claim must be brought in the Small Claims Tribunal), may be recovered as a civil debt in proceedings in the District Court. Section 16I(5) also provides that the claim under s.16I(5) may be brought in conjunction with or independently of any other claim made under the Ordinance to be brought in the District Court.

(19) Section 36F—Jurisdiction to determine any dispute that arises as to the liability to pay or the necessity or cost of any prosthesis or surgical appliance supplied and fitted to an employee under Part IIIA (ss.36A *et seq.*) of the Ordinance.

(20) Section 36G—If an employer fails to comply with or disputes a request made by the Director of Health under s.36D for payment of the cost of supplying and fitting a prosthesis or surgical appliance to an employee, the Director of Health may apply to the District Court for enforcing his claim to payment of the cost or to determine the dispute.

Q1/5/21 **Serious and wilful misconduct of the employee under s.5(3)**—The burden of proof is on the respondent to demonstrate serious and wilful misconduct of the employee, on a balance of probabilities. If the employee's job involves driving a motor vehicle, which, in unsafe hands, is a lethal weapon, on a highway, any degree of impairment due to voluntary ingestion of alcohol which has the effect of dulling the driver's sense, slowing his reaction time and hampering his motor skills does constitute serious and wilful misconduct: *Yuen Yuk ying v. Chan Kam wing t/a Kam Bo Real Estate Co.* [1997] 1 H.K.C. 198, Godfrey J at p. 204, following *Millen v. Fowler* [1926] NZLR 372 and *Decision No. 763191* (1994), WCAT Reporter 45, Canadian Workman's Compensation Act Tribunal Panel, followed in *Ma Shiu Wai v. Chun Fai Container Transportation Co. Ltd* (unrep., DCEC 877/2002, [2003] H.K.E.C. 1463, Wong DCJ).

Even if the accident is attributable to the wilful misconduct of the employee, the court has a discretion to under s.5(3) to award compensation to the employee (or the applicant, if the employee is deceased): *Yuen Yuk Ying v. Chan Kam Wing t/a Kam Bo Real Estate Co.* (ibid at 205D–G), followed obiter in *Ng Mung Khian v. Wing Kwong Painting Co.* (unrep., DCEC 749/2002, [2004] H.K.E.C. 744) Wong DCJ (in which Wong DCJ would have taken into account, if it had been necessary to decide the case on the basis of s.5(3), that the deceased employee had died leaving a young wife, an infant son and an aged father). Suicide by an employee, if proved by the respondent, will constitute wilful misconduct: *Ng Mung Khian v. Wing Kwong Painting Co.* (ibid) (in which case there was insufficient evidence to prove suicide).

Q1/5/22 **Presumption under s.5(4)(a)**—Section 5(4) presumes an accident arising in the course of an employee's employment to have also arisen out of that employment in the absence of evidence to the contrary. The burden rests on the respondents to prove otherwise. In *Law Yim Ming v. Cheung Hang Fook* (unrep., DCEC 450/2001, [2002] H.K.E.C. 799), the respondents argued that the people who attacked the applicant in the business premises were sent by his debt collector or the attack related to a private dispute between the applicant and a third party. The court found, however, that there was no direct evidence to substantiate this argument. The fact that no money or property had been stolen would not be sufficient to suggest that the incident was a private dispute of the applicant. Instead, the court regarded the fact that the attack was carried out at the business premises rather than outside it as a ground to hold that on the balance of probability the attack was business related, and the presumption was upheld. The presumption provided for by s.5(4) was applied in *Ng Mung Khian v. Wing Kwong Painting Co.* (unrep., DCEC 749/2002, [2004] H.K.E.C. 744) Wong DCJ (insufficient evidence to rebut the presumption in a case in which the employer and main contractor contended that the deceased employee had killed himself by starting a fire). See also *Lam Chi Biu v. Mak Kee Ltd* (unrep., DCEC 1203/2002, [2004] H.K.E.C. 814) in which the presumption was applied to assist the court in concluding

that an assault on the applicant employee at his workplace by strangers coming on to the premises claiming to look for work and being interviewed by the application was an accident arising in the course of the employee's employment, and did not arise (as contended by the respondents) because he had been attacked in his personal capacity, and not in his capacity as an employee. See also *Chan Ho v. 999 HK Petroleum Co. Ltd* [2004] 1 H.K.L.R.D. D20 and *Yu Sang v. International United Shipping Agency* (unrep., ECC 17 and 90/1988, [1992] H.K.L.Y. 463) (worker was killed by a fellow seaman on a ship where they worked in the aftermath of a personal quarrel. This brought him outside the scope of his employment).

The phrase "in the course of employment" does not mean "during the period of employment". It connotes the idea that the employee is doing something which is part of his service to his employer: see *Charles R Davidson & Co. v. M'Robb or Officer* [1918] A.C. 304. It means in the course of the work which the employee is employed to do and what is incidental to it – in other words, in the course of his service: *Cheung Kai Chi v. Chun Wo Contractors Ltd* (unrep., DCEC 415/2003, [2004] H.K.E.C. 1347).

For cases in which the employee was held to be not acting in the course of his employment, because he had embarked on activity which was not doing any job within his ordinary duties or one which had been assigned to him, see *M'Allan v. Perthshire County Council* (1906) 8 F. 783 and *Brinckman v. Harris* [1916] 9 B.W.C.C. 200. In some cases, there is doubt if the employees' injuries have any causal connection with the employment. Sometimes the weakness or illness of the employees may simply be congenital or predisposing. In confronting this kind of case, the Hong Kong courts follow the established principle in *Clover Clayton & Co. Ltd v. Hughes* [1910] AC 242 and *Wilson v. Chatterton* [1946] 1 K.B. 360—it is only if the accidental injury has no causal connection with the employment at all that it can be said not to arise out of it though it may occur in the course of it. The test is neatly summarised by Lord Loreburn in *Clover Clayton* as follows:

> "In each case the arbitrator ought to consider whether in substance as far as he can judge on such a matter the accident came from disease alone so that whatever the man had been doing it would probably have come all the same or whether the employment contributed to it. Did he die from the disease alone or from the disease and employment taken together looking at it broadly?"

When applying the principle, the Court would have to seek assistance from the medical evidence and then rule on causation. The Court would however not be dictated by the medical evidence and would use commonsense to approach the question of causation in the same way as juror: *Lee Kin-kai v. Ocean Tramping Co. Ltd t/a Ocean Tramping Workshop* (unrep., CACV 64/1998). For the application of the said test in Hong Kong, see, for instance, *O-Anan, Umphai v. National Lacquer and Paint Products Co Ltd* (unrep., DCEC 103/1998, [2001] H.K.E.C. 450), *Leung Koon Chun v. City Act Trading Ltd* [2002] H.K.L.R.D. (Yrbk) 430).

In *Wong Yuet Yung v. Wah Fung Hong Gas Engineering Co. Ltd* (unrep., CACV 33/2007), the Court of Appeal endorsed the trial judge's interpretation of s.5(4) that the section would to mean no more than that if there was evidence that the accident did not arise out of the employment then no presumption arose at all.

Presumption under section 5(4)(g)—In *Chan Ho Yuen v. Multi Circuit Board (China) Ltd* [2011] 5 H.K.L.R.D. 554, the Court had to consider the presumption in the case of a non-temporary deviation or interruption of a journey undertaken in the course of employment. The Court of Appeal accepted and adopted the principles set out in the leading English case of *Smith v. Stages* [1989] 1 A.C. 928 in deciding whether, as a matter of common law, an employee is acting in the course of his employment whilst travelling to or from a place of work. On facts of this case, the Court of Appeal did not consider that the detour to the karaoke parlour for about 2.5 hours was of such a character or duration as to prevent the resumption of employees' journey in an employee's car from being a continuation of the course of their employment. There must be a limit to their course of employment and it may be necessary to apply common sense in deciding whether, on the facts of a particular case, the deviation in the journey in question operates as more than a temporary interruption: see also *Hsu Shu Chiao v. Lung Cheong Toys Ltd* (unrep., CACV 754/2002, [2002] H.K.E.C. 188). **Q1/5/23**

Added peril—If the accident arises from some "added peril" to which the employee has exposed himself by his own conduct and which he was not allowed to encounter by any term of his contract of service, the accident cannot be said to arise out of his employment: *Stephen v. Cooper* [1929] A.C. 570. Lord Dunedin stated the principle in *Plumb v. Cobden Flour Mills Co.* [1914] A.C. 62, 68 as follows: "A risk is not incidental to the employment ... when it is an added peril due to the conduct of the servant himself"; and Lord Haldane explains the expression "added peril" in *Lancashire and Yorkshire Ry. Co. v. Highley* [1917] A.C. 352, 361, 365 as meaning a peril "voluntarily superinduced on what arose out of his employment, to which the workman was neither required nor had authority to expose himself". See also *Thomas v. Ocean Coal Co.* [1933] A.C. 100, in which the worker failed to comply with the warning notice posted up under the English Coal Mines Act 1911 as he walked past the uncovered shaft under the pit trams and was crushed by the descending cage-lift. Lord Buckmaster remarked that, **Q1/5/24**

> "[i]n one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the [Workmen's Compensation]

Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can, of course, be so reckless and so unnecessary as to take it outside the meaning of the statute ...".

Q1/5/25 **Breaches of statutory regulations or instructions**—There may in some circumstances be a fine dividing line between on the one hand merely doing work in a way that is not the safest way or breaching a regulation and on the other hand conduct involving "added peril". But, following *Thomas v. Ocean Coal Co.*, unless conduct is regarded as so reckless and so unnecessary as to take out outside the Ordinance, s.5(4)(b) does not allow the employer to rely on the employee's breach of statutory regulations or his instructions as long as the act done by the employee was for the purposes of and in connection with the employer's trade or business. For discussion of this principle in Hong Kong, see *Chen Xiumei v. Li Siu Wo* (unrep., DCEC 645/2005, [2007] H.K.E.C. 26, D.J. E. Yip).

Q1/5/26 **Effect of the Employees' Compensation Insurance policy**—In *Yau Kam Ching v. Man Fat Co. Ltd* (unrep., DCEC 1400/2009, [2013] H.K.E.C. 875) in concluding that the employee's injuries arouse out of and in the course of employment, the learned judge had considered the terms of the employer's insurance policy which contains a "Meal and Lunch Time Clause" to the effect that in the event of any employee staying in the employer's premises meal and lunchtime being injury or killed shall be deemed to have arisen out of and in the course of the employee's employment.

Compensation in fatal cases

Q1/6 **6.**—(1) Where death results from the injury, then, subject to section 6A, the amount of compensation payable to the members of the family of the employee shall be— *(Amended 52 of 2000 s.5)*

(a) in the case of an employee under 40 years of age at the time of the accident, a lump sum equal to 84 months' earnings or 84 times the amount specified in the second column of the Sixth Schedule shown opposite section 6(1)(a) specified in the first column of that Schedule, whichever is the less;

(b) in the case of an employee of or over 40 years of age but under 56 years of age at the time of the accident, a lump sum equal to 60 months' earnings or 60 times the amount specified in the second column of the Sixth Schedule shown opposite section 6(1)(b) specified in the first column of that Schedule, whichever is the less;

(c) in the case of an employee of or over 56 years of age at the time of the accident, a lump sum equal to 36 months' earnings or 36 times the amount specified in the second column of the Sixth Schedule shown opposite section 6(1)(c) specified in the first column of that Schedule, whichever is the less. *(Amended L.N. 79 of 1983; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; 66 of 1993 s.2; L.N. 566 of 1995; 36 of 1996 s.4)*

(2) The amount of compensation payable under subsection (1) shall in no case be less than the amount specified in the second column of the Sixth Schedule shown opposite section 6(2) specified in the first column of that Schedule. *(Amended L.N. 79 of 1983; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.4)*

(3) Notwithstanding anything in subsection (1) or (2), where in respect of the same accident compensation has been paid under section 7 or 9, there shall be deducted from the sum payable under subsection (1) any sums so paid as compensation.

(4) *(Repealed 52 of 2000 s.5)*

(5) Where death results from the injury, reimbursement of the reasonable expenses of the funeral of the deceased employee and the reasonable expenses of medical attendance on the deceased employee, not exceeding in all the sum of the amount specified in the second column of the Sixth Schedule shown opposite section 6(5) specified in the first column of that Schedule, shall be paid by the employer to any person who has paid the

expenses. *(Amended 76 of 1982 s.5; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.4; 52 of 2000 s.5)*

(6) *(Repealed 52 of 2000 s.5)*

(Replaced 44 of 1980 s.4)

Where death results—Deliberate self injury exception and suicide—The question of whether death resulted from the injury is a matter of causation. If the chain of causation is broken by *novus actus interveniens*, the old cause goes and it is the new act which gives a fresh origin to the after-consequences. Under s.5(2), no compensation is payable in respect of death resulting from deliberate self injury. Therefore, any death caused by suicide may not be compensable, as suicide is a crime and the presumption is against its having been committed. In order to succeed, the applicant must prove that the suicide was caused by injury resulting from accident and there must be a complete chain of causation, unbroken by the intervention of some new cause. The English and Australian authorities suggest that in suicide cases, the members of the family can succeed if: **Q1/6/1**

(a) the deceased was insane at the time of committing suicide;
(b) insane was the result of the insanity;
(c) insane was not indirectly in consequence of a state of depression in mind brought about by the consequences of the injury (*Withers v. London, Brighton and South Coast Ry. Co.* [1916] 2 KB 772, *Johnson v. Warren & Co*. (1929) 21 B.W.C.C. 241, *Haber v. Walker* [1963] V.R.339).

Apportionment of compensation

6A.—(1) Where death results from the injury, the compensation shall be payable only to eligible members of the family and apportioned in the manner set out in the Seventh Schedule. **Q1/6A**

(2) For the purposes of this section—

(a) "eligible" (合資格), in relation to a member of the family, means the member is entitled to compensation under section 6(1) by virtue of a determination under section 6B(1), 6D(6), 6H(4) or 18A(1);

(b) a reference to a child of a deceased employee includes a child born after the death of the employee but before a determination made under section 6B(1)(a), 6D(6), 6H(4) or 18A(1) in respect of the employee.

(3) In determining the amount of compensation payable under section 6(1), the Commissioner or the Court shall take into account—

(a) any compensation deductible under section 6(3);
(b) any interim payments paid under subsection (4).

(4) Where the spouse of the employee who has been paid any interim payments dies prior to the Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case is issued, the aggregate amount of interim payments already paid shall be deducted from the total amount of compensation payable before the apportionment of the amount for other members of the family.

(5) In stating the amount of compensation payable to each member of the family named in the Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case, the Commissioner and the Court may round down the amounts to the nearest dollar.

(Added 52 of 2000 s.6)

Determination by Commissioner of claims for compensation in fatal cases

6B.—(1) Subject to subsection (2), where death results from the injury, the Commissioner may, on application by the members of the family under subsection (4) and with the consent in writing of the employer and signed by him— **Q1/6B**

(a) determine in respect of the members of the family making the application—

(i) the total amount of compensation payable;
(ii) the persons to whom the compensation is payable and the amount of compensation payable to each such person; and
(iii) the persons who are not entitled to the compensation; and

(b) issue a certificate—
(i) as to his determination under paragraph (a); and
(ii) as soon as practicable after making the determination, but in any case not earlier than 6 months from the date of death of the employee or the date of accident if the date of death cannot be ascertained.

(2) The Commissioner shall not determine or continue to determine a claim under subsection (1)(a) where—

(a) the employer does not give his consent in writing signed by him to the Commissioner determining the claim;
(b) the employer gives his consent to the Commissioner determining the claim but prior to determination withdraws such consent by notice in writing signed by him to the Commissioner;
(c) there is a dispute on the familial connection between the employee and any of the persons claiming compensation;
(d) any party to the claim, at any time prior to the issue of the Certificate of Compensation Assessment for Fatal Case, declines determination by the Commissioner;
(e) a claim for compensation in respect of the same employee has been filed with the Court;
(f) in the Commissioner's opinion, the claim is not suitable for such determination; or
(g) the first application under subsection (4) has not been made within 24 months from the date of death of the employee.

(3) Where the Commissioner has proceeded to determine a claim under subsection (1)(a) but prior to the issue of the Certificate of Compensation Assessment for Fatal Case, the process of determination is terminated by virtue of subsection (2)—

(a) the claim shall be determined by the Court pursuant to section 18A(1); and
(b) the Commissioner shall notify the parties concerned of the termination.

(4) An application under subsection (1) shall be made—

(a) in such form as the Commissioner may specify and signed by the person making it;
(b) within 6 months from the date of death of the employee or the date of accident if the date of death cannot be ascertained (but the Commissioner may, if he thinks fit, extend the period for making the application);
(c) subject to paragraph (d), separately by each person claiming compensation or by his authorized representative;
(d) where the person claiming compensation is a minor or a person incapable of managing himself and his affairs, by his guardian or legal representative, as the case may be.

(5) A Certificate of Compensation Assessment for Fatal Case shall—

(a) be in such form as may be specified by the Commissioner giving details of the determination; and
(b) be sent—
(i) to the employer; and
(ii) to each person named in the certificate, whether or not compensation is payable to the person.

(6) The Commissioner shall, as soon as practicable after he decides to determine a claim for compensation under subsection (1)(a), send to the Court a notice advising the Court of that decision.

(Added 52 of 2000 s.6)

Determination by Commissioner of interim payments

6C.—(1) Where a claim for compensation is to be determined under section 6B(1)(a), upon application by the spouse of the deceased employee, the Commissioner— Q1/6C

(a) may, irrespective of whether applications for compensation have been made by other members of the family and prior to the issue of the Certificate of Compensation Assessment for Fatal Case, on application by the spouse in a form as the Commissioner may specify and signed by the spouse, determine that interim payment of compensation be made by the employer to the spouse; and

(b) where he makes a determination under paragraph (a), shall issue a certificate—

(i) as to his determination; and

(ii) as soon as practicable after making the determination.

(2) A Certificate of Interim Payment shall—

(a) be in such form as may be specified by the Commissioner giving details of the determination; and

(b) be sent—

(i) to the employer;

(ii) to the spouse of the employee; and

(iii) to each of the persons who has made an application under section 6B(1).

(3) Interim payments—

(a) shall be payable to the spouse named in the Certificate of Interim Payment or, where that Certificate is cancelled under subsection (12), in the Review Certificate of Interim Payment concerned until the aggregate amount referred to in paragraph (c) is fully paid;

(b) shall comprise—

(i) an initial payment calculated by multiplying the monthly payment referred to in subparagraph (ii) by the number of months elapsed between the date of death, or the date of accident if the date of death cannot be ascertained, and the date of issue of the Certificate of Interim Payment or Review Certificate of Interim Payment, as the case may require;

(ii) subsequent monthly payments calculated at the rate of 50% of—

(A) the monthly earnings of the deceased employee at the time of the accident as determined in accordance with section 11; or

(B) the amount specified in the second column of the Sixth Schedule shown opposite section 6(1)(a) specified in the first column of the Schedule,

whichever is the less;

(c) shall not in aggregate exceed 45% of the total amount of compensation payable under section 6(1) after deducting any compensation which has already been paid under sections 7, 9 and 13(3);

(d) shall—

(i) be deducted from the compensation payable under section 6A to the person to whom interim payments have been paid; and

(ii) where the spouse dies before the issue of the Certificate of Compensation Assessment for Fatal Case, be deducted from the compensation payable to the members of the family under section 6(1),

except that any surcharge payable under subsection (8) by the employer for late payment of interim payments shall not be deductible.

(4) Interim payments shall be payable by the employer—

(a) as to the initial payment, not later than 21 days after the date of issue of the Certificate of Interim Payment or Review Certificate of Interim Payment, as the case may require;

(b) as to each monthly payment, not later than the date corresponding to the date on which the preceding initial payment or monthly payment is payable or if there is no such corresponding date in that month, the last day of that month.

(5) An employer is not required to make payments under a Certificate of Interim Payment pending the completion of a review under subsection (10) or (11).

(6) Where the Commissioner is satisfied on reasonable grounds that a determination which gave rise to a Certificate of Interim Payment was based on information false or misleading in a material particular, he may, by notice in writing to the employer and spouse named in the Certificate of Interim Payment setting out those grounds, order that interim payments under that Certificate shall cease on and from a date specified in the notice for the purpose until such time, if any, that the notice is revoked.

(7) Interim payments shall cease to be payable—

(a) 7 days before the date on which compensation under section 6(1) is due in accordance with a Certificate of Compensation Assessment for Fatal Case;

(b) on the date specified in a notice under subsection (6) for the purpose;

(c) when the total amount of interim payments paid to the spouse reaches the aggregate amount that may be payable as stated in the Certificate of Interim Payment or Review Certificate of Interim Payment, as the case may require; or

(d) on the date the Commissioner notifies the employer and the spouse of his decision that the claim shall be determined by the Court under section 18A(1),

whichever is the earlier.

(8) An employer who fails without reasonable excuse to make interim payments in accordance with a Certificate of Interim Payment or Review Certificate of Interim Payment, as the case may require, shall pay to the spouse of the employee, in addition to the amount of interim payments—

(a) upon the expiry of the payment period, a surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6C(8)(a) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6C(8)(a) specified in the first column of that Schedule of the amount of interim payment then remaining unpaid,

whichever is the greater; and

(b) thereafter upon the expiry of 3 months after the expiry of the payment period, a surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6C(8)(b) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6C(8)(b) specified in the first column of that Schedule of the amount of interim payment then remaining unpaid,

whichever is the greater.

(9) A person may object to a determination under subsection (1)(a) by sending an objection in writing signed by him to the Commissioner within 14 days from the date of issue of the Certificate of Interim Payment, or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit, stating the grounds of the objection.

(10) Without prejudice to the right of any other person to object to a determination under subsection (1)(a), the Commissioner may on his own initiative review any such determination at any time if he considers that it—

(a) was made in ignorance of, or under a mistake as to the circumstances of the claim; or

(b) was based upon any false or misleading information or statement given or made to the Commissioner.

(11) On receipt of an objection under subsection (9) or on a review under subsection (10), the Commissioner shall—

(a) in the case of an objection, send a copy of the objection to any other person who has made an application under section 6B(1) and to the employer if the employer is not the objector;

(b) review the determination under subsection (1)(a) concerned and confirm or vary the determination as he thinks fit (including ceasing interim payments);

(c) upon completing the review, issue to the employer and the spouse a certificate in such form as he may specify stating—

(i) that the original determination is confirmed and giving details thereof;

(ii) details of the determination as varied; and

(d) send a copy of the Certificate to each of the persons who has made an application under section 6B(1).

(12) Upon the issue of a Review Certificate of Interim Payment, the Certificate of Interim Payment to which it relates shall be cancelled.

(13) A Certificate of Interim Payment or Review Certificate of Interim Payment, other than a Certificate cancelled under subsection (12), purporting to be issued and signed by or for the Commissioner shall be admitted in evidence without further proof on its production before any Magistrate or in any court, and—

(a) until the contrary is proved it shall be presumed that the Certificate is so issued and signed; and

(b) shall be evidence of the matters stated therein.

(14) A Certificate of Interim Payment or Review Certificate of Interim Payment, other than a Certificate cancelled under subsection (12) may, on application to the Court by the employer or the spouse of the employee, be made an order of the Court and, for the purposes of this subsection, the amount payable under any such Certificate shall include any surcharge payable under subsection (8).

(15) An employer who fails without reasonable excuse to comply with subsection (4) or (8) commits an offence and is liable to a fine at level 6.

(16) This section shall not apply in the case of a member of the family where the employee was in the service of the Government unless and until the member gives up his rights under the Pensions Ordinance (Cap. 89), the Pension Benefits Ordinance (Cap. 99), the Pension Benefits (Judicial Officers) Ordinance (Cap. 401) and the Auxiliary Forces Pay and Allowances

Ordinance (Cap. 254) to receive pension or gratuities arising from the death of the employee in consequence of injury received in the discharge of his duties.

(17) For the purposes of this section—

"date of issue" (發出日期) means the date appearing on the Certificate of Interim Payment or Review Certificate of Interim Payment;

"payment period" (付款期) means the appropriate period of payment referred to in subsection (4);

"spouse" (配偶) does not include a cohabitee.

(Added 52 of 2000 s.6)

Payment of compensation and objection to determination of Commissioner

Q1/6D **6D.**—(1) Where the Commissioner determines a claim under section 6B(1)(a) (including any case where such a determination is varied under this section), compensation, other than interim payments payable under a Certificate of Interim Payment or Review Certificate of Interim Payment, shall be payable by the employer not earlier than 42 days but not later than 49 days after the date of issue of the Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case, as the case may be.

(2) If any person named in the Certificate of Compensation Assessment for Fatal Case has received any interim payment or payment under section 13(3), the employer shall only be required to pay the balance of the amount of compensation, if any, stated in the Certificate after deducting from that amount the amount of any such payment paid to that person.

(3) An employer who fails without reasonable excuse to make payment in accordance with a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case shall pay, in addition to the amount of compensation payable—

(a) upon the expiry of the payment period, a surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6D(3)(a) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6D(3)(a) specified in the first column of that Schedule of the amount of compensation then remaining unpaid,

whichever is the greater; and

(b) upon the expiry of 3 months after the expiry of the payment period, a further surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6D(3)(b) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6D(3)(b) specified in the first column of that Schedule of the amount then remaining unpaid of the aggregate of any amount of compensation referred to in paragraph (a) and the surcharge imposed under that paragraph,

whichever is the greater.

(4) An objection to a determination under section 6B(1)(a) may be made in writing—

(a) by the employer, any person who has made an application under section 6B(1) or the ECAFB;

(b) within 30 days after—

(i) in the case of the employer or any person who has made an application under section 6B(1), the date of issue of the Certificate of Compensation Assessment for Fatal Case concerned;

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap 365) by a member of the family of the deceased employee, or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit; and

(c) stating the grounds of the objection. (Replaced 16 of 2002 s. 33)

(5) Without prejudice to the right of any other person to object to a determination under section 6B(1)(a), the Commissioner may on his own initiative review any such determination at any time if he considers that it—

(a) was made in ignorance of, or under a mistake as to the circumstances of the claim; or

(b) was based upon any false or misleading information or statement given or made to the Commissioner.

(6) On receipt of an objection under subsection (4) or on a review under subsection (5), the Commissioner shall—

(a) in the case of the objection, send a copy of the objection to any other person who has made an application under section 6B(1) to the employer if the employer is not the objector and to the ECAFB if the ECAFB, as the case requires, is not the objector; (Amended 16 of 2002 s. 33);

(b) review the determination under section 6B(1)(a) concerned and confirm or vary the determination as he thinks fit;

(c) upon completing the review, issue to the employer to each of the members of the family and the ECAFB, as the case requires, a certificate in such form as he may specify stating—(Amended 16 of 2002 s. 33)

(i) that the original determination is confirmed and giving details thereof;

(ii) details of the determination as varied; or

(iii) that due to the reasons set out under section 6B(2), the Commissioner shall not continue to determine the claim;

(d) send a copy of the certificate to each of the persons who has made an application under section 6B(1).

(7) Upon the issue of a Review Certificate of Compensation Assessment for Fatal Case, the original Certificate of Compensation Assessment for Fatal Case to which it relates shall be cancelled.

(8) A certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case, other than a Certificate cancelled under subsection (7), purporting to be issued and signed by or for the Commissioner shall be admitted in evidence without further proof on its production before any Magistrate or in any court, and—

(a) until the contrary is proved it shall be presumed that the Certificate is so issued and signed; and

(b) shall be evidence of the matters stated therein.

(9) A Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case, other than a Certificate cancelled under subsection (7) may, on application to the Court by the employer, any person named in the Certificate, or the ECAFB, be made an order of the Court, and for the purposes of this subsection, the amount payable under any such Certificate shall include any surcharge payable under subsection (3).

(10) An employer who fails without reasonable excuse to comply with subsection (1) or (3) commits an offence and is liable to a fine at level 6.

(11) For the purposes of this section—

"date of issue" (發出日期) means the date appearing on the Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case;

"payment period" (付款期) means the appropriate period of payment referred to in subsection (1).

(Added 52 of 2000 s.6)

Q1/6D/1 **Payment of Minority Interest**—This section does not provide for any mechanism for the protection of minority interests, which would automatically be under O.80 if the compensation were determined and apportioned by the court, or if in proceedings brought before the court, the parties reached agreement. In *Chantex Engineering Ltd v. Chan Hei Tai* (unrep., DCEC 571/2002, 25 October 2002), the Court held that in such case, the employer had every right to apply to the court under s.6D(9) and make payment into court. It is open to the employer to pay direct to the adult family members within the time limit. Provision for payment on account of a claim which is pending settlement is made in s.13(3). Such payment would not have precluded the applications under s.6D(9); although the whole of the certificate would become an order of the court, there was no need for the whole of the compensation to be paid in but only those sums payable to the infant.

Determination by Commissioner of claims for funeral and medical attendance expenses

Q1/6E **6E.**—(1) Subject to subsection (17), where an application seeking a determination under this section is made to the Commissioner by any person who has paid the expenses of the funeral of the employee or the expenses of medical attendance on the employee, and the employer has given his consent in writing signed by him to the Commissioner that the Commissioner may make such determination, then the Commissioner, after the period referred to in subsection (3)(b)—

(a) if there is a liability to pay any such expenses under section 6(5), may determine, in respect of the persons making the application, the persons to whom reimbursement of such expenses under that section is payable and the amount of reimbursement payable to each such person; and

(b) where he makes a determination under paragraph (a), shall issue a certificate—

(i) as to his determination; and

(ii) as soon as practicable after making the determination.

(2) A consent referred to in section 6B(1) given by an employer in respect of an employee shall be deemed to be a consent referred to in subsection (1) given by the employer in respect of the employee.

(3) An application under subsection (1) shall be—

(a) made in such form as the Commissioner may specify and signed by the person making it;

(b) made within 30 days from the date of cremation or date of burial of the employee, or the date on which the Commissioner receives the consent or deemed consent referred to in subsection (1) or (2), as the case may be, from the employer, whichever is the later;

(c) made separately by each of the persons who has paid the expenses or his authorized representative; and

(d) accompanied by supporting documents.

(4) A Certificate for Funeral and Medical Attendance Expenses shall—

(a) be in such form as may be specified by the Commissioner giving details of the determination; and

(b) be sent—

(i) to the employer;

(ii) to each person who has made an application under subsection (1) whether or not reimbursement of the expenses is payable to him.

(5) In determining the amount of reimbursement payable under section 6(5), if the aggregate claimed amount exceeds the amount specified in the second column of the Sixth Schedule shown opposite section 6(5) specified in the first column of that Schedule, the Commissioner shall apportion the amount payable on a pro rata basis.

(6) Where a person who has paid any expenses of the funeral of the employee and expenses of medical attendance on the employee dies prior to the reimbursement of the expenses is paid to him, his legal personal representative shall substitute for him in pursuing the claim.

(7) In stating the reimbursement payable to each person named in the Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses, the Commissioner may round down the amounts to the nearest dollar.

(8) Reimbursement of the expenses of the funeral of the employee and expenses of medical attendance on the employee shall be payable by the employer not earlier than 42 days but not later than 49 days after the date of issue of the Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses, as the case may be.

(9) An employer who fails without reasonable excuse to pay reimbursement in accordance with a Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses, shall pay, in addition to the reimbursement payable—

(a) upon the expiry of the payment period, a surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6E(9)(a) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6E(9)(a) specified in the first column of that Schedule of the reimbursement then remaining unpaid,

whichever is the greater; and

(b) upon the expiry of 3 months after the expiry of the payment period, a further surcharge of—

(i) the amount specified in the second column of the Sixth Schedule shown opposite section 6E(9)(b) specified in the first column of that Schedule; or

(ii) the percentage specified in the third column of the Sixth Schedule shown opposite section 6E(9)(b) specified in the first column of that Schedule of the amount then remaining unpaid of the aggregate of any reimbursement referred to in paragraph (a) and the surcharge imposed under that paragraph,

whichever is the greater.

(10) An objection to a determination under subsection (1) may be made in writing—

(a) by the employer, any person who has made an application under that subsection or the ECAFB;

(b) within 30 days after—

(i) in the case of the employer or any person who has made an application under that subsection, the date of issue of the Certificate for Funeral and Medical Attendance Expenses concerned;

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap 365) by a person who is entitled to the reimbursement of the expenses of the funeral of the deceased

employee or of the expenses of the medical attendance on the deceased employee, or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit; and

(c) stating the grounds of the objection. (Replaced 16 of 2002 s. 33)

(11) Without prejudice to the right of any other person to object to a determination under subsection (1)(a), the Commissioner may on his own initiative review any such determination at any time if he considers that it—

(a) was made in ignorance of, or under a mistake as to the circumstances of the claim; or

(b) was based upon any false or misleading information or statement given or made to the Commissioner.

(12) On receipt of an objection under subsection (10) or on a review under subsection (11), the Commissioner shall—

(a) in the case of the objection, send a copy of the objection to any other person who has made an application under subsection (1), to the employer if the employer is not the objector and to the ECAFB if the ECAFB, as the case requires, is not the objector; (Amended 16 of 2002 s. 33)

(b) review the determination under subsection (1)(a) concerned and confirm or vary the determination as he thinks fit;

(c) upon completing the review, issue to the employer and each of the persons who has made an application under subsection (1) a certificate in such form as he may specify stating—

(i) that the original determination is confirmed and giving the details thereof; or

(ii) details of the determination as varied.

(13) Upon the issue of a Review Certificate for Funeral and Medical Attendance Expenses, the Certificate for Funeral and Medical Attendance Expenses to which it relates shall be cancelled.

(14) A Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses, other than a Certificate cancelled under subsection (13), purporting to be issued and signed by or for the Commissioner shall be admitted in evidence without further proof on its production before any Magistrate or in any court, and—

(a) until the contrary is proved it shall be presumed that the Certificate is so issued and signed; and

(b) shall be evidence of the matters stated therein.

(15) A Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses, other than a Certificate cancelled under subsection (13) may, on application to the Court by the employer, or the persons named in the Certificate, or the ECAFB, be made an order of the Court and the amount payable under the Certificate shall include any surcharge payable under subsection (9). (Amended 16 of 2002 s. 33)

(16) An employer who fails without reasonable excuse to comply with subsection (8) or (9) commits an offence and is liable to a fine at level 6.

(17) The Commissioner shall not determine or continue to determine under subsection (1) a claim for funeral expenses or medical attendance expenses where—

(a) the employer does not give his consent in writing signed by him to the Commissioner to make such determination;

(b) the employer gives his consent to the Commissioner to determine the claim but prior to the determination withdraws such consent by notice in writing signed by him to the Commissioner;

(c) any party to the claim, at any time prior to the issue of the Certificate for Funeral and Medical Attendance Expenses, declines determination by the Commissioner;
(d) a claim for funeral and medical attendance expenses has been filed with the Court; or
(e) in the Commissioner's opinion, the claim is not suitable for such determination.

(18) For the purposes of this section—
"date of issue" (發出日期) means the date of issue appearing on the Certificate for Funeral and Medical Attendance Expenses or the Review Certificate for Funeral and Medical Attendance Expenses;
"expenses for medical attendance" (醫護費) means any expenses incurred by any person other than the deceased employee for the convalescence given in a hospital or medical treatment given to the employee arising from the accident before his death;
"payment period" (付款期) means the appropriate period of payment referred to in subsection (8).

(Added 52 of 2000 s.6)

Supply of particulars to Commissioner

6F.—(1) For the purposes of making a determination under section 6B(1)(a), 6C(1)(a) or (11), 6D(6)(b) or 6E(1)(a) or (12), the Commissioner may by notice in writing require— **Q1/6F**
(a) any person making the claim; and
(b) the employer of the employee and if the employer is a sub-contractor, the principal contractor,

to provide such particulars in writing as the Commissioner thinks necessary, or by the production of documents or the submission of copies of documents, as the Commissioner may direct.

(2) Any person who—
(a) fails or refuses without reasonable excuse to provide any particular required to be provided under this section; or
(b) provides any particular which he knows or reasonably ought to know to be false or misleading in any material particular,

commits an offence and is liable to a fine at level 5.

(Added 52 of 2000 s.6)

Discharge of liability of employer and his insurer in fatal cases

6G.—(1) Subject to subsections (2), (3) and (4), the total liability of an employer and his insurer shall not in respect of any one deceased employee exceed the aggregate amount payable under section 6(1) and (5). **Q1/6G**

(2) Where the employer is liable to pay reimbursement of the expenses of the funeral of the employee and the expenses of medical attendance on the employee, the total amount payable for such expenses by the employer and his insurer shall not in any one fatal case for any one deceased employee exceed the aggregate amount payable under section 6(5).

(3) Any compensation paid to the employee under sections 10 and 10A prior to his death and any surcharge payable under sections 6C(8), 6D(3), and 6E(9) shall not be taken into account when calculating the aggregate amount of compensation paid or payable by the employer under section 6.

(4) Where an amount in excess of the compensation payable by the employer under section 6 is paid to the employee by the employer under sections 7 and 9 prior to his death, the employer shall not recover any such excess amount.

(Added 52 of 2000 s.6)

Appeal against determination of Commissioner in fatal cases

Q1/6H **6H.**—(1) Subject to the provisions of this section, an appeal shall lie to the Court from a determination under section 6B(1)(a), 6C(1)(a) or (11), 6D(6)(b) or 6E(1)(a) or (12), as the case may be.

(2) No appeal shall lie after the expiry of 42 days from the date of issue of the certificate concerned under section 6B, 6C, 6D or 6E, unless the Court, as it thinks fit, extends the time for an appeal notwithstanding that the 42 days period has elapsed.

(3) On an appeal under this section, the Court may confirm or vary the determination of the Commissioner.

(4) Where the Court varies the determination of the Commissioner, the Court shall—

(a) in the case of a determination under section 6B(1)(a) or 6D(6)(b), make an order to apportion the amount of compensation payable under section 6(1) to the member of the family of the employee according to section 6A;

(b) in the case of a determination made under section 6E(1)(a) or (12), make an order to apportion the amount of reimbursement payable to each person who has paid the expenses of the funeral of the employee and the expenses of medical attendance on the employee taking into account section 6E(5).

(5) The Court shall—

(a) subject to section 6G, direct the employer to pay to the Court any amount of payment which is payable by the employer but not yet paid; and

(b) direct any person who has received the payment from the employer in accordance with a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case, a Certificate of Interim Payment or Review Certificate of Interim Payment, a Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses to pay to the Court any amount which has been overpaid to the person taking into account the apportionment made by the Court; and

(c) make such order as to costs as the Court thinks fit.

(6) The amount apportioned to—

(a) any member of the family; or

(b) any person who has paid the expenses of the funeral of the employee and the expenses of medical attendance on the employee,

shall be paid to him, or be invested, applied or otherwise dealt with for his benefit in such manner as the Court thinks fit.

(Added 52 of 2000 s.6)

Q1/6H/1 **Nature of the appeal**—The appeal is as of right.

Q1/6H/2 **Time-limit for the appeal**—The appeal must be started within 42 days following the date of issue of the certificate, unless the District Court makes an order, on application by the proposed appellant, granting leave for the appeal to be started out of time. In *Chan Siu Ling v. Tonyear Ltd (t/a Kwan Shing Restaurant)* [1999] 2 H.K.C. 348, Rogers J.A. in the Court of Appeal held that the power to extend time under s.14(4) of the Ordinance should be exercised liberally by the court. The provisions of this section are slightly different. Those seeking an extension of time have to establish circumstances where the court may "think fit" to extend time.

Q1/6H/3 **Powers of court on hearing the appeal**—The court's powers on hearing the appeal are set out in s.6H(3) to (6). The court may confirm or vary the determination and make such order as it thinks fit as to the costs of the appeal proceedings. As the appeal may be in respect of amounts already paid, the court may direct any person who has received an overpayment to pay the amount overpaid to the Court. It appears that, in appropriate cases, the court may annul any determination made, although s.6H(3) only refers to the court confirming or varying the

determination of the Commissioner. The court also has power, in respect of any amount it confirms or directs is payable to any person, to make directions as to the payment, investment or application of the amount for the benefit of the person concerned.

Parties—As to the appropriate parties to the appeal proceedings, see paras Q1/21/2. **Q1/6H/4**

Form of appeal—The Employees Compensation (Rules of Court) Rules do not provide a prescribed form for any appeal under the Employees Compensation Ordinance. As to the form of application see para.Q1/21/2. **Q1/6H/5**

Costs—The hearing for apportionment of compensation in fatal cases is to be regarded as part of the litigation as a whole for which the employer must be responsible in terms of costs on a party and party basis: see *Li Choi Na v. Well Done Garment Factory Ltd* (unrep., DCEC 1023/2001, 13 May 2002). **Q1/6H/6**

Compensation in case of permanent total incapacity

7.—(1) Where permanent total incapacity results from the injury, the amount of compensation shall be— **Q1/7**

(a) in the case of an employee under 40 years of age at the time of the accident, a lump sum equal to 96 months' earnings or 96 times the amount specified in the second column of the Sixth Schedule shown opposite section 7(1)(a) specified in the first column of that Schedule, whichever is the less;

(b) in the case of an employee of or over 40 years of age but under 56 years of age at the time of the accident, a lump sum equal to 72 months' earnings or 72 times the amount specified in the second column of the Sixth Schedule shown opposite section 7(1)(b) specified in the first column of that Schedule, whichever is the less;

(c) in the case of an employee of or over 56 years of age at the time of the accident, a lump sum equal to 48 months' earnings or 48 times the amount specified in the second column of the Sixth Schedule shown opposite section 7(1)(c) specified in the first column of that Schedule, whichever is the less. *(Amended L.N. 79 of 1983; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; 66 of 1993 s.3; L.N. 566 of 1995; 36 of 1996 s.5)*

(2) The amount of compensation payable under subsection (1) shall in no case be less than the amount specified in the second column of the Sixth Schedule shown opposite section 7(2) specified in the first column of that Schedule. *(Amended L.N. 79 of 1983; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.5)*

(3) For the purposes of this section, permanent total incapacity shall be deemed to result from an injury where the percentage or aggregate percentage of the loss of earning capacity amounts—

(a) in the case of an incapacity of a permanent nature which results from an injury specified in the First Schedule, to 100 per cent or more as specified in that Schedule; or

(b) in the case of an incapacity of a permanent nature which results from an injury not specified in the First Schedule, to 100 per cent or more as assessed by an Ordinary Assessment Board, a Special Assessment Board or the Court,

and a reference in this subsection to an injury shall include a reference to a combination of injuries whether they are mentioned in paragraph (a) or (b) or in both those paragraphs. *(Added 49 of 1985 s.3)*

(Replaced 44 of 1980 s.4)

Employee requiring attention

8.—(1) Where permanent incapacity which results from the injury is of such a nature that the employee is unable to perform the essential actions of **Q1/8**

life, without the attention of another person the compensation payable under this section for and in relation to such attention shall, in addition to any compensation payable under other provisions of this Ordinance, be— *(Amended 1 of 1995 s.4)*

(a) such amount not exceeding the amount specified in the second column of the Sixth Schedule shown opposite section 8(1)(a) specified in the first column of that Schedule as the Court considers necessary to meet the cost of such attention; or *(Added 1 of 1995 s.4)*

(b) an amount of the amount specified in the second column of the Sixth Schedule shown opposite section 8(1)(b) specified in the first column of that Schedule payable pursuant to an agreement entered into by the employer with the injured employee and approved by the Commissioner under this section. *(Added 1 of 1995 s.4; L.N. 566 of 1995; 36 of 1996 s.6)*

(2) Compensation under subsection (1)(a) shall be— *(Amended 1 of 1995 s.4)*

(a) a lump sum payment calculated with regard to the probable duration and cost of the attention; or

(b) (i) periodical payments, payable at such intervals as the Court may order, to cover periods not exceeding a total of 2 years after the date on which the employee becomes entitled to receive compensation under section 7; and

(ii) if on the expiry of the period of 2 years prescribed in subparagraph (i) the Court considers that the employee is still in need of attention, such lump sum payment, as the Court may order, calculated with regard to the probable duration and cost of the attention. *(Amended 1 of 1995 s.4)*

(3) No compensation under this section shall be payable in respect of any period during which the employee is receiving free medical treatment as an inpatient in a hospital or otherwise.

(4) Every agreement under this section shall, as soon as possible after the execution thereof, be submitted in triplicate by the employer to the Commissioner. *(Replaced 1 of 1995 s.4)*

(5) Where an agreement under this section is submitted to the Commissioner, he may—

(a) subject to subsection (6), approve the agreement and signify his approval in writing; or

(b) refuse to approve the agreement. *(Added 1 of 1995 s.4)*

(6) Where the Commissioner has reason to believe that the interests of the employee require that the agreement be read over and explained to the employee, the Commissioner shall not signify his approval of the agreement under subsection (5)(a) until he has so read and explained it to the employee. *(Added 1 of 1995 s.4)*

(7) No agreement made under this section shall be binding on any party thereto until the Commissioner has signified his approval thereof in writing under subsection (5)(a). *(Added 1 of 1995 s.4)*

(8) Where the Commissioner refuses to approve an agreement under subsection (5)(b), he shall notify the employer in writing of his refusal giving his reasons therefor, and at the same time may return the agreement to the employer for amendment in such manner as he may specify. *(Added 1 of 1995 s.4)*

(9) The Commissioner shall, as soon as possible after signifying his approval to an agreement under subsection (5)(a), forward one copy thereof each to the employer and the employee and retain one copy for his records. *(Added 1 of 1995 s.4)*

(10) Any agreement made under this section which has been approved by the Commissioner may, on application to the Court by any party thereto or by the Commissioner, be made an order of the Court. *(Added 1 of 1995 s.4) (Added 55 of 1969 s.8. Amended 44 of 1980 s.15)*

Limits on agreement that can be reached—Section 8 allows the employer and employee to reach agreement as to the compensation payable, subject to the approval of the Commissioner. However, no agreement can be approved unless it provides for the maximum permitted compensation to be paid (see s.8(1)). **Q1/8/1**

Procedure under s.8(10)—There is no prescribed time-limit for making the application for an agreement made under s.8 which has been approved by the Commissioner to be made an order of the court. The application can be made by the employer, the employee or the Commissioner. There is no prescribed form for the application but it should be made in Form 3 as it is a similar application to the applications covered by r.27 of the Rules of Court (see para.K2/27). **Q1/8/2**

Prima facie there does not appear to be any basis on which application made under s.8(10) may be resisted as the agreement made under s.8, once approved by the Commissioner, does not appear to be capable of challenge (see ss.18 and 18A(1)(a) at paras Q1/18 and Q1/18A). It is therefore not clear whether it is necessary to serve the application, assuming it is made by the employee or the Commissioner, on the employer (see *Wong Kam Cheung v. Tai Fong Dyeing & Weaving Factory Ltd* (unrep., CACV 21/1982, 16 March 1982), in respect of the former s.17, now repealed, of the Ordinance). It would appear that the case law decided in respect of the provisions of the English Workmen's Compensation Act 1825 for the recording and registration of agreements at the county court (see *Halsbury's Laws of England* (2nd ed.), Vol.34, para.1362) are of little or no assistance as that dealt with agreements merely between employer and employee, without the benefit of the agreement of a statutory officer such as the Commissioner. However, the agreement is capable of being reviewed on application under s.19 of the Ordinance. The better course therefore is for all applications under s.8(10) to be served on the other parties to the agreement, so that the employer or the employee as the case may be can consider whether to make an application under s.19, to be heard at the same time as the application under s.8(10). Accordingly, if the court in those circumstances concluded that it was appropriate to vary the agreement pursuant to s.19, the court would make an order to reflect the variation of the agreement rather than in terms of the original agreement. The making of an order under s.8(10) would not appear to preclude a subsequent application under s.19. If an order is made in such circumstances, i.e. so as to vary an agreement that has already been made into an order of the court, the order made under s.19 would presumably take effect and be expressed to do so as a variation of the order made under s.8(10).

Once an order has been made by the court under s.8(10) the agreement can be enforced like any order or judgment of the court.

The court has similar power under s.16A(8) (see para.Q1/16A).

Compensation in case of permanent partial incapacity

9.—(1) Subject to subsection (1A), where permanent partial incapacity results from the injury the amount of compensation shall be— *(Amended 76 of 1982 s.6)* **Q1/9**

(a) in the case of an injury specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury;

(aa) in the case of a combination of injuries specified in the First Schedule, the aggregate of the compensation which would have been payable in respect of the injuries; and *(Added 4 of 1973 s.2)*

(b) in the case of an injury not specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury in any employment which the employee was capable of undertaking at that time: *(Amended 19 of 1964 s.7; 55 of 1969 s.9; 44 of 1980 s.15)*

Provided that—

(i) in the case of injury to any part of the body specified in the First Schedule not amounting to the loss of that part, the loss

of earning capacity permanently caused by that injury, expressed as a percentage, shall not exceed the appropriate percentage specified in the First Schedule in respect of the loss of such part; *(Added 4 of 1978 s.3)*

(ii) in the case of injury not specified in the First Schedule, the loss of earning capacity permanently caused by such injury shall be assessed as a percentage having regard so far as possible to the scale of percentages specified in that Schedule and to the Note thereto. *(Replaced 49 of 1985 s.4)*

(1A) Where—

(a) permanent partial incapacity results from an injury or a combination of injuries (whether or not specified in the First Schedule); and

(b) the percentage of the loss of earning capacity specified or assessed in relation to that injury or combination of injuries in accordance with subsection (1) would be substantially less than the percentage of the loss of earning capacity permanently caused by the injury or injuries in the special circumstances of the employee, including, without limiting the generality of the foregoing—

(i) the nature of the injury or injuries in relation to the nature of his former usual employment; and

(ii) his qualifications, previous training and experience,

the amount of compensation shall be such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury or injuries in any employment which, having regard to those special circumstances, the employee was capable of undertaking at that time. *(Added 76 of 1982 s.6)*

(2) Where more injuries than one are caused by the same accident, the amount of compensation payable under the provisions of this section shall be aggregated, but not so in any case as to exceed the amount which would have been payable if permanent total incapacity had resulted from the injuries.

(3) For the purposes of this section, permanent partial incapacity shall be deemed to result from an injury where the percentage or aggregate percentage of the loss of earning capacity amounts—

(a) in the case of an incapacity of a permanent nature which results from an injury specified in the First Schedule, to less than 100 per cent as specified in that Schedule; or

(b) in the case of an incapacity of a permanent nature which results from an injury not specified in the First Schedule, to less than 100 per cent as assessed by an Ordinary Assessment Board, a Special Assessment Board or the Court,

and a reference in this subsection to an injury shall include a reference to a combination of injuries whether they are mentioned in paragraph (a) or (b) or in both those paragraphs. *(Added 49 of 1985 s.4)*

(4) In assessing the loss of earning capacity for the purposes of subsection (3)(b), an Ordinary Assessment Board, a Special Assessment Board or the Court, as the case may be, may but shall not be obliged to give weight to any actual earnings of the employee earned after the accident causing the injury. *(Added 49 of 1985 s.4)*

Q1/9/A **Existence of permanent partial incapacity**—The employee is entitled to compensation under section 9 when he has suffered permanent partial incapacity. Under section 10(5) the permanence is deemed to exist once the employee has received a maximum of 36 periodical payments. The employee's entitlement to payments under section 9 in respect of his incapacity is thus crystallised in accordance with section 10(5): *Wong Hoi Chung v. LKK Trans Ltd* [2005] 2 H.K.L.R.D. 444 (CA) per Hon Rogers V.-P. and Mr. Justice Ribeiro P.J. (2006) 9 H.K.C.F.A.R. 103.

Assessment of percentage of loss of earning capacity under s.9(1)(b)—It is for the court to assess the percentage of loss of earning capacity. The assessment of loss of earning capacity, pursuant to s.9(1)(b), must reflect and be proportionate to the fixed statutory percentages provided for the scheduled injuries. Medical experts were familiar with the First Schedule of the ECO and the Notes thereto and were adept at assessing the percentage of loss of earning capacity for non-scheduled cases and they regularly did so when preparing in their expert reports for employees' compensation cases. Those reports were admissible and of assistance to the District Court in assessing compensation for non-scheduled cases which did not require special treatment under the provisions of s.9(1A): see *Chan Yuet Keung v. Harmony (International) Knitting Factory Ltd* [2011] 1 H.K.C. 463. Medical opinion is useful but it is for the court to come to its own conclusion: *Tang Shau Tsan v. Wealthy Construction Co. Ltd* (unrep., CACV 58/2000, 5 April 2000), followed in *Fan Kwok Keung v. Team Work Event Promotion Ltd* (unrep., DCEC 973/2002, [2003] H.K.E.C. 1398), Fung DCJ. For the purpose of assessing the loss of earning capacity the relevant consideration is not the seriousness of the injuries but the effect of the injuries on the earning ability of the employee. A similarly serious injury may have a significantly different impact on different individuals in different employment, with the result that appropriate and correct assessment of the percentage loss of earning capacity arising from a similar injury may be very different (*Yung Chi Man v. Tang Kan Fu*, (unrep., DCEC 770/2004, [2006] H.K.E.C. 222), Yau D.D.J.). **Q1/9/1A**

In *Hong Kong Paper Mills Ltd v. Chan Hin-Wu* [1981] H.K.L.R. 556, the Court of Appeal set out the formula to be applied when determining the amount of compensation payable under s.9(1)(b), namely:

> Compensation = a/b × c
> Where a is the earning capacity at the time of the accident in any employment of which the workman is now capable,
> b is the earning capacity at the time of the accident, and
> c is the compensation payable upon permanent total incapacity.

This formula was later modified by the Court of Appeal in *Lui Kwong-Yan v. Shui Hing Decoration Works* [1993] 1 H.K.L.R. 168, which held that the correct formula should be:

$$\frac{b - a}{b} \times c$$

The *Hong Kong Paper Mills* formula, as modified, was adopted by the Court of Appeal in *Lau Man Keung v. Yiu Wing Construction Co. Ltd* [2002] 2 H.K.L.R.D. H15 and by Deputy District Judge Tracy Chan in *Hang Huu Duc v. Hanbo Engineering Ltd* (unrep., DCEC 201/2003, [2005] H.K.E.C. 315).

Section 9(1A)—The primary rationale of s.9(1A) is to give the court a wide discretion as to what percentage of loss of earning capacity should be awarded, depending on whether there are special circumstances in respect of the employee and, if so, what are those special circumstances. More specifically, it must be established that (1) permanent partial incapacity has resulted from an injury or injuries and (2) the percentage loss of earning capacity produced by the usual calculation under s.9 would be "substantially less" than such percentage as would result if the "special circumstances" of that particular employee are taken into account: *Law Siu See v. De Rodeo Human Resources Ltd* (unrep., DCEC 989/2001, [2003] H.K.E.C. 533) (air-conditioning technician on basic monthly salary of $11,000 suffered impairment to his left wrist, but had other special skills (such as driving skills), appeared to be a positive person and had seriously considered options of alternative employment, so no evidence before court that earning capacity would be "substantially less" by reason of any special circumstances than that assessed under s.9(1)). The concept of earning capacity is certainly not limited to the present or to be measured by some immediate and possibly quite fortuitous achievement. It is concerned with a continuing state, with the potential of an individual and so very much with the future as well. The words "or is able to earn" are most significant. They point to the retention of the power to earn something in a suitable employment, and to the extent that this power is retained or has returned, though the employee may not try to exercise it, the employee does not incur the particular kind of loss for which compensation is to be given. The essential elements are not actual earnings, whether in alternative employment as at the date of the accident or in the relevant employment at such time, but earning capacity in one or other form of employment. Section 9(1A) is to be invoked to assess a higher loss of earning capacity in cases where the applicant had received little education and did not possess other special skills apart from working in manual work or other work which requires manual dexterity or physical strength (*Wong Sau Lai v. Cathay Pacific Airways Ltd* [2003] 1 H.K.C. 331 at 338D–339C, *per* Judge C.B. Chan, following *Ball v. William Hunt & Sons Ltd* [1912] A.C. 496 at 505, *per* Lord Atkinson; *Lau Ho Wah v. Yau Chi Biu* [1987] H.K.L.R. 1061 at 1063G, *per* Sir Owen Woodhouse and *Wong Siu Fung v. Fu Ming Stainless Engineering Co. Ltd* (unrep., CACV 123/1987), in particular the decision of Kempster J.A.—the employee was a cabin attendant with pre-accident monthly earnings of H.K.$16,397.40, but who had the previous work experience and training of a legal secretary earning H.K.$16,000 pcm working for the partner of a solicitors' firm and who had enhanced **Q1/9/2**

her communication and presentation skills while employed as a cabin attendant. Whilst her injury meant that the work of a cabin attendant would no longer be suitable, she had the ability to regain all her former skills and even improve on them, so the case did not fall within s.9(1A)). For an example of the court's invoking s.9(1A) to assess a higher loss of earning capacity, see *Kwan Yee Chor v. Hung Fau Metal Construction Co. Ltd* [2002] 2 H.K.L.R.D. 768. Lok J. held that the applicant's pre-accident job involved a great deal of physical demand on the use of the right wrist and after his injuries he could not return to his former employment. Coupled with the fact that the applicant had received little education and did not possess other special skills apart from working as an iron-work worker, the percentage of loss of earning capacity assessed under s.9(1) would be substantially less than the percentage of actual loss of earning capacity suffered by the applicant.

See also *Wong Hoi Chung v. LKK Trans Ltd* (unrep., DCEC 153/1999, [2004] H.K.E.C. 369), C.B. Chan DCJ (a 50 year old employee was a delivery worker who had received very little education. Having been seriously injured, he could not carry on that occupation and was not fit for sedentary work either. His actually loss of earning capacity was 100% as compared to the assessment of the Ordinary Assessment Board, on review, of 60%. It was conceded that he might have a residual earning capacity of 10%, and the court adjudicated his loss of earning capacity at 90% under s.18 (approved on appeal to Court of Appeal [2005] 2 H.K.L.R.D. 444 (CA)).

Q1/9/3 **The court's assessment of the cause of, and contributing factors leading to, permanent partial incapacity**—Whether permanent partial incapacity results from the injury is a question of fact to be determined by the judge in all of the circumstances, including, but not limited to, any expert medical or other evidence. It is quite legitimate and proper to consider whether an accident has accelerated an existing tendency to disease in the body. There is a sufficient causal connection if it is shown on the balance of probabilities that the accident was a substantially contributing cause of the injury, even if it was not the sole cause. In considering this question a judge is required to apply common sense to the question in the same way as would a juror. *Lai Yuen Hing v. Lo Chi Hung* (unrep., DCEC 14/2000, [2001] H.K.E.C. 1562), K. Lin D.D.C.J. applying *Ystradowen Colliery Co. Ltd v. Griffiths* [1909] 2 K.B. 533 and *Lee Kin Kai v. Ocean Tramping Co. Ltd* [1991] 2 H.K.L.R. 232.

In some cases, the employee's injury at work may be the sole cause of the extent of the employee's permanent partial incapacity, and there may have been no pre-existing condition which exacerbated the impact of the injury, and the employee may have done his best to seek to obtain treatment to recover as fully as possible from the injury. However, in other cases, the employee may have had a pre-existing condition which exacerbated the impact of the injury. In *LKK Trans Ltd v. Wong Hoi Chung* (unrep., DCEC 153/1999, [2006] H.K.E.C. 356), the Court of Final Appeal set out the approach the court should take in such circumstances, by reference to the relevant principles underlying the Ordinance, as follows.

(1) The Ordinance provides for a no-fault scheme aimed at giving quick financial relief to employees incapacitated by work-related injuries. It is a scheme whereby the community, through the cost-sharing device of compulsory insurance, permits employees so incapacitated to look to their employers for compensation having regard to the extent of the incapacity suffered, regardless of any fault on the part of the employer and regardless of the circumstances in which the work accident happened. The focus is, in other words, on insurance-based compensation aimed at alleviating the incapacitated employee's hardship rather than on compensation confined in a manner which reflects the employer's fault or otherwise.

(2) It is not necessary therefore for the employee making a claim under the Ordinance to demonstrate that the injury was the sole cause of the incapacity.

(3) There does need to be a causal connection between the injury and the incapacity. This is clear from the language of s.9(1)(b).

(4) But there is no basis for any apportionment to take place such as would result in an apportionment of the degree of incapacity caused by the work-related injury and any other, pre-existing cause. To approach s.9 in this way would be inconsistent—without any good reason—with the approach taken in the Ordinance to the other scenarios, namely fatal cases, permanent total incapacity and permanent partial incapacity involving injuries set out in the First Schedule to the Ordinance.

(5) The conclusion set out above follows from ss.5, 6, 7 and 9. The conclusion does not follow from s.10(5). Section 10(5) deals with deeming of the permanence of the incapacity: it does not operate to deem causation. (In this respect the Court of Final Appeal differed from the reasoning of the judge at first instance and Reyes J. in the Court of Appeal.)

In some cases, an employee may have declined recommended medical treatment after the injury, and it may be asserted that as a result, the employee has caused a greater degree of incapacity than would otherwise have been the case. The Court of Appeal in *LKK Trans Ltd v. Wong Hoi Chung* [2005] 2 H.K.L.R.D. 444, following *Hong Kong Paper Mills Ltd v. Chan Hin-wu* [1981] H.K.L.R. 556 and *Wilson v. Chalterton* [1946] 1 K.B. 360 (C.A.), held that, in the absence of an express provision, the common law duty to mitigate could not be imported into the statutory scheme. Accordingly, a claimant who had refused to have an operation which on medical evidence, would have resulted in a significantly reduced permanent incapacity was

nonetheless entitled to full compensation. The Court of Final Appeal in *LKK Trans Ltd v. Wong Hoi Chung* cited this part of the Court of Appeal's decision without disagreeing with it in the analysis of the question (answered negatively) as to whether the Ordinance provided for any apportionment as a result of there having been a pre-existing condition of the employee contributing to the incapacity arising from the work-related injury. This might therefore be regarded as at least tacit approval of the Court of Appeal's decision in this respect. But, at the same time, the Court of Final Appeal declined to decide any question as to the approach to be taken to assessment of compensation involving employees who were victims of a second or subsequent accident. So, strictly, the question may be regarded as open for decision by the Court of Final Appeal.

Court's review of assessment under s.9(4)—In *Wong Wing Cheung v. Interlite (Asia) Ltd* (unrep., DCEC 893/2001, [2003] H.K.E.C. 918), the Ordinary Assessment Board determined that the employee had a permanent loss of earning capacity of 4 per cent. However, it was clear on the medical evidence before the court that, whereas at the time of his accident the employee was earning $18,200 per month as an electrician, as a result of his injury he suffered permanent impairment and loss of future job capacity, reducing his likely earning capacity to that which he would earn as a messenger or security guard. The court did not have before it, however, any evidence of what a messenger or security guard would earn, but was prepared to apply a figure of 15 per cent proposed by the medical experts based on the nature of the permanent injury. **Q1/9/4**

Compensation in case of temporary incapacity

10.—(1) Where temporary incapacity whether total or partial results from the injury, the compensation shall be the periodical payments hereinafter mentioned, or a lump sum calculated accordingly, having regard to the probable duration, and probable changes in the degree, of the incapacity. Such periodical payments shall be, or shall be at the rate proportionate to, a monthly payment of four-fifths of the difference between the monthly earnings which the employee was earning at the time of the accident and the monthly earnings which he is earning, or is capable of earning, in some suitable employment or business during the period of the temporary incapacity after the accident. *(Amended 55 of 1969 s.10; 76 of 1982 s.7; 67 of 1996 s.3)* **Q1/10**

(2) For the purposes of this section a period of absence from duty certified to be necessary by a medical practitioner, a registered dentist, an Ordinary Assessment Board or a Special Assessment Board shall be deemed to be a period of total temporary incapacity irrespective of the outcome of the injury. *(Added 55 of 1969 s.10. Amended 31 of 1985 s.2)*

(3) Periodical payments under this section shall be payable on the same days as wages would have been payable to the employee if he had continued to be employed under the contract of service or apprenticeship under which he was employed at the time of the accident:

Provided that—

(a) by agreement or by order of the Court, the periodical payments may be made at shorter intervals; and

(b) the interval between periodical payments shall not exceed 1 month. *(Added 55 of 1969 s.10)*

(4) In the event of death or permanent incapacity following a period of temporary incapacity whether total or partial, no periodical or lump sum payments paid or payable under this section shall be deducted from any amount of compensation payable under section 6, 7, 8 or 9. *(Added 55 of 1969 s.10)*

(5) An employee who has received periodical payments under this section for a period of 24 months from the date of the commencement of the temporary incapacity or for such further period being not more than 12 months as the Court may allow in any particular case shall no longer be entitled to periodical payments under this section but shall be deemed to have suffered permanent incapacity and the provisions of section 7 or 9, as the case may be, shall apply to the employee. *(Added 55 of 1969 s.10. Amended 1 of 1995 s.5)*

(6) In fixing the amount of the periodical payment, the Court shall have regard to any payment, allowance or benefit which the employee may receive from the employer during the incapacity.

(7) On the ceasing of the incapacity before the date on which any periodical payment falls due, there shall be payable in respect of that period a sum proportionate to the duration of the incapacity in that period.

(8) An employee in receipt of periodical payments under this section who intends to leave Hong Kong for the purpose of residing outside Hong Kong may apply to the Court for an order for the redemption of such periodical payments and the payment to him, subject to subsection (9), of a lump sum amount to be determined by the Court. *(Replaced 1 of 1995 s.5)*

(9) The amount of a lump sum payable to an employee under subsection (8) together with the periodical payments already made to the employee under subsection (1) shall not exceed the lump sum which would be payable in respect of the same degree of incapacity under the provisions of section 7 or 9, as the case may be, if the incapacity were permanent. *(Replaced 1 of 1995 s.5)*

(10) Without prejudice to any other provision of this Ordinance, an employer who without reasonable excuse fails to pay to the employee or to the Court any compensation or any proportionate part thereof under this section within a period of 7 days after the date on which such compensation falls due (whether under subsection (3) or by agreement or by order of the Court), commits an offence and is liable to a fine at level 6. *(Added 76 of 1982 s.7. Amended 63 of 1992 s.4; 64 of 1992 s.2; 36 of 1996 s.7)*

(11) If the period of temporary incapacity does not exceed 3 days and the employer fails to pay to the employee or to the Court the compensation or any proportionate part thereof that he is liable to pay under this section within the period referred to in subsection (10), the compensation or proportionate part thereof may be recovered by the employee from the employer—

(a) as a civil debt in the Small Claims Tribunal established under the Small Claims Tribunal Ordinance (Cap. 338); or

(b) where the amount claimed exceeds the jurisdiction of the Small Claims Tribunal, as a civil debt in the District Court. *(Added 67 of 1996 s.3)*

(12) A claim for compensation or any proportionate part thereof may be brought in the District Court under subsection (11)(b) either independently of or in conjunction with any other claim for compensation which is, under this Ordinance, to be brought in the District Court. *(Added 67 of 1996 s.3) (Amended 44 of 1980 s.15)*

Q1/10/1 **General purpose of s.10 and nature of application and hearing under s.10**—S.10 deals with the aspect of compensation payable for temporary incapacity, whether total or partial, of any injured worker. This is in contradistinction to a permanent incapacity, which is dealt with under s.9. Where it is not clear whether the incapacity arising from an injury is going to be temporary or permanent, alternative claims can be made under both ss.9 and 10. An adjudication under s.10 is not in any sense an interim order: subject only to the outcome of any review under s.19, it is a final and permanent decision of the court to the right of an injured employee to payment in respect of temporary incapacity. The decision will have implications in terms of res judicata and issue estoppel.

In order to determine a claim for relief under s.10, it will be necessary for the court to be satisfied on the evidence of all the requisite factors provided for by s.9, including fundamentally proof of the employee-employer relationship and, where main-contractors and sub-contractors are involved, the existence of employment by the sub-contractor (see s.24(1)). A substantive hearing under s.10 amounts to a trial and must be heard in open court, not in chambers: *Poon Chi Kwong v. Poon Wing Kee (Metal) (Work)* (unrep., CACV 378/2003, [2004] H.K.E.C. 535). *Poon Chi Kwong* is followed in the subsequent cases: *Cheung Yee San v. Chan Kwok Wai* (unrep., DCEC 858/2004, May 10, 2005) and *Ho Shuk Man v. Sunflower Travel Service Ltd* (unrep., DCEC 618/2009, [2010] H.K.E.C. 226). In *Ho Shuk Man*, the Court was faced with an application for "interim periodical payment" upon production of medical evidence to respondent in support of the continuing temporary incapacity at the rate of HK$7,321 per month or at other rate the

court shall think fit. The Court found no legal basis for the applicant to ask for "interim periodical payment" under s.10(5) of the Employees' Compensation Ordnance or O.29 of the Rules of District Court.

Scope of s.10(5)—Section 10(5) provides that, generally, if an employee receives periodical payments in respect of temporary capacity for 24 months (i.e. two years), rather than continue to receive periodical payments for temporary incapacity after 24 months, the employee shall be deemed to have suffered permanent incapacity and must look to compensation under ss.7 or 9. However, s.10(5) also gives the court power to extend the period for periodical payments beyond 24 months for up to a further 12 months. If payments continue to be required beyond 36 months (i.e. three years), then the employee must look to compensation under ss.7 or 9 thereafter. For an example of the court granting leave to extend periodical payments under s.10(5) beyond two years (on the facts of the case for approximately 32 months), see *Yung Chi Man v. Tang Kan Fu* (unrep., DCEC 770/2004, [2006] H.K.E.C. 222, D.D.J. Yau). The scope of s.10(5) and the interrelationship between s.10(5) and s.14(1) are difficult questions. These were the questions facing the Court of Appeal in *Chan Siu Ling v. Tonyear Ltd (t/a Kwan Shing Restaurant)* [1999] 2 H.K.C. 348. The employer made periodical payments to the employee on a voluntary basis by way of compensation for temporary incapacity. The employer made payments for a period of over 24 months following the date of the accident. However, the employer then stopped making payments, before it had been established whether the employee's incapacity (constituting lower back pain) was in fact permanent. The employee applied to the District Court for an order for continuation of the periodical payments for up to 12 months. The employer objected to the application on the grounds that the application was time-barred under s.14(1), the application for compensation not having been made within 24 months from the occurrence of the accident. The employee contended that the application fell outside s.14(1) by reason of the words "[e]xcept where otherwise provided by this Ordinance ...", on the basis that an employee could not be expected to make the application for an extension of time until after the expiry of the prescribed 24 months. The District Court judge rejected the employee's contention, finding that the limitation period prescribed by s.14(1) applied to an application for compensation for temporary incapacity, whether the application was for periodical payments during the first 24 months following the accident or for such further period as the court may allow under s.10(5). The lack of clarity in the wording of the Ordinance is reflected by the fact that each of the three judges sitting in the Court of Appeal reached their decision by a different route. Rogers J.A. determined that the application made to the District Court should be characterised as an application for periodical payments for temporary incapacity made under s.18A(2). As such s.14(1) applied to it. He found that s.10(5) does not make any provision to escape the application of the 24-month time-limit under s.14(1). Section 10(5) is entirely silent as to when the court may allow payments during the 12-month period following the initial 24-month period. However, he also held that s.14(4)—which allows the court to permit an application for compensation to be received and determined even if initiated out of time—should be exercised liberally. On the facts of the case, Rogers J.A. could see no reason why the District Court judge should not have exercised his discretion to hear and determine the application pursuant to s.14(4). Mortimer V.-P. held that the payments made by the employer were only voluntary and not "periodical payments" under s.10(5). Accordingly, he agreed with Rogers J.A.'s conclusion that the application made by the employee was a claim under s.18A(2). He held that the application was out of time under s.14(1) and the employee should pursue her application under s.14(4) before the District Court judge. Godfrey J.A., however, held that the application was in substance an application pursuant to s.10(5) and not an "application for compensation" at all. An application under s.10(5) is merely an application to postpone the descent of the statutory guillotine when an employee ceases to be regarded as temporarily incapacitated and becomes deemed to be permanently incapacitated. The question of whether an employee is receiving compensation voluntarily or pursuant to a court order is immaterial. Section 14(1) is not applicable in the case of applications under section 10(5). **Q1/10/2**

In practice, an employee would be well advised to avoid any issue arising by making an application under s.10(5) immediately, or shortly, before the expiry of the 24-month period.

Notwithstanding Godfrey J.A.'s observations in his judgment in *Chan Siu Ling v. Tonyear Investment Ltd (t/a Kwan Shing Restaurant)* (above) to the contrary, there does not seem to be any impediment to an application under s.10(5), to postpone the date from which an employee is deemed permanently incapacitated, being initiated before the expiry of 24 months from the date of the accident in question. If an application is made only after the expiry of the 24-month period, it should be made promptly following the expiry of the period and contain an application pursuant to s.14(4) for leave to make the application outside the time limit prescribed by s.14(1). The application for leave under s.14(4) is likely to be allowed as the court should exercise its discretion under that section liberally.

Rationale of s.10—The mischief sought to be cured by the introduction of s.10 is the problem which could be caused when an employee suffered a period of temporary incapacity followed by a period of permanent partial incapacity, which would result in his not receiving adequate compensation for the period when he was temporarily incapacitated. (See *Choy Wai Chung v. Chun Wo Construction & Engineering Co Ltd* [2001] 2 H.K.L.R.D. 803, approved by *Lau* **Q1/10/3**

King Sun v. CHEC-CWF Joint Venture [2002] 2 H.K.L.R.D. G17, Wong D.D.J., where the court exercised its discretion to extend the period of periodical payments beyond the statutory 24 months, but by not more than 12 months, upon the plaintiff producing medical certificates).

Q1/10/4 **Section 10(1) and effect of certificate under s.10(2)—Temporary incapacity must result from injury**—s.10(1) requires the applicant to establish that the temporary incapacity, whether total or partial, results from the injury. (*Lai Yuen Hing v. Lo Chi Hung* (unrep., DCEC 14/2000, [2001] H.K.E.C. 1562)).

Q1/10/4A **Effect of certificate under s.10(2)**—There were two schools of thought and conflicting authorities as to whether the deeming provision of s.10(2) should be conclusive or rebuttable, and how the same could be rebutted.

It is only until recently in the Court of Appeal cases of *Yu Tat Kam v. Chu Tung Shing* (unrep., CACV 25/2008, [2009] H.K.E.C. 1656) and *Kan Wai Ming v. Hong Kong Airport Services Ltd* [2011] 3 H.K.L.R.D. 497 that the Court of higher hierarchy confirms that the presumption that a period of absence from duty so certified is a period of total incapacity is rebuttable.

Unfortunately, the Court of Appeal however did not formulate a test as to how the presumption could be rebutted, but simply stressed the importance for an employer to obtain independent medical evidence and to invoke the right under section 16.

As the risk of abuse should lie on the employer rather than the employee, an employer should consider institute proceedings to assess compensation and thereby seek a determination from the court of the period for which periodical payments would fall to be made by obtaining a final assessment under section 10, other than waiting the employee to commence proceedings.

In an earlier Court of Appeal case of *Lau Man Keung v. Yiu Wing Construction Co. Ltd* [2002] 2 H.K.L.R.D. H15, the Court held that evidence from a video (showing the injured employee climbing stairs and riding a bicycle) and a specialist at trial were not sufficient to rebut the evidence of the medical certificates. The Court noted that sick leave had been certified necessary by a number of doctors and confirmed by the Board and no suggestion had been made that the medical certificates were issued without due consideration by doctors.

For a detailed analysis of the previous case laws, and how the presumption can be rebutted, please refer to the following articles: "*Is the presumption under section 10(2) of the Employees' Compensation Ordinance rebuttable? – View from a practitioner*" published in January 2005 issue of Hong Kong Lawyer, and "*Sick Leave Certificates: The Debate Continues*" published in October 2007 issue of Hong Kong Lawyer.

Q1/10/5 **Form of application under s.10(9)**—The application by the employee should be in Form 3 to the Rules of Court. For an example of the approach taken in Australia to the question of redemption of periodical payments in favour of a lump sum, see the High Court of Australia's decision in *Perry Engineering Co. Ltd v. Mermingis* (1964) 112 C.L.R. 468.

Q1/10/6 **Procedure under s.10(11)**—As with other similar provisions under the Ordinance, the claim should be brought in the District Court by either writ of summons or originating summons and the proceedings will be conducted in the same manner as any other action begun by writ of summons or originating summons, as the case may be, in the District Court.

Q1/10/7 **Refund of overpayment**—There is a distinction between periodical payment made under s.10 of the Ordinance and the interim payment made under O.29, r.27 Rules of District Court. Periodical payments paid pursuant to s.10 are not deductable from any amount of compensation payable under ss.6, 7, 8 or 9. Therefore, the Court has no power to order for any set off or repayment for overpaid amount. On the other hand, if the payments are only interim payment, O.29, r.27 allows a Court to make adjustment on final judgment or order, including the power to order for the repayment by the Plaintiff of all or part of the "interim payment" paid (See *Poon Chi Kwong, supra*).

What can cause dispute is an employer's payment which does not specifically state to be periodical payment.

In *Kan Wai Ming v. Hong Kong Airport Services Ltd* [2011] 3 H.K.L.R.D. 497, the Court of Appeal held that the intention of the legislature in enacting s.10(4) was so that an employee's compensation for temporary incapacity under section 10 and his compensation for permanent incapacity under s.9 should be kept separate and distinct, and that in case an employee was entitled to both, they cannot be set off against each other. *Lai Yuen Hing v. Lo Chi Hung t/a Kam Hung Construction Co.* (unrep., DCEC 14/2000, 16 December 2002) and *Tsang Kwong v. Mayshing Construction Co. Ltd* (unrep., DCEC 1026/2003, 16 March 2005) dispproved.

The Court of Appeal left open the question as to how, and what exact basis, an employer could recover any overpayment made by him under section 10, because the appeal did not concern the question of whether it was open to the respondent to recover that excess from the applicant. The Court of Appeal held that the circumstances in which an excess payment might come to have been made were necessarily fact sensitive and could arise in a variety of different scenarios.

It is respectfully submitted that, in some cases, it would be possible for the Court to allow refund/restitution of part or the full amount of an employer's payments on ground of unjust enrichment by holding that the overpaid periodical payments were made by mistake (*Kleinwort*

Benson Ltd v. Lincoln City Council [1999] 2 AC 349, and under s.21, the Court shall have the power to make such an Order since the overpaid portion is an issue in connection with an employer's entitlement to compensation. If at trial the Court holds that there was no accident whilst at work but an employer had made periodical payments, it will be unjust to give a windfall to the employee without asking him to make repayment.

Payment to mentally incapacitated person—The Ordinance does not provide for any mechanism as to how periodical payments are to be paid to the mentally incapacitated person who has no capacity to give a proper discharge of monies received. In pre-action cases, unless a committee is already formed under Mental Health Ordinance or a guardianship order is granted, the employer shall find practical difficulty in how to properly effect periodical payments. It is respectfully submitted that the employer shall apply to Court for the determination of claims pursuant to s.18A. Section 18A empowers the Court to determine all claims for compensation and any matter arising out of proceedings in respect of such claim, which covers procedural and interlocutory matters which arise from compensation claims. In such event, a next friend will be appointed and give proper discharge of the monies received. **Q1/10/8**

For accidents happened on or after September 1, 2008—Section 10(2) shall read as follows: **Q1/10/9**

> (2) For the purposes of this section a period of absence from duty certified to be necessary by a registered medical practitioner, a registered Chinese medicine practitioner, a registered dentist, an Ordinary Assessment Board or a Special Assessment Board shall be deemed to be a period of total temporary incapacity irrespective of the outcome of the injury. *(Added 55 of 1969 s.10. Amended 31 of 1985 s.2; 16 of 2006 s.13)*

Reasonable Excuse—What constitutes a legitimate reasonable excuse in not paying periodical payments is a mixed question of fact and evidence. In appropriate cases, the employer may rely on medical evidence in its defence to any prosecution under s.10(10) as showing that payment is not due under s.10 or, if it is due, as providing a reasonable excuse for non-payment: see *Li Lam Piu v. Jardine Air Terminal Services Ltd* (unrep., DCEC 11/2003). In some cases, other evidence such as surveillance videos would be useful in defending any prosecution. **Q1/10/10**

However, in the assessment of compensation under the Ordinance, it is incumbent upon the employer to prove that despite the certified incapacity, the employee would still capable of earning money in a suitable employment. If the employer could do, those potential earnings would also be put in s.10(1) calculation. It would only be in rare circumstances where an employer could prove potential earnings where total incapacity has been certified, because (a) it is not only physical disability that incapacitates an employee from working—an employee may be incapacitated by discomfort or pain preventing him from concentrating, and (b) an employee is expected only to undertake employment which is suitable for him: *Yu Tat Kam v. Chu Tung Shing* (unrep., CACV 25/2008, [2009] H.K.E.C. 1656).

Payment of medical expenses

10A.—(1) Subject to this Ordinance, if, in any employment, personal injury is caused to an employee by accident occurring on or after the date on which this section comes into operation and arising out of and in the course of his employment his employer shall be liable to pay the medical expenses for the medical treatment in respect of such injury. *(Amended 76 of 1982 s.8)* **Q1/10A**

(1A) Medical expenses which an employer is liable to pay under subsection (1) shall, unless otherwise provided by agreement in writing entered into by the employer with the employee, not include those in respect of medical treatment given outside Hong Kong in relation to an accident occurring in Hong Kong. *(Added 1 of 1995 s.6)*

(2) Medical expenses which an employer is liable to pay under subsection (1) shall be payable in addition to any other compensation which the employer is liable to pay under this Ordinance. *(Replaced 76 of 1982 s.8)*

(3) Medical expenses which the employer is liable to pay under subsection (1) shall be payable in accordance with the Third Schedule in respect of the period during which the employee receives medical treatment until the attending registered medical, registered Chinese medicine practitioner or practitioner, registered dentist certifies that in his opinion no further treatment is required. *(Replaced 76 of 1982 s.8. Amended 16 of 2006 s. 14.)*

(4) An employer shall not be liable to pay medical expenses under subsection (1)—

(a) if the employer has provided adequate free medical treatment to the employee; or

(b) if, by a written undertaking given in accordance with subsection (5) the employer has agreed to provide adequate free medical treatment and the employee fails, without reasonable excuse, to submit himself for such medical treatment. (Amended 16 of 2006 s. 14)

(5) Where an employer proposes to provide free medical treatment to an employee for personal injury caused to the employee by accident arising out of and in the course of his employment, he- (Amended 16 of 2006 s. 14)

(a) shall give to the employee a written undertaking to—

(i) provide free medical treatment; or

(ii) pay the medical expenses for the medical treatment;

(b) shall specify in such undertaking the description of the medical treatment; and

(c) shall not recover any part of the cost of the medical expenses from the employee. (Amended 16 of 2006 s. 14)

(5A) Subsection (4) does not relieve an employer of the liability to pay medical expenses in respect of medical treatment of any description received by an employee unless the free medical treatment provided or agreed to be provided by the employer covers medical treatment of the same description. (Added 16 of 2006 s. 14)

(5B) In subsections (5) and (5A), a reference to a description of medical treatment is a reference to any of the following—

(a) medical treatment given by, or under the supervision of, a registered medical practitioner;

(b) medical treatment given by, or under the supervision of, a registered Chinese medicine practitioner;

(c) medical treatment given by, or under the supervision of, a registered dentist;

(d) physiotherapy given by, or under the supervision of, a registered physiotherapist or registered medical practitioner;

(e) occupational therapy given by, or under the supervision of, a registered occupational therapist or registered medical practitioner;

(f) medical treatment given by, or under the supervision of, a registered chiropractor. (Added 16 of 2006 s. 14)

(6) Where an employee has paid for any medical treatment received by him he shall be entitled to recover the medical expenses which his employer is liable to pay under subsection (1) from his employer by serving on the employer a request in writing for the payment of the medical expenses together with a receipt for the payment for the medical treatment.

(7) If an employer does not pay an employee the medical expenses he is liable to pay under subsection (1) within 21 days after the date of receipt of a request for payment under subsection (6) or, where an application is made to the Commissioner under section 10B for the determination of a dispute, within 21 days after the date of determination of the dispute, the medical expenses may be recovered by the employee from the employer—

(a) as a civil debt in the Small Claims Tribunal established under the Small Claims Tribunal Ordinance (Cap. 338); or

(b) where the amount claimed exceeds the jurisdiction of the Small Claims Tribunal, as a civil debt in the District Court.

(8) A claim for medical expenses in the District Court may be brought either independently of or in conjunction with any other claim for compensation which is, under this Ordinance, to be brought in the District Court.

(9) *(Repealed 76 of 1982 s.8)*

(Added 74 of 1977 s.3. Amended 44 of 1980 s.15)

Procedure—For procedure see para.Q1/10/3. **Q1/10A/1**

Evidence of medical expenses—The claimant must produce evidence of medical expenses incurred by him, for example receipts, otherwise the court will not be able to make an award under s.10A. See *Wong Wing Cheung v. Interlite (Asia) Ltd* (unrep., DCEC 893/2001, [2003] H.K.E.C. 918). **Q1/10A/2**

For accidents happened on or after September 1, 2008—Sections 10A(3), (4) and (5) are amended, and new subs.5A and 5B are added. They read as follows: **Q1/10A/3**

(3) Medical expenses which the employer is liable to pay under subsection (1) shall be payable in accordance with the Third Schedule in respect of the period during which the employee receives medical treatment until the attending registered medical practitioner, registered Chinese medicine practitioner or registered dentist certifies that in his opinion no further treatment is required. *(Replaced 76 of 1982 s.8. Amended 16 of 2006 s.14)*

(4) An employer shall not be liable to pay medical expenses under subsection (1)—

(a) if the employer has provided adequate free medical treatment to the employee; or

(b) if, by a written undertaking given in accordance with subsection (5), the employer has agreed to provide adequate free medical treatment and the employee fails, without reasonable excuse, to submit himself for such medical treatment. *(Amended 16 of 2006 s.14)*

(5) Where an employer proposes to provide free medical treatment to an employee for personal injury caused to the employee by accident arising out of and in the course of his employment, he— *(Amended 16 of 2006 s.14)*

(a) shall give to the employee a written undertaking to—

(i) provide free medical treatment; or

(ii) pay the medical expenses for the medical treatment;

(b) shall specify in such undertaking the description of the medical treatment; and

(c) shall not recover any part of the cost of the medical expenses from the employee. *(Amended 16 of 2006 s.14)*

(5A) Subsection (4) does not relieve an employer of the liability to pay medical expenses in respect of medical treatment of any description received by an employee unless the free medical treatment provided or agreed to be provided by the employer covers medical treatment of the same description. *(Added 16 of 2006 s.14)*

(5B) In subsections (5) and (5A), a reference to a description of medical treatment is a reference to any of the following—

(a) medical treatment given by, or under the supervision of, a registered medical practitioner;

(b) medical treatment given by, or under the supervision of, a registered Chinese medicine practitioner;

(c) medical treatment given by, or under the supervision of, a registered dentist;

(d) physiotherapy given by, or under the supervision of, a registered physiotherapist or registered medical practitioner;

(e) occupational therapy given by, or under the supervision of, a registered occupational therapist or registered medical practitioner;

(f) medical treatment given by, or under the supervision of, a registered chiropractor. *(Added 16 of 2006 s.14)*

Medical expenses for accidents occurring outside Hong Kong

10AA.—(1) This section applies to the liability imposed on an employer under section 10A, for the payment of medical expenses for medical treatment, given outside Hong Kong, in respect of personal injury caused to an employee by accident occurring outside Hong Kong and arising out of and in the course of that employee's employment. **Q1/10AA**

(2) An employer shall not be liable to pay medical expenses under section 10A(1)—

(a) in respect of medical treatment given outside Hong Kong to an employee in relation to an accident occurring—

(i) outside Hong Kong; and

(ii) before the commencement of the Employees' Compensation (Amendment) Ordinance 1995 (1 of 1995);

(b) in respect of medical treatment given outside Hong Kong to an employee, unless and until a certificate has been issued by the Commissioner under section 10B(1)(b) stating the amount of such medical expenses;
(c) if the employer has provided adequate free medical treatment outside Hong Kong to the employee; or
(d) if, by a written undertaking, the employer has agreed to provide adequate free medical treatment outside Hong Kong to the employee and the employee fails, without reasonable excuse, to submit himself for such medical treatment.

(Added 1 of 1995 s.7)

The following new section is added and applies to accident which happened on or after September 1, 2008:

Q1/10AB Remarks:

*Italicized parts are not yet in operation.

(1) This section applies where an employer is liable under section 10A to pay the medical expenses for the medical treatment given in Hong Kong in respect of an employee's personal injury.

(2) Subject to the other provisions of this section, the medical expenses that an employer is liable to pay in respect of an employee's personal injury—

(a) include the cost of medicines to the extent that the medicines are prescribed medicines for the direct treatment of the injury; but
(b) do not include the cost of any tonic or substance that is prescribed for the purpose of the maintenance of general health only.

(3) For the purposes of this section, a reference to prescribed medicines is a reference to—

(a) medicines prescribed by a registered medical practitioner or registered dentist; or
(b) Chinese herbal medicines or proprietary Chinese medicines prescribed by a registered Chinese medicine practitioner.

(4) An employer is not liable to pay any cost of medicines relating to any pharmaceutical product or substance that is required to be registered under the Pharmacy and Poisons Ordinance (Cap. 138) unless it is so registered.

*[(5) *An employer is not liable to pay any cost of medicines relating to any proprietary Chinese medicine unless the proprietary Chinese medicine—*

(a) is registered under section 121 of the Chinese Medicine Ordinance (Cap. 549);
(b) is deemed to have been registered under section 128 of that Ordinance;
(c) is exempted from registration by virtue of section 158(6) of that Ordinance;
(d) is exempted from registration by virtue of section 37 of the Chinese Medicines Regulation (Cap. 549 sub. leg. F); or
(e) is a substance or product that is registered under the Pharmacy and Poisons Ordinance (Cap. 138).]

(6) An employer is not liable to pay any cost of medicines relating to any Chinese herbal medicine unless the Chinese herbal medicine—

(a) is sold to the employee concerned by a person who—
(i) is the holder of a retailer licence issued under section 114 of the Chinese Medicine Ordinance (Cap. 549); or
(ii) is deemed, under section 118(1) of that Ordinance, to have been granted such a licence; or

(b) is sold by a registered Chinese medicine practitioner for the purpose of administering, as described in section 158(2) of that Ordinance, to the employee concerned who is a patient under that Chinese medicine practitioner's direct care.

(7) An employer is not liable to pay any cost of medicines relating to medicines dispensed pursuant to the same prescription on a second or subsequent occasion unless—

(a) the prescription contains a direction that the medicines are to be dispensed for a stated number of times; and

(b) the medicines are dispensed in accordance with that direction.

(8) Where the medical expenses for the medical treatment of an employee include the cost of medicines, the employer or the Commissioner may request the employee to produce to him the prescription for the medicines and the receipt for the payment of that cost. The employer is not liable to pay the cost of medicines if the employee fails, without reasonable excuse, to comply with the request.

(9) A prescription given by a registered medical practitioner or registered dentist and produced for the purposes of subsection (8) must show—

(a) the name of the medical practitioner or dentist;

(b) the name of the patient to whom the prescription is given;

(c) the trade name or pharmacological name and dosage of each medicine prescribed; and

(d) the date on which the prescription is given.

(10) A prescription given by a registered Chinese medicine practitioner and produced for the purposes of subsection (8) must show—

(a) the name of the Chinese medicine practitioner;

(b) the name of the patient to whom the prescription is given;

(c) if any Chinese herbal medicine is prescribed, its name and quantity;

(d) if any proprietary Chinese medicine registered under section 121 of, or deemed to have been registered under section 128 of, the Chinese Medicine Ordinance (Cap. 549) is prescribed, its product name and dosage;

*[(e) *if any proprietary Chinese medicine exempted from registration by virtue of section 158(6) of the Chinese Medicine Ordinance (Cap. 549) is prescribed, the name and quantity of each Chinese herbal medicine that is contained in the proprietary Chinese medicine; and*]

(f) the date on which the prescription is given.

(11) A receipt for the payment of the cost of medicines produced for the purposes of subsection (8) must show—

(a) the name and address of the person by whom the prescribed medicines were sold;

(b) the date of sale; and

(c) the name, quantity and price of the prescribed medicines sold.

(12) For the purposes of this section—

"Chinese herbal medicine" (中藥材) means—

(a) a Chinese herbal medicine specified in Schedule 1 or 2 to the Chinese Medicine Ordinance (Cap. 549); or

(b) any other material of herbal, animal or mineral origin customarily used by the Chinese for medicinal purpose;

"proprietary Chinese medicine" (中成藥) has the meaning assigned to it by section 2 of the Chinese Medicine Ordinance (Cap. 549).

(*Added 16 of 2006 s.15*)

Determination by Commissioner of medical expenses payable

Q1/10B **10B.**—(1) The Commissioner shall, on application made to him by an employee or employer—

(a) determine whether or not there is a liability to pay medical expenses under section 10A in respect of medical treatment given outside Hong Kong to the employee; and

(b) where the Commissioner has determined that there is such liability, determine the amount of such medical expenses and issue a certificate to the employee and the employer stating the amount of such medical expenses.

(2) Where there is a dispute as to—

(a) the liability to pay medical expenses under section 10A; or

(b) the amount of such medical expenses,

in respect of medical treatment given in Hong Kong to an employee, the Commissioner shall, on application made to him by the employee or the employer—

(i) in the case of paragraph (a)—

(A) determine whether or not there is a liability to pay such medical expenses; and

(B) where the Commissioner has determined that there is such liability, determine the amount of such medical expenses and issue a certificate to the employee and the employer stating the amount of such medical expenses;

(ii) in the case of paragraph (b), determine the amount of such medical expenses and issue a certificate to the employee and the employer stating the amount of such medical expenses.

(3) A certificate purporting to be issued under subsection (1)(b) or (2)(i)(B) or (ii) and to be signed by or for the Commissioner shall be admitted in evidence without further proof on its production in any court and—

(a) unless there is evidence to the contrary, it shall be presumed that the certificate is so issued and signed;

(b) shall be evidence of the amount of medical expenses payable by the employer.

(4) A determination by the Commissioner under this section as to any liability to pay medical expenses, and as to the amount of such medical expenses, may be reviewed by the Court on the application either of the employee or of the employer within 14 days of the issue by the Commissioner of a certificate under subsection (1)(b) or (2)(i)(B) or (ii), or within such further time as the Court, in the circumstances of any particular case, thinks fit; and on any such review the Court may confirm, vary or reverse the determination or may substitute its own determination for that of the Commissioner and may make such order in respect thereof, including any order as to costs, as it thinks fit.

(Replaced 1 of 1995 s.8)

Q1/10B/1 **Powers of the court on an application under s.10B(4)**—Section 10B(4) gives the court very broad powers. The court may confirm, vary or reverse the determination. The court may substitute its own determination for that of the Commissioner. It may make such order as it thinks fit. It may make any order for costs that it thinks fit.

Q1/10B/2 **Time-limit**—The application for a review should be made within 14 days of the issue by the Commissioner of a certificate under s.10B(1)(b) or 10B(2)(i)(B) or 10B(2)(ii), although the court has a discretion as to whether to hear and determine an application that is made outside that 14-day period.

Q1/10B/3 **Parties**—The application may be made by either the employer or the employee. The other should be joined as respondent.

Q1/10B/4 **Form of application**—The application should be in Form 3 to the Rules of Court.

Method of calculating earnings

11.—(1) Subject to this section, for the purposes of this Ordinance the monthly earnings of an employee at the time of the accident shall be the earnings— **Q1/11**

(a) for the month immediately preceding the date of the accident; or

(b) computed in such manner as is best calculated to give the rates per month at which the employee was being remunerated during the previous 12 months if he has been so long employed by the same employer, but, if not, then for any lesser period during which he has been employed by the same employer,

whichever calculation is more favourable to the employee. *(Replaced 76 of 1982 s.9)*

(1A) Where an employee suffers temporary incapacity after an accident and such incapacity extends beyond 12 months after the date of the accident the monthly earnings of an employee at the time of the accident shall, in respect of temporary incapacity beyond the 12-month period after the date of the accident, be computed for the purposes of section 6, 7, 9 or 10 as being the earnings calculated—

(a) where the employer employs, in similar employment, other persons of similar earning capacity to the employee, as the earnings that, if the accident had not occurred, the employee would have received at the end of a 12-month period after the date of the accident in accordance with the average rate of increase in respect of the earnings of other persons of similar earning capacity employed by the employer in similar employment;

(b) where the employer does not employ, in similar employment, other persons of similar earning capacity to the employee, as the monthly earnings of the employee computed under subsection (1) or (2) and adjusted in accordance with the rate of increase in the Consumer Price Index at the end of a 12-month period after the date of the accident. *(Added 1 of 1995 s.9)*

(1B) Where an employee suffers temporary incapacity after an accident and such incapacity extends beyond 24 months or such further period as the Court may have allowed under section 10(5) the monthly earnings of an employee at the time of the accident shall, in respect of temporary incapacity beyond the 24-month period or beyond such further period after the date of the accident, be computed for the purposes of section 6, 7, 9 or 10 as being the earnings calculated—

(a) where the employer employs, in similar employment, other persons of similar earning capacity to the employee, as the earnings that, if the accident had not occurred, the employee would have received at the end of a 24-month period after the date of the accident in accordance with the average rate of increase in respect of the earnings of other persons of similar earning capacity employed by the employer in similar employment;

(b) where the employer does not employ, in similar employment, other persons of similar earning capacity to the employee, as the monthly earnings of the employee computed under subsection (1) or (2) and adjusted in accordance with the rate of increase in the Consumer Price Index at the end of a 24-month period after the date of the accident. *(Added 1 of 1995 s.9)*

(1C) For the purposes of subsections (1A) and (1B), "Consumer Price Index"（消費物價指數）means the consumer price index as compiled and published as CPI(A) in a Consumer Price Index Report by the Commissioner for Census and Statistics. *(Added 1 of 1995 s.9)*

(2) Where by reason of the shortness of the time during which an employee has been in the employment of his employer or of the casual nature of the

employment, or of the terms of employment, it is impracticable to compute the rate of remuneration of such employee at the date of the accident, regard may be had to the average monthly amount which, during the 12 months previous to the accident, was being earned by a person of similar earning capacity in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person of similar earning capacity in the same grade employed in the same class of employment and in the same district. *(Added 55 of 1969 s.11)*

(3) Where an employee was, at the date of the accident, under the age of 18 years his earnings shall, for the purposes of assessing compensation payable in the case of death or permanent incapacity, be deemed to be such amount as, if the accident had not occurred, he would probably have received upon attaining the age of 18 years, or at the end of a period of 5 years after the accident, whichever calculation is more favourable to the employee. *(Added 55 of 1969 s.11. Amended 76 of 1982 s.9)*

(4) Where an employee was, at the date of the accident, employed under a contract of apprenticeship his earnings shall, for the purposes of assessing compensation payable in the case of death or permanent incapacity, be deemed to be such amount as, if the accident had not occurred, he would probably have received upon the completion of his contract of apprenticeship. *(Added 55 of 1969 s.11. Amended 76 of 1982 s.9)*

(4A) Where an employee was, at the date of the accident, under the age of 18 years and employed under a contract of apprenticeship, his earnings shall, for the purposes of assessing compensation payable in the case of death or permanent incapacity, be deemed to be the amount calculated under subsection (3) or (4), whichever calculation is more favourable to the employee. *(Added 76 of 1982 s.9)*

(5) Where the earnings of an employee calculated under any of the provisions of this section amount to less than the amount specified in the second column of the Sixth Schedule shown opposite section 11(5) specified in the first column of that Schedule per month, the earnings of such employee shall, for the purposes of this Ordinance, be deemed to be the amount specified in the second column of the Sixth Schedule shown opposite section 11(5) specified in the first column of that Schedule per month. *(Added 55 of 1969 s.11. Amended 76 of 1982 s.9; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.8)*

(6) For the purposes of subsections (1) and (2), employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause. *(Amended 55 of 1969 s.11)*

(7) Where the employee had entered into concurrent contracts of service with 2 or more employers under which he worked at one time for one such employer and at another time for another such employer, his monthly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident:

Provided that the earnings of the employee under the concurrent contract shall be taken into account only so far as the employee is incapacitated from performing the concurrent contract:

Provided further that this subsection shall not apply where an employee is in the full time employment of that employer for whom he was working at the time of the accident, in which case the earnings of such employee shall be his earnings in such full time employment. For the purposes of this proviso, full time employment means employment for not less than 40 hours during a minimum period of 5 days in any 1 week. *(Amended 76 of 1982 s.9)*

(7A) An employee shall, at the written request of his employer, give his employer sufficient written information to enable the employer to comply with section 40 regarding any of the employee's concurrent contracts of service referred to in subsection (7) that are then in force or subsequently entered into. *(Added 59 of 1988 s.2)*

(7B) Subsection (7) does not apply where an employee fails to comply with subsection (7A). *(Added 59 of 1988 s.2)*

(8) Within 14 days after the date of issue of a written request of the employee or of the Commissioner to the employer liable to pay compensation, that employer shall furnish in writing a list of the earnings which have been earned by that employee upon which the amount of the monthly earnings may be calculated for the purpose of this section. *(Amended 76 of 1982 s.9)*

(9) An employer who without reasonable excuse contravenes subsection (8) commits an offence and is liable to a fine at level 3. *(Added 76 of 1982 s.9. Amended 36 of 1996 s.8)*

(Amended 44 of 1980 s.15)

Q1/11/1

General principles of construction and interpretation of s.11—Like all other legislation, s.11 must by s.19 of the Interpretation and General Clauses Ordinance, Cap.1, "*... receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit*". In the case of the Employees' Compensation Ordinance, it is a piece of social legislation designed for the protection of employees and the legislature's consistent policy has been to enlarge its provisions in favour of employees (see *Wong Leung Tak v. Hip Hing Construction Co Ltd* [1991] 2 H.K.L.R. 345). Accordingly, where an employee receives a daily wage of $800, but pays from that a figure of between $50 and $100 each day to another employee who recruited him on the employer's behalf, that should not be regarded as affecting the position as between the employer and the employee, and the monthly earnings calculation under s.11 should be based on a figure of $800 as a daily wage, and not a lower figure: *Leung Kam To v. Lau Ka Yeung* (unrep., DCEC 342/2001, [2004] H.K.E.C. 842), Muttrie DCJ.

Q1/11/2

Computation of monthly earnings under s.11(1)—The word "month" here must mean calendar month: *Mak Mui Chun v. Luen Yip Engineering Co*. (unrep., DCEC 716/2004, [2006] H.K.E.C. 1443, D.J. Poon). Section 11(1) provides two alternative methods of computation of the employee's monthly earnings: (i) under ss.1(1)(a), for the month immediately preceding the date of the accident; and (ii) under ss.11(1)(b), such as is best calculated to give the rates per month at which the employee was being remunerated during the previous 12 months, if he had been employed for so long a period by the employer, failing which for any lesser period during which he had been employed by the same employer. The court is obliged by s.11 to apply the calculation which results in the highest monthly figure, i.e the figure that is most favourable to the employee. This provision is designed to avoid an injustice that may arise from the application of ss.11(1)(a) alone, if in the month before the accident the employee had happened to work relatively little for the employer, compared to his average work (and monthly earnings) in the longer preceding period, of up to 1 year. But, on the face of it, each limb of s.11(1) assumes that the employee has worked for the employer for at least a month preceding the accident. What if the employee has not done so? In *Sze Wing Yam v. China State Construction Engineering Corp* (unrep., DCEC 571/2003, [2003] H.K.E.C. 1528), Carlson DCJ, in the context of an application for periodical payments, the court was faced with the difficulty of computing monthly earnings for a claimant who had only worked for the respondents for 3 days in employment of a casual nature before the accident occurred. Carlson DCJ held that, in such circumstances: (1) s.11(1)(a) cannot apply because it assumes that the employee had been fully employed by that employer for the whole of the preceding month before the accident; (2) s.11(1)(b) *prima facie* is a better candidate for computing monthly earnings in such circumstances; (3) however, where the application of s.11(1)(b) would create an injustice, because the employee has a full employment history with other employers prior to commencing the employment in which the accident occurred, it should not be applied directly; (4) in such circumstances, with assistance from s.11(1)(b), the court should, by reference to the employee's previous full history with previous employers, identify an average number of days per month worked, and then apply that to the rate at which employee was employed at the time of his accident.

The question may arise as to how many days work per month is the appropriate figure for calculation. It is for the employee to prove this. However, absent evidence the court will estimate the figure and, in cases involving work on a building site, the court's starting point will be 26 per days month, absent evidence that less work is available, as that is what an employee expects an employee to work on a building site, in optimum conditions, using a 6-day week. Where an

employer does not adduce evidence within its knowledge and records of the actual days work per month undertaken, the court is unlikely to accept an argument that, absent evidence from the employee (even where the employee has failed to seek discovery of records from the employer), a lower figure should be applied than the optimum figure. So, by failing to produce evidence itself, an employer takes the risk that, absent any other evidence, the court will apply the optimum figure in favour of the employee: *Leung Kam To v. Lau Ka Yeung* (unrep., DCEC 342/2001, [2004] H.K.E.C. 842), Muttrie DCJ.

Q1/11/3 **Application of s.11(2)**—The Court would accept and adopt the income statistics published by the Census and Statistics Department, in the absence of other evidence (see *Choi Yin Ling v. Sung Kai Kau* [2007] H.K.C.L.R.T. 241. In some cases, only statistics on the average daily wage of a particular occupation is available, but not the average number of working days. The Court may consider an applicant's background and the labour market condition to come up with an estimation of number of working days (see *Chan Kam Fai v. Yip Sau Mei* (unrep., DCEC 944/2001, [2002] H.K.E.C. 1187)).

There are two Court of Appeal judgments which elaborate the meaning of s.11: *Lai Cheung Kwan v. Lo King Sum* [2008] 3 H.K.L.R.D. 643, and *Or Wing Ming v. Ho Bing Chi* [2008] 4 H.K.L.R.D. 337, and these decisions are followed in *Leung Wai Pong v. Tang Hon Kong* (unrep., DCEC 237/2007, [2008] H.K.E.C. 1950).

The legal principles in assessing the monthly earnings of short-term employees are neatly summarised by the learned Judge Lok in *Leung Wai Pong* as follows:

(i) the methods of assessing the monthly earnings under ss.11(1)(a) and 11(1)(b) are only applicable if the injured worker worked for the same employer for the relevant periods under the said sub-sections. In other words, if the worker injured himself on the first day of his work, his income earned by working for the other employers before the accident is not directly relevant in assessing the worker's income at the time of the accident (per Cheung JA in *Lai Cheung Kwan,* paras. 6–9 and Yuen JA in *Or Wing Ming*, para.24);

(ii) the object of s.11(5) is to provide a minimum protection to an employee in the case that his monthly income is less than the amount prescribed in the statute, and the court should not therefore adopt this figure as the monthly income even if there is not much evidence about the earnings of other comparable workers for assessing the employee's income under s.11(2) (per Yeung JA in *Lai Cheung Kwan*, paras. 35–37, per Yuen JA in *Or Wing Ming*, para.26);

(iii) if the injured worker only worked for a short period of time and there is no practical way to compute the rate of remuneration, the court has to adopt the methods prescribed in s.11(2) to ascertain his monthly earnings, and it is the duty of the court to make such factual finding based on whatever evidence before the court (per Yeung JA in *Lai Cheung Kwan*, para.37); and

(iv) in order to assist the court in assessing the monthly earnings of short-term employees under s.11(2), practitioners should ensure that there is sufficient evidence before the court for the purpose of such assessment exercise (per Yuen JA in *Or Wing Ming*, para.31).

Q1/11/4 **Adjustment of monthly earnings with respect to incapacity beyond 12/24 months after the accident under s.11(1A) and s.11(1B)**—In *Tang Yam Kau v. Key Asia Engineering Ltd* (unrep., DCEC 694/2011, [2014] H.K.E.C. 1243) Deputy Dictrict Judge Ho, the Court gave a very detailed analysis on the scenarios which the court may potentially face with when being asked to consider the issue of statutory annual adjustment for section 10 compensation by making reference to section 11(1A)(b) and section 11(1B)(b). Both sections 11(1A) and 11(1B) apply only if the employer has not employed comparable workers, and if this is satisfied, they serve as statutory mechanism for making upward adjustment but not downward adjustment of a relevant employee's monthly earnings for the purpose of calculating compensation under section 6, 7, 9 or 10. When these two sections apply, it is possible for the monthly earnings of the relevant employee to be adjusted twice for section 10 purpose (namely the end of the 12-month period after the accident and the end of the 24-month period after the accident), by making reference to the date of accident as a checkpoint on any change of rate in CPI (A).

Persons entitled to compensation

Q1/12 **12.**—(1) Except where otherwise provided by or under this Ordinance, compensation shall be payable to or for the benefit of the employee, or, where death results from the injury, to or for the benefit of the members of his family as provided by this Ordinance. *(Amended 76 of 1982 s.10; 52 of 2000 s.7)*

(2) Where a member of the family dies—

(a) prior to an application made under section 6B(1) or 18A(1);

(b) if an application under section 6B(1) has been made, prior to a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case is issued; or

(c) if a claim has been made to the Court, prior to an order for the payment of compensation has been made,

the legal personal representative of the member of the family shall have no right to payment of compensation. *(Replaced 52 of 2000 s.7)*

(3) *(Repealed 52 of 2000 s.7)*

(Amended 44 of 1980 s.15)

Q1/12/1

Scope of s.12—Section 12 deals with the situation where, following the death of an employee due to an accident at work, a family member who is prima facie entitled to claim compensation also dies. Section 12(2) makes it clear that, unless, before the death of the family member, a certificate of compensation for fatal case has been issued (in the case of a claim dealt with by way of application to the Commissioner) or an order for compensation has been made by the District Court for payment of compensation (in the case of an application for determination to the District Court under s.18A), no right to compensation shall have vested in the family member such as, when the family member dies, becomes part of the family member's estate. In s.12(2)(b) it is unclear why reference is made in the alternative to a review certificate of compensation assessment for fatal case. Query, what the position is if the family member in question dies after a certificate of compensation for fatal case has been issued and after an objection has been received under s.6D(4) or a review has been initiated under s.6D(5), but before a review certificate of compensation for fatal case has been issued.

Distribution of compensation

Q1/13

13.—(1) Compensation payable where the death of an employee has resulted from an injury, other than those which have been determined under section 6B(1)(a), 6C(1)(a) or (11), 6D(6)(b) or 6E(1)(a) or (12), shall be paid to the Court, and the Court may—

(a) in the case of compensation paid under section 6(1), order any sum so paid in to be apportioned among the members of the family according to section 6A; and

(b) in the case of reimbursement paid under section 6(5), order any sum so paid in to be apportioned to the persons who have paid the expenses of the funeral of the employee and the expenses of medical attendance on the employee according to section 6E(5),

and the sum so apportioned shall be paid to them or be invested, applied or otherwise dealt with for their benefit in such manner as the Court thinks fit.

Where, on application being made in accordance with rules made under this Ordinance, it appears to the Court that, on account of the variation of the circumstances of the various members of the family, or for any other sufficient cause, an order made under this subsection ought to be varied, the Court may make such order for the variation of the former order as in the circumstances of the case the Court may think just:

Provided that no such order shall be made which requires the repayment by a dependant of any compensation already paid to him except where such payment has been obtained by fraud, impersonation or other improper means. *(Amended 52 of 2000 s.8)*

(2) Except where otherwise provided by or under this Ordinance, any other compensation payable under this Ordinance shall be paid to the Court, and any sum so paid shall— *(Amended 76 of 1982 s.11)*

(a) be paid by the Court to the person entitled thereto; or

(b) if the compensation is payable under the provisions of section 7, 8 or 9 or is a lump sum payable under the provisions of section 10, be invested, applied or otherwise dealt with by the Court for his benefit in such manner as the Court thinks fit:

Provided that—

(i) where periodical payments are payable under the provisions of section 8(2)(b)(i) or section 10, such payments may be paid by the employer direct to the employee; and

(ii) where compensation has been agreed and approved in accordance with the provisions of section 8, such compensation may be paid by the employer direct to the employee. *(Amended 55 of 1969 s.12; 36 of 1996 s.9)*

(3) An employer may make a payment direct to an employee or member of the family on account of a claim which is pending settlement or determination, and the Court or, if the compensation is not paid to the Court, the Commissioner may order that the whole or any part of such payment shall be deducted from the amount of compensation payable to the employee or member of the family under the provisions of this Ordinance: *(Replaced 55 of 1969 s.12. Amended 76 of 1982 s.11; 59 of 1988 s.3; L.N. 435 of 1991; 63 of 1992 s.5)*

Provided that no such payment shall—

(a) constitute a periodical payment or an interim payment for the purposes of this Ordinance; or

(b) relieve the employer of an obligation to make any periodical payment or an interim payment under this Ordinance. *(Added 76 of 1982 s.11. Amended 52 of 2000 s.8)*

(4) The receipt of the Registrar of the Court shall be a sufficient discharge in respect of any amount paid to the Court under the provisions of this Ordinance.

(5) No appeal shall lie from any order or direction of the Court or of the Commissioner made or given under this section. *(Amended 50 of 1954 s.5) (Amended 44 of 1980 s.15)*

Q1/13/1 **General effect of s.13**—The effect of s.13 is that all compensation payable in fatal cases shall be paid to the court, except in the following cases:

(1) Determinations by the Commissioner, as original determinations or on review, of (a) claims for compensation in fatal cases by agreement of the parties, (b) interim payments to a spouse of a deceased employee and (c) claims for funeral or medical attendance expenses (s.13(1)).

(2) Payments made in non-fatal cases by an employer to an employee on account of a claim (s.13(3)).

(3) Periodical payments payable in non-fatal cases in respect of the cost of attendance of another person on the employee to assist the employee to perform the essential functions of life (s.13(2)(i)).

(4) Periodical payments in respect of temporary incapacity (s.13(2)(i)).

(5) Compensation payable pursuant to an agreement approved by the Commissioner under s.8 (s.13(2)(ii)).

Q1/13/2 **Court's powers to deal with compensation paid to it**—The court's powers and the way it exercises them will broadly depend on whether the compensation is paid in respect of a fatal or non-fatal case.

Q1/13/3 *Fatal cases*—The court will apportion the compensation between the family members in accordance with s.6A and the Seventh Schedule to the Ordinance (s.13(1)(a)). In doing so the District Court in practice often relies on social inquiry reports prepared by the Social Welfare Department. In *Fung Sook Hing v. Leung Tse Wing (t/a Wing Kee)* [1991] 2 H.K.L.R. 229, the Court of Appeal held that where such reports are provided by the Social Welfare Department they should not be placed on the court file or be shown to the judge. They can and should be provided to the parties and, if any parts are agreed, they can be put before the judge. In the case of reimbursement of funeral and medical attendance expenses, the court will apportion them where appropriate in accordance with s.6E(5). It may also in fatal cases vary any order made by it as to how the compensation should be dealt with to take into account a variation in the circumstances of the family members or for any other sufficient cause. The court cannot however vary a payment such as to require a repayment by a dependent of monies already paid to him, unless satisfied that the monies payment was obtained by fraud, impersonation or other improper means (s.13(1)). The apportioned compensation may be paid out, invested, or applied or otherwise dealt with as the court thinks fit. The court is more likely to pay out the

compensation in full to adult family members and less likely to do so (and instead to invest the funds and make periodical payments out as appropriate) in the case of minors or other persons under a disability.

Non-fatal cases—A distinction is drawn in s.13(2) between (1) compensation for permanent total or partial incapacity or in respect of the cost of attendance of another person to assist the employee to perform the essential functions of life, and (2) any other case. In the former, the court is empowered to invest, apply or otherwise deal with the compensation for the employee's benefit as the court thinks fit. In the latter case, the court must pay the compensation to the employee. **Q1/13/4**

Receipt of the District Court Registrar—Upon payment of the compensation to the court, the Registrar will issue a receipt. Under s.13(4), such receipt shall be sufficient discharge in respect of any amount paid to the court. **Q1/13/5**

No right of appeal—Section 13(5) provides that there is no right of appeal from any order or direction given by the court under s.13. This also applies in respect of any order by the Commissioner made under s.13(3). **Q1/13/6**

Requirements as to notice of accident and application for compensation

14.—(1) Except where otherwise provided by this Ordinance, proceedings for the recovery under this Ordinance of compensation for an injury shall not be maintainable unless notice of the accident has been given to the employer by or on behalf of the employee, in the manner hereinafter provided, as soon as practicable after the happening thereof and before the employee has voluntarily left the employment in which he was injured, and unless the application for compensation with respect to such accident (being an application to the Court by an employee under section 18A(2)) has been made within 24 months from the occurrence of the accident causing the injury or, in the case of death, within 24 months from the date of death or prior to a determination made by the Commissioner under section 6B(1)(a), whichever is the earlier: *(Amended 55 of 1969 s.13; 4 of 1978 s.4; 76 of 1982 s.12; 52 of 2000 s.9)* **Q1/14**

Provided that the want of, or any defect or irregularity in, a notice shall not be a bar to the maintenance of proceedings—

(a) if the application is made in respect of the death of an employee resulting from an accident which occurred on the premises of the employer, or at any place where the employee at the time of the accident was working under the control of the employer or of any person employed by him, and the employee died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred; or

(b) if the employer is proved to have had knowledge of the accident from any other source at or about the time of the accident, or if it is found in the proceedings for settling that claim that the employer is not prejudiced or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or irregularity, or that such want, defect or irregularity was occasioned by mistake, absence from Hong Kong, or other reasonable cause. *(Amended 76 of 1982 ss.12 & 37)*

(2) A notice under this section may be given either in writing or orally to the employer (or, if there is more than one employer, to one of such employers), or to any foreman or other official under whose supervision the employee is employed, or to any person designated for the purpose by the employer, and shall specify the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date on which and the place at which the accident occurred.

(3) Where section 24 applies, notice of an accident to an employee employed by a sub-contractor given in accordance with this section to the sub-contractor, or to any foreman or other official under whose supervision the employee is employed, or to any person designated for the purpose by the sub-contractor, shall be deemed to be notice to the principal contractor. *(Replaced 76 of 1982 s.12)*

(4) The Court may receive and determine any application for compensation in any case notwithstanding that the notice required by subsection (1) has not been given, or that the application has not been made in due time as required by that subsection, if it is satisfied that there was reasonable excuse for the failure so to give notice or to make an application, as the case may be. *(Amended 44 of 1980 s.15)*

Q1/14/1 **Form of notice**—The notice may be given either in writing or orally to the employer. Where there is more than one employer, it need only be given to one of them. The notice will be sufficient if it is given to the foreman or other official of the employer under whose supervision the employee works. It will also be sufficient if it is given to any person designated for the purpose of receiving such notices. Regulation 3 of the Employees' Compensation Regulations (see para.K3/3) provides that the notice of accident required by s.14 if given in writing may be in Form 1 in the Schedule (in the case of accidents causing personal injury) and in Form 1A (in the case of incapacity or death due to an occupational disease). The regulation is permissive and not prescriptive and any notice given in writing need not be in either Form 1 or Form 1A.

Q1/14/2 **Timing of notice**—The notice must be given as soon as practicable after the accident and before the employee voluntarily leaves the employment in which he is injured, assuming he does leave the employment. The notice must be given as a precursor to proceedings being initiated for the recovery of compensation under the Ordinance, subject to the exceptions identified below.

Q1/14/3 **Contents of notice**—The notice must specify the name and address of the person injured. It must state in ordinary language the cause of the injury and the date on which and the place at which the accident occurred.

Q1/14/4 **Deemed notice for the purpose of s.24**—Where s.24 applies, notice given in accordance with s.14(1) and (2) shall be deemed to be notice to the principal contractor as well as to the sub-contracting employer.

Q1/14/5 **Where notice is not necessary as a precursor to a claim**—The absence of a notice, or any defect or irregularity in a notice, shall not be a bar to proceedings if:

(1) the proceedings are an application made in respect of the death of an employee resulting from an accident which occurred on the employer's premises or at another place where the employee was working under the control of the employer or any person employed by him and the employee died at those premises or that other place or any premises belonging to the employer (s.14(1)(a));
(2) the employer is proved to have had knowledge of the accident from any other source at or about the time of the accident (s.(1)(b));
(3) if it is found in the proceedings that the employer is not prejudiced in his defence by the absence of a notice (s.14(1)(b));
(4) if by a notice or amended notice being given and the hearing postponed, the employer will not be prejudiced in his defence (s.14(1)(b)); or
(5) if the want, defect or irregularity in the notice was occasioned by mistake, absence from Hong Kong or other reasonable cause (s.14(1)(b) and 14(4)).

Q1/14/6 **Prejudice to the employer in his defence**—In *Yeung Ying v. Ching Hing Construction Co. Ltd* [1960] H.K.D.C.L.R. 129 no notice was given under the then equivalent of s.14. It was held on the facts that the employee, by reason of the extent of his illness caused by the accident and which led to his hospitalisation and death had a reasonable excuse for not giving notice. That alone would have sufficed to dispose of the question of inadequate or no notice. However, the judge considered in detail the application of the provisos set out in s.14(1)(a) and (b). He applied the principles as set out in *Willis on Workmen's Compensation* (36th ed.) and concluded that the great probability was that the employer was not prejudiced in his defence by the absence of a notice. The District Court judge cited the applicable principles from *Willis?*

(1) the whole question is one of fact for the court;
(2) the burden of proving that the employer has not been prejudiced by lack of notice rests in the first on the employer, but this burden is not that of establishing the negative proposition that the employers were not prejudiced;

(3) the employee has not to exhaust the possibilities of prejudice and displace them, but if from the evidence it may be inferred reasonably that the employers have not been prejudiced the burden of proof that they have been prejudiced is shifted on to them;
(4) the court must make its findings after looking at all matters and facts before it;
(5) there is no presumption one way or the other, and if there is no evidence that the employers, if proper notice had been given, could have acquired further useful information than they already possessed, it cannot be presumed that they could have done so, and they cannot supplant or rebut the evidence given by mere conjectural or theoretical considerations;
(6) the question in each case is whether the facts before the court warrant it coming to the conclusion that the great probability is that no prejudice has been incurred, and if the employer does not give evidence of prejudice, the court is warranted in coming to the conclusion that there was no prejudice.

See also *Chan Wing Chuen v. Sun Cheong Bleaching & Dyeing Factory Ltd* [1989] 2 H.K.D.C.L.R. 55 in which the District Court took a consistent approach to the application of the "prejudice" test in s.14(1).

Mistake—See *Willis on Workmen's Compensation* (36th ed.), pp. 440 *et seq*. **Q1/14/7**

Absence from Hong Kong—See *Willis on Workmen's Compensation* (36th ed.), p. 442. **Q1/14/8**

Reasonable cause—Reasonable cause is the phrase used in the proviso in s.14(1)(b). See *Willis on Workmen's Compensation* (36th ed.), pp. 436 *et seq.; Wong Man Tak v. Shaws & Sons Ltd* [1957] H.K.D.C.L.R. 85; *Yeung Ying v. Ching Hing Construction Co. Ltd* [1960] H.K.D.C.L.R. 129; and *Chan Wing Chuen v. Sun Cheong Bleaching & Dyeing Factory Ltd* [1989] 2 H.K.D.C.L.R. 55. Examples of "reasonable cause" are: (1) a reasonable belief that the injury was trivial, when in fact it was not; (2) a mistaken diagnosis of the injury; (3) a reasonable belief, induced by the employer, that a claim for compensation was unnecessary or that notice need not be given; (4) if an employee has delayed his application for employee compensation because he has been threatened by his employer not to do so. For consideration of the meaning of "reasonable cause" in the context of the Australian legislation, see *Dare v. Dietrich* (1979) 37 F.L.R. 175. **Q1/14/9**

Reasonable excuse—Reasonable excuse is the phrase used in s.14(4). In *Wong Man Tak v. Shaws & Sons Ltd* [1957] H.K.D.C.L.R. 85, the court held that "reasonable cause" and "reasonable excuse" have the same meaning. The court in *Yeung Ying v. Ching Hing Construction Co. Ltd* [1960] H.K.D.C.L.R. 129 held that "reasonable excuse" has a different meaning from "reasonable cause" (otherwise the same phrase would have been used twice) and that "reasonable excuse" should be construed as giving the court a much wider discretion regarding failure to give notice than is given by the phrase "reasonable cause". Thus, reasonable excuse can include lack of education or illiteracy. **Q1/14/10**

In determining whether the applicant has a reasonable excuse, the principle to be applied, as stated in *Wong Man Tak* (above) is "an applicant has a reasonable excuse for not making an application to the court for compensation within the prescribed time if his failure were due to a cause or causes other than unreasonable conduct or an unreasonable decision on his part". Each case must be considered on its own facts. Neither *Wong Man Tak* nor any other case sets out an exhaustive set of circumstances in which a reasonable excuse exists (*Wong Chin Wah v. Varitronix Ltd* (unrep., DCEC 1105/2005, [2006] H.K.E.C. 2213, D.J. Pang). So, the court should take into account all of the circumstances of the case, including not just the reasons for not making the application within the prescribed time, but also any delay after the expiry of the prescribed time: *Lau Suet Fung v. Future Engineering Co.* (unrep., CACV 110/2003, [2004] H.K.E.C. 150), applied in *Chiu Kwok Hung v. Ng. Fu Wing* (unrep., DCEC 887/2002, [2005] H.K.E.C. 1994), Ko D.D.J. In order for the court to exercise the discretion "if it thinks fit" under s.18(2) of ECO, the court has to be provided with all relevant factors including the length of delay, the reason for the delay, the merits of the application and the prejudice to the other party if the extension is granted (*Chung Sau Ling v. Million Join Ltd* [2003] 4 H.K.C. 561 *per* Cheung J.A., cited with approval in *Wong Chin Wah v. Varitronix Ltd* (unrep., DCEC 1105/2005, [2006] H.K.E.C. 2213, D.J. Pang). The applicant must have a reasonable cause for the whole period of delay or failure to make a claim. Although the applicant's case is to be tested at trial, the Court has to be satisfied, at the application stage, as to the credibility of the applicant's explanation as to why the application was not made within time: *Tsui Man Cheong v. Fei Tsui Transportation Co.* (unrep., DCEC 1290/2008, [2009] H.K.E.C. 1565).

Employees on ships—See ss.29(1)(a) and 30(2) for provisions as to notice in respect of employees on ships. **Q1/14/11**

Occupational disease—See s.32(1)(e) for provisions as to notice in respect of claims arising from occupational disease. **Q1/14/12**

Q1/14/13 **Scope and application of the 24-month time-limit**—The scope of the 24-month time-limit is somewhat unclear, by reason of the words in square brackets it contains, namely "[being an application to the Court by an employee under Section 18A(2)]". The Court of Appeal held, Liu J.A. noting the lack of certainty as to the effect of words in square brackets, that the time-limit of 24 months provided by s.14(1) only applies to applications under s.18A(2) and even then does not apply where the Ordinance provides otherwise. It does not apply to an application to court by way of appeal under s.18 which governs appeals to the court from decisions of an assessment board (*Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49). In *Chan Siu Ling v. Tonyear Ltd (t/a Kwan Shing Restaurant)* [1999] 2 H.K.C. 348, the question is to what extent the reference in the words in brackets to s.18A(2) further limits the application of the 24-month time-limit above and beyond the decision in *Chung Lung Shun* itself that the limit does not apply to appeals under s.18 or where provisions of the Ordinance provide an alternative time-limit. Section 18A(2) refers to "[a]n employee ... mak[ing] an application for *enforcing* his claim for compensation to the Court" (emphasis added). The use of the word "enforcing" might suggest that the claim has already been determined. The phrase "an application for enforcing [an employee's] claim for compensation" is different from that used in s.18A(1). The latter uses the phrase "*determined* by the Court" (emphasis added). Rogers J.A. decided in *Chan Siu Ling v. Tonyear Investment Ltd (t/a Kwan Shing Restaurant)* (above) that an application made to the District Court under s.10(5) should be characterised as an application for periodical payments for temporary incapacity made under s.18A(2). As such s.14(1) applied to it. He found that s.10(5) does not "otherwise provide" such as to escape the application of the 24-month time-limit under s.14(1).

Q1/14/14 **Leave to apply outside the 24-month time-limit**—Where an application is made under s.18A to the District Court, and is made outside the 24-month period, leave is required under s.14(4) from the court to proceed with it. However, the discretion to grant leave to apply outside time under s.14(4) should be exercised liberally—Rogers J.A. in *Chan Siu Ling v. Tonyear Ltd (t/a Kwan Shing Restaurant)* [1999] 2 H.K.C. 348.

Where an application has been made already to the Commissioner for Labour in respect of the same matter and an appeal to the District Court is brought within the time for bringing an appeal against a decision of the Commissioner or either the Ordinary Assessment Board or the Special Assessment Board, in practice there may be no purpose served in also making an application in respect of the same matter under s.18A. However, the District Court will allow the application to be brought on both bases, provided that in the case of the applications they are made in time or leave is granted by the court for them to be brought out of time. (*Leung Ming Tim v. Fan Tai Kan* [2001] H.K.L.R.D. (Yrbk) 461, Carlson D.C.J.)

Q1/14/15 **"Applicant must show reasonable excuse"**—In order to obtain leave under s.14(4) to make an application under s.18A outside the 24-month time-limit, an applicant must show that he has a reasonable excuse for not having started within the limitation period. The expression "reasonable excuse" for the purpose of s.14(4) is to be equated with reasonable cause. (See the decision of Chan D.J. in *Chu Suk Han v. Szeto Wai Yiu* (unrep., DCEC 402/2002, [2002] H.K.E.C. 1543), in which the court rejected the contention, based on *Yeung Ying v. Ching Hing Construction Co. Ltd* [1960] H.K.D.C.L.R. 129, that the words "reasonable excuse" are wider and should be construed more liberally than "reasonable cause".) In short, it can be said that an applicant has a reasonable excuse if his failure was due to a cause or causes other than unreasonable conduct or an unreasonable decision on his part. Moreover, the reasonable excuse must be one which operates over the whole of the two-year period (*Wong Man Tak v. Shaw & Sons Ltd* [1957] H.K.D.C.L.R. 85 approved in *Leung Ming Tim v. Fan Tai Kan* [2001] H.K.L.R.D. (Yrbk) 461, Carlson D.C.J. and *Kwok Yau Tai v. Tung Wah Group of Hospitals* (unrep., DCEC 44/2000, [2002] H.K.E.C. 591), Carlson D.C.J. See also *Si Nga Lai v. Uniforce Trading Co.* (unrep., DCEC 838/2001, [2002] H.K.E.C. 492), Carlson D.C.J.). The court will take into account all of the circumstances of the case including the circumstances of the applicant, such as his literacy and level of education, the length of delay and the severity of the injury suffered and its consequences. Where the applicant was informed of the deadline (twice) by the Labour Department, acknowledged its existence and made a conscious and fully informed decision not to pursue an application to the court by way of s.18A, leave was not granted to bring an application four and a half months out of time even though the applicant had little formal education, was illiterate, and the injury was traumatic and with serious consequences. In any event, the applicant had appealed against an assessment within time and the appeal could be brought as of right with the same consequences (*Leung Ming Tim v. Fan Tai Kan* [2001] H.K.L.R.D. (Yrbk) 461, Carlson D.C.J.). See also *Kwok Chi Yip v. Wan Kei Geotechnical Engineering Co. Ltd* (unrep., DCEC 180/2001, [2001] H.K.E.C. 1083), Carlson D.C.J., *Chan Pak Lin v. Society for the Prevention of Cruelty to Animals* (unrep., DCEC 937/2001, [2002] H.K.E.C. 829), Carlson D.C.J. and the decision of Chan D.J. in *Chu Suk Han v. Szeto Wai Yiu* (unrep., DCEC 402/2002, [2002] H.K.E.C. 1543) to the same effect.

An applicant had reasonable excuse for failing to make an application within the two year limitation period provided for in s.14(1) if the delay was due to a cause other than the unreasonable conduct or an unreasonable decision on the applicant's part. Any reasonable cause had to operate for the whole of the period of the time limit. The court will determine whether the applicant has a reasonable excuse by reference to the facts of each case. Previous

decisions of the court will accordingly rarely be of great assistance. Where reasonable excuse is established, facts that the court will then take into account in deciding whether to exercise its discretion under s.14(4) in favour of the applicant will include the delay being relatively modest and the lack of forensic prejudice by the delay to the respondent. *Chan Man Lap v. Secretary for Justice* [2001] 3 H.K.L.R.D. K15. Absent reasonable excuse, an extension of time will be refused, even if as a matter of fact the delay is short and has caused no forensic prejudice to the respondent (*Ng Kin Lam v. Hong Kong Aircraft Engineering Co. Ltd* [2001] 3 H.K.L.R.D. L11).

Ignorance on the part of the applicant of his right to make an application to the court under s.18A or of the limitation period does not amount to a reasonable excuse (*Rolls v. Pascal & Sons* [1911] 1 K.B. 982 and *Judd v. Metropolitan Asylum Board* [1912] 5 B.W.C.C. 420). This will be particularly so where the applicant receives letters from the Labour Department (which are issued as a matter of standard practice) informing the applicant of the limitation period and its consequences. (*Ng Kin Lam v. Hong Kong Aircraft Engineering Co. Ltd* [2001] 3 H.K.L.R.D. L11.)

Where the applicant had, for 23 months of the required two-year period, no reason to believe that there was going to be an issue over her sick leave payments in question and the matter was proceeding amicably through the intervention of the Labour Department, she was excused for being out of time for 2½ months, given that she had already moved with due expedition once she was informed that the payments in question were to stop (*Kwok Yau Tai v. Tung Wah Group of Hospitals* (above), Carlson D.C.J.).

The period of limitation provided for by s.14 is shorter than the standard common law position which is of course three years. It is quite clear from the structure of the Ordinance that cases falling under it should be dealt with expeditiously, because it is to protect an employee, or the employee's family (*Tai Hing (a firm) v. Chan Yuk Wan* [1997] H.K.L.R.D. 1148).

Employer to report the injury to or death of an employee and method of notification

15.—(1) Notice of any accident which results in the death of the employee within 3 days after the accident shall be given in the prescribed form to the Commissioner by the employer not later than 7 days after the accident irrespective of whether the accident gives rise to any liability to pay compensation. *(Replaced 64 of 1992 s.3)* **Q1/15**

(1A) Notice of any accident which results in the total or partial incapacity of the employee shall be given to the Commissioner by the employer not later than 14 days after the accident, irrespective of whether the accident gives rise to any liability to pay compensation, and shall be given—

(a) in the prescribed form, if the accident results in the total or partial incapacity of the employee for a period exceeding 3 days immediately following the accident; or

(b) in the form specified by the Commissioner, if the accident results in the total or partial incapacity of the employee for a period not exceeding 3 days immediately following the accident. *(Replaced 67 of 1996 s.4)*

(1B) If the happening of such accident was not brought to the notice of the employer or did not otherwise come to his knowledge within such periods of 7 and 14 days respectively referred to in subsections (1) and (1A) then such notice shall be given not later than 7 days or, as may be appropriate, 14 days after the happening of the accident was first brought to the notice of the employer or otherwise came to his knowledge. *(Added 64 of 1992 s.3)*

(1BA) Where—

(a) an employer has given notice of an accident in the form specified by the Commissioner for the purposes of subsection (1A)(b); and

(b) the total or partial incapacity of the employee resulting from the accident extends beyond the period referred to in that subsection,

the employer shall give further notice of the accident to the Commissioner in the form prescribed for the purposes of subsection (1A)(a) not later than 14 days after the extension of the incapacity beyond the period referred to in subsection (1A)(b) was first brought to the notice of the employer or otherwise came to his knowledge. *(Added 67 of 1996 s.4)*

(1C) The Commissioner may, by notice in writing to an employer, require the employer to give notice to the Commissioner of an accident causing injury to an employee, being an accident— *(Amended 64 of 1992 s.3)*

(a) which may give rise to a liability to pay compensation;
(b) to which subsections (1) and (1A) do not apply; and *(Amended 64 of 1992 s.3)*
(c) which does not result in the death of the employee,

in the prescribed form within such period, not being less than 7 days, as is specified in the notice to the employer. *(Added 76 of 1982 s.13)*

(2) When the death of an employee in any circumstances other than those specified in subsection (1) is brought to the notice of, or comes to the knowledge of, his employer, the employer shall, not later than 7 days after the death, give notice thereof in the prescribed form to the Commissioner, irrespective of whether the death gives rise to any liability to pay compensation: *(Amended 64 of 1992 s.3)*

Provided that if the death was not brought to the notice of the employer or did not otherwise come to his knowledge within such period of 7 days then such notice shall be given not later than 7 days after the death was first brought to the notice of the employer or otherwise first came to his knowledge. *(Replaced 55 of 1969 s.14)*

(2A) The notice of accident referred to in subsections (1), (1A) and (2) shall contain such matters relating to the accident, the employer, the employee, any compensation agreed, paid or payable, and any matters incidental thereto as may be prescribed or, where the notice of accident is required to be given in the form specified by the Commissioner for the purposes of subsection (1A)(b), as may be specified by the Commissioner. *(Replaced 67 of 1996 s.4)*

(3) On receipt of a notice under subsection (1), (1A) or (2) the Commissioner may make such inquiry as he thinks fit and if it appears to him that a claim for compensation may arise in respect of— *(Amended 64 of 1992 s.3)*

(a) the death of the employee, he may—
  (i) make such inquiry as he thinks fit to ascertain whether there are any members of the family of the deceased employee; and *(Amended 52 of 2000 s.10)*
  (ii) inform such members of the family, if any, of the reported cause and circumstances of the death of the employee and advise them of their right to compensation; or *(Amended 52 of 2000 s.10)*
  (iii) *(Repealed 52 of 2000 s.10)*
(b) the incapacity of the employee, he may, if the employee so requests, make a claim for compensation on behalf of the employee. *(Added 55 of 1969 s.14)*

(4) In any claim for compensation under section 6 the Court may, for the purposes of section 13(1), take into consideration a written report from the Commissioner of his findings on an inquiry under subsection (3)(a)(i). *(Added 55 of 1969 s.14)*

(5) For the purposes of subsections (1) and (2), the death of an employee on the premises of his employer shall be deemed to be within the knowledge of such employer. *(Amended 55 of 1969 s.14; 64 of 1992 s.3)*

(6) Any employer who—

(a) without reasonable excuse fails to give notice as required by subsection (1), (1A), (1B) or (2) or as required by a notice of the Commissioner under subsection (1C); or
(b) in or in connection with any notice given by him under subsection (1), (1A), (1C) or (2), makes any false or misleading statement or furnishes any false or misleading information,

commits an offence and is liable to a fine at level 5. *(Replaced 76 of 1982 s.13. Amended 63 of 1992 s.6; 64 of 1992 s.3; 36 of 1996 s.10)*

(7) Nothing contained in this section shall prevent any person from making a claim for compensation under this Ordinance.

(Amended 44 of 1980 s.15)

Notice to the Commissioner by the employer—Regulation 4 and Forms 2 and 2A of the Employees' Compensation Ordinance prescribe the form of notice to be given by an employer to the Commissioner under s.15(1), 15(1A)(a), 15(1B), 15(1C) and 15(2). **Q1/15/1**

Written report of findings of the Commissioner on an inquiry as to whether there are any members of family of a deceased employee—Pursuant to s.15(4), the court may, in any claim for compensation under s.6 (compensation in fatal cases), take into consideration a written report by the Commissioner of his inquiry, if he has made one, following receipt of a notice under s.15 concerning the death of an employee, as to whether there are any members of family of the deceased employee. The Commissioner is not obliged to conduct any such inquiry or reduce the results of the inquiry to writing, although one would expect him to produce a written report and make it available to the court if he makes an inquiry. The court is not bound by the contents of the report and has a discretion as to whether to take it into consideration and, if so, how to do so. **Q1/15/2**

Medical examination and treatment

16.—(1) Where an employee has given notice of an accident— **Q1/16**

(a) the employer may, within 7 days from the time at which the notice is given, require the employee to undergo a medical examination without expense to the employee; and

(b) the employee shall undergo the examination. (Replaced 16 of 2006 s. 16)

(1A) An employer may require an employee who is in receipt of a periodical payment under section 10 to undergo a medical examination from time to time, without expense to the employee, and the employee shall undergo the examination. (Added 16 of 2006 s. 16)

(1B) Where an employee is required under subsection (1) or (1A) to undergo a medical examination—

(a) if the employee is attended—

(i) by a registered medical practitioner, the examination shall be conducted by a registered medical practitioner named by the employer;

(ii) by a registered Chinese medicine practitioner, the examination shall be conducted by a registered Chinese medicine practitioner named by the employer; or

(iii) by a registered dentist, the examination shall be conducted by a registered dentist named by the employer; or

(b) in any other case, the examination shall be conducted by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist named by the employer. (Added 16 of 2006 s. 16)

(2) The employee shall, when required, attend upon the registered medical practitioner, registered Chinesemedicine practitioner or registered dentist concerned at the time and place notified to the employee by the employer or that medical practitioner, Chinese medicine practitioner or dentist (as the case may be), provided such time and place is reasonable.

(3) If the employee is, in the opinion of any registered medical practitioner, registered Chinese medicine practitioner or registered dentist, unable or not in a fit state to attend on the registered medical practitioner, registered Chinese medicine practitioner or registered dentist named by the employer—

(a) that fact shall be notified to the employer; and

(b) the medical practitioner, Chinese medicine practitioner or dentist so named shall—

(i) fix a reasonable time and place for a medical examination of the employee; and

(ii) notify the employee accordingly. (Replaced 16 of 2006 s. 16)

(3A) As soon as reasonably practicable after an employee has undergone a medical examination required under this section, the medical practitioner, Chinese medicine practitioner or dentist who conducts the examination shall, at the employer's expenses—

(a) prepare a report on the examination, setting out all findings reasonably related to the injury of the employee; and

(b) send the report to the employer. (Added 16 of 2006 s. 16)

(3B) The employee may in writing request the employer to send to him, free of charge, a copy of the report referred to in subsection (3A). (Added 16 of 2006 s. 16)

(3C) The employer commits an offence and is liable on conviction to a fine at level 3 if he fails, without reasonable excuse, to comply with a request under subsection (3B) before the later of the following—

(a) the expiry of 21 days after the employer receives the request; or

(b) the expiry of 14 days after the report concerned is received by the employer. (Added 16 of 2006 s. 16).

(4) If the employee fails to undergo a medical examination as required under this section, his right to compensation shall be suspended until such examination has taken place; and if such failure extends over a period of 15 days from the date when the employee was required to undergo the examination under subsection (2) or (3), as the case may be, no compensation shall be payable, unless the Court is satisfied that there was reasonable cause for such failure.

(5) The employee shall be entitled to have his own registered medical practitioner, registered Chinese medicine practitioner or registered dentist present at such examination, but at his own expense.

(6) Where the employee is not attended by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist he shall, if so required by the employer, submit himself for treatment by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist without expense to the employee.

(7) If the employee fails to submit himself for treatment when so required under subsection (6), or having submitted himself for such treatment disregards the instructions of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist concerned, then if it is proved that such failure or disregard was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting incapacity shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the employee had submitted himself for such treatment, and had duly carried out the instructions of, such medical practitioner, Chinese medicine practitioner or dentist, and compensation, if any, shall be payable accordingly.

(8) Where under this section a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension.

(9) Notwithstanding the previous provisions of this section, where a claim for compensation is made in respect of the death of an employee, then if the employee failed to undergo a medical examination or submit himself for treatment when so required under this section or having submitted himself for such treatment disregarded the instructions of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist concerned, and if it is proved that such failure or disregard was unreasonable in the circumstances of the case and that the death of the employee was caused thereby, the death shall not be deemed to have resulted from the injury, and no compensation shall be payable in respect of the injury.

(Amended 44 of 1980 s. 15; 16 of 2006 s. 16)

Reasonable cause for failure by an employee to submit himself for medical examination—Under s.16(4) the court may, if it is satisfied that there is a reasonable cause for the failure, disapply s.16(4) which otherwise provides that an employee shall have no right to compensation if he fails to submit himself for an examination offered by his employer under s.16(1) for a period over 15 days from the date when the employee was required to submit himself for examination under s.16(2) or 16(3), as the case may be. As to the meaning of "reasonable cause" generally, albeit in the context of s.14 of the Ordinance, see para.Q1/14/9. For English decisions under the Workmen's Compensation Acts of 1897, 1906 and 1925 which may be of guidance in determining whether there is reasonable cause for a failure to be examined, see the cases cited in the notes to para.1350 of *Halsbury's Laws of England* (2nd ed.), Vol.34. Those cases concern the question of whether a requirement imposed by the employee on an examination taking place is a reasonable one, for example as to the timing of the examination, the identity of the doctor conducting the examination, the procedure to be adopted during the examination and the attendance of the employee's own representatives, medical and legal. **Q1/16/1**

Sections 16(6) and 16(7)—Under s.16(6), where an employee is not attended by a medical practitioner (who will presumably prepare and keep notes of his examinations and treatments and the progress of his patient), the employee shall if required by the employer submit himself for treatment by a medical practitioner without expense to the employee (*i.e.* at the employer's expense). Under s.16(7) if the employee fails to comply with s.16(6), or disregards the instructions of any medical practitioner who attends him pursuant to s.16(6), if it is proved that the failure or disregard was unreasonable in the circumstances of the case and resulted in aggravation of the injury, for the purpose of proceedings under the Employees Compensation Ordinance the injury and resulting incapacity will be deemed to be only that which might reasonably be expected to have occurred had there been no such failure or disregard. In *Lau Kwok Keung v. Evergo Electrical Manufacturing Co. Ltd* [1989] H.K.D.C.L.R. 40, the employee had commenced common law proceedings for damages against his employer and proceedings in the District Court under s.18 of the Employment Compensation Ordinance. The employer applied for a stay of the proceedings under s.18, *inter alia*, on the ground that it was unclear whether the employee would submit himself to a suggested operation and under s.16(7) the court could and should stay the proceedings. The District Court judge held that s.16(6) and (7) was only applicable where the employer establishes (the burden of proof being on him and not the employee) that the employee was not attended by a medical practitioner. On the facts of the case the employee was being attended by a medical practitioner at the relevant time. See also paras Q1/26/1 *et seq*. See also *Fazlic v. Milingimbi Community Inc*. [1982] 150 C.L.R. 345, in which the High Court of Australia considered the approach to questions as to whether or not it was reasonable for an employee not to follow a recommended course of medical action, which, on the facts of the case, was a back operation. **Q1/16/2**

For accidents which happened on or after September 1, 2008—The old s.16 is substantively amended, and the new s.16 reads as follows: **Q1/16/3**

(1) Where an employee has given notice of an accident—
  (a) the employer may, within 7 days from the time at which the notice is given, require the employee to undergo a medical examination without expense to the employee; and
  (b) the employee shall undergo the examination. *(Replaced 16 of 2006 s.16)*

(1A) An employer may require an employee who is in receipt of a periodical payment under section 10 to undergo a medical examination from time to time, without expense to the employee, and the employee shall undergo the examination. *(Added 16 of 2006 s.16)*

(1B) Where an employee is required under subsection (1) or (1A) to undergo a medical examination—
  (a) if the employee is attended—
    (i) by a registered medical practitioner, the examination shall be conducted by a registered medical practitioner named by the employer;
    (ii) by a registered Chinese medicine practitioner, the examination shall be conducted by a registered Chinese medicine practitioner named by the employer; or
    (iii) by a registered dentist, the examination shall be conducted by a registered dentist named by the employer; or
  (b) in any other case, the examination shall be conducted by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist named by the employer. *(Added 16 of 2006 s.16)*

(2) The employee shall, when required, attend upon the registered medical practitioner, registered Chinese medicine practitioner or registered dentist concerned at the time and place notified to the employee by the employer or that medical practitioner, Chinese medicine practitioner or dentist (as the case may be), provided such time and place is reasonable.

(3) If the employee is, in the opinion of any registered medical practitioner, registered Chinese medicine practitioner or registered dentist, unable or not in a fit state to attend on the registered medical practitioner, registered Chinese medicine practitioner or registered dentist named by the employer—
  (a) that fact shall be notified to the employer; and
  (b) the medical practitioner, Chinese medicine practitioner or dentist so named shall—
    (i) fix a reasonable time and place for a medical examination of the employee; and
    (ii) notify the employee accordingly. *(Replaced 16 of 2006 s.16)*

(3A) As soon as reasonably practicable after an employee has undergone a medical examination required under this section, the medical practitioner, Chinese medicine practitioner or dentist who conducts the examination shall, at the employer's expenses—
  (a) prepare a report on the examination, setting out all findings reasonably related to the injury of the employee; and
  (b) send the report to the employer. *(Added 16 of 2006 s.16)*

(3B) The employee may in writing request the employer to send to him, free of charge, a copy of the report referred to in subsection (3A). *(Added 16 of 2006 s.16)*

(3C) The employer commits an offence and is liable on conviction to a fine at level 3 if he fails, without reasonable excuse, to comply with a request under subsection (3B) before the later of the following—
  (a) the expiry of 21 days after the employer receives the request; or
  (b) the expiry of 14 days after the report concerned is received by the employer. *(Added 16 of 2006 s.16)*

(4) If the employee fails to undergo a medical examination as required under this section, his right to compensation shall be suspended until such examination has taken place; and if such failure extends over a period of 15 days from the date when the employee was required to undergo the examination under subsection (2) or (3), as the case may be, no compensation shall be payable, unless the Court is satisfied that there was reasonable cause for such failure.

(5) The employee shall be entitled to have his own registered medical practitioner, registered Chinese medicine practitioner or registered dentist present at such examination, but at his own expense.

(6) Where the employee is not attended by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist he shall, if so required by the employer, submit himself for treatment by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist without expense to the employee.

(7) If the employee fails to submit himself for treatment when so required under subsection (6), or having submitted himself for such treatment disregards the instructions of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist concerned, then if it is proved that such failure or disregard was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting incapacity shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the employee had submitted himself for such treatment, and had duly carried out the instructions of, such medical practitioner, Chinese medicine practitioner or dentist, and compensation, if any, shall be payable accordingly.

(8) Where under this section a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension.

(9) Notwithstanding the previous provisions of this section, where a claim for compensation is made in respect of the death of an employee, then if the employee failed to undergo a medical examination or submit himself for treatment when so required under this section or having submitted himself for such treatment disregarded the instructions of the registered medical practitioner, registered Chinese medicine practitioner or registered dentist concerned, and if it is proved that such failure or disregard was unreasonable in the circumstances of the case and that the death of the employee was caused thereby, the death shall not be deemed to have resulted from the injury, and no compensation shall be payable in respect of the injury.

(Amended 44 of 1980 s.15; 16 of 2006 s.16)

Q1/16/4 **New Provisions (for accidents on or after September 1, 2008)**—There are two major changes after amendments. First, whilst the employee is still required to undergo medical examination arranged by the employer, there is a specific stipulation that the examination shall be conducted by medical practitioner of same specialty who was attended by the employee. That is to say, for instance, if an employee consults only a registered Chinese medicine practitioner, his employer cannot compel him to undergo examination by a registered medical practitioner. Second, the law now specifically requires the employer to give disclosure of the medical report prepared by the medical practitioner, Chinese medicine practitioner or dentist who conducts the examination. Legal privilege over the expert's report is expressly waived by the statutory

provision. This new requirement is similar to that of s.19 of the English Workmen's Compensation Act 1925. Indeed, the question of legal professional privilege may not even be an issue in the first place, for the reason that the employer who wishes to invoke the new s.16 to examine the employee is fully aware of the disclosure condition beforehand and hence subject to it. That is to say, it is a prerequisite for the employer to provide a report before he can invoke the new s.16 to request for examination. It is respectfully submitted that an employer could not subsequently argue otherwise and claim legal professional privilege to bypass the statutory requirement. It is patently wrong to allow an employer to enjoy the benefit to request for an examination under s.16 without honouring the obligations. The statutory provisions have made clear there is no legal professional privilege attached to such report made for the purpose of and pursuant to medical examination under s.16(1) or (1A) of the Ordinance: *Lau Wai Ping v. Yiu Fung Transportation Co.* (unrep., DCEC 1563/2008, 13 May 2009).

However, it depends on the circumstances in each case as to whether any medical report prepared by a medical practitioner, Chinese medicine practitioner or dentist nominated by the employer is made under s.16 of the Ordinance or is in fact subject to legal professional privilege (see *Chung Fung Chu v. Secretary for Justice* (unrep., CACV 123/2007, [2007] H.K.E.C. 1918).

If the examination is arranged in contemplation of legal proceedings, and is not requested under s.16, the medical expert report prepared thereafter is subject to the protection of legal professional privilege. The Court's modern approach towards any argument of abrogation of legal professional privilege in a medical report can be seen in the case of *Lau Lai Shan v. Hospital Authority* (unrep., DCEC 784/2007, [2008] H.K.E.C. 347), though that case does not rule on the interpretation of this new s.16. In *Lau Lai Shan*, the Court, in dealing with an employee's argument on abrogation of legal professional privilege in refusing to arrange a joint medical report after the joint medical examination, held that upon considering the principles of justice and the case management objectives, the Court could require a cooperative approach on expert evidence as a condition of being permitted to adduce the same.

The employer is at his own perils of facing criminal conviction if he fails to accede to the request of the employee for a copy of the medical report, provided that the examination is arranged under this section.

However, the wordings in s.16(3A) are ambiguous that the report has to set out all "findings" reasonably related to the injury of the employee. "Findings" are matters discovered based on evidence, and may be distinguishable from "opinion". The section does not expressly require the attending practitioner's "opinion" on what extent the incapacity is due to the accident. It is respectfully submitted that the literal meaning of the word "findings" should reasonably include all test findings conducted in the examination, diagnosis and prognosis, but may not necessarily include personal opinion by the attending practitioner or dentist on the appropriate length of sick leave and/or his own assessment of loss of earning capacity. There is no sanction against the employer if the employee is not satisfied with the completeness of the medical report.

Consequences of failure to attend examination—The right to a medical examination only arises if the employee is being paid periodical payments: *Yu Yau Choi v. Ming Sang (HK) Engineering Ltd* (unrep., DCEC 833/2000, 2 January 2001). Therefore, technically, in cases where the employee is paid "interim payment" under O.29 of the Rules of District Court other than periodical payments under the Ordinance, the employer has no right to require the injured employee to attend examination under s.16. **Q1/16/5**

Also, it seems that the Court is not empowered to direct or compel an employee to attend medical examination under s.16: see *Lau Wai Ping v. Yiu Fung Transportation Co.* (unrep., DCEC 1563/2008, 13 May 2009).

Determination of claims in respect of minor injuries

16A.—(1) Where— **Q1/16A**

(a) a claim for compensation arises in respect of an accident causing injury to an employee that results in temporary incapacity, whether total or partial; or

(b) a claim for compensation arises in respect of an accident causing injury to an employee that results in loss of earning capacity as assessed under section 16D(5), 16E(8) or (9), 16G(2) or 16GA(1), *(Amended 36 of 1996 s.11)*

the Commissioner may assess the compensation payable under sections 7, 9 and 10. *(Replaced 59 of 1988 s.4. Amended 36 of 1996 s.11)*

(1A) Compensation shall not be assessed by the Commissioner under subsection (1) unless claim for compensation arises within 24 months after the happening of the accident. *(Added 59 of 1988 s.4)*

(2) Where the Commissioner assesses compensation under subsection (1) he shall issue to the employer and the employee a certificate in such form as

he may specify stating the amount of the compensation and details of the assessment, and shall retain one copy of the certificate for his records.

(3) An objection to the amount of compensation assessed under subsection (1) may be made in writing—

(a) by the employer, the employee or the ECAFB;

(b) within 14 days after—

(i) in the case of the employer or employee, the date of issue of the certificate issued under subsection (2);

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap 365) by the employee, or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit;

(c) stating the grounds of the objection; and

(d) by the objector sending a copy of the objection—

(i) where the objector is the employer, to the employee;

(ii) where the objector is the employee, to the employer;

(iii) where the objector is the ECAFB, to the employer and the employee. (Replaced 16 of 2002 s. 33)

(4) On receipt of an objection under subsection (3) the Commissioner shall—

(a) if the objection relates to the assessment of the percentage of loss of earning capacity made by an Ordinary Assessment Board under section 16D(5) or by a Special Assessment Board under section 16E(8) or (9), forward a copy of the objection to the Ordinary Assessment Board or the Special Assessment Board, as the case may be, for a review under section 16G(2); and

(b) after taking into account the objection and any review referred to in paragraph (a) of this subsection, confirm, vary or cancel the assessment of compensation under subsection (1). *(Replaced 59 of 1988 s.4. Amended 63 of 1992 s.7; 36 of 1996 s.11)*

(4A) *(Repealed 36 of 1996 s.11)*

(5) Upon completing a review under subsection (4), the Commissioner shall issue to the employer and the employee a certificate in such form as he may specify stating—

(a) that the original assessment is confirmed and giving details thereof; or

(b) details of the assessment as varied,

and shall retain one copy of the certificate for his records.

(6) Upon the issue of a certificate under subsection (5), the certificate issued under subsection (2) shall be cancelled.

(7) A certificate purporting to be issued—

(a) under subsection (2), other than a certificate cancelled under subsection (6); or

(b) under subsection (5),

and to be signed by or for the Commissioner shall be admitted in evidence without further proof on its production in any court, and—

(i) until the contrary is proved it shall be presumed that the certificate is so issued and signed; and

(ii) shall be evidence of the matters stated therein.

(8) A certificate issued—

(a) under subsection (2), other than a certificate cancelled under subsection (6); or

(b) under subsection (5),

may, on application to the Court by the employer, the employee or the Commissioner, be made an order of the Court and, for the purposes of this

subsection, the amount payable under any such certificate shall include any surcharge payable in respect thereof under subsection (10).

(9) Subject to section 18, the employer shall pay to the employee within a period of 21 days after—

(a) the date of issue of the certificate issued under subsection (2); or

(b) where an objection is made under subsection (3), the date of issue of the certificate issued under subsection (5),

the balance (if any) of the amount of compensation stated in the certificate after deducting from such amount—

(i) the total sum of any periodical payments made by the employer to the employee under section 10 in respect of the injury to which the certificate relates; and

(ii) any sum which the Commissioner has ordered to be deducted under section 13(3).

(10) An employer who fails without reasonable excuse to comply with subsection (9) shall pay to the employee, in addition to the amount of compensation payable under that subsection— *(Amended 59 of 1988 s.4)*

(a) upon the expiry of the payment period, a surcharge of the percentage specified in the third column of the Sixth Schedule shown opposite section 16A(10)(a) specified in the first column of that Schedule of the amount of compensation then remaining unpaid or the amount specified in the second column of the Sixth Schedule shown opposite that section as specified, whichever is the greater; and *(Amended 36 of 1996 s.11)*

(b) upon the expiry of 3 months after the expiry of the payment period, a further surcharge of the percentage specified in the third column of the Sixth Schedule shown opposite section 16A(10)(b) specified in the first column of that Schedule of the amount then remaining unpaid of the aggregate of the amount of compensation referred to in paragraph (a) and the surcharge imposed under that paragraph or the amount specified in the second column of the Sixth Schedule shown opposite that section as specified, whichever is the greater. *(Amended L.N. 390 of 1987; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.11)*

(11) For the purposes of subsection (10) "payment period" (付款期) means the appropriate period for payment referred to in subsection (9).

(12) An employer who fails without reasonable excuse to comply with subsection (9) or (10) commits an offence and is liable to a fine at level 6. *(Added 59 of 1988 s.4. Amended 36 of 1996 s.11; 52 of 2000 s.11)*

(13) For the purposes of this section "date of issue" (發出日期) means the date appearing on the certificate of assessment. *(Added 63 of 1992 s.7)*

(Added 76 of 1982 s.14)

Q1/16A/1 **Note**—For the exercise of the Commissioner's discretion under s.16(3), see *Lau Suet Fung v. Future Engineering Co.* (unrep., CACV 110/2003, [2004] HKEC 150) and the commentary in Note Q1/16B/4 below.

Q1/16A/2 **Procedure under s.16A(8)**—See the notes to s.8 and in particular s.8(10) at para.Q1/8/2. In theory a certificate issued under s.16A(2) might be made into an order under s.16A(8) and then subsequently varied and cancelled under s.16A(5) and (6) respectively. In practice, however, given the time-limit of 14 days for objection to a certificate, albeit that the Commissioner can deal with an objection made late, it is most unlikely that such a scenario would arise. If such a scenario did arise, presumably the Commissioner, if not the employer or employee, would apply for the new certificate to be made an order under s.8(10) and for an order from the court providing that the original order is replaced by the new order.

Q1/16A/3 **Provision of details of certificate to the District Court Registrar**—Where it is desired to proceed under s.16A(8), reg. 5 of the Employees' Compensation Regulations requires the details of the certificate issued under s.16A(2) or (5) to be provided to be lodged with the Registrar of the District Court in Form 3 of the Schedule to the Regulations.

Q1/16A/4 **Inappropriate use of the term "minor" in the heading to s.16A**—As noted by Yuen J in *Lau Suet Fung v. Future Engineering Co.* (unrep., CACV 110/2003, [2004] H.K.E.C. 150), the use of the term "minor" in s.16A is misleading. It appears from s.16A(1)(a), that the Commissioner may assess compensation in all cases except for cases of permanent incapacity. However, that is covered by s.16A(1)(b), so far from the Commissioner determining only compensation for "minor" injuries, in effect the Commissioner (whether by himself or through the assessment boards) assesses all claims for compensation under the s.16A umbrella, and whether the injury results in temporary or permanent incapacity.

Q1/16A/5 **Binding Nature of s.16A certificate**—Absent any objection pursuant to section 16A or any application under section 16B, a section 16A certificate is binding and conclusive as to quantum, but is not binding as to liability (as the issue of liability is to be decided by the court): *Lam Chi Biu v. Mak Kee Ltd* (unrep., CACV 191/2004, [2005] H.K.E.C. 875).

Cancellation of minor injuries claim certificate by the Court

Q1/16B **16B.**—(1) Notwithstanding anything in section 16A, the Court may, on application by the employer, the employee, the Commissioner or the ECAFB cancel a certificate issued under section 16A(2) or (5) and make such order (including an order as to any sum already paid under the certificate) as in the circumstances the Court may think just, if it is proved that—(Amended 16 of 2002 s. 33)

(a) the sum paid or to be paid was or is not in accordance with the provisions of this Ordinance; or

(b) the certificate was issued in ignorance of, or under a mistake as to, the true nature or the extent of the injury; or *(Amended 60 of 1986 s.2)*

(c) the certificate was based upon any false or misleading information or statement given or made.

(2) An application under subsection (1) shall be made within 6 months of the date of issue of the certificate in respect of which the application is made, or within such further time as the Court, in the circumstances of any particular case, thinks fit.

(Added 76 of 1982 s.14)

Q1/16B/1 **General, and in particular the relationship between ss.16B and 18(1)**—There are two routes for challenging an assessment made under s.16A, whether an original assessment or an assessment on review. Under s.16B the court may, on application by either the employer, employee or the Commissioner, cancel a certificate issued under s.16A(2) or (5) and make such order in its place as the court thinks fit in the circumstances. Under s.18 there is a right of appeal to the District Court against an assessment under s.16A. There does not appear to be anything to preclude a person from making simultaneous applications under ss.16B and 18. The principal differences and similarities between the two routes are:

Q1/16B/2 *Subject of the appeal*—An appeal under s.18 will be against the assessment made under s.16A. An application under s.16B will be to cancel the certificate issued by the Commissioner under s.16A, the issue of which follows the assessment. Thus, strictly the subject of the applications is not the same, although they are likely to be the same in substance.

Q1/16B/3 *Grounds of application*—In the case of s.16B, these are limited to those set out in s.16B(1)(a), (b) and (c). In the case of an appeal under s.18, there is no limit in the sense that, although the application is by way of appeal, it is in fact a hearing afresh by the District Court (see *Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49). Given that the grounds for appeal under s.18 are wider than the grounds for cancellation of a certificate under s.16B, it would appear prudent for an employer or employee who wishes to challenge an assessment reflected in a certificate issued under s.16A to apply using both routes.

Q1/16B/4 *Time-limit for making application*—Both an application to cancel a certificate under s.16B and an appeal under s.18 (where it is in respect of an assessment) must be made within six months of the date of issue of the certificate, unless the court allows it to be made later (ss.16B(2) and 18(2)). Where the appeal is in respect of a decision of the Commissioner under ss.16A or 16D which does not take the form of an assessment, the six-month period runs from the date of the decision. See, for example, *Lui Wai Yin v. Att.-Gen*. [1992] H.K.D.C.L.R. 57. The language of the s.16B(2) is discretionary. In the exercise of its discretion, the court will not assist a part who has slept on his rights. However, where an employee relied on consistent medical advice which under-estimated the seriousness of his injury in not objecting to an assessment, and only

realised well after the six-months time limit that the injury was much more serious, and at that point was not dilatory in making his application to the Commissioner for an extension of time under s.16A(3) for a re-assessment, which application was rejected, bearing in mind the "Commissioner-driven" assessment and the complexity of the provisions of the Ordinance, the discretion of the court could only have been exercised in favour of allowing the employee time to make the application, even where the application for an extension was made two and a half years after the assessment: *Lau Suet Fung v. Future Engineering Co.* (unrep., CACV 110/2003, [2004] H.K.E.C. 150).

Applicants—It appears that the Commissioner cannot initiate an appeal under s.18, but he can apply under s.16B. Thus the grounds for the Commissioner to challenge a certificate issued under s.16A are more limited than those available to an employer or employee, who can also appeal under s.18. An "employer" for these purposes includes a principal contractor, against whom a certificate has been issued pursuant to the application of s.24 (liability in the case of employees employed by sub-contractors)—such a principal contract can apply under s.16B for cancellation of the certificate (*Lam Geotechnics Ltd v. Wong Kai Hung* (unrep., DCEC 322/2005, [2006] H.K.E.C. 693), CB Chan D.C.J.). **Q1/16B/5**

Court's powers—Under s.16B the court may cancel a certificate and make such order, including an order as to any sum already paid under the certificate, as in the circumstances it thinks fit. Under s.18, the court may confirm or vary any assessment or may substitute its own assessment and may determine the amount of compensation payable and may make such order as it thinks fit, including as to costs. Although not expressly provided for by s.16B itself, the District Court appears to have power to make orders as to costs in respect of applications to cancel certificates made under s.16B. The power of the court under s.16B to make such order as it thinks fit, in addition to cancelling the certificate, includes the power to make a fresh assessment (see *Liu Ah Sai v. Yiu Lian Dockyards Ltd* [1996] 4 H.K.C. 244, CA) although it appears that under s.16B the court could direct the Commissioner or the assessment boards to undertake a fresh assessment and issue a fresh certificate. In practice, applicants under s.16B who are either the employer or employee will bring their applications under both ss.16B and 18, and will lead evidence to allow the court to address both the question of whether the certificate should be cancelled (and ancillary orders made as to payments already made under it) and the question of what would be an appropriate assessment, if any, in its place. **Q1/16B/6**

Grounds of application for cancellation of a certificate under s.16B—The grounds for an application under s.16B are threefold and are set out in s.16B(1), namely: **Q1/16B/7**

(1) the sum paid or to be paid was not or is not in accordance with the provisions of the Ordinance (s.16B(1)(a));
(2) the certificate was issued in ignorance of, or under a mistake as to, the true nature or the extent of the injury (s.16B(1)(b)); and
(3) the certificate was based upon any false or misleading information or statement given or made (s.16B(1)(c)).

The three statutory grounds are exhaustive. It cannot be contended in an application under s.16B that, because the Form 5 assessment had the same basis as a Form 7 assessment, which assessment has already been replaced, as reflected in a Form 9, then for all practical purposes the Form 5 assessment must be automatically regarded as cancelled. See *Shum Tsz Yan v. Union Medical Centre Ltd* (unrep., DCEC 1135/2004, [2006] H.K.E.C. 1348), D.J. T Au.

Section 16B(1)(a)—This provision covers mistakes such as arithmetical calculations in arriving at the amount of compensation payable and incorrect descriptions of the injury in the certificate (*Tung Shui Bun v. Gammon Building Construction Ltd* [1985] 2 H.K.C. 117, overturned by legislation on its principal point and dealing with s.17, subsequently amended and then repealed but in substance in the same terms as s.16B(1)(a)–(c) following amendment). It also covers assessments made *ultra vires* the powers of the Commissioner or the assessment boards (*Liu Ah Sai v. Yiu Lian Dockyards Ltd* [1996] 4 H.K.C. 244, CA). **Q1/16B/8**

Section 16B(1)(b)—As to the scope of this provision, guidance may be found in the English and other U.K. decisions cited in the notes to para.1420 of *Halsbury's Laws of England* (2nd ed.). **Q1/16B/9**

The word "true" in s.16B(1)(b) means the "true and unique" nature of the injury in a similar fashion to the expressions "true identity" or "true likeness" (*Tung Shui Bun v. Gammon Building Construction Ltd* [1985] 2 H.K.L.Y. 468, *per* Silke J.A., commenting on the predecessor provision of s.16B(1)(b)). So, where, subsequent to the assessment, evidence comes to light that the employee was suffering from depression at the time of his injury, and the expert evidence is that the pre-existing depression might well have had an impact on the assessment, then the court may exercise its discretion to cancel the certificate form of assessment (*Shum Tsz Yan v. Union Medical Centre Ltd* (unrep., DCEC 1135/2004, [2006] H.K.E.C. 1348, T Au D.D.J.C.).

Section 16B(1)(c)—As to the scope of this provision, guidance may also be found in the English and other U.K. decisions cited in the notes to para.1420 of *Halsbury's Laws of England* **Q1/16B/10**

(2nd ed.). Questions that may arise include whether the party seeking to cancel the certificate has to show intent to provide false or misleading information or statements on the part of the party providing it and also the materiality of the falsity or misleading nature of the information or statement. In *Lam Geotechnics Ltd v. Wong Kai Hung* (unrep., DCEC 322/2005, [2006] H.K.E.C. 693), CB Chan D.C.J., the applicant successfully applied for the cancellation of a review of compensation assessment (Form 6) on the grounds that it erroneously filed the Form 2 stating that it was a principal contractor when, in fact, and on the application of s.24, it was not a principal contractor. The court held that the contents of Form 2 are not binding and conclusive against a party identifying themselves as a principal contractor in the form, which is a question of fact to be determined by the court upon the evidence before it (citing with approval *Chan Sik Pan v. Wylam's Services Ltd* (2001) 4 H.K.C.F.A.R. 308 and *Lung Yui Man v. Yee Hing Kee Plumbing Works Co. Ltd* (unrep., HCPI 923/1996, [2000] H.K.E.C. 130).

The language of s.16B(1)(c) should be compared with the language of s.16CB(1)(c): the extent of the overlap and differences between the two sets of provisions is unclear.

Q1/16B/11 **Approach to be taken by court**—In *Liu Ah Sai v. Yiu Lian Dockyards Ltd* [1996] 4 H.K.C. 244, the Court of Appeal considered the question of how the court should approach an application to cancel a certificate issued by the Commissioner under s.16A. Based on an assessment by the Ordinary Assessment Board of loss of earning capacity of 4 per cent, the Commissioner then issued a certificate quantifying the total amount of compensation due. The employee brought proceedings in the District Court by way of (1) an appeal under s. against the Board's assessment of his earning capacity, (2) an application under s.16B to cancel the certificate issued by the Commissioner, and (3) an application for compensation for partial incapacity, temporary incapacity and medical expenses under ss.9, 10 and 10A of the Ordinance. The District Court judge on hearing the matter, including competing expert evidence from medical experts, found that the loss of earning capacity was limited to at most 5 or 6 per cent. On the basis that the difference between this and the Board's assessment was only 1 or 2 per cent, the judge dismissed the appeal under s.18 and the application under s.16A to cancel the certificate issued by the Commissioner. On appeal the Court of Appeal disagreed with the District Court judge's approach and set out the correct approach by reference to the intent of the statutory scheme:

(1) Section 18A(1)(b) provides that all claims for compensation shall be determined by the District Court "except to the extent that such claims are determined ... by a certificate under Section 16A".

(2) Thus, either the certificate under s.16A is determined to be valid, and not cancelled, in which case the District Court cannot separately determine any claim which has been dealt with by the certificate, or it is cancelled or successfully appealed against, in which case it is for the District Court to determine the award, and that is the only award in respect of the matters which were the subject of the certificate. It is not possible for there to be parallel, coexistent awards embodied in a certificate and made by the District Court.

(3) The District Court must determine whether or not the certificate is liable to cancellation by reference to the grounds set out in s.16B(1), namely if: (a) the sum paid or to be paid was or is not in accordance with the provisions of the Ordinance; or (b) the certificate was issued in ignorance of, or under a mistake as to, the true nature or the extent of the injury; or (c) the certificate was based upon false or misleading information or statement given or made.

(4) On the facts of the case, there were two bases on which the District Court should have found that the conditions of s.16B(1) had been satisfied. First, s.16B(1)(a) was satisfied because, even on the judge's findings, the correct loss of earnings capacity in accordance with the provisions of the Ordinance was 6 per cent, and 4 per cent was not correct. At the time in question, the Commissioner, under the terms of s.16A, only had power to assess compensation under s.16A where the loss of earning capacity did not exceed 5 per cent. Accordingly, nothing he did, in issuing the certificate, was in accordance with the Ordinance. Secondly, in any event, a fair summary of the evidence led to the conclusion that the employee's loss of earning capacity was 8 per cent, not merely 6 per cent, *i.e.* double the loss assessed by the Board and embodied in the certificate. The difference was so great as a matter of fact and degree to prove, on the balance of probabilities, that the Board must have been mistaken as to the extent of the employee's injury. It followed that the certificate was also issued in ignorance of, or under a mistake as to, the extent of the employee's injury and s.16B(1)(b) was also satisfied (*Liu Ah Sai v. Yiu Lian Dockyards Ltd* [1996] 4 H.K.C. 244).

In determining whether to cancel a certificate under s.16B, the correctness of an assessment must be judged with regard to the employee's condition *at the time of* the issue of the relevant certificate, disregarding events subsequent thereto which might make the extent of injury or the extent of loss of earning capacity greater than it was thought to be at the time of the issue of the certificate (*Tung Shui Bun v. Gammon Building Construction* [1985] 2 H.K.L.Y. 468, followed in *Chu Chin Yiau v. Ray On Construction Co. Ltd* [1992] 1 H.K.C. 246 and *Shum Tsz Yan v. Union Medical Centre Ltd*, (unrep., DCEC 1135/2004, [2006] H.K.E.C. 1348, T Au D.D.C.J.).

Form of application under s.16B—The application should be in Form 3 to the Rules of Court. Q1/16B/12

16C. *(Repealed 31 of 1985 s.4)* Q1/16C

Determination of compensation by agreement in certain cases

16CA.—(1) Where a claim arises in respect of an accident causing injury to an employee that results in temporary incapacity, whether total or partial, for a period exceeding 3 days but not exceeding 7 days, the employer may enter into an agreement with the injured employee as to the compensation payable by him under section 10(1). *(Amended 67 of 1996 s.5)* Q1/16CA

(2) Periodical payments agreed under section (1) shall be made in the manner specified under section 10(3).

(3) Any lump sum agreed under subsection (1) shall be paid on or before the day immediately following such agreement on which wages would have been payable to the employee if he had continued to be employed under the contract of service or apprenticeship under which he was employed at the time of accident.

(Added 64 of 1992 s.4)

Section 16CA—Section 16CA provides a simplified procedure for agreement to be reached between employer and employee in respect of compensation payable arising out of accidents causing injury that results in temporary incapacity for a period exceeding three days but not exceeding seven days. The incapacity can be either total or partial. The agreement can be for periodical payments or a lump sum payment, but subject to s.16CA(2) and (3) respectively. The approval of the Commissioner is not required. Q1/16CA/1

Cancellation of agreement by Commissioner

16CB.—(1) Where an agreement has been entered into under section 16CA, the Commissioner may on the application of either party to the agreement cancel the agreement if he is satisfied that— Q1/16CB

(a) the sum paid or to be paid was or is not in accordance with the provisions of this Ordinance; or

(b) the agreement was entered into in ignorance of, or under a mistake as to, the true nature or extent of the injury; or

(c) the agreement was obtained by such fraud, undue influence, misrepresentation or other improper means as would, in law, be sufficient ground for avoiding it.

(2) An application under subsection (1) shall be made within 6 months after the date on which the parties entered into the agreement or within such further time as the Commissioner in the circumstances of any particular case thinks fit.

(3) Where the Commissioner cancels the agreement under subsection (1), he shall make an assessment under section 16A of the compensation payable under section 10 and the provisions in this Ordinance affecting such assessment shall apply accordingly.

(Added 64 of 1992 s.4)

Section 16CB—However, s.16CB provides for the agreement to be cancelled by the Commissioner on application by either party, made within six months or such further time as the Commissioner thinks fit. The grounds for cancellation are set out in s.16CB(1)(a), (b) and (c). On cancellation the Commissioner shall make an assessment under s.16A of the compensation payable under s.10. Q1/16CB/1

No right of appeal—By omission from s.18(1), there is no right of appeal against a decision made under s.16CB. Q1/16CB/2

Employees' Compensation (Ordinary Assessment) Boards

Q1/16D **16D.**—(1) The Commissioner shall for the purposes of this section appoint one or more boards to be known as Employees' Compensation (Ordinary Assessment) Boards.

(2) An Ordinary Assessment Board shall consist of—

(a) 2 persons each of whom shall be a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; and (Amended 16 of 2006 s. 17)

(b) a Senior Labour Officer or a Labour Officer. *(Amended 31 of 1985 s.5)*

(3) A member of an Ordinary Assessment Board shall hold office on such terms and for such period as the Commissioner may determine.

(4) The Commissioner may refer to an Ordinary Assessment Board any claim for compensation for an injury to an employee of which he has notice if in the opinion of the Commissioner such injury is likely to result in permanent total or partial incapacity.

(5) In respect of a claim referred to it under subsection (4), an Ordinary Assessment Board shall—

(a) subject to subsection (6), assess the percentage of the loss of earning capacity permanently caused by the injury in accordance with this Ordinance; and

(b) assess the period of absence from duty necessary as a result of the injury. *(Replaced 63 of 1992 s.8)*

(6) Where it appears to an Ordinary Assessment Board that a claim referred to it under subsection (4) is one to which section 9(1A) applies, it shall refer the claim to a Special Assessment Board.

(7) A decision of an Ordinary Assessment Board, if not unanimous, shall be that of the majority of the members thereof.

(8) Subject to this section, the procedure of an Ordinary Assessment Board shall be such as the Commissioner may determine.

(Added 76 of 1982 s.14)

Q1/16D/1 **For accidents happened on or after September 1, 2008**—The composition of the Employees' Compensation (Ordinary) Assessment board changes to include also registered Chinese medicine practitioner. It remains to be seen how different medical theories can be reconciled in the medical assessment of an employee's injury when both a registered medical practitioner and a registered Chinese medicine practitioner are appointed at the same time. No guideline has been issued by the Commissioner of Labour yet. The new s.16D(2)(a) reads as follows:

(2) An Ordinary Assessment Board shall consist of—

(a) 2 persons each of whom shall be a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; and *(Amended 16 of 2006 s.17)*

(b) a Senior Labour Officer or a Labour Officer. *(Amended 31 of 1985 s.5)*

Employees' Compensation (Special Assessment) Boards

Q1/16E **16E.**—(1) The Commissioner shall for the purposes of this section appoint one or more boards to be known as Employees' Compensation (Special Assessment) Boards.

(2) Subject to subsection (4), a Special Assessment Board shall consist of—

(a) one of the following, that is to say—

(i) the Occupational Health Consultant; or

(ii) a Senior Occupational Health Officer; or

(iii) an Occupational Health Officer;

(b) a Senior Labour Officer; and

(c) a Labour Officer who is a member of an Ordinary Assessment Board appointed under section 16D(2).

(3) A member of a Special Assessment Board referred to in subsection (2) shall hold office on such terms and for such period as the Commissioner may determine.

(4) The Commissioner may appoint as additional members of a Special Assessment Board not more than 2 persons who are, in his opinion, qualified to give expert advice on any matter relating to a claim for compensation referred to the Special Assessment Board, and may at any time revoke any such appointment.

(5) A member appointed under subsection (4) may at any time resign by giving notice in writing to the Commissioner.

(6) The Commissioner shall appoint a member of a Special Assessment Board to be the chairman of the Special Assessment Board.

(7) At all meetings of a Special Assessment Board 3 members shall form a quorum.

(8) In respect of a claim referred to it by an Ordinary Assessment Board under section 16D(6), a Special Assessment Board shall, subject to subsection (9), assess the percentage of the loss of earning capacity permanently caused by the injury in accordance with this Ordinance.

(9) Where it appears to a Special Assessment Board that a claim referred to it by an Ordinary Assessment Board under section 16D(6) is a claim to which section 9(1A) applies, the Special Assessment Board shall assess the percentage of the loss of earning capacity permanently caused by the injury for the purposes of section 9(1A).

(10) A decision of a Special Assessment Board shall be that of the majority of the members in attendance or, if there is no majority, shall be that of the chairman thereof.

(11) Subject to this section, the procedure of a Special Assessment Board shall be such as the Commissioner may determine.

(Added 76 of 1982 s.14)

Certificates of assessment

16F. An Ordinary Assessment Board, where it has made an assessment under section 16D(5) or a Special Assessment Board, where it has made an assessment under section 16E(8) or (9), shall issue to the employee, the employer and the Commissioner a certificate in such form as may be specified by the Commissioner giving details of the assessment. **Q1/16F**

(Added 76 of 1982 s.14)

Review of assessments

16G.—(1) An objection to an assessment by an Ordinary Assessment Board under section 16D(5) or by a Special Assessment Board under section 16E(8) or (9) may be made by the employer or the employee in writing to the Commissioner within 14 days after the date of issue to him of the relevant certificate under section 16F, or within a further time that the Commissioner, in the circumstances of any particular case, thinks fit, stating the ground of the objection, and a copy of the objection shall be sent by the objector— **Q1/16G**

(a) where the objector is the employer, to the employee; and

(b) where the objector is the employee, to the employer. *(Replaced 59 of 1988 s.5)*

(1A) On receipt by the Commissioner of an objection under subsection (1)—

(a) the Commissioner shall forward a copy of the objection to the Ordinary Assessment Board or the Special Assessment Board, as the case may be; and

(b) all issued certificates and proceedings in progress under or pursuant to section 16A are void. *(Added 59 of 1988 s.5)*

(2) On receipt of a copy of the objection forwarded under subsection (1A) or under section 16A(4)(a), the Ordinary Assessment Board or the Special Assessment Board, as the case may be, shall review its assessment and, after taking into account the objection, may confirm or vary the assessment. *(Amended 59 of 1988 s.5)*

(3) Upon completing a review under subsection (2) the Ordinary Assessment Board or the Special Assessment Board, as the case may be, shall issue to the employee, the employer and the Commissioner a certificate in such form as may be specified by the Commissioner stating—

(a) that the original assessment is confirmed and giving details thereof; or

(b) details of the assessment as varied.

(4) Upon the issue of a certificate under subsection (3), the certificate referred to in subsection (1) shall be cancelled.

(5) Notwithstanding anything in subsection (2), (3) or (4), where upon a review of an assessment by an Ordinary Assessment Board under subsection (2), it appears to the Ordinary Assessment Board that the claim for compensation to which the assessment relates is one to which section 9(1A) applies, it shall not complete the review but shall refer the claim to a Special Assessment Board.

(6) The provisions of sections 16E, 16F and this section shall apply to a claim referred to a Special Assessment Board under subsection (5) as if it were a claim referred to a Special Assessment Board under section 16D(6).

(7) Upon the issue by the Special Assessment Board of a certificate under section 16F in respect of a claim referred to it under subsection (5), the certificate issued under section 16F in respect of that claim by the Ordinary Assessment Board shall be cancelled.

(8) Subsections (2), (3), (4), (5), (6) and (7) shall not apply where an assessment is reviewed under section 16GA(2). *(Added 31 of 1985 s.6)*

(Added 76 of 1982 s.14)

Q1/16G/1 **Principal contractor also entitled to object**—A principal contractor may also file an objection under section 16G of the Ordinance if compensation is being claimed against him or her: *Chan Sik Pan v. Wylam's Service Ltd* (unrep., CACV 17/2003 and 66/2003, [2004] H.K.E.C. 1282). Section 24 provides that where compensation is being claimed from a principal contractor then in the application of the Ordinance, references to the principal contractor shall be substituted for references to the employer. When applying section 16G, therefore, the reference to the "employer" should be read as if it had been substituted by "the principal contractor". A principal contractor who files an objection under section 16G is not, therefore, estopped from denying that he or she is an employer: *Chan Sik Pan v. Wylam's Service Ltd* (unrep., CACV 17/2003 and 66/2003, [2004] H.K.E.C. 1282).

Review of assessments other than under section 16G

Q1/16GA **16GA.**—(1) Without prejudice to section 16G, an Ordinary Assessment Board or a Special Assessment Board may, on its own initiative, review its assessment under section 16D(5) or section 16E(8) or (9), as the case may be, within 3 months after the date of issue of a certificate under section 16F, or within such further time as the Ordinary Assessment Board or the Special Assessment Board, in the circumstances of any particular case, thinks fit, if the assessment—

(a) was made in ignorance of, or under a mistake as to, the true nature or the extent of the injury; or *(Amended 60 of 1986 s.3)*

(b) was based upon any false or misleading information or statement given or made,

and may confirm or vary the assessment.

(2) An Ordinary Assessment Board or a Special Assessment Board may review its assessment under subsection (1) and at the same time take into account any objection under section 16G(1).

(3) Before proceeding with a review under subsection (1), the Ordinary Assessment Board or the Special Assessment Board, as the case may be, shall notify the employer, the employee and the Commissioner in writing of the review and the ground of the review specified in subsection (1), and (where applicable) that an objection under section 16G(1) is being taken into account.

(4) Upon completing a review under subsection (1) or (2), the Ordinary Assessment Board or the Special Assessment Board, as the case may be, shall issue to the employer, the employee and the Commissioner a certificate in such form as may be specified by the Commissioner stating—

(a) that the original assessment is confirmed and giving details thereof; or

(b) details of the assessment as varied.

(5) Upon the issue of a certificate under subsection (4), the certificate referred to in subsection (1) shall be cancelled.

(6) Notwithstanding anything in subsection (1), (2), (4) or (5), where upon a review of an assessment by an Ordinary Assessment Board under subsection (1) or (2), it appears to the Ordinary Assessment Board that the claim for compensation to which the assessment relates is one to which section 9(1A) applies, it shall not complete the review but shall refer the claim to a Special Assessment Board.

(7) The provisions of sections 16E and 16F and of this section shall apply to a claim referred to a Special Assessment Board under subsection (6) of this section as if it were a claim referred to a Special Assessment Board under section 16D(6).

(8) Upon the issue by the Special Assessment Board of a certificate under section 16F in respect of a claim referred to it under subsection (6) of this section, the certificate issued under section 16F in respect of the claim by the Ordinary Assessment Board shall be cancelled.

(Added 31 of 1985 s.7)

Certificates as evidence

16H. A certificate purporting to be issued— **Q1/16H**

(a) under section 16F, other than a certificate cancelled under section 16G(4) or (7) or section 16GA(5) or (8); or

(b) under section 16G(3) or section 16GA(4), *(Amended 31 of 1985 s.8)*

and to be signed by or for an Ordinary Assessment Board or a Special assessment Board, as the case may be, shall be admitted in evidence without further proof on its production in any court and—

(i) until the contrary is proved, it shall be presumed that the certificate is so issued and signed; and

(ii) shall be evidence of the matters stated therein.

(Added 76 of 1982 s.14)

Attendance of employee for purposes of assessment, etc.

16I.—(1) The Commissioner, an Ordinary Assessment Board or a Special Assessment Board may by notice in writing to an injured employee require the employee to attend for the purposes of an examination or assessment on such date and at such time and place as is specified in the notice. **Q1/16I**

(2) An employee who receives a notice under subsection (1) shall as soon as possible notify his employer (if any) of the date, time and place for such attendance.

(3) For the purposes of an attendance referred to in subsection (1) an employer shall, if the employee is not already—

(a) on leave of absence from work; and

(b) receiving periodical payments under section 10,

grant to the employee leave of absence from work and, subject to subsection (4), shall pay to the employee, within 7 days after the day on which wages are normally paid to the employee next following such absence from work, the wages or salary in respect of such absence from work or the wages or salary he would have earned if he had worked during such period.

(4) No wages or salary shall be payable under subsection (3) by an employer unless he was the employer of the employee at the time of the accident.

(5) A claim for wages or salary payable under subsection (3) may be brought—

(a) as an action for civil debt in any court or tribunal of competent jurisdiction; or

(b) as a claim for compensation in the Court, either independently of or in conjunction with any other claim for compensation brought in the Court.

(6) Any employer who without reasonable excuse contravenes subsection (3) commits an offence and is liable to a fine at level 5. *(Amended 63 of 1992 s.9; 36 of 1996 s.12)*

(Added 76 of 1982 s.14)

Q1/17 **17.** *(Repealed 36 of 1996 s.13)*

Q1/17A **17A.** *(Repealed 36 of 1996 s.14)*

Q1/17B **17B.** *(Repealed 36 of 1996 s.15)*

Appeals to the Court

Q1/18 **18.**—(1) Subject to this section, an appeal shall lie to the District Court from any decision or assessment of the Commissioner, an Ordinary Assessment Board or a Special Assessment Board under section 16A, 16D, 16E, 16G or 16GA. *(Amended 31 of 1985 s.10)*

(2) No appeal shall lie after the expiry of 6 months from the date of the decision or, in the case of an assessment, of the date of issue of the relevant certificate under section 16A, 16F, 16G or 16GA, as the case may be: *(Amended 31 of 1985 s.10; 59 of 1988 s.8)*

Provided that the Court may, if it thinks fit, extend the time within which to appeal under this section notwithstanding that the time has elapsed.

(3) On an appeal under this section, the Court may confirm or reverse any decision, or confirm or vary any assessment, of the Commissioner, an Ordinary Assessment Board or a Special Assessment Board, or may substitute its own assessment, and may determine the amount of compensation payable and may make such order in respect thereof, including any order as to costs, as it thinks fit.

(Replaced 76 of 1982 s.16)

Q1/18/1 **General**—The regimes under s.18 (appeals to the District Court) and s.18A (determination of claims by the District Court) are markedly different. The proceedings for an appeal to the District Court under s.18 are in the nature of an appeal to the court notwithstanding that they are made in the form of an originating application, the form prescribed for which includes a claim for compensation. It is not an original application to the court, made under s.18A(2), for the determination of his claim by the court in the first instance, which would on the facts have been an application made, by reasons of the time-limit prescribed by s.14, out of time (*Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49).

Section 18 does involve the District Court starting afresh, notwithstanding the fact that it is hearing an appeal. The boards are acting on their own knowledge: they hear no evidence; they keep no record; they give no reasons; they provide no material which explains the basis of their approach; they only produce a result. It is not necessary for the applicant to file grounds of appeal in a s.18 appeal (*Chan Kit v. Sum Wo Industrial Manufactory* [1989] 2 H.K.L.R. 230,

approved by Bokhary J.A. in *Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49 and by the Court of Appeal in *Tsang Kwong Tong v. Tennille Decoration & Design Ltd* (unrep., CACV 42/2006, [2006] H.K.E.C. 1880).

Scope of s.18—Appeals may be brought against decisions or assessments of the Commissioner, the Ordinary Assessment Board or the Special Assessment Board under s.16A (determination of claims in respect of minor injuries), s.16D (assessments by the Ordinary Assessment Board), s.16E (assessments by the Special Assessment Board), s.16G (review of assessments) or s.16GA (review of assessments other than under s.16G). **Q1/18/2**

Where an assessment made by either the Ordinary Assessment Board or the Special Assessment Board is disputed, it should be challenged by way of appeal under s.18. This is to be contrasted with cases where liability is disputed, when the appropriate course is for an employee to lodge a claim for compensation with the District Court under s.18A of the Ordinance, albeit that in such proceedings an assessment made can also be challenged by adding an appeal or an application to appeal out of time against the assessment. Similarly, in proceedings brought under s.18A, if the employer is dissatisfied with the assessment, he can add an appeal or an application to appeal out of time in his answer. However, where no appeal is made under s.18 or added to proceedings under s.18A, the assessment made by the Board is binding on the parties and the court. This is so notwithstanding the fact that s.16H provides only that a certificate issued and signed by a board shall be evidence of the matters stated therein. The plain intent of the legislation is that absent an appeal, the assessments made by the boards are to be final unless appealed within the prescribed time-limit (*Ng Ming Cheong v. Mass Transit Railway Corp*. [1997] H.K.L.R.D. 1231, following dicta in *Wong Sing Fung v. Fu Ming Stainless Engineering Co. Ltd* (unrep., CACV 76/1986, [1986] H.K.E.C. 114), CA, and *Chan Kit v. Sum Wo Industrial Manufactory* [1989] 2 H.K.L.R. 230).

Where there are separate proceedings pursuant to s.18 and s.18A respectively, there does not appear to be any reason why the proceedings cannot conveniently be consolidated and heard together without practical difficulty (*Ng Ming Cheong v. Mass Transit Railway Corp*. (above)).

Further, where the notice of application includes an appeal against an original assessment, but by oversight does not include an appeal against the decision made a review of the assessment, the court will normally have no hesitation in giving leave to amend the notice of application (so as to include an appeal against the review) even at the substantive hearing of the application, and absent a formal application can treat the appeal mentioned in the notice of application as being an appeal against the review (*Lai Yuen Hing v. Lo Chi Hung* (unrep., DCEC 14/2000, [2001] H.K.E.C. 1562), K. Lin D.D.C.J.

Time-limits for appeals—The time-limit for commencing appeal proceedings is six months (s.18(2). In *Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49 the Court of Appeal held, in respect of an appeal against an assessment under s.16A, that the provisions in s.16A only have relevance, if at all, for the purposes of s.18A, to determine whether the original claim was made within time, *i.e.* whether the claim for compensation was made within 24 months of the date of the accident causing the injury. So far as the appeal itself is concerned, the time limit is six months from the date of assessment or review of assessment as provided for by s.18(2). On the facts, s.18(2) was complied with because the appeal was made within six months of the date of the assessment on review pursuant to s.16GA. *Mutatis mutandis*, the decision applies to appeals under ss.16D, 16E, 16G and 16GA. See also *Li Wan Kei v. Hyundai Engineering & Construction Co. Ltd* (unrep., DCEC 1425/2004, [2005] H.K.E.C. 1988), C.B. Chan D.C.J. **Q1/18/3**

The time-limit of six months may be extended by the court if it thinks fit (s.18(2)): *Gurung Umesh v. W Ho Civil Engineering & Construction Co. Ltd* (unrep., DCEC 1040/2000, [2002] H.K.E.C. 590). Where an s.18A application is already before the court, the question of an appeal out of time against a certificate of review may, subject to all of the other circumstances of the case, be considered more generously than under the stricter requirements of an s.14(4) application for extension of time: *Kwok Yau Tai v. Tung Wah Group of Hospitals* (unrep., DCEC 44/2000, [2002] H.K.E.C. 591), Carlson D.C.J. Generally, as to the question of whether to grant leave to appeal out of time, the court should determine whether the overall justice of the case justifies an extension of time to appeal, in the light of all the circumstances of the case including the length of delay, the reason for the delay, the prejudice to the other party if the extension is granted and the merits of the appeal: *Chung Sau Ling v. Million Join Ltd* [2003] 4 H.K.C. 561, overruling (*Yung King v. Ka Ming Hop Yick Engineering Co.* (unrep., DCEC 655/2000, September 10, 2002, K. Lin D.C.C.J.). See also *Limbu Netrakumar v. Yau Lee Construction Co. Ltd* (unrep., DCEC 710/2000, [2006] H.K.E.C. 2194), D.J. Li (lengthy delay—over two and a half years) but the applicant was not responsible for the delay; it appeared to have been oversight by the applicant's former Legal Aid assigned solicitors. Further, the applicant had clearly instructed solicitors to get on with an appeal, the appeal appeared to have a strong prospects of success, and there was no indication of any real prejudice to the respondents by a grant of an extension of time. Contrast *Chong Hon Sing v. Gammon Skanska Ltd* (unrep., DCEC 342/2004, [2006] H.K.E.C. 1849), D.J. E. Yip, in which there was a similarly lengthy delay of two and a half years but no reasonable excuse for the delay, no obviously strong merits in the appeal and, further, the respondent appeared to have been prejudiced because the delay meant that it would be

extremely difficult to assess whether the appellant's medical condition had changed or not in the intervening period. Contrast also *Limbu Prem Parkash v. Ng Yuk Man* (unrep., DCEC 51/2008, [2008] H.K.E.C 841), S. Leung, May 19, 2008.

The correct process is to apply to the Court for an extension of time within which to appeal pursuant to s.18(2). In *Lau Sek Yu v. Citybus Ltd* (unrep., DCEC 1031/2002, [2004] H.K.E.C. 1318), the Court dismissed an application to appeal out of time on the basis that an extension of time had not yet been sought and obtained from the Court. Only once the extension of time to appeal has been granted, should the appeal itself be lodged. A delay of over a year was held to be too long and the explanation that the applicant was ignorant of the law and of limited education held to be incredible in light of the fact that the applicant could read the Chinese text of the Important Note, which set out the applicable time limits.

In *Limbu Perm Parkash v. Ng Yuk Man* (unrep., DCEC 51/2008, [2008] H.K.E.C 841), the application for leave to appeal against the Certificate of Review of Assessment was three months out of time. The Court followed the approach in *Chung Sau Ling* to hold that the merit of the appeal would be a relevant factor in the exercise of discretion for leave to appeal out of time. The Court was not informed of the basis on which the Applicant disagreed with Form 9, and there was no medical record or expert evidence in support of the merits of the intended appeal. There was no evidence of any language barrier or difficulty to understand the assessment procedure. There was no explanation by the Applicant as to why he failed to inform his solicitors of such assessment and the existence of the certificate. Though the delay was relatively short and there ought not to be substantive prejudice to the Respondent, the Court refused to grant leave.

By contrast, in *Hui Ching Moon v. Double Security Ltd* (unrep., DCEC 1530/2006, [2008] H.K.E.C. 1748), the learned deputy district judge Frederick Chan disagreed with the rulings in *Lau Sek Yu David* and refused to follow the approach. The learned judge ruled that the approach in *Lau Sek Yu David* might be viewed as mechanical, literal and too much focus was placed on the wordings of s.18 of the Ordinance. The learned judge ruled that the modern judicial approach on s.18 of the Ordinance was a holistic one and in exercising the undoubted discretion therein to take into account the fact that the Application used the phrase "appeal out of time" together with all other circumstances of the case, and the Respondent was not misled by the short-hand expression of "appeal out of time". The Applicant was acting in person and he had filed no affirmation to explain the delay. The learned judge ruled that the filing of affirmation evidence was generally expected but was only a matter of practice and might be departed in appropriate circumstances of the case, and the documents before him showed the steps taken by the Applicant. The learned judge also considered that the Applicant's case under s.9 could be resolved at the end of a full-blown trial.

Q1/18/4 **Powers of the District Court under s.18**—The jurisdiction of the District Court in a s.18 appeal is very wide. It includes determining the amount of compensation payable and making such order in respect thereof, including any order as to costs, as it thinks fit. Costs will normally follow an event. Where an applicant commences proceedings against a number of respondents, but only one or some, but not all, of the respondent are proven at trial to be liable as the applicant's employer or employers, a question will arise as to the liability for costs as between the applicant and the respondent or respondents against whom the applicant does not succeed. In such circumstances it is not necessarily the case that the applicant will not obtain a costs order against all respondents. For example, if the question of which respondent was the employer is uncertain at the time the proceedings were commenced, and cannot be satisfactorily resolved without a trial, or at least before the limitation period expires, and particularly if the uncertainty as to who is the employer is caused primarily by the respondents, the court may in the exercise of its discretion order the respondents in question to bear the applicant's cost of the proceedings, notwithstanding the fact that at trial the respondents are not found to be liable: *Hussain v. Leung Yung Shing* (unrep., DCEC 688/2003, [2006] H.K.E.C. 20, C.B. Chan D.C.J.). The District Court has procedural power, as an inherent feature of its jurisdiction under s.18, to allow an appeal to be brought before it under that section in any way which, as a matter of substance, duly invokes such jurisdiction. "Duly" means plainly and with proper service on the other side (*Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49). An appellant seeking an extension of time to appeal must explain the reason for the delay, particularly where it is substantial. In order to enable the court to decide how it should exercise its discretion, it has to consider the overall justice of the case and in order for that it must be provided with details of all relevant factors including the length of delay, the reasons for it, the merits of the appeal and the prejudice to the other party or parties if the extension is granted. The court will not go into detailed arguments in respect of these various factors but, as a starting point, the party applying for the extension of time must present these matters for the court's consideration. See *Chung Sau Ling v. Million Join Ltd* [2003] 4 H.K.C. 561, CA.

Q1/18/5 **Relationship between ss.16B and 18**—See paras Q1/16B/1 *et seq*.

Q1/18/6 **Form of appeal**—No form is provided for by the Employees' Compensation (Rules of Court) Rules for the initiation of an appeal under s.18. The Court of Appeal has observed that it may be that the forms are unhappily worded, and has recommended that a separate form should be provided for an appeal to the District Court under s.18, as distinct from those provided for an

application to the court under s.18A (*Chung Lung Shun v. Adams Parking (International) Ltd* [1996] 1 H.K.L.R. 49). Although no form is prescribed for initiating an appeal under s.18, the applicant must notify the court and inform the other parties about the appeal in clear, certain and unambiguous terms. The court or other parties should not be left to guess as to whether or not an appeal has in fact been launched. The document initiating the appeal should make it clear that the assessment in dispute is being challenged by way of appeal under s.18, either in isolation or by way of an additional application included in proceedings brought under s.18A: *Lam Pui Yi v. Secretary for Justice* (unrep., DCEC 844/2001, [2005] H.K.E.C. 1290), M. Ng D.C.J., applying the judgment of Le Pichon J.A. in *Ng Ming Cheong v. Mass Transit Railway Co.* [1997] H.K.L.R.D. 1231.

In *Lam Pui Yi*, *supra*, the Court commented that it was common for practitioners to add the following prayer of relief in s.18A applications or in the answers an appeal against the Certificate of Assessment and/or Certificate of Review of Assessment "if necessary", "if any", "if so advised" and/or "if appropriate". Such boilerplate prayer of relief for it serves no useful purpose, since it does not tell the court or the other party whether there is an appeal or not and as such it does not plainly or duly invoke the court's jurisdiction under s.18. If it is made before the relevant Certificate(s) come into existence, it is invalid and has no meaning. Such type of boilerplate prayer is liable to be struck out accordingly.

For accidents happened on or after September 1, 2008—Section 19(1) and 19(3) are amended as follows: **Q1/18/7**

(1) Any periodical payment payable under this Ordinance either under agreement between the parties or under an order of the Court, may be reviewed by the Court on the application either of the employer or of the employee:

(2) Provided that where the application for review is based on a change in the condition of the employee any such application shall be supported by a certificate of a registered medical practitioner, registered Chinese medicine practitioner or registered dentist. *(Amended 16 of 2006 s.18)*

(3) Where application is made by an employer under this section for any periodical payment to be ended or diminished and the application is supported by the certificate of a registered medical practitioner, registered Chinese medicine practitioner or registered dentist, the employer may pay into Court the periodical payment, or so much thereof as is equal to the amount by which he contends that the periodical payment should be diminished, to abide the decision of the Court made on a review under this section. *(Amended 16 of 2006 s.18)*

Determination of claims by the Court

18A.—(1) Except where otherwise provided under this Ordinance, all claims for compensation, except to the extent that such claims are determined— **Q1/18A**

(a) by agreement under section 8; or *(Replaced 1 of 1995 s.10)*

(aa) *(Repealed 1 of 1995 s.10)*

(ab) by a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case; or *(Added 52 of 2000 s.12)*

(ac) by a Certificate for Funeral and Medical Attendance Expenses or Review Certificate for Funeral and Medical Attendance Expenses; or *(Added 52 of 2000 s.12)*

(b) by certificate under section 16A; or *(Replaced 1 of 1995 s.10)*

(c) by agreement under section 16CA; or *(Added 1 of 1995 s.10)*

(d) *(Repealed 36 of 1996 s.16)*

and any matter arising out of proceedings in respect of such claims shall be determined by the District Court, whatever may be the amount involved, and the Court may, for that purpose, call upon any person to give evidence, if the Court is of the opinion that such person is, by virtue of his expert knowledge, able to assist the Court.

(2) An employee may, in the prescribed form and manner, make an application for enforcing his claim for compensation to the Court:

Provided that no application shall be made—

(a) in the case of a claim in respect of an injury to which section 16A applies, until after the expiry of the payment period within the meaning of subsection (11) of that section; and *(Amended 31 of 1985 s.11)*

(b) *(Repealed 36 of 1996 s.16)*

(3) The Court shall, as soon as practicable after it receives a claim for compensation where death results from the injury concerned, cause to be sent to the Commissioner a notice advising the Commissioner of the receipt of that claim. *(Added 52 of 2000 s.12)*

(Added 76 of 1982 s.16)

Q1/18A/1 **General**—Section 18A provides that, save where otherwise provided for by the Ordinance, or s.18A itself, the District Court will have primary and exclusive jurisdiction to determine all claims for compensation under the Ordinance. The exceptions have been identified in the notes to s.5 above—see paras Q1/5/5 and Q1/5/6. In *Paquito Lima Buton v. Rainbow Joy Shipping Ltd Inc*. (unrep., CACV 243/2006, [2006] H.K.E.C. 322), the Court of Appeal held that s.18A (when read together with s.21) serves to give the District Court exclusive jurisdiction within Hong Kong court system (*i.e.* to the exclusion of other courts) to deal with claims for statutory compensation under the Ordinance, except as provided for by s.18A itself, *i.e.* except for the jurisdiction of the Small Claims Tribunal under s.10(11). However, the fact that the District Court has almost exclusive jurisdiction within the court system to hear compensation claims under the Ordinance, does not preclude parties, an employee and an employer, from agreeing that a claim will be determined by an arbitral process. Any arbitration agreement must however also comply with s.31 of the Ordinance (see para.Q1/31/1 below).

The Commissioner and the assessment boards do not, even where they have power to deal with matters, have exclusive jurisdiction over those matters, unless the Ordinance provides. Thus, rather than seek determinations of claims by the Commissioner under s.6B (claims for compensation in fatal cases), s.6C (claims for interim payments in fatal cases), s.6E (claim in respect of funeral and medical attendance expenses), s.8 (attendance costs), s.10B (medical expenses) and s.16A (claims under ss.7, 9 and 10 in respect of minor injuries), the employee may apply to the court under s.18A.

Q1/18A/2 **Relationship between s.18 and s.18A**—See para.Q1/18/2.

Q1/18A/3 **No financial limits to the jurisdiction of the District Court**—Section 18A(1) provides that the District Court shall have jurisdiction to determine claims for compensation and any matter arising out of proceedings in respect of such claims whatever may be the amount involved. Thus, even where the amount claimed exceeds the District Court's usual financial limit, the District Court, and not the High Court, shall have jurisdiction to determine the claim. See *Li Kwok Shing v. Law Ka Fu* (unrep., CACV 212/2002, [2003] H.K.E.C. 763).

Q1/18A/4 **Time-limit**—The general time-limit for bringing claims under s.18A is the 24-month time period prescribed by s.14(1), subject to the jurisdiction of the court under s.14(4) to permit an application to be made and determined outside that period. See para.Q1/14/14.

Q1/18A/5 **Form of application**—Under r.16 of the Rules of Court the application must be in one of Forms 1, 2 and 3, as appropriate.

Q1/18A/6 **Any matter arising out of proceedings in respect of such claims**—In this respect, and specifically in respect of the question of taxation of costs of employees' compensation proceedings, the ambit of s.18A is affected by s.21, which provides that the law, rules and procedure of the District Court are to apply to the enforcement of judgments and orders of a compensation claim. Taxation of costs pertains to the enforcement of judgments and orders. Accordingly, the jurisdiction exercised in that regard is that of the District Court and not the exclusive jurisdiction conferred on it by the Ordinance. Thus, an order of the District Court, transferring the taxation of employee compensation proceedings to the High Court is made pursuant to s.42 of the District Court Ordinance, and orders in the subsequent taxation proceedings in the High Court by masters are to be appealed to to a judge in chambers under HCR 0.58, and not to the Court of Appeal: *Tsang Kar Lee v. Rich Long Transportation Ltd* (unrep., CACV 73/2003, [2003] H.K.E.C. 1294), CA.

Review

Q1/19 **19.**—(1) Any periodical payment payable under this Ordinance either under agreement between the parties or under an order of the Court, may be reviewed by the Court on the application either of the employer or of the employee:

Provided that where the application for review is based on a change in the condition of the employee any such application shall be supported by a certificate of a medical practitioner.

(2) Subject to the provisions of this Ordinance, any periodical payment may, on review under this section, be continued, increased, diminished, converted to a lump sum, or ended. If the accident is found to have resulted in permanent incapacity, the provisions of section 7 or 9 shall apply, as the case may be. *(Replaced 55 of 1969 s.16)*

(3) Where application is made by an employer under this section for any periodical payment to be ended or diminished and the application is supported by the certificate of a medical practitioner, the employer may pay into Court the periodical payment, or so much thereof as is equal to the amount by which he contends that the periodical payment should be diminished, to abide the decision of the Court made on a review under this section.

(4) In making a review under this section, the Court shall have regard only to the capacity for work of the employee as affected by the accident.

(Amended 44 of 1980 s.15)

Scope of s.19—Section 19 applies to any periodical payment payable under the Ordinance, either under agreement or under an order of the court. Any such payment may be reviewed by the court on the application of the employer or the employee. It appears that the court will only alter the periodical payments if there has been a material change in the capacity for work of the employee as affected by the accident. This appears to be the consequence of s.19(4) which provides that the court shall have regard under s.19 only to the capacity for work of the employee. **Q1/19/1**

Power of the court—The court can continue, increase, diminish, convert to a lump sum or end any periodical payment (s.19(2)). **Q1/19/2**

Where on a review the court determines that the accident has resulted in permanent incapacity, the court must apply the provisions of ss.7 and 9 accordingly (s.19(2)).

Procedure—The application can be made at any time. Any application would only serve any purpose if made at a point in time where future periodical payments are liable to be made. Rule 28 of the Rules of Court provides that an application under s.19 shall be in Form 8 in the Schedule to the Rules of Court. Where the application is based on a change in condition of the employee, as in practice most applications will be under s.19, the application must be supported by a certificate of a medical practitioner (the proviso to s.19(1)). Where the application is supported by such a certificate and made by an employer, the employer may pay into court the periodical payment, or the difference between the payment and the lesser sum which he contends should be paid. The Court will then deal with that sum accordingly when it makes its determination on the hearing of the employer's application for a review (s.19(3)). The assumption underlying s.19(3) appears to be that the application by the employer is likely to succeed if it is supported by a medical certificate. However, there is no corresponding provision addressing the position where an employee is making an application for an upwards review and the application is supported by a medical certificate. **Q1/19/3**

Limitation of power of employer to end or decrease periodical payments

20. Subject to the provisions of sections 10(5), 16(4) and 19(3), an employer shall not be entitled, otherwise than in pursuance of an order of the Court or a certificate under section 16A— *(Amended 55 of 1969 s.17; 76 of 1982 s.17; 1 of 1995 s.11; 36 of 1996 s.17)* **Q1/20**

(a) to end periodical payments except—

(i) where an employee resumes work and his earnings are not less than the earnings which he was obtaining before the accident; or

(ii) where an employee dies;

(b) to diminish periodical payments except—

(i) where an employee in receipt of periodical payments in respect of total incapacity has actually returned to work; or

(ii) where the earnings of an employee in receipt of periodical payments in respect of partial incapacity have actually been increased.

(Amended 44 of 1980 s.15)

Q1/20/1 **Scope**—Section 20 applies to, and must be complied with in respect of any cessation or diminution of, payments made voluntarily to an employee by an employer in respect of employees' compensation (see *Western Australian Coastal Shipping Commission v. Wallner* (1980) 144 C.L.R. 110 and the English and Australian decisions cited by it).

Jurisdiction of the Court

Q1/21 **21.**—(1) Save as is provided in this Ordinance and any rules made thereunder, the District Court shall, upon or in connection with any question to be investigated or determined thereunder, have all the powers and jurisdictions exercisable by the District Court in or in connection with civil actions in such Court in like manner as if the Court had by the District Court Ordinance (Cap. 336) been empowered to determine all claims for compensation under this Ordinance whatever the amount involved and the law, rules and practice relating to such civil actions and to the enforcement of judgments and orders of the Court shall mutatis mutandis apply. *(Amended 76 of 1982 s.18)*

(2) The Court shall have jurisdiction to hear and determine any action notwithstanding that the amount claimed exceeds the sum mentioned in section 33 of the District Court Ordinance (Cap. 336). *(Added 55 of 1969 s.18. Amended 79 of 1981 s.3)*

(3) The Court may, in any proceedings brought in the Court for the recovery of any compensation, order that there shall be included in the sum for which an order for payment is made interest at such rate as it thinks fit on the whole or any part of such sum for the whole or any part of the period between the date of the accident and the date of the order. *(Added 76 of 1982 s.18)*

Q1/21/1 **General**—Section 21 serves three purposes: first, to provide for the power, jurisdiction and procedure of the District Court in respect of Employees Compensation Ordinance proceedings in the District Court (s.21(1)); secondly, to confirm that the District Court has jurisdiction to hear Employees Compensation Ordinance proceedings even though the amount claimed exceeds the financial jurisdictional limit provided for by s.33 of the District Court Ordinance (Cap. 336) (s.21(2)); and thirdly, to expressly provide that the District Court has the power to include in any award made under the Employees Compensation Ordinance an award of such interest as it thinks fit (s.21(3)).

Q1/21/2 **Section 21(1)**—This provides that, subject to the provisions of the Ordinance, and any rules of procedure made under the Ordinance (as to which, the power to make rules of court is vested in the Chief Justice by s.50), the District Court shall have all the powers and jurisdictions that it has under the District Court Ordinance in respect of civil claims. In so far as the provisions of the Ordinance and the Rules of Court made under s.50 do not provide to the contrary, the law, rules and practice applicable to ordinary civil claims brought in the District Court shall also apply to proceedings in the District Court under the Ordinance. The Chief Justice has made rules of court under s.50 and these are called the Employees Compensation (Rules of Court) Rules (see paras K2/1 *et seq.*). The Rules were originally made immediately following the original enactment of the Ordinance. They have been subsequently amended, most recently in 2000.

Under s.72 of the District Court Ordinance (Cap. 336) the Rules Committee has made rules. New rules were gazetted in May 2000 and brought into effect as of September 1, 2000, which repealed and substituted *in toto* the previous rules and procedures of the District Court. The new rules follow very closely, indeed in large part replicate, the Rules of the High Court. The new rules are to be read in conjunction with *Practice Direction 27*, issued at the same time as the introduction of the new rules.

In *Li Kwok Shing v. Law Ka Fu* (unrep., CACV 212/2002, [2003] H.K.E.C. 763), and in particular the judgment of Ma J.A., the Court of Appeal laid down the following guidance for dealing with any difficulties in the application of the Rules of Court made under s.50:

1. In interpreting the Rules of Court made under s.50 in conjunction with the Rules of the District Court, the starting point must be the establishment of procedures that will facilitate and promote the administration of justice in employees' compensation proceedings.
2. The intention behind s.21 is to provide for employees' compensation claims as comprehensive a procedural system as that governing civil claims in the District Court.
3. The Rules of the District Court provide a comprehensive and workable procedural context in which civil litigation in the District Court is regulated. However, it must

also be recognised that there are certain features peculiar to employees' compensation claims, given their nature.

4. Where, however, both the Rules of Court made under s.50 and the Rules of the District Court provide for some aspect of procedure, that does not mean that one should necessarily have regard only to the Rules of Court and exclude the application of the Rules of the District Court. Wherever possible, *i.e.* except where they conflict, the Rules of Court and the Rules of the District Court should be read as complementary and both applicable to any particular aspect of procedure. Order 1, r.2(2A)(c)(ii) of the Rules of the District Court only operates to exclude the application of the Rules of the District Court where express provisions in the Rules of Court made under s.50 deal with specific situations. See, for example, in *Chan Po Kai v. Ng Moon Sum* (unrep., DCEC 820/2004, [2006] H.K.E.C. 346 and 531 (corrigendum), M Ng D.C.J.). Whilst there is no writ of summons and arguably no pleadings in employees' compensation cases, there is clearly no conflict between O.18, r.19, RDC and the Employees' Compensation (Rules of Court) Rules, as the latter does not have any provision for striking out, and applications may be brought, in appropriate circumstances to strike out proceedings under O.18, r.19, RDC. On the facts, the application to strike out the proceedings was unsuccessful.

The following are the principal differences of procedure between Employees Compensation Ordinance proceedings and proceedings involving ordinary civil claims, as provided for by the Employees Compensation Ordinance and the Employees Compensation (Rules of Court):

(1) Under ss.10B(4) and 18 of the Employees Compensation Ordinance, the District Court exercises a review and appellate jurisdiction respectively, albeit that in fact the court will consider the matters in question afresh. Review applications should be in Form 8 in the Schedule. There is no prescribed form for an appeal.

(2) The lack of financial limit on the District Court's jurisdiction under the Employees Compensation Ordinance—see below.

(3) Under r.4 of the Employees Compensation (Rules of Court) Rules, the Registrar is duty bound to assist non-legally represented parties to Employees Compensation Ordinance proceedings. It has been held that this duty may extend to formulating and drafting applications that the court believes it is in the best interests of a party to make during the course of proceedings. See *Chan Kit v. Sum Wo Industrial Manufactory* [1989] 2 H.K.L.R. 230.

(4) There are simplified rules for service of applications and other documents in Employees Compensation Ordinance proceedings under rr. 13 to 15 of the Employees Compensation (Rules of Court) Rules. Rule 13 deals with service in Hong Kong. In particular under r.13 service can be effected on a solicitor employed by a party for the purpose of the application. Rule 14 deals with service in cases not falling within r.13, *i.e.* service out of Hong Kong or where in any event substituted service is required. An application for an order under r.14 is made *ex parte* supported by affidavit. Except for the originating application, which will be served by the Registry, service of documents is to be effected by the parties, not the court (r.15). Sections 30(1) and 30B(5) provide special rules in respect of the submission to the Hong Kong jurisdiction of employers in the case of accidents causing injury occurring outside Hong Kong on ships.

(5) Any application by an employer or employee for determination of a question under the Employees Compensation Ordinance shall be commenced by lodging with the Registrar a written application in Form 1, 2 or 3, as is appropriate, of the Employees Compensation (Rules of Court) Rules (r.16). Form 1 is for use in fatal cases. Form 2 is for use in non-fatal cases. Form 3 is for all other cases except for applications by way of review which are brought in Form 8. A writ of summons or originating summons under the District Court Rules would be inappropriate, save in cases where the Employees Compensation Ordinance specifically provides that an amount payable may be recovered as a civil debt and the amount in question falls within the District Court's jurisdiction (rather than the Small Claims Tribunal's jurisdiction). Under r.16(2), an application by an employer must be accompanied by a statement as to the extent to which the employer admits liability and, where liability is denied, the grounds of denial.

(6) The court is not entitled to require an applicant who has brought proceedings in the court under s.18 to file grounds of appeal. Although the application is characterised as being in the nature of an appeal, in substance the application is heard by the court afresh and there is no material produced by the Board to explain and support its assessment, such as may allow grounds of appeal to be formulated. The District Court is constrained by s.21 of the Employees Compensation Ordinance to apply and make use of the procedure provided for by the Employees Compensation (Rules of Court) Rules. The appropriate rule is r.18, but this involves a prescribed procedure, namely the respondent making a request for particulars of the claim to be filed. Rule 18 only provides for a request for particulars to be made by the respondent, and particulars cannot be required by the court under r.18 of its own volition (*cf.* r.24). However, the court can encourage and under r.4 assist the respondent in making a request for further particulars, and the applicant must give

sufficient particulars to show what is claimed and how it is arrived at (*Chan Kit v. Sum Wo Industrial Manufactory* [1989] 2 H.K.L.R. 230).

(7) The procedure in Employees Compensation Ordinance proceedings after the application is lodged is relatively simple compared to the procedure under the District Court Rules. This relatively informal approach has received judicial endorsement in *Chan Kit v. Sum Wo Industrial Manufactory* [1989] 2 H.K.L.R. 230.

(a) Under r.17, the Registry serves a copy of the application and accompanying particulars and statements, on the respondents, together with a notice in Form 4 in the Schedule to the Rules of Court.

(b) Where the respondents intend to oppose the application, they must within 21 days (or upon such longer period as the court may allow upon special request) lodge with the Registry a written answer in Form 5 in the Schedule concisely stating the extent and grounds of opposition (r.17(2)). A "home-made defence" not in the form of Form 5, whilst it may not comply with the format and wording in Form 5, may be accepted by the court, if in substance it states an intention to oppose the application and states the extent and grounds of opposition: *Ho Chi Ching v. Saiky Co. Ltd* (unrep., DCEC 149/2002, [2004] H.K.E.C. 335), Lok DCJ, applying s.37(1) of the Interpretation and General Clauses Ordinance, Cap. 1 ("Where any form is prescribed by or under any Ordinance, deviations therefrom, not affecting the substance of the form, shall not invalidate it.") Although not expressly provided for by the rules (as noted by the Honourable Mr. Justice Ma Chief Judge in *Poon Chi Kwong v. Poon Wing Kee (Metal) (Work)* (unrep., CACV 378/2003, [2004] H.K.E.C. 535), the Registrar will serve any answers filed on the applicant.

(c) Rule 17(1) also provides that the court may make an order in default if a respondent fails to lodge a response with the Registry.

(d) The respondents may also, within 14 days of receiving the notice of application, serve on the applicant a request in Form 6 in the Schedule for further particulars of the grounds of the application (r.18(1)).

(e) Likewise, the applicant may request further particulars of the ground of opposition to the application (r.18(1)). Copies of the requests and the replies must be lodged at the Registry. If requests are not complied with voluntarily within 14 days, r.18(3) provides that the court may, if it proves to be necessary to adjourn a hearing, make an order that the defaulting party pay the costs occasioned by the adjournment. The court may make an order requiring a request to be complied with, as such orders can be made under the District Court Rules.

(f) An application, answer and any particulars or accompanying statement may be amended with leave of the court on prior notice to the other parties under rr.17(3) and 19.

(g) In appropriate circumstances an application may be made under DCR O.18, r.19 to strike out an originating document used to commence proceedings under the Ordinance on the grounds set out in sub-para.(1) of r.19. In addition, the District Court has an inherent jurisdiction to strike out originating process in order to protect its process against abuse: *Lam Pui Yi v. Secretary for Justice*, (unrep., DCEC 844/2001, [2005] H.K.E.C. 1290), M Ng D.C.J. and *Chan Po Kai v. Ng Moon Sum* (unrep., DCEC 820/2004, [2006] H.K.E.C. 346 and 531 (corrigendum), M Ng D.C.J.).

(h) Unless the respondents consent, the period between service of the notice of application on the respondents and the date of the hearing of the application shall be at least one month (r.17(1)). Assuming the application is opposed, the initial hearing will function as a call-over hearing: directions will be made and the application will be adjourned to be fixed for a full hearing. At the first hearing, if a respondent has neither filed an answer as is required by rule 17(2) nor attending the hearing, the court can enter judgment in default. Practitioners should, however, clarify with the court as to whether an answer has been filed before they apply for a judgment in default. If the respondent has filed an answer, the court cannot enter judgment in default. In appropriate cases, where discovery and filing of witness statements are not necessary to determine the matter, the court may conduct the trial at the first hearing. In such a case, the application may proceed to prove his case against an absent respondent and the court may enter judgment, if the case is proved. On the other hand, if the applicant fails to appear at the first hearing, the court may conduct the trial and simply dismiss the application for lack of supporting evidence: *Ho Chi Ching v. Saiky Co. Ltd* (unrep., DCEC 149/2002, [2004] H.K.E.C. 335), Lok DCJ. If judgment in default is entered in respect of liability only, the respondent is not precluded from contesting quantum at trial and adducing evidence relevant to quantum: *Tai Shing Fai v. Wong Chung Tung* (unrep., DCEC 649/2006, [2008] H.K.E.C. 91), DDCJ J. Ko.

(i) Rule 20 allows a simplified form of payment into court by a respondent, with similar cost consequences to r.22 of the District Court Rules. If the terms of a payment into court during employees' compensation proceedings are silent as to liability, the payment will be taken by the court as being made without admission of liability, in accordance with the general principle expressed in *A. Martin French v. Kingswood Hill Ltd* [1961] QB 96; the phrase "to cover his liability" in r.20 is not wide enough to displace the general principle: *Ng Ming Chor v. Pui Hing Construction Co. Ltd* (unrep., DCCJ 496/1996, 26 May 1998), To DCJ, approved by the Court of Appeal in *Sun Jianqiang v. Trans-Island Limousine Service Ltd* (unrep., CACV 20/2003, [2003] H.K.E.C. 1363). Rule 20 does not provide a complete code in relation to payments into court in employees' compensation proceedings and it must be read as applying in combination with O.22 of the Rules of the District Court. Otherwise, such matters as the costs consequences of acceptance or non-acceptance of payments into court, non-disclosure to the court of payments into court and increases of payments into court would not be certain and might be unworkable. See *Li Kwok Shing v. Law Ka Fu* (unrep., CACV 212/2002, [2003] H.K.E.C. 763) and in particular the judgment of Ma J.A. followed in *Sun Jianqiang v. Trans-Island Limousine Service Ltd* (above). As to costs relating to sanctioned payment, see commentary under O.22, Vol.1. (ii) Security for costs—in appropriate cases, for example where the applicant is resident overseas, the court may exercise its discretion to order that the applicant provide security for the respondent's costs. The manner in which the court exercises its discretion is as per RDC O.23: *Kondylis v. Kim's Yacht Co. Ltd* (unrep., DCEC 918/2005, [2007] H.K.E.C. 1898).

(j) Rules 22 and 23 provide for intervention by a sub-contractor in claims under s.24 where a notice is served under s.24(3). Rule 23 is important because it provides that, in the absence of appearance before the court by a sub-contractor (in response to a notice served under s.24(3) and r.22) to dispute the applicant's claim or liability to the principal contractor, the sub-contractor is deemed to admit the validity of any order made against the principal contractor and liability to indemnify the principal contractor.

(k) Rule 24 provides the procedure for any interested person not a party to Employees Compensation Ordinance proceedings to be joined to the proceedings by leave of the court. The principles for joinder will be the same as under RDC, O.15, r.6(2)(b), except that r.24 is of even wider ambit than RDC O.15, r.6 as it permits joinder at any time in the proceedings: *Sheppard v. Richstone Industries Co. Ltd* (unrep., DCEC 113, 116 & 117/1984) and *Ernst Edward Sprecher v. Zingrich Cabletrans GmbH* (unrep., DCEC 1498/2006, [2007] H.K.E.C. 2133, M Ng D.C.J.). The rule is commonly used for joinder of insurers as respondents. Joinder may be allowed even where relatively late, if there is a good arguable case against the additional respondent and the delay is not unreasonable. In the case of joinder of an insurer three years after institution of the proceedings the delay was not unreasonable because of the onset of insolvency of the employer (*Commercial Union Assurance Ltd v. Richard White*, unreported, AP No. 8 of 1997, November 21, 1997; [1997] N.T.S.C. 133).

(l) Directions made by the court will typically include directions for the filing of expert medial reports. The court will apply the same general principles to the filing of medical reports in Employment Compensation Ordinance cases as the courts do in personal injuries cases. Accordingly, the courts as a general rule will guard against an over-proliferation of experts' reports. See *Yeung Man v. Wing Shing Caisson & Foundation Ltd* (unrep., DCEC 851/2004, [2005] H.K.E.C. 1456), M Ng D.C.J., applying *Wong Hin Pui v. Mok Ying Kit (No. 2)* [2002] H.K.L.R.D. 856 at 874–875.

(8) The Employees Compensation (Rules of Court) Rules do not provide expressly for any form of discovery. The combined effect of rr. 17 and 18 is to require the parties to lodge and file documents setting out particulars of their claims and objections. The intent appears to be to adopt a procedure analogous to the procedure for originating summonses, rather than the procedure for an action begun by writ of summons. The court may, however, make an order requiring specific discovery to be given, as such orders can be made under the District Court Rules. It is usual for an employer to be ordered to file and serve details of the employee's earnings, compiled from the employer's records, unless it has already been provided as a list of earnings pursuant to a request under s.11(8). This is a form of specific discovery and non-compliance with such an order can result in judgment in default being entered: see *Chan Kwok Keung v. Molesworth Ltd* (unrep., CACV 113/1990, [1990] H.K.L.Y. 920).

(9) Evidence from or relating to third parties—The court has power under s.18A(1) of the Employees Compensation Ordinance to call upon any person to give evidence, if the court is of the opinion that such person is, by virtue of his expert knowledge,

able to assist the court. See *Re A Certificate of Review of Assessment in respect of Ng Kai Yin* [1991] 2 H.K.D.C.L.R. 61 which confirms that s.18A(1) enables the court to order discovery of medical records used by the Ordinary or Special Assessment Boards. Under the District Court Ordinance, the court has special powers to obtain evidence in the context of "proceedings for personal injuries or arising out of the death or a person". See s.47A (power of the court to order disclosure, etc., of documents before commencement of proceedings) and s.47B (extension of powers of the court to order disclosure of documents, inspection of property, etc.). It appears that these special powers are exercisable in proceedings under the Employees Compensation Ordinance given the nature of those proceedings. For the approach to psychiatric expert evidence, and expert evidence, see *Fong Bun Mo v. Hong Kong Airport Services Ltd* (unrep., DCEC 1200/2005, [2006] H.K.E.C. 575), *Ansar Mohammed v. Global Legend Transportation Ltd* (unrep., DCEC 1090/2006, [2007] H.K.E.C. 845) and *Lau Lai Shau v. Hospital Authority* (unrep., DCEC 784/2007, [2008] H.K.E.C. 347), all decisions of M Ng D.C.J. The court adopted the following principles:

(i) The court's power is as to whether to grant leave to allow parties to adduce expert evidence at trial, and has inherent power to rule on admissibility at a pre-trial stage—see *Woodford and Ackroyd v. Burgess* [2000] CP report 79, *Ko Chi Keung v. Lee Ping Yan Andrew* (unrep., HCA 18029/1999, [2002] H.K.E.C. 462) and *Lee Kin Yee v. Lee Wing Kim* (unrep., HCA 9522/1997, [2001] H.K.E.C. 1546).

(ii) The guiding criteria are threefold, namely (a) necessity, (b) relevance and (c) probative value—see *Chan Kwok Ming v. Hitachi Service Co. Ltd* (unrep., HCPI 322/2002) and *Arfran Muhammed and MPS Engineering Ltd* (unrep., HCPI 457/2003, [2005] H.K.E.C. 1436).

(iii) Where the proposed expert evidence is plainly inadmissible or irrelevant, the court ought to exercise its discretion to refuse the admission of such evidence. But where the court cannot form a clear view on the relevance of the proposed expert evidence or where it considers that the proposed evidence is clearly relevant, then it should grant leave for the evidence to be adduced at the trial—see *Ko Chi Keung v. Lee Ping Yan Andrew* (above), at 67 and *Lee Kin Yee v. Lee Wing Kim* (above), at 15.

(iv) In deciding whether certain proposed expert evidence should be received, the relevant test is a two-stage one. Firstly, the evidence has to be admissible as "expert evidence" for the purpose of s.58 of the Evidence Ordinance, Cap. 8. Secondly, the evidence must be relevant, in the sense that it is helpful to the court in arriving at its decision on one or more of the issues to be resolved: *Barings Plc (in Liquidation) & Another v. Coopers and Lybrand* [2002] 2 B.C.L.C. 364, Evans-Lombe J.

(v) There should not be an unnecessary proliferation of experts' reports—see *Wong Hin Pui v. Mok Ying Kit* [2000] 1 H.K.L.R.D. 856, Seagroatt J. and *Ho Man Fong v. Sime Darby Motor Services Ltd* (unrep., HCPI 196/2003, [2005] H.K.E.C. 1111). This is particularly so as regards occupational therapists and psychiatric reports. In fact, bearing in mind the nature of, and policy considerations underlying, employees' compensation cases, the court's expectations are that the parties will in most cases reach sensible consensus on how medical examinations and experts' reports are to be done. Normally, and with a view to better case management, and avoiding the risk of disputes in relation to history taking and on observations, the parties should produce joint medical reports pursuant to a joint medical examination by the respective medical experts. Conferring between medical experts should minimise the risk of diametrically opposing views. The discussion may reveal relevant facts or information that are not appreciated by one of them and may help in identifying and putting to one side peripheral issues. The joint discussion and the exercise of drafting a joint report can lead to a greater focus on narrowing the medical issue and expert opinion, on defining the significant areas of disagreement. Such an approach should facilitate reasonable and honest settlement. This is subject to the possibility of countervailing considerations which may mean joint medical examinations and joint experts' reports are inappropriate in some cases. See *Ansar Mohammed*, paras 39 to 47 and *Lau Lai Shan*, paras 20 to 34.

(On the facts, in *Fong Bun Mo v. Hong Kong Airport Services Ltd*, the court was not prepared to rule out the use of psychiatric reports at trial because it appeared clear on the evidence that it was relevant, and was not fully addressed in the treating hospital's medical report.) Note, the court ought not entertain any expert medical evidence at the trial in respect of the assessments themselves if the respondent has chosen not to appeal against the assessment in the certificate of assessment (*Ng Ming Cheong v. Mass Transit Railway Corp.* [1997] 3 H.K.L.R.D. 1231 and *Hussain Tanweer v. Focus Roller Shutter Ltd* (unrep., DCEC 1145/2005, [2006] H.K.E.C. 1754, D.C.J. M. Ng). However, if liability is disputed, expert medical evidence, as to whether the claimant's injury was likely to have been caused by the accident at work

or not, may be admissible—*Wong Tak Fai v. Orient Trucking Ltd* (unrep., DCEC 1032/2007, [2008] H.K.E.C. 904), T.A. D.C.J.

(10) Obtaining evidence from overseas—Sections 29(1)(c) and 30A provide for testimony given in the People's Republic of China to be admissible in Employees Compensation Ordinance proceedings in Hong Kong. Section 59 of the District Court Ordinance (Cap. 336) empowers the Court of First Instance of the High Court to issue letters of request for obtaining evidence from overseas for use in District Court proceedings.

(11) Settlement of proceedings—The District Court has no power to approve a settlement whereby the amount of compensation would be less than the statutory minimum. The general tenor of the Ordinance is extreme jealousy for the rights of employees. Nowhere does the Ordinance allow the parties to arrive at an agreement that provides for a lesser sum (*Yeung Hung v. Yee Fat Transportation Co.* [1962] H.K.D.C.L.R. 67). Section 31 avoids any agreement whereby an employee purports to relinquish any right to compensation from an employer or to remove or reduce the liability of any person to pay compensation under the Ordinance. However, there is nothing in the Ordinance to prevent parties from compromising disputed issues of fact, which incidentally has the effect of reducing the compensation payable. See *Shiu Ying Kwong v. Po On* [1990] 1 H.K.D.C.L.R. 15. Where employees' compensation proceedings are settled by a consent order, the court nevertheless has jurisdiction in appropriate circumstances to set the judgment aside; the ambit of s.48 of the District Court Ordinance is very wide: *Manzoor Hussain v. Bavarian Chemicals Co. Ltd* (unrep., CACV 37/2003, [2003] H.K.E.C. 1199), CA.

(12) Rule 29 provides the procedure for submission of questions of law by special case by the District Court to the Court of Appeal.

(13) Rule 30 provides that no fees shall be paid to the District Court in respect of any Employees Compensation Ordinance proceedings. The District Court does, however, have a general discretion as to the costs of Employees Compensation Ordinance proceedings—see s.10B(4) specifically in the case of a review by the court under that section, and s.53 of the District Court Ordinance for the general power of the court.

Costs orders are governed in the District Court by O.62, RDC, and the normal principles will apply in employees' compensation cases, i.e.:

(i) Costs are at the discretion of the court.

(ii) Cost will normally follow the event.

(iii) The general rule that costs follow the event does not cease to apply simply because the successful party raises issues or makes allegations on which he fails.

(iv) However, costs will not follow the event when it appears to the court that some other order should be made.

(v) In particular, where a successful party has raised issues or made allegations on which he fails and the raising of those issues or the making of those allegations causes a significant increase in the length or the costs of the proceedings, he may be deprived of the whole or a part of his costs.

(vi) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or part of the unsuccessful party's costs.

(*Yung Chi Man v. Tang Kan Fu (No. 2)* (unrep., DCEC 770/2004, [2006] H.K.E.C. 557), Deputy District Judge Yau, citing with approval *F v. F* (unrep., HCMC 4/2001), Hartmann J., and *In Re Elgindata Ltd (No. 2)* [1992] 1 W.L.R. 1207, Nourse L.J. at 1214.)

Further:

(vii) When an applicant for compensation has not been unreasonable in pursuing proceedings under the Ordinance for statutory compensation and also commencing a common law action for damages, and then a settlement of the common law action is achieved by acceptance of a payment into court in those proceedings, where in reality the settlement is a global one, and the applicant seeks to discontinue the proceedings under the Ordinance, the court may, looking at the overall justice of the matter, depart from the normal order as to costs on a discontinuance application, and instead order that the costs of the discontinued proceedings be paid by the respondent to the applicant: *Lai Yun Pui v. Gammon Construction Ltd* (unrep., DCEC 956/2003, [2006] H.K.E.C. 2340), D.C.J. Chan.

(14) Examination—The court may, on application of a party that has the benefit of an order for payment which has not been complied with, make an order for the examination of the party ordered to pay, and order that the costs of the order for examination be paid by the party in default of payment (*Gurung Ram Pasad v. WLS Contractors Ltd* (unrep., DCEC 1392/2005, [2006] H.K.E.C. 640, S Chow D.C.J.).

Inherent jurisdiction—The District Court, like any other court, has power to deal with "what is ... plainly an abuse of its own procedure. Power to do so is inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure", *per* Judge Huggins in *Yam* **Q1/21/3**

Sau Ying v. Young Ying Cheung [1964] H.K.D.C.L.R. 32 in respect of a vexatious application by an imprisoned, defaulting judgment debtor and *Chan Po Kai v. Ng Moon Sum* (unrep., DCEC 820/2004, [2006] H.K.E.C. 346 and 531) (corrigendum), M Ng D.C.J. The District Court has jurisdiction to order interim payments pursuant to RDC O.29, rr.10–11 in employees' compensation cases under section 10 of the Employees' Compensation Ordinance (Cap. 282): *Khan Sabz Ali v. Ko Kim Development Ltd* (unrep., DCEC 1350/2012, [2012] H.K.E.C. 1487).

Q1/21/3A **Interim payments**—Applications for interim payments in employees' compensation proceedings are normally brought under the provisions of the Ordinance. However, they can also be brought under O.29, r.2 of the District Court Rules: *Mehmood v. Hung Wai Kwan* [2003] 3 H.K.L.R.D. K18 (application dismissed because on the evidence before the court it could not be shown that the application would succeed at the trial on the disputed question of whether the injury arose out of and in the course of his employment by the respondent, and O.29, r.2 requires the court to be satisfied on the balance of probabilities that the applicant will succeed, not merely that the application is likely to succeed).

Q1/21/4 **Section 21(2)**—Under s.32 of the District Court Ordinance (Cap. 336) the court has jurisdiction to hear and determine actions where the amount of the claim does not exceed, presently, HK$1,000,000. The effect of s.21(2) is that there is no financial limit, whether of HK$1,000,000 or any higher sum, in the case of proceedings under the Employees Compensation Ordinance. All proceedings at first instance must be brought in the District Court, and not the High Court. The provisions for the transfer of cases from the District Court to the High Court do not apply to claims under the Employees Compensation Ordinance. The involvement of the High Court is under ss.22 and 23 which provide for referrals of questions of law on a special case basis (s.22) and appeals from orders of the District Court (s.23) to the Court of Appeal.

Q1/21/5 **Section 21(3)**—Section 21(3) empowers the District Court to award interest on any sum ordered to be paid by way of compensation. The District Court may award interest on all or only part of the sum and for all or only part of the period between the date of the accident and the date of the court's order. The section does not provide any guidance itself as to the principles by which the court should determine what interest should be awarded, if any, other than the use of the phrase "recovery of compensation". In *Ng Oi Wa v. Lamp's Co.* [1980] 1 H.K.C. 57, the Court of Appeal held that, whilst the nature of an award of compensation under the Ordinance was ambiguous, it was on balance to be regarded as compensation which automatically becomes payable on occurrence of an accident, subject only to establishing liability and assessment of the amount payable. Accordingly, it appears that in cases where notice is required to be given of the accident, interest should run as a general rule from the date of the giving of notice, although the general rule may not apply where lack of notice is excused or the notice is given late but the employer was well aware of the fact of the accident and the probability of compensation being due. In other cases (fatal cases) as a general rule interest should run from the date of the accident. In *Tse Hin v. Ying Ming Construction Ltd* (unrep., ECC 101/1986), Davies D.J. reconsidered *Ng Oi Wa v. Lamp's Co.* (above), and concluded that it remained good law notwithstanding the amendment of s.21 in 1982 and that the court has a very wide discretion as regards the rate of interest which can be awarded and the period for which interest can be paid (followed and applied in *So Ka Chun v. Ho Tai Shing* (unrep., DCEC 592/2000, [2002] H.K.E.C. 1012), Wong D.C.J. in which it was held that the claimant had done everything in his power to notify all relevant parties following the accident and accordingly interest would be awarded at half judgment rate from the date of the accident to the date of judgment and thereafter at full judgment rate until payment).

Q1/21/6 **Section 186, Companies Ordinance (Cap. 32)**—Proceedings under the Employees' Compensation Ordinance before the District Court or on appeal to the Court of Appeal are subject to s.186 of the Companies Ordinance, which provides that "when a winding-up order has been made, or a provisional liquidator has been appointed, *no action or proceedings shall be proceeded with* or commenced against the company *except by leave of the court*, and subject to such terms as the court may impose" (emphasis added). In *Hussain Tanweer v. Focus Roller Shutter Ltd* (unrep., DCEC 1145/2005, [2006] H.K.E.C. 1754), D.C.J. M. Ng, the court gave guidance on the application of s.186, as follows.

(1) Where a party to proceedings has been wound up by the court, s.186 of the Companies Ordinance comes into play and serves a laudable purpose. It enables the Companies Court to scrutinise whether it is appropriate to grant leave to, say, the opposite party to continue with legal proceedings against the company that was wound up. In considering whether to grant leave, the Companies Court bears in mind not just the interest of the claimant but also the interests of the creditors of the company that was wound up. Section 186 also gives time for the provisional liquidators of the company that was wound up to assess the litigation and decide what stance to adopt.

(2) Once a party becomes aware that its opponent has been wound up, it is incumbent on such party to immediately assess the situation and consider whether further

directions are required for the conduct of the proceedings even if leave is granted by the Companies Court to continue with the proceedings. In appropriate cases, it may necessitate an application to vacate the hearing date and seek consequential directions. A party who fails to prudently consider the appropriate way forward may find he has to shoulder the liability for costs wasted.

(3) A party has six months under s.18 of the Ordinance to appeal against the assessment in the certificate of assessment or the certificate of review of assessment. Such time limit does not necessary run in tandem with the progress of the applicant's employees' compensation proceedings. Injuries may take a while to stabilise or reach maximum medical improvement, so it is not uncommon to find that medical assessment by the board takes place some time after employees' compensation proceedings have commenced. Nevertheless, a decision whether to appeal against the assessments in the certificate of assessment or the certificate of review of assessment has implications on the conduct of the employees' compensation proceedings, particularly on the assessment on the quantum of compensation. It may entail expert directions on expert medical evidence. So if the appeal is made shortly before the trial or the assessment of compensation (albeit within the s.18 time limit), it is incumbent for the appellant to carefully consider whether the hearing can be proceeded with or whether such hearing should be vacated for appropriate directions to be sought. Failure to prudently consider these matters may also result in the appellant having to bear liability for costs wasted.

Power of the Court to submit questions of law

22.—(1) The Court may, if it thinks fit, submit any question of law for the decision of the Court of Appeal. **Q1/22**

(2) Such submission shall be in the form of a special case in accordance with rules made under this Ordinance.

Appeals

23.—(1) Subject to the provisions of this section and of section 13, an appeal shall lie to the Court of Appeal from any order of the Court. **Q1/23**

(2) Except with the leave of the Court or of the Court of Appeal (which shall not be granted unless in the opinion of the Court of Appeal some substantial question of law is involved in the appeal) no appeal shall lie if the amount in dispute is less than $1,000.

(3) No appeal shall lie in any case in which the parties have agreed to abide by the decision of the Court, or in which the order of the Court gives effect to an agreement come to by the parties.

(4) No appeal shall lie after the expiration of 30 days from the date of the order of the Court:

Provided that the Court of Appeal may, if it thinks fit, extend the time within which to appeal under this section notwithstanding that that time has elapsed.

Scope of appeals—As a general rule, an appeal lies under s.23 to the Court of Appeal against any order of the District Court made in Employees Compensation Ordinance proceedings. Thus appeals may be brought against interlocutory or final orders. Appeals lie as of right, on questions of law and fact, without the necessity of obtaining leave, except where the Ordinance requires leave to be granted or the Ordinance excludes any right of appeal (*Fong Fung Ying v. Att.-Gen.* (unrep., DCEC 17/1984, July 25, 1984), *Wong Po Sin v. New Universal Paper Co. Ltd* [1973] H.K.L.R. 59, *Chan Chu Ngan v. Wong Woon Pui* (unrep., CACV 104/1992, [1992] H.K.L.Y. 458) and *Ngai Chu v. Lau Pong Chun* (unrep., CACV 402/2004, [2005] H.K.E.C. 1844). See also *Tsang Kwong Tong v. Tennille Decoration & Design Ltd* (unrep., HCMP 48/2006, [2006] H.K.E.C. 248), Tang J.A., in which an extension of time was given to appeal out of time based on the unusual circumstances of the case: there had been a collective failure to appreciate that no leave to appeal was needed and an application for leave to appeal had been brought (erroneously, since no leave was required) within the 30 days period and the court was satisfied that the appeal had a real prospect of success. However, in respect of costs orders made in Employment Compensation Ordinance proceedings, these do not fall within the words "any order of the Court" in s.23(1) and are orders made under the law, rules and practice of the District Court. Accordingly, appeals to the Court of Appeal against such orders are subject to s.14 of the High Court Ordinance and leave is required for them to be brought: *Tam Yiu Fai v. Aberdeen Marina Holdings Ltd* (unrep., CACV 167/2005, [2005] H.K.E.C. 1739). **Q1/23/1**

Whereas in England the right to appeal from the county court on a decision of fact has always been very limited, the phraseology of s.23 clearly contemplates a full right of appeal on fact as

well as law from orders of the District Court in Employees Compensation Ordinance proceedings. On appeal, the Court of Appeal will, where appropriate, make a distinction between primary facts and secondary facts or inferences. The Court of Appeal will attach the greatest weight to findings of fact based on the testimony of witnesses seen and heard by the District Court. But where no question as to truthfulness arises, and the question is as to the proper inferences to be drawn from the truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court (*Wong Po Sin v. New Universal Paper Co. Ltd* [1973] H.K.L.R. 59).

See also *Tsang Kwong Tong v. Tennille Decoration & Design Ltd* (unrep., HCMP 48/2006, [2006] H.K.E.C. 248), Tang J.A., in which an extension of time was given to appeal out of time based on the unusual circumstances of the case: there had been a collective failure to appreciate that no leave to appeal was needed and an application for leave to appeal had been brought (erroneously, since no leave was required) within the 30 days period and the court was satisfied that the appeal had a real prospect of success.

Q1/23/2 **Exceptions to the right of appeal**—No right of appeal lies against an order of the District Court in the following circumstances:

(1) Orders as to distribution of compensation under s.13—by s.13(5) no appeal shall lie from any order or directions of the court made under s.13. This is an absolute bar on any right of appeal.

(2) Amounts in dispute of less than $1,000—unless the Court of Appeal is satisfied that the appeal involves some substantial question of law. Leave will not be granted for such an appeal unless the Court of Appeal is so satisfied.

(3) The parties have agreed to abide by the decision of the court—no right of appeal lies by s.23(3).

(4) The order made gives effect to an agreement come to by the parties—no right of appeal lies by s.23(4).

Q1/23/3 **Time-limit for appeal**—The appeal must be started within 30 days from the date of the order of the court (s.23(4)).

Q1/23/4 **Leave to appeal out of time**—The Court of Appeal may extend time for appealing notwithstanding that time has elapsed (s.23(4)). In considering whether to extend time, as a general rule the Court of Appeal does not need to be satisfied that there are reasonable grounds of appeal. The primary question is the extent of and reasons for the delay in bringing the appeal. It may be appropriate to look at the merits of the appeal if the respondent asserts that there would be grave injustice done in reopening the case. The court will ask the question, "does the appeal have a real prospect of success?". This is a relatively low threshold test. It is usually sufficient, without evidence of real injustice by reason of the appeal proceedings at all, if the court is satisfied that an informed assessment of the prospects of an appeal could only be made at a hearing equivalent to the hearing of the appeal (*Tsang Kwong Tong v. Tennille Decoration & Design Ltd* (unrep., HCMP 48/2006, [2006] H.K.E.C. 248), Tang J.A., citing *Unison Knitwear v. Rich Easy Ltd* [2001] 1 H.K.L.R.D. 856, in particular at 858J, Le Pichon L.J., in *Secretary for Justice v. Hong Kong & Yaumati Ferry Co Ltd* [2001] 1 H.K.C. 125, the latter adopting the judgment in Keith J. in *Chiu Sin Chung v. Yu Yan Yan Angela* [1993] 1 H.K.L.R. 225 at 225–228).

Q1/23/5 **Stay of execution**—The court has jurisdiction to grant a stay of execution, and in this connection the appellant may undertake to pay the judgment sum together with accrued interest into court (*Tsang Kwong Tong v. Tennille Decoration & Design Ltd* (unrep., HCMP 48/2006, [2006] H.K.E.C. 248, Tang J.A.).

Liability in case of employees employed by sub-contractors

Q1/24 **24.**—(1) Where any person (in this section referred to as the principal contractor), in the course of or for the purposes of his trade or business, contracts with a sub-contractor for the execution by or under the sub-contractor of the whole or any part of any work undertaken by the principal contractor, the principal contractor shall be liable to pay to any employee employed by that sub-contractor or by any other sub-contractor in the execution of the work any compensation under this Ordinance which the principal contractor would have been liable to pay if that employee had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal contractor, then, in the application of this Ordinance, references to the principal contractor shall be substituted for references to the employer, except that the amount of any

compensation calculated by reference to earnings shall be calculated by reference to the earnings of the employee under the employer by whom he is immediately employed.

(1A) Where a principal contractor is liable to pay compensation under this section, he shall be liable for the offences under sections 6C(15), 6D(10), 6E(16), 10(10), 16A(12) and 16I(6) as if he were an employer. *(Added 52 of 2000 s.13)*

(2) Where the principal contractor is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the employee independently of this section.

(3) An employee employed by a sub-contractor may issue a written request to the sub-contractor to supply to the employee the name and address of the principal contractor.

(4) A sub-contractor shall within 7 days after the date of issue of a written request under subsection (3)—

(a) supply to the employee the name and address of the principal contractor; and

(b) deliver a copy of the written request to the principal contractor.

(5) A sub-contractor who without reasonable excuse fails to comply with subsection (4) commits an offence and is liable to a fine at level 5. *(Amended 63 of 1992 s.11; 36 of 1996 s.18)*

(6) An employee shall, before making any claim or application by virtue of this section against a principal contractor, serve on the principal contractor a notice in writing stating—

(a) the name and address of the employee;

(b) the name and address of the sub-contractor by whom he is employed;

(c) the address of the place of employment of the employee;

(d) the particulars of the accident and the injury suffered; and

(e) the amount of compensation to be claimed.

(7) Where a claim or application is made by virtue of this section against a principal contractor, the principal contractor shall give notice thereof to the sub-contractor specified in the notice served on the principal contractor under subsection (6), who shall thereupon be entitled to intervene in any application made against the principal contractor.

(8) Nothing in this section shall be construed as preventing an employee recovering compensation under this Ordinance from a sub-contractor instead of the principal contractor.

(Replaced 76 of 1982 s.19)

Q1/24/1

Scope of s.24—Section 24 provides in appropriate cases for a right on the part of the employee to claim directly against a principal contractor. "Work undertaken by the principal contractor" in s.24(1) means work which is the subject of a contract to be performed either personally or vicariously (*Poon Hau Kei v. Hsin Cheong Construction Co. Ltd, Taylor Woodrow International Joint Venture* (unrep., FACV 12/1999, [2000] H.K.E.C. 230), *per* Lord Hoffman at 346D). It also provides for a corresponding indemnity claim by the principal contractor against the sub-contractor who employed the employee.

An employer would be a principal unless the work is merely ancillary to or incidental to and is not part of, or process in the trade or business carried on by the employer (see *Hockley v. West London Timber and Joinery Co.* [1914] 3 K.B. 1013). It must be work undertaken by the principal either for himself or under a contract. In *Bush v. Hawes* [1902] 1 K.B. 216, it was held that the test, whether a subcontract is for work ancillary or incidental to the business carried on by the undertaker, is whether the work is that of the particular undertaker, and not whether it is generally undertaken by persons carrying on a similar business.

The remedy under s.24(1) for an employee of a sub-contractor to claim against the principal contractor is an additional remedy and does not restrict the right of the employee to claim under s.5 against the employer/sub-contractor. The result would be, where claims under each of s.5 and s.24 are successful, that both the employer and principal contractor are severally liable to pay compensation to the employee. The employee is therefore entitled to bring claims under both sections in the same proceedings in which the employer and the principal contractor are

both respondents (*Wong Leung Tak v. Wong Lee (Bros) Transportation Co. Ltd* (unrep., CACV 151/1989, [1990] H.K.L.Y. 579), CA and *Wong Leung Tak v. Hip Hing Construction Co. Ltd* [1991] 2 H.K.L.R. 345, following *Cooper & Crane v. Wright* [1902] A.C. 302, HL and *Mulrooney v. Todd* [1909] 1 K.B. 165, CA, and not following *Herd v. Summers*, 1905 13 S.L.T. 239, *Meier v. Dublin Corp*. [1912] 2 I.R. 129 and *Geddes v. Dunfermline District Committee*, 1927 S.L.T. 571).

Wong Leung Tak v. Hip Hing Construction Co. Ltd was applied in *So Ka Chun v. Ho Tai Shing* (unrep., DCEC 592/2000, [2002] H.K.E.C. 1012), Wong, D.C.J., which found, applying *Chan Kwok Kin v. Mok Kwan Hing* [1991] 1 H.K.L.R. 631, that a carpenter working on a per unit basis on a construction site was not an independent contractor but was employed by the first respondent who was a sub-sub-contractor of the second respondent, a sub-contractor, with the result that all three respondents, including the third respondent, the main contractor, were liable.

The deeming provision under s.24(1) only operates for the purpose of claims by an employee for compensation, i.e. it allows the employee to make a claim against his direct employer's principal contractor as if that principal contractor were his direct employer. It does not have any effect or impact for the purpose of Part IV of the Ordinance. Part IV of the Ordinance sets out the regime for compulsory insurance against an employer's liability to pay compensation for injury by accident for death or for the death of an employee that arises out of and in the course of employment, and (specifically by s.44(1)) gives an employee a direct claim against his employer's insurers. See *Leung Siu Mui v. Tai Ping Insurance Co. Ltd* [2002] 2 H.K.C. 314, Carlson D.C.J., applying *Woo Kin Wah v. Tugu Insurance Co. Ltd* [1993] 1 H.K.L.R. 300, CA, the majority decision in *Leung Chack v. Asia Insurance Co. Ltd* [1991] 2 H.K.L.R. 496, *Siu Yin-Kwan v. Eastern Insurance Co. Ltd* [1993] 2 H.K.L.R. 101 and *B+B Construction Co. Ltd v. Sun Alliance and London Insurance Plc* [2001] 1 H.K.L.R.D. 1, CFA, *Waan Chuen Ming v. Law King Nam* (unrep., DCEC 505/2002, [2005] H.K.E.C. 713).

Q1/24/2 **Indemnity in favour of principal contractor against employer**—The right of indemnity under s.24(2) in favour of the principal contractor against the employer is absolute and not defeasible by the employer on the grounds of negligence or breach of statutory duty on the part of the principal contractor. However, s.25(1)(b) gives the employer a separate right to relief if the principal contractor's negligence had caused the injury to the employee (*Wong Leung Tak v. Wong Lee (Bros) Transportation Co. Ltd* (unrep., CACV 151/1989, [1990] H.K.L.Y. 579), CA, following *Heywood & Bryett Ltd v. A. Heywood & Son* [1940] 2 K.B. 145, CA). The right of indemnity extends to the costs incurred by principal contractor in the proceedings: *Mak Wing Fai v. Chevalier (HK) Ltd* [1999] 3 H.K.L.R.D. (Yrbk) 396, applied in *Tsui Tsun Wei v. Lai Wai Man* (unrep., DCEC 927/2004, [2005] H.K.E.C. 1617), J. Ko D.D.J. (decisions of *Wong Leung Tak v. Hip Hing Construction Co. Ltd* [1991] 2 H.K.L.R. 345 and *Azhar Hussain v. Fastcut Services Ltd* (unrep., DCEC 917/2003, [2005] H.K.E.C. 438) not followed). The claim under s.24(2) by the principal contractor against the employer can and should be brought in proceedings started by the employee against both the employer and principal contractor under ss.5 and 24 respectively. However, the claim of an employer under s.25(1)(b) to an indemnity against a third party, where that third party is the principal contractor and the principal contractor is seeking an indemnity from the employer under s.24(2), cannot be raised by way of counterclaim to the principal contractor's claim for an indemnity under s.24(2). It must be brought by way of separate proceedings in the High Court. It is inappropriate for a District Court judge to seek to give directions to facilitate the s.25(1)(b) claim being brought in the same proceedings. Nevertheless, in such circumstances, the District Court has power to stay an award made in favour of the principal contractor against the employer under s.24(2) until the determination in the separate proceedings of the employer's claim for an indemnity under s.25(1)(b) against the principal contractor (*Wong Leung Tak v. Wong Lee (Bros) Transportation Co. Ltd* (unrep., CACV 151/1989, [1990] H.K.L.Y. 579), CA, followed in *Azhar Hussain v. Fastcut Services Ltd* (unrep., DCEC 917/2003, [2005] H.K.E.C. 438).

Q1/24/3 **Obtaining details of the principal contractor**—The employee may request in writing to the sub-contractor that the sub-contractor supply the name and address of the principal contractor to the employee (s.24(3)). Within seven days after the date of issue of a request under s.24(3), the sub-contractor must supply the requested details to the employee and also deliver a copy of the written request to the principal contractor (s.24(4)). Failure to comply with s.24(4) constitutes an offence (s.24(5)).

There may be many "principal contractors" against whom an injured employee may make a claim under s.24: *Chan Sik Pan v. Wylam's Service Ltd* (unrep., CACV 17/2003 and 66/2003, [2004] H.K.E.C. 1282, CA). In this case, the Hon Yuen JA noted that having regard to sections 3 and 24 of the Ordinance, a person is liable under s.24 to compensate employees (whether of his own immediate sub-contractor, or any other sub-contractors down the line) who are injured in the course of doing the work that he has undertaken. As such, liability as a principal contractor follows the scope of the work undertaken.

Q1/24/4 **Notice of claim against principal contractor**—Section 24(6) requires an employee to give notice of the claim to the principal contractor before making any claim. The requisite minimum contents of the notice are set out in s.24(6)(a)–(e).

In *Mohammad Munir v. Yau Kei Tak* (unrep., DCEC 251/2006, 26 March 2007), the Court held that s.24(6) must be strictly complied with for the claim against the principal contractor to become maintainable. An Applicant has no right against the principal contractor save where the legislation so provides. To take the benefit conferred by the statute, the Applicant must comply with the statutory requirements. There is no room for the exercise of any discretion for a failure to comply with the requirements of s.24(6).

Notice of claim for an indemnity—Upon a claim or application being made by an employee against the principal contractor under s.24, the principal contractor shall give notice thereof to the sub-contractor who shall then be entitled to intervene in any application made against the principal contractor. The notice to be given under s.24(7) by the principal contractor to the employer/sub-contractor should be in the form set out in Form 10 to the Employees Compensation (Rules of Court) Rules. Form 10 is a simple form giving notice of a claim and in its blank pro forma form makes no reference to a claim for an indemnity by the principal contractor against the employer. If the principal contractor wishes to claim an indemnity against the sub-contractor/employer, it must be identified in the completed Form 10. **Q1/24/5**

Procedure for intervention by sub-contractor—The procedure for intervention by a sub-contractor in an application by an employee against the principal contractor is set out in rr.22 and 23 of the Employees Compensation (Rules of Court) Rules. See para.Q1/21/2. **Q1/24/6**

Remedies against both employer and third party

25.—(1) Where the injury in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (in this section referred to as the third party) to pay damages to the employee in respect thereof— **Q1/25**

(a) the employee may both claim compensation under this Ordinance and take proceedings against the third party in the Court of First Instance or, subject to the provisions of the District Court Ordinance (Cap. 336) relating to the limits of jurisdiction, in the District Court to recover damages: *(Amended 25 of 1998 s.2)*

Provided that where any such proceedings are instituted the court in which the action is tried shall, in awarding damages, have regard to the amount which, by virtue of paragraph (b), has become or is likely to become payable to the employer by the third party; and

(b) the employer by whom compensation is payable, and any person who may be called upon to pay an indemnity under section 24 in the case of an employee employed by a sub-contractor, shall have a right of action against the third party for the recovery of any sum which he is obliged to pay as a result of the accident, whether by way of compensation or indemnity or by virtue of any agreement made with the employee prior to the accident, and may exercise such right either by joining in an action begun by the employee against the third party or by instituting separate proceedings:

Provided that the amount recoverable under this paragraph shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for the provisions of this Ordinance.

(2) An employee shall, before instituting proceedings for damages under subsection (1), in writing notify the employer of his intention to do so and shall likewise notify the employer if he decides to abandon such proceedings or to relinquish or settle his claim for damages, and shall in connection with any such notification furnish such particulars as the employer may require.

(3) If an employee who has—

(a) failed to notify the employer of his intention to institute proceedings under subsection (1); or

(b) in connection with any such notification, failed to furnish such particulars as the employer may require,

recovers damages against a third party in any such proceedings, then—

(i) where the amount of damages recovered is equal to or greater than the amount of compensation which would, but for this subsection, be payable, no compensation shall be payable; or

(ii) where the amount of damages recovered is less than the amount of compensation which would, but for this subsection, be payable, the amount of compensation payable shall be a sum equal to the difference between the amount of damages recovered and the amount of compensation which would, but for this subsection, be payable.

(4) In any proceedings to which subsection (3) applies the court may, where any sum of compensation referred to in that subsection has already been paid, make such order with respect to the repayment of such sum or any part thereof as is necessary to give effect to that subsection.

(5) Notwithstanding anything to the contrary in any other enactment, where written notice of intention to institute proceedings under subsection (1)(b) has been given by an employer, or by any person who may be called upon to pay an indemnity under section 24, to a third party within 12 months of the receipt by the employer or such person of due notice of the accident concerned, no such proceedings shall lapse, or be barred, under any enactment relating to the limitation of actions, until after the expiry of a period of 3 months from the date upon which a claim for compensation in respect of such accident has been—

(a) determined by certificate under section 16A; or

(aa) settled by agreement under section 16CA; or *(Added 64 of 1992 s.6)*

(aaa) determined by a Certificate of Compensation Assessment for Fatal Case or Review Certificate of Compensation Assessment for Fatal Case; or *(Added 52 of 2000 s.14)*

(b) *(Repealed 36 of 1996 s.19)*

(c) finally determined by a court,

as the case may be.

(6) Where notice is given to the employer under subsection (2) and the provisions of section 24 apply, the employer shall give notice thereof to any person who may be called upon to pay an indemnity under that section.

(Replaced 76 of 1982 s.19)

Q1/25/1 **Limitation period for claim under s.25**—The period of limitation imposed on an employer who wishes to bring proceedings under s.25(1)(b) in respect of damages which he has paid under the Employees Compensation Ordinance is a period of six years from a particular event, by virtue of s.4(1)(d) of the Limitation Ordinance, this being an action to recover a sum "by virtue of any ordinance". The three-year limitation period imposed by s.27 of the Limitation Ordinance is not applicable to this type of action. The correct legal description of a claim under s.25(1)(b) is a claim for indemnity, not a claim in tort, following *Post Office v. Official Solicitor* [1951] 1 All E.R. 522 (see also *Tai Hing (A Firm) v. Chan Yuk Wan* [1997] H.K.L.R.D. 1148).

Section 25(1)(b) has all the hallmarks of an indemnity. The word "indemnity" is used. As far as the third party against whom the indemnity is claimed is concerned, under s.27 it is described as an indemnity. However, for the purpose of determining when the limitation period of six years begins to run, the important words are the opening words of s.25(1)(b) which read, "... the employer by whom compensation is payable". An employer is liable to pay compensation on the event which gives rise to his normal liability, which is that found in s.5, namely "... if in any employment, personal injury by accident arising out of and in the course of employment is caused to an employee, his employer should be liable to pay compensation ...". Those words mean exactly the same, although put somewhat differently, as the opening words of s.25(1)(b). The words are in contradistinction to those which were found in the English Workmen's Compensation Act 1925, s.30(2) which began, "[i]f the workman has recovered compensation ...". Further, s.25(1)(b) refers to the employer's "*right of action* against the third party for recovery of any sum which he is obliged to pay *as a result of the accident* ..." (emphasis added). The liability to pay compensation whether under s.5 or s.25(1)(b) arises at the same moment in time, that is, the date on which the event occurs which gives rise to such liability. On the facts of the case, the

date in question was the date of the accident and the six-year period to initiate proceedings for an indemnity ran from that date and not any later date (*Tai Hing (A Firm) v. Chan Yuk Wan* [1997] H.K.L.R.D. 1148).

The approach taken in *Tai Hing (A Firm) v. Chan Yuk Wan* [1997] H.K.L.R.D. 1148 should not prejudice an employer. The employer should in practice be aware of the accident, and under the Ordinance is required to be given notice of it. The employer has six years, which is a substantial period, to decide whether to initiate proceedings for an indemnity.

Scope of s.25—Until recently, there was conflicting authority and considerable uncertainty as to the scope of s.25 and in particular as to whether it only affords a remedy by way of a claim for an indemnity from a third party where the employer is not at all to blame for the worker's injury, but rather the third party or parties are to blame, or whether it also affords a remedy by way of a claim for a contribution, the employer having, to a greater or lesser extent, contributed to the accident giving rise to the compensation paid to the employee. Both lines of authority – the decisions of the Court of First instance in *Wong Yat Chiu* and *Yardway* respectively – are described below. The issue has recently been determined by the Court of Appeal in *Yardway Motors Ltd v. Tam Siu Lin* [2005] 2 H.K.L.R.D. 118, which held, by majority, that an employer does not have any right of action against a third party under s.25 where the employer is partially responsible for the employee's injury. The basis for this finding was the strict construction of s.6 as referring to the sole legal liability of a third party. The Court of Appeal referred in particular to the fact that the provision allows an indemnity, not merely or alternatively a contribution. The Court of Appeal also concluded that this was soundly based in policy: when dealing with a section which is one giving a right to an indemnity, if the court can adopt any reasonable construction that will prevent the result of a man getting an indemnity in respect of damage to the production of which he has materially contributed, the court ought to adopt that construction. In *Wong Yat Chiu v. Chan Kwok Wa* [1999] 2 H.K.L.R.D. 849, Deputy Judge McMahon rejected an argument that the enactment of legislation enabling contributions between tortfeasors (in Hong Kong the Civil Liability (Contribution) Ordinance (Cap. 377)), meant that the approach of *Cory & Son v. France, Fenwick & Co*. should no longer be followed, and instead a tortious employer should be permitted under s.25 to recover an indemnity from the tortious third party proportionate to the third party's degree of fault. The Deputy Judge noted that there had been no English decision to such effect. Further, he noted that in *Public Transport Commission of New South Wales v. J. Murray-More (NSW) Pty. Ltd* (1975) 132 C.L.R. 336, in respect of effectively identical legislation (s.64 of the New South Wales legislation), and decided many years after the introduction of legislation in New South Wales allowing for contribution between tortfeasors, the High Court of Australia followed *Cory & Son v. France, Fenwick & Co*. The Deputy Judge held that the approach in *Cory & Son v. France, Fenwick & Co*. remained correct. He held that the spirit and intent behind s.25 is to create an statutory right in an employer to recover on an indemnity basis from a third party and, further, s.9(3) of the Civil Liability (Contribution) Ordinance expressly negatives any intent to import into the statutory scheme provided for by s.25 a right to claim a contribution. Section 9(3) provides by its terms that it shall not affect any express right to indemnity. See also *Wah Kwong Construction Material v. Wong Man Yip* [1995] 1 H.K.L.R. 85 in which the Court of Appeal proceeded on the basis that s.25(1) operated as an indemnity provision. **Q1/25/2**

However, in *Yardway Motors Ltd v. Tam Siu Lin* (unrep., HCA 4158/2001, [2003] H.K.E.C. 436), the court came to the opposite conclusion from that in *Wong Yat Chiu v. Chan Kwok* (above). The court distinguished each of the decisions in *Cory & Son v. France* (above) and *Public Transport Commission of New South Wales v. J. Murray-More* (above) on the grounds that they were decided in the context of different statutory provisions and against the background of different contribution legislation and the relevant legislation in those cases used the word "indemnified" whereas, by the introduction of the present s.25, that word was dropped and replaced by a differently worded section by a right in the employer against the third party "for the recovery of any sum which he is obliged to pay as a result of the accident". The court also had regard to the fact that, if the dependants of the deceased employee had chosen to sue at common law, and all three parties (the employee, the employer and the third party) had been litigating, then contribution would have taken place between the employer and the third party in respect of the common law action and the employees' compensation would have been credited against those damages, which would, in the court's view, be a fair and just result. In particular, the court rejected the contention that the words "in circumstances creating a legal liability in some person other than the employer" refer only to a liability in such other persons to the exclusion of the employer, and noted in that context that the same words are still used for the modern Australian legislation which specifically allows for contribution as well as indemnity in such circumstances (see *I & J Foods v. Bergzam* (1997) 14 NSWCCR 486, CA (NSW)). The third party in the *Yardway* case appealed to the Court of Appeal (*Yardway Motors Ltd v. Tam Siu Lun* [2005] 2 H.K.L.R.D. 118). The Court of Appeal unanimously dismissed the appeal, but for different reasons. Hon Rogers VP, following the reasoning of the Court of First Instance, held that the right under s.25 is not confined to an indemnity, i.e. the full amount of the sum, but may be a partial amount, so that the employer (who was partially responsible for the accident) had a right of action against the third party for the recovery of part of the sum which the employer was obliged to pay by way of compensation. Hon Yuen JA held that the employer does not have a right of action against the third party under s.25 where the employer is also at fault. However, where the family

members to whom employees' compensation is paid are also the employee's dependants to whom the third party would be liable at common law, then the employer is entitled to claim contribution against the third party under the Civil Liability (Contribution) Ordinance ("CLCO"). Hon Le Pichon JA also held that the employer is entitled to claim contribution against the third party under the CLCO and held, obiter, that s.25 does not allow a claim for contribution by the employer who is partially responsible for the accident. Accordingly, by majority, the Court of Appeal held that s.25 only affords a remedy by way of a claim for an indemnity from a third party where the employer is not at all responsible for the employee's injury. However, it may still be open to argument that the judgment of Le Pichon JA is obiter on this issue, and that therefore employers may rely on s.25 even if they have been negligent.

Likewise, where a claimant has already received significant compensation from the employer by way of an application for compensation under the Employees Compensation Ordinance, and a separate action is brought against a third party for damages for negligence, upon an application for an interim payment from the defendant third party (under O.29, r.11 of the High Court Rules or the District Court Rules, as the case may be) the court must take into account the payment made when determining what amount to award by way of interim payment (*Mak Sau Fun v. Kwok Pui Chun Estates Ltd* (unrep., DCPI 182/2001, [2002] H.K.E.C. 977), Carlson D.C.J., a payment of H.K.$130,000 had been made under the Employees Compensation Ordinance so only H.K.$30,000 was ordered on the facts as an interim payment).

In any event, a tortious employer may claim a contribution from a tortious third party by contribution proceedings where credit would be given for the award of employees' compensation. In *Chan Wing Fai v. Wong Hon Kwong* [2002] 2 H.K.L.R.D. H11, the question arose as to the amount to which contribution among the three defendants should extend, i.e. as between the gross amount of $740,790.25 and the net amount of $351,285 having deducted the sum of $389,505.25 (being the Employees' Compensation received by the plaintiff). The fact that a plaintiff has received advance payment by means of an award of Employees' Compensation, as the court held, would not avail non-employer defendants of the opportunity fortuitously to reduce their liability and restrict contribution to the net amount only. The object of the contribution proceedings is to apportion the full value of the plaintiff's claim as between the defendants. The court ruled that the defendants' liabilities were as to one-third of the gross amount, which is $246,930 each, and hence there shall be a repayment of $142,575 to the employer defendant being the sum overpaid between himself and the other two defendants. See also *Chan Suk Ying v. Cityplaza Holdings Ltd* (unrep., DCPI 35/2002, [2002] H.K.E.C. 840), Carlson J. in Chambers to the same effect.

Q1/25/3 **Effect of the proviso to s.25(1)(a)**—This provides that, when the court determines a claim for damages by an employee against a third party, the court shall have regard to amounts of sums that become or are likely to become payable by the third party to the employer as reimbursement of the employer's payment of compensation to the employee. The purpose of this is to enable the court to avoid a double payment of both damages and employees' compensation to the employee. It was considered in *Chan Yuk Sum v. Wong Pai Kwan* [1973] H.K.L.R. 250, in which it was held that:

(1) Compensation paid under the Employees Compensation Ordinance in fatal case is for the benefit of the dependants of the deceased as are sums awarded under the Fatal Accidents Ordinance. Consequently, a sum awarded under the former should be deducted from a sum awarded under the latter.

(2) A sum awarded under the Law Reform (Miscellaneous Provisions) Ordinance however, forms part of the estate of the deceased and is for the benefit not of the dependants of the deceased but for the persons entitled to his estate. Section 25(1) does not apply so as to deprive the person entitled to the estate of the deceased. This was the position on the facts of the case.

(3) Section 25(1) does not state that any award of compensation shall be set off or deducted from any award of damages payable in an action brought against a third party, only that the court must "have regard to the amount" of such award of compensation.

Q1/25/4 **Effect of proviso to s.25(1)(b)**—The fact that an employee or his estate fails to bring a claim for damages against the third party and becomes barred from doing so by the relevant limitation period, so that there can be no possible award to the employee, does not affect the right of the employer to claim an indemnity against the third party in respect of the compensation paid by the employer to the employee—that is not the correct construction of the proviso to s.25(1)(b). The right to an indemnity under s.25 is in no sense under the control of the injured employee or his dependants. The employee is not bound to sue the tortfeasor (*Tickle Industries Pty Ltd v. Hann* (1974) 130 C.L.R. 321 citing *Cory & Son Ltd v. France, Fenwick & Co. Ltd* [1911] 1 K.B. 114 and *Tuckwood v. Rotherham Corp.* [1921] 1 K.B. 526. The third party is protected by the effect of the proviso to s.25(1)(b) and s.27 but cannot gain a benefit by the employer's failure or omission to sue the third party (which may simply be a matter of choice on the part of the employee because the employee is content with the measure of compensation under the Employees Compensation Ordinance).

Procedure—The employee must notify the employer before instituting any claim for damages against a third party under s.25(1). The employee must also notify the employer of any decision to abandon, relinquish or settle his claim and provide particulars thereof as requested by the employer (s.25(2)). If no notice is given or particulars as requested are not provided, s.25(3) provides for a mandatory reduction to zero where appropriate of the amount of compensation payable by reference to the damages awarded against the third party. Notice under s.25(2) does not have to be given where both the respondent employer and the "third party" are found to be liable at common law to the applicant, because then s.25 is not applicable: *Shah Nisar v. Wai Kit Engineering Co. Ltd* (unrep., DCEC 2068/2005, [2005] H.K.E.C. 2068), J. Ko D.D.J., applying Yuen J.A. and Le Pichon J.A. in *Yardway* (above). **Q1/25/5**

Relevant court for s.25 claims—Whereas the District Court has exclusive jurisdiction for determining claims brought against insurers under Part IV of the Ordinance, it has no jurisdiction in the exercise of its employees' compensation jurisdiction to determine claims brought under s.25. Subject to the financial amount involved, claims under s.25 are brought in the District Court or the High Court by separate action in either case (*Wong Leung Tak v. Hip Hing Construction Co. Ltd* [1991] 2 H.K.L.R. 345). **Q1/25/6**

Effect of s.25(5)—This may operate to extend the limitation period for claims under s.25. **Q1/25/7**

Remedies independently of Ordinance against employer

26.—(1) Where any injury is caused to an employee by the negligence, breach of statutory duty or other wrongful act or omission of the employer, or of any person for whose act or default the employer is responsible, nothing in this Ordinance shall limit or in any way affect any civil liability of the employer independently of this Ordinance: *(Amended 32 of 2000 s.48)* **Q1/26**

Provided that any damages awarded against an employer in an action at common law or under any enactment in respect of any such negligence, breach of statutory duty, wrongful act or omission, shall be reduced by the value, as decided by the Court of First Instance or the District Court, as the case may be, of any compensation which has been paid or is payable under the provisions of this Ordinance in respect of the injury sustained by the employee. *(Replaced 55 of 1969 s.20. Amended 44 of 1980 s.15; 76 of 1982 s.20; 25 of 1998 s.2; 52 of 2000 s.15)*

(2) If, within the time limited for taking proceedings under this Ordinance by section 14(1), an action is brought to recover damages independently of this Ordinance for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Ordinance, the action shall be dismissed; but the court in which the action is tried, or, if the determination is (on an appeal by either party) by an appellate tribunal, that tribunal, shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Ordinance. In any proceeding under this subsection, when a court or appellate tribunal assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction of costs, and such certificate shall have the force and effect of an order of the District Court under this Ordinance:

Provided that an appellate tribunal may, instead of itself assessing such compensation, remit the case to the District Court for the assessment of the compensation, and in such case may order the District Court to deduct from the amount of compensation assessed by it all or part of such costs as aforesaid. *(Amended 76 of 1982 s.20)*

(3) Where, within the time limited for taking proceedings under this Ordinance by section 14(1), an action is brought to recover damages independently of this Ordinance in respect of an injury giving rise to a claim for compensation under this Ordinance, and it is determined in that action that—

(a) damages are recoverable independently of this Ordinance subject to such reduction as is mentioned in section 21(1) of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23); and

(b) the employer would have been liable to pay compensation under this Ordinance,

subsection (2) shall apply in all respects as if the action had been dismissed, and, if the plaintiff chooses to have compensation assessed and awarded in accordance with the said subsection (2), no damages shall be recoverable in the said action.

(4) Without prejudice to section 21(3), where a court or appellate tribunal assesses compensation in accordance with subsection (2) it may include in the sum awarded interest at such rate as it thinks fit on the whole or any part of such sum for the whole or any part of the period between the date of the accident and the date of the certificate given under that subsection. *(Added 76 of 1982 s.20)*

[*cf. 1925 c.84 s.29 U.K.*]

Q1/26/1 **General**—See *Lau Kwok Keung v. Evergo Electric Manufacturing Co. Ltd* [1989] H.K.D.C.L.R. 40 for consideration of the scope of the High Court jurisdiction to address matters relating to the Employment Compensation Ordinance in separate common law proceedings brought in the High Court. The court held that the proviso in s.26(1) is not intended or sufficient to confer jurisdiction on the High Court to determine employees' compensation cases. Instead, it permits the High Court, if the High Court considers it appropriate, to assess the amount of compensation which may be awarded under the Ordinance, and deduct that from any award of damages, for example where no claim has yet been made under the Ordinance or a claim has been lodged with the District Court but not yet determined. Whilst issue estoppel may arise as between the two or more sets of proceedings, it is not possible to stay employees' compensation proceedings on the grounds that the employee has commenced separate proceedings claiming damages under common law in respect of the same accident.

Indeed, it is clear that s.26(1) permits two claims to be lodged by the employee against the employer. It cannot be an abuse of process to institute two sets of proceedings either one after the other or at the same time. The issues in the two claims are different and it is unlikely that the same issues will be in dispute, or allowed by the court to be disputed, in the action that is heard second. The court has a discretion as to the appropriate orders for the costs of the proceedings, and would no doubt make an appropriate order if the applicant sought to re-litigate the same issues for a second time: *Lau Kwok-keung v. Evergo Electric Manufacturing Co. Ltd* [1989] H.K.D.C.L.R. 40. In circumstances in which the common law proceedings proceed first, but it is not clear whether the 24-month limitation period will expire before judgment is given in the common law proceedings, an applicant is entitled, and would be prudent, to commence proceedings under the Employment Compensation Ordinance. An application who does not do so, and waits for the judgment in the common law proceedings, is undertaking an unnecessary risk by relying on a favourable exercise of the District Court's discretion to grant leave under s.14(4) of the Ordinance to commence proceedings under the Ordinance out of time. As to how the proceedings are then conducted by the applicant, the applicant should act reasonably and endeavour not to cause costs to be incurred in the proceedings under the Ordinance unnecessarily. Provided an applicant acts reasonably, even if in due course it becomes appropriate to seek to withdraw the proceedings because the damages awarded in the common law proceedings subsume the amount claimed under the Ordinance, the District Court may award the cost of the proceedings to the applicant. See *Shah Nisar v. Wai Kit Engineering Co. Ltd* (unrep., DCEC 2068/2005, [2005] H.K.E.C. 2068), J. Ko D.D.J.

Q1/26/2 **Scope of proviso to s.26(1)**—The proviso is intended to prevent double recovery of compensation and damages by the same person. It does not prevent double payment in respect of the same accident where the payments are made to different persons. For consideration of these issues in unusual circumstances, see *Lai Tat Wah v. Franki Contractors Ltd* [1993] 1 H.K.L.R. 1.

Q1/26/3 **Note**—See *Yuen Yiu Kwong v. Chan Kwok Chuen* [2003] 2 H.K.L.R.D. 70, not following *Lam Sui Wo v. Leung Kam Tin* [1990] 1 H.K.C. 456, for consideration of the question of whether, in respect of any action for personal injuries, and the question of whether to start the action in the District Court or the High Court, regard should be had to the impact of s.26(1) in reducing the amount of damages awardable at common law by the amount of employees' compensation paid or payable under the Ordinance. In *Yuen Yiu Kwong v. Chan Kwok Chuen* (above), whilst the amount claimed by the plaintiff in his statement of damages settled by counsel was significantly higher, the net award, following trial, of damages at common law, after deducting the amount of

employees' compensation payable, was less than the District Court jurisdictional limit as at the time the writ was issued. The quantum of employees' compensation was known approximately one month before the issue of the writ. Accordingly, the court ordered that the element of costs payable to the plaintiff should be taxed on the District Court scale only as, properly advised, the plaintiff should have commenced proceedings in the District Court and not the High Court.

Limitation of right of indemnity against third party under section 25

27. Where an employee or his legal personal representative or member of his family has recovered compensation under this Ordinance or any sum by virtue of an agreement referred to in section 25(1)(b) in respect of an injury caused under circumstances which would give a right to recover reduced damages in respect thereof by virtue of section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), from some person other than the employer (hereinafter referred to as the third party), any right conferred by section 25 of this Ordinance on the person by whom the compensation or sum was paid, or on any person called on to pay an indemnity under section 24 of this Ordinance, to be indemnified by the third party shall be limited to a right to be indemnified in respect of such part only of the compensation, sum or indemnity paid or payable as bears to the total compensation, sum or indemnity so paid or payable the same proportion as the said reduced damages bear to the total damages which would have been recoverable if the employee had not been at fault. **Q1/27**

(Replaced 76 of 1982 s.21. Amended 52 of 2000 s.16)

[*cf. 1945 c.28 s.2(2) U.K.*]

In *Cheng Cheung Kai v. Wai Sai Kwong* [2005] 1 H.K.C. 26, the court held that the employer was entitled to recover from the defendant (who was responsible for the injury suffered by the employee) the amount which the employer was obliged to pay pursuant to the provisions of this Ordinance, subject to that amount being reduced by an amount equal to the employee's own negligence. In that case, the employee was 75% contributorily negligent, so that the employer was only able to recover from the defendant 25% of the sum that it had paid the employee by way of compensation under the Ordinance. **Q1/27/1**

28. *(Repealed 66 of 1993 s.4)* **Q1/28**

Application to persons employed on ships

29.—(1) This Ordinance shall apply to masters and seafarers who are employees within the meaning of this Ordinance and are members of the crew of a Hong Kong ship, subject to the following modifications— *(Amended 44 of 1980 s.15; 44 of 1995 s.143)* **Q1/29**

(a) the notice of accident and the claim for compensation may, except where the person injured is the master, be given to the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary for any seafarer to give notice of the accident; *(Amended 44 of 1995 s.143)*

(b) in the case of the death of the master or seafarer, the application for compensation shall be made within 2 years after the occurrence of the death or, where the ship has been or is deemed to have been lost with all hands, within 2 years of the date on which the ship was, or is deemed to have been, so lost; *(Amended 44 of 1995 s.143)*

(c) whenever in the course of any legal proceeding under this Ordinance the testimony of any witness is required in relation to the subject matter of the proceeding, then, upon due proof that the witness cannot be found in Hong Kong, any deposition which the witness may have previously made on oath in relation to the same subject matter before any justice or magistrate in Her Majesty's dominions or in any place where Her Majesty exercises jurisdiction or before any British Consular Officer elsewhere and which, if the

proceeding had been under the Merchant Shipping Act 1894 (1894 c.60 U.K.)[#], would have been admissible in such proceeding by virtue of sections 691 and 695 of that Act, shall be admissible in evidence subject to similar conditions as are laid down in the said sections 691 and 695;

(d) in case of the death of a master or seafarer, no reimbursement of the reasonable expenses of the funeral shall be payable, if the owner of the ship is, under any law in force for the time being in Hong Kong relating to merchant shipping, liable to pay the expenses of burial. *(Amended 76 of 1982 ss.22 & 37; 44 of 1995 s.143; 52 of 2000 s.17)*

(2) This Ordinance shall also apply to any person, not being a master or seafarer, employed or engaged in any capacity on board and on or about the business of a Hong Kong ship and if he is otherwise an employee within the meaning of this Ordinance. *(Amended 44 of 1980 s.15; 44 of 1995 s.143)*

(3) *(Repealed 76 of 1982 s.22)*

(4) In this section—

"Hong Kong ship" (香港船舶) includes any ship or vessel registered or licensed in Hong Kong; *(Amended 23 of 1998 s.2)*

"ship" (船舶), "vessel" (船隻), "seafarer" (海員) and "master" (船長) shall have the respective meanings ascribed to them by the Merchant Shipping (Seafarers) Ordinance (Cap. 478) or the Shipping and Port Control Ordinance (Cap. 313), as the case may require. *(Replaced 44 of 1995 s.143)*

Application to persons employed on non-Hong Kong ships

Q1/30 **30.**—(1) If the employer submits or has agreed to submit to the jurisdiction of the Court, then, notwithstanding that the accident causing the personal injury occurred outside Hong Kong, this Ordinance shall apply, subject to the modifications in subsections (2) and (3) and section 30A, to seafarers who are employees within the meaning of this Ordinance and, having been recruited or engaged in Hong Kong, are members of the crew of a ship which is not a Hong Kong ship as defined in section 29(4). *(Amended 44 of 1980 s.15; 59 of 1988 s.9; 44 of 1995 s.143; 23 of 1998 s.2)*

(2) The notice of accident and the claim for compensation may be given to the master of the ship as if he were the employer, but where the accident occurred and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident. *(Replaced 76 of 1982 s.23)*

(3) In the case of the death of a seafarer to whom this section applies, the application for compensation shall be made within 2 years after the death occurred or, where the ship has been or is deemed to have been lost with all hands, within 2 years after the date on which the ship was, or is deemed to have been, so lost. *(Amended 44 of 1995 s.143)*

(4) *(Repealed 59 of 1988 s.9)*

(5) In this section—

"seafarer" (海員) has the meaning that it has for the purposes of the Merchant Shipping (Seafarers) Ordinance (Cap. 478). *(Replaced 44 of 1995 s.143)*

(Added 55 of 1969 s.21A. Amended 23 of 1998 s.2)

Please also see following—

(a) in relation to the Merchant Shipping Act 1894, Part 3 of Schedule 5 to Cap. 415 and s.1 of Schedule 2 to Cap. 508;

(b) in relation to the Merchant Shipping Acts 1894 to 1979, s.117 of Cap. 281, s.103 of Cap. 415 and s.142 of Cap. 478.

Testimony of witness outside Hong Kong

30A.—(1) Where in a proceeding under this Ordinance in relation to an injury that occurred outside Hong Kong the testimony of a witness is required, on proof that the witness cannot be found in Hong Kong a deposition, or a certified copy of it, which the witness may have previously made on oath outside Hong Kong in relation to that injury before a justice or magistrate in Her Majesty's dominions or in any place where Her Majesty exercises jurisdiction or before any British Consular Officer elsewhere is, subject to subsection (2), admissible in evidence without proof of the signature or official character of the person appearing to have signed the deposition. **Q1/30A**

(2) The person before whom the deposition was made shall sign it and certify that the witness was present at the making of the deposition.

(Added 59 of 1988 s.10)

Application to an employee injured outside Hong Kong

30B.—(1) In this section— **Q1/30B**

"foreign compensation" (外地補償) means compensation paid to an employee in respect of an injury under the law of a place outside Hong Kong where the injury occurred;

"person carrying on business" (經營業務的人) has the same meaning as in the Business Registration Ordinance (Cap. 310).

(2) This Ordinance also applies where personal injury by accident arising out of and in the course of employment is caused to an employee outside Hong Kong where the employee's contract of employment is entered into in Hong Kong with an employer who is a person carrying on business in Hong Kong.

(3) Compensation payable under this Ordinance to an employee referred to in subsections (2) and (5) shall be reduced by the amount of any foreign compensation paid to him in respect of the same injury. *(Amended 63 of 1992 s.12)*

(4) Where foreign compensation is paid to an employee after compensation in respect of the same injury is paid under this Ordinance, the amount paid under this Ordinance, not exceeding the amount of the foreign compensation paid, shall be repaid to the employer by the employee and the amount is recoverable as a civil debt.

(5) If an employer who is a person carrying on business outside Hong Kong submits or has agreed to submit to the jurisdiction of the Court, then, notwithstanding that the accident causing the personal injury occurred outside Hong Kong, this Ordinance shall apply to employees within the meaning of this Ordinance who have been recruited or engaged in Hong Kong. *(Added 63 of 1992 s.12)*

(Added 59 of 1988 s.10)

Contracting out

31.—(1) Any contract or agreement whether made before or after the commencement of this Ordinance, whereby an employee relinquishes any right to compensation from an employer for personal injury by accident arising out of and in the course of his employment, shall, subject to subsection (2), be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under the provisions of this Ordinance. **Q1/31**

(2) The Commissioner may, if satisfied that, by reason of old age or serious physical defect or infirmity, a person, if employed as an employee, is specially liable to meet with an accident, or, if he meets with an accident is specially liable to sustain injury, in connection with any contract of such employment, authorize the person and the employer to enter into an

agreement in writing reducing or giving up the right of such person to compensation under the provisions of this Ordinance in respect of any accident which is caused or contributed to by the old age or serious physical defect or infirmity.

(3) An agreement entered into under subsection (2) shall be ineffective unless the Commissioner certifies that in his opinion such agreement is fair and reasonable.

(Amended 55 of 1969 s.22; 44 of 1980 s.15)

Q1/31/1 **Note**—In *Paquito Lima Buton v. Rainbow Joy Shipping Ltd Inc.* (2008) 11 H.K.C.F.A.R. 464, the Court of Final Appeal held that s.18A(1), subject to specified exceptions only, covers all claims and gives the District Court exclusive jurisdiction. Arbitration is not a specified exception. Section 18A(1) excludes the court's jurisdiction to stay court proceedings in favour of arbitration proceedings. The Court of Final Appeal noted that the intention to confer exclusive jurisdiction on the District Court is reinforced by s.21 which, in addressing the Court's procedural powers, postulates that it is "empowered to determine all claims for compensation under this Ordinance whatever the amount involved". These are general words covering all claims under the statute, leaving little room for distinguishing between the pursuit of such claims in an arbitral rather than a judicial tribunal.

PART III

COMPENSATION FOR OCCUPATIONAL DISEASES

Compensation in the case of occupational disease

Q1/32 **32.**—(1) If the total or partial incapacity (whether of a permanent or temporary nature) or the death of an employee results from an occupational disease and is due to the nature of any employment in which the employee was employed at any time within the prescribed period immediately preceding such incapacity or death, whether under one or more employers, then, the employee or members of his family, as the case may be, shall be entitled to compensation under this Ordinance as if such incapacity or death had been caused by an accident arising out of and in the course of employment in respect of which the provisions of section 5 apply, and the provisions of this Ordinance (including in particular section 15) shall, mutatis mutandis, apply thereto, subject to the following modifications— *(Amended 1 of 1995 s.12; 52 of 2000 s.18)*

(a) the incapacity or the death shall be treated as the happening of the accident;

(b) if it is proved that the employee, at the time of entering into the employment, wilfully and with intent to deceive represented in writing that he had not previously suffered from the disease resulting in the incapacity or death, compensation shall not be payable;

(c) subject to subsection (3), the compensation shall be recoverable from the employer who last employed the employee during the prescribed period immediately preceding the incapacity or death in the employment to the nature of which the disease was due;

(d) the amount of the compensation shall be calculated with reference to the earnings of the employee under the employer from whom the compensation is recoverable pursuant to paragraph (c) or subsection (3);

(e) the employer to whom notice of incapacity or death is given shall be the employer who last employed the employee during the prescribed period immediately preceding the incapacity or death in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the employee has voluntarily left such employer's employment.

(2) Where an employee suffers incapacity or dies as a result of an occupational disease, the employee or members of his family, as the case may be, shall, if so required, furnish to the employer who last employed the employee during the prescribed period immediately preceding the incapacity or death in the employment to the nature of which the occupational disease was due such information as to the names and addresses of all other employers who employed him in such employment during such period as he or they may possess, and, if such information is not furnished or is not sufficient to enable that employer to take proceedings under subsection (3), that employer, upon proving that the disease was not contracted whilst the employee was in his employment, shall not be liable to pay compensation. *(Amended 52 of 2000 s.18)*

(3) If the employer who last employed the employee during the prescribed period immediately preceding the incapacity or death in the employment to the nature of which the occupational disease was due alleges that the disease was in fact contracted whilst the employee was in the employment of some other employer during such period, and not whilst in his employment, he may join such other employer as a party to the proceedings in respect of the claim for compensation, and if the allegation is proved that other employer shall be the employer from whom the compensation is recoverable.

(4) If the occupational disease is of such a nature as to be contracted by a gradual process, any other employers who during the prescribed period immediately preceding the incapacity or death employed the employee in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable pursuant to subsection (1)(c) or subsection (3) such contribution as, in default of agreement, may be determined by a Court at the hearing of the claim for compensation, or, if the amount of and liability to pay the compensation is not in dispute, by the Court at a separate hearing.

(5) Nothing in subsection (2) shall be construed as preventing the employee or members of his family, as the case may be, from recovering compensation under this Part from any other employer who employed the employee in the employment to the nature of which the occupational disease was due during the prescribed period immediately preceding the incapacity or death in the event of the employer who last employed the employee in such employment proving that the disease in question was not contracted whilst the employee was in his employment. *(Amended 52 of 2000 s.18)*

(6) For the purposes of this section—

(a) the date of the incapacity shall, in the absence of agreement, be such date as the Court shall determine as being the date upon which the incapacity commenced; and no employee shall be prejudiced in any claim for compensation under this Part by reason only of the fact that the notice of incapacity given to the employer specified some other date;

(b) the prescribed period shall be the period specified in the fourth column of the Second Schedule in relation to the trade, industry or process specified in the third column of that Schedule.

(Added 19 of 1964 s.5. Amended 55 of 1969 s.23; 44 of 1980 s.15)

Medical examination before employment

33.—(1) Any employer may, before employing an employee in any trade, industry or process specified in the third column of the Second Schedule, require the employee to undergo a medical examination by a medical practitioner at the cost of the employer. **Q1/33**

(2) (a) Subject to paragraph (b), any employee who refuses to undergo a medical examination required under subsection (1) shall not be

entitled to recover from that employer compensation under this Ordinance for incapacity or death suffered as a result of an occupational disease.

(b) Paragraph (a) shall not apply unless the refusal to undergo the medical examination is evidenced by writing under the hand of the employee.

(Added 19 of 1964 s.5. Amended 44 of 1980 s.15)

Q1/33/1 **For accidents happened on or after September 1, 2008**—Section 33(1) is amended to read as follows:

(1) Any employer may, before employing an employee in any trade, industry or process specified in the third column of the Second Schedule, require the employee to undergo a medical examination by a registered medical practitioner at the cost of the employer. *(Amended 16 of 2006 s.19)*

Presumption as to cause of occupational disease

Q1/34 **34.** If an employee who suffers incapacity or dies as a result of an occupational disease was within the period specified opposite to that disease in the fourth column of the Second Schedule immediately preceding such incapacity or death employed in any trade, industry or process specified opposite to that disease in the third column of that Schedule, it shall be presumed, until the contrary is proved, that such disease was due to the nature of such employment.

(Added 19 of 1964 s.5. Amended 55 of 1969 s.24; 44 of 1980 s.15)

Amendment of Second Schedule

Q1/35 **35.** The Commissioner may from time to time by order, which shall be published in the Gazette, amend the Second Schedule.

(Added 19 of 1964 s.5. Amended 66 of 1993 s.5)

Saving in case of diseases other than occupational diseases

Q1/36 **36.**—(1) Subject to subsection (2), nothing in this Part shall prejudice the right of an employee to recover compensation under this Ordinance in respect of a disease to which this Part does not apply, if the disease is a personal injury by accident within the meaning of section 5. *(Added 19 of 1964 s.5. Amended 44 of 1980 s.15; 51 of 1980 s.48)*

(2) Subsection (1) does not apply to any incapacity resulting from—

(a) pneumoconiosis or mesothelioma (or both) in respect of which compensation is recoverable under the Pneumoconiosis and Mesothelioma (Compensation) Ordinance (Cap. 360); or (Replaced 6 of 2008 s. 45)

(b) noise-induced deafness in respect of which compensation is payable under the Occupational Deafness (Compensation) Ordinance (Cap. 469). *(Replaced 21 of 1995 s.41)*

PART IIIA

PROSTHESES AND SURGICAL APPLIANCES

(Amended 44 of 1980 s.6)

Interpretation of Part IIIA

Q1/36A **36A.** In this Part—

"Board" (委員會) means the Prostheses and Surgical Appliances Board appointed under section 36M(1); *(Added 44 of 1980 s.7)*

"Director" (署長) means the Director of Health; *(Added 44 of 1980 s.7. Amended L.N. 76 of 1989)*

"prosthesis" (義製人體器官) means any artificial item which replaces a part of the body removed or amputated as a result of an injury;

"surgical appliance" (外科器具) means any artificial item which supports directly or indirectly the structure or function or a part of the body impaired as a result of an injury.

(Added 67 of 1971 s.2)

Employer's liability to pay for the cost of supplying and fitting prosthesis or surgical appliance

36B.—(1) Subject to the provisions of this section, if, in any employment, personal injury is caused to an employee by accident arising out of and in the course of the employment, the employer shall, notwithstanding any other compensation he may be liable to pay under this Ordinance, be liable to pay for the cost of supplying and fitting to the employee a prosthesis or surgical appliance required by him as a result of his injury. *(Amended 76 of 1982 s.24)* **Q1/36B**

(1A) Notwithstanding anything in section 5(2)(a), the employer shall be liable under subsection (1) whether or not the injury has resulted or is likely to result in any temporary incapacity or permanent incapacity causing a loss of earning capacity. *(Added 76 of 1982 s.24. Amended 1 of 1995 s.13; 67 of 1996 s.6)*

(2) The employer shall not be liable under subsection (1) unless—

(a) the employee submits himself to treatment by a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; (Amended 16 of 2006 s. 20)

(b) the prosthesis or surgical appliance is supplied and fitted to the employee; and

(c) the prosthesis or surgical appliance so supplied and fitted is—

(i) manufactured or on sale in Hong Kong; and

(ii) certified by the Board under section 36M(4). *(Replaced 44 of 1980 s.8)*

(2A) Where an employee who has sustained injury outside Hong Kong in an accident arising out of and in the course of his employment submits himself to medical treatment outside Hong Kong by or under the supervision of a person who is allowed to practise medicine, surgery or dentistry in the place where such medical treatment is given, the employer shall, notwithstanding subsection (2)(a), if the Board so approves, be liable to pay for the cost of supplying and fitting the prosthesis or surgical appliance required by the employee. *(Added 1 of 1995 s.13)*

(3) If the prosthesis or surgical appliance required by the employee is not manufactured or on sale in Hong Kong, and the Director gives his approval, the employee may be supplied and fitted with a prosthesis or surgical appliance which is manufactured or on sale at a place other than Hong Kong, in which case, the employer shall, notwithstanding subsection (2)(c)(i), be liable to pay for the cost of supplying and fitting the same to the employee.

(Added 67 of 1971 s.2. Amended 44 of 1980 ss.8 & 15)

For accidents happened on or after September 1, 2008—Section 36B(2)(a) is amended to read as follows: **Q1/36B/1**

(2) The employer shall not be liable under subsection (1) unless—

(a) the employee submits himself to treatment by a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; *(Amended 16 of 2006 s.20)*

Limit of employer's liability to pay under section 36B

36C. The amount of the cost which the employer is liable to pay under section 36B shall not, in the case of any one employee, exceed an aggregate **Q1/36C**

of the amount specified in the second column of the Sixth Schedule shown opposite section 36C specified in the first column of that Schedule in respect of any one accident.

(Added 67 of 1971 s.2. Amended 44 of 1980 s.15; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; 36 of 1996 s.20)

Manner in which a claim under section 36B may be made

Q1/36D **36D.**—(1) A claim for the cost of supplying and fitting any prosthesis or surgical appliance which the employer is liable to pay under section 36B may be made by the Director by serving on the employer a request in writing for the payment of the cost.

(2) A request for payment under subsection (1) shall specify—

(a) *(Repealed 59 of 1988 s.11)*

(b) the amount claimed; and

(c) the address at which the Director may be served under section 36E(2)(b) if the employer disputes the claim.

(3) A request for payment under subsection (1) shall be supported by a certificate issued by the Board under section 36M(4).

(Added 67 of 1971 s.2. Amended 44 of 1980 s.9)

Employer to pay amount in 1 month unless he disputes the claim

Q1/36E **36E.**—(1) The employer shall, on receipt of a request for payment under section 36D and before the expiry of 1 month from the time of receipt, pay the amount of the cost to the Director, unless he disputes his liability to pay or the necessity or cost of the prosthesis or surgical appliance.

(2) If the employer so disputes, he shall within the period specified in subsection (1)—

(a) deposit the amount of the cost claimed with the Director who shall hold the same until any such dispute is determined; and

(b) serve on the Director at the address specified in section 36D(2) a notice setting out the grounds of dispute.

(3) If the employer so disputes, but fails without reasonable excuse to comply with the provisions of subsection (2), he shall be deemed to have agreed to pay the amount of the cost claimed in the request for payment.

(Added 67 of 1971 s.2. Amended 44 of 1980 s.10)

Disputes to be determined by the Court

Q1/36F **36F.**—(1) Where any dispute arises as to the liability to pay or the necessity or cost of any prosthesis or surgical appliance supplied and fitted to the employee under this Part, the dispute shall be determined by the Court.

(2) At the determination of the dispute, the Court may make such order as it may deem fit in respect of the deposit under section 36E(2)(a), but shall order the return of the deposit to the employer if it finds the employer not liable or that the prosthesis or surgical appliance is not necessary for the employee.

(Added 67 of 1971 s.2. Amended 44 of 1980 s.15)

Application to the Court

Q1/36G **36G.** Where the employer on whom a request for payment under section 36D is served fails to pay within the period specified in section 36E(1), or disputes the claim, an application to the Court in the prescribed form and manner may be made by the Director for enforcing his claim to the amount of the cost or for the determination of the dispute.

(Added 67 of 1971 s.2. Amended 44 of 1980 s.11)

Claim under section 36B to be made within 5 years

36H. All claims for the cost of supplying and fitting any prosthesis or surgical appliance to an employee under this Part shall be made within 5 years from the occurrence of the accident giving rise to the injury. Q1/36H

(Added 67 of 1971 s.2. Amended 44 of 1980 s.15)

Employer's liability to pay for the cost of repair or renewal of prostheses or surgical appliances

36I. Subject to section 36J, where in respect of an accident occurring on or after the date on which this section comes into operation an employer is liable to pay for the cost of supplying and fitting a prosthesis or surgical appliance to an employee under section 36B, he shall also be liable to pay for the probable cost of the normal repair and renewal of the prosthesis or surgical appliance during a period of 10 years after the date on which the prosthesis or surgical appliance is originally fitted. Q1/36I

(Replaced 44 of 1980 s.12)

Limit of employer's liability to pay under section 36I

36J. The amount of the cost which the employer is liable to pay under section 36I shall be the total amount assessed by the Board under section 36M(2)(c) and (3) and shall not, in the case of any one employee, exceed an aggregate of the amount specified in the second column of the Sixth Schedule shown opposite section 36J specified in the first column of that Schedule in respect of any one accident. Q1/36J

(Replaced 44 of 1980 s.12. Amended L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N 566 of 1995; 36 of 1996 s.21)

Treatment of claims under section 36I

36K.—(1) A claim for payment of the cost which an employer is liable to pay under section 36I shall be treated as a claim for the cost of supplying and fitting a prosthesis or surgical appliance under section 36B, and, subject to subsection (2), sections 36D, 36E, 36F, 36G and 36H shall, with the necessary modifications, apply in respect of a claim under section 36I. *(Amended 76 of 1982 s.25)* Q1/36K

(2) An employer may not, in respect of any claim made under section 36I, dispute the necessity for renewal and repair of the prosthesis or surgical appliance.

(Added 44 of 1980 s.12)

Payment of costs from and into general revenue

36L.—(1) Where, in respect of an accident occurring on or after the date on which this section comes into operation, an employer is liable to pay for the cost of— Q1/36L

(a) supplying and fitting any prosthesis or surgical appliance to an injured employee under section 36B; and

(b) the normal repair and renewal of such prosthesis or surgical appliance under section 36I,

then, subject to the rights of the Director in respect of the recovery of any amount from the employer under this Part, the cost—

(i) of the supplying and fitting; and

(ii) whenever incurred, of the normal repair and renewal,

of such prosthesis or surgical appliance shall be payable out of the general revenue of Hong Kong.

(2) All amounts—

(a) paid to the Director under section 36E(1); and

(b) recovered by him under sections 36F(2) and 36G,

shall be paid by him into the general revenue of Hong Kong.

(Added 44 of 1980 s.12)

Director may proceed against insurer

Q1/36LA **36LA.**—(1) Where the Director is satisfied that—

(a) the employer cannot be readily located in Hong Kong;

(b) the employer is insolvent; or

(c) the insurer of the employer has disclaimed liability under the policy of insurance issued for the purposes of Part IV,

the Director may take proceedings directly against the insurer for a claim under this Part as if the insurer were the employer.

(2) Where under this Part an amount is paid by the insurer which would, but for this section, not be payable under the policy of insurance, the employer is liable to pay that amount to the insurer.

(Added 66 of 1993 s.6)

Prostheses and Surgical Appliances Board

Q1/36M **36M.**—(1) The Director shall appoint a board to be known as the Prostheses and Surgical Appliances Board which shall consist of—

(a) 2 persons each of whom shall be a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; and (Replaced 16 of 2006 s. 21)

(b) the Senior Occupational Health Officer or any Occupational Health Officer. *(Amended L.N. 248 of 1982)*

(2) The functions of the Board shall be—

(a) to determine whether a prosthesis or surgical appliance required by an injured employee is necessary for him having regard to the nature and extent of his injury and, if so, to determine the cost of supplying and fitting the same;

(b) in any case where a prosthesis or surgical appliance has already been fitted to an injured employee, to determine whether the prosthesis or surgical appliance is necessary for him having regard to the nature and extent of his injury and, if so, to determine whether the cost of the same is reasonable; and

(c) in any case to which section 36I applies, to assess the total amount of the probable cost of the normal repair and renewal of any prosthesis or surgical appliance during a period of 10 years after the date of the original fitting of the same.

(2A) Where a prosthesis or surgical appliance has already been supplied and fitted outside Hong Kong to an injured employee, the Board, in the exercise of its functions pursuant to subsection (2), may regard the injured employee as not having been fitted with that prosthesis or surgical appliance but, instead, as having been supplied and fitted with a prosthesis or surgical appliance manufactured or on sale in Hong Kong. *(Added 1 of 1995 s.14)*

(3) The Board shall, when assessing the total amount of the probable cost of the normal repair and renewal of a prosthesis or surgical appliance under subsection (2)(c), have regard to—

(a) the durability of the prosthesis or surgical appliance originally fitted;

(b) the probable number of replacements of such prosthesis or surgical appliance required during a period of 10 years after the date of the original fitting; and

(c) the cost of the prosthesis or surgical appliance at the time of the assessment.

(4) If the Board is satisfied—

(a) in any case to which subsection (2)(a) applies, that the prosthesis or surgical appliance is necessary; or

(b) in any case to which subsection (2)(b) applies, that the prosthesis or surgical appliance is necessary and that the cost of supplying and fitting the same is reasonable,

it shall issue a certificate to the Director, stating in respect of such prosthesis or surgical appliance—

(i) that it is necessary;

(ii) the cost of the supplying and fitting;

(iii) that such cost has been determined by the Board under subsection (2)(a) or has been determined by the Board to be reasonable under subsection (2)(b), as the case may be; and

(iv) where applicable, the Board's assessment of the total amount of the probable cost under subsection (2)(c).

(5) A certificate purporting to be issued under subsection (4) and to be signed by or for the Board shall be admitted in evidence without further proof on its production in the Court and—

(a) until the contrary is proved, it shall be presumed that the certificate is so issued and signed;

(b) shall be evidence of the matters stated therein.

(Added 44 of 1980 s.12)

For accidents happened on or after September 1, 2008—Section 36M(1)(a) reads as follows: **Q1/36M/1**

(1) The Director shall appoint a board to be known as the Prostheses and Surgical Appliances Board which shall consist of—

(a) 2 persons each of whom shall be a registered medical practitioner, a registered Chinese medicine practitioner or a registered dentist; and *(Replaced 16 of 2006 s.21)*

Attendance of employee for purposes of section 36M

36MA. The Board may for the purposes of section 36M, by notice in writing to an injured employee, require the employee to attend for an examination or assessment on such date and at such time and place as is specified in the notice, and the provisions of section 16I(2), (3), (4), (5) and (6) shall apply in respect of a notice under this section as they apply in respect of a notice under section 16I(1). **Q1/36MA**

(Added 76 of 1982 s.26)

Director to take steps to ensure supply, etc.

36N. The Director shall take such steps as to him seem necessary to ensure— **Q1/36N**

(a) the supply and fitting of a prosthesis or surgical appliance to an injured employee under section 36B; and

(b) the normal repair and renewal of such prosthesis or surgical appliance under section 36I.

(Added 44 of 1980 s.12)

Application of certain provisions

36O. Notwithstanding anything in section 24 or 31, in the application of those sections in respect of any claim for the cost of supplying and fitting a prosthesis or surgical appliance and for the cost of repair and renewal of such prosthesis or surgical appliance under this Part— **Q1/36O**

(a) the rights possessed by or vested in an employee under section 24 shall be vested in the Director; and

(b) the right of any person to compensation referred to in section 31(2) shall be deemed to include the right of the Director to claim for such cost under this Part.

(Replaced 76 of 1982 s.27. Amended 66 of 1993 s.7)

PART IV

COMPULSORY INSURANCE

Q1/37 **37.** *(Omitted as spent—E.R. 1 of 2014)*

Interpretation

Q1/38 **38.** In this Part, unless the context otherwise requires—

"the available amount covered by the policy of insurance" (可得的保險單承保款額) means the amount covered by the policy of insurance after deducting therefrom any amount which is either paid or due and payable by the insurer under the policy in respect of the same event; *(Added 47 of 1995 s.3)*

"company" (公司) has the meaning given by section 2(1) of the Companies Ordinance (Cap. 622); (Added 47 of 1995 s. 3. Amended 28 of 2012 ss. 912 & 920)"

"construction work" (建造工作) means—

(a) the construction, erection, installation, reconstruction, repair, maintenance (including redecoration and external cleaning), renewal, removal, alteration, improvement, dismantling, or demolition of any structure or works specified in the Fifth Schedule;

(b) any work involved in preparing for any operation referred to in paragraph (a), including the laying of foundations and the excavation of earth and rock prior to the laying of foundations;

(c) the use of machinery, plant, tools, gear, and materials in connection with any operation referred to in paragraph (a) or (b); *(Added 47 of 1995 s.3)*

"domestic premises" (住宅處所) means any premises used exclusively for residential purposes.

"group of companies (公司集團) has the meaning given by section 2(1) of the Companies Ordinance (Cap. 622); (Added 28 of 2012 ss. 912 & 920)

holding company (控權公司) has the meaning given by section 13 of the Companies Ordinance (Cap. 622) for the purposes of that Ordinance; (Added 28 of 2012 ss. 912 & 920)"

"policy of insurance issued for the purposes of this Part" (因本部的規定而發出的保險單) means any policy of insurance issued by an insurer that insures or purports to insure an employer against his liability to pay compensation for the injury by accident or for the death of an employee that arises out of and in the course of employment. *(Added 66 of 1993 s. 8. Amended 28 of 2012 ss. 912 & 920)*

"subsidiary (附屬公司) has the meaning given by section 15 of the Companies Ordinance (Cap. 622) for the purposes of that Ordinance. (Added 28 of 2012 ss. 912 & 920) *(Amended 28 of 2012 ss. 912 & 920 and E.R. 1 of 2014)"*

Q1/38/1 **"Employer" and "policy of insurance issued for the purpose of this Part"**—For the purpose of s.38 and hence Part IV of the Ordinance generally, "employer" means the direct or immediate employer of an employee. It does not include a principal contractor who may be deemed by virtue of s.24 to be an employer of an employee directly employed by a sub-

contractor. Where a principal contractor takes out a public liability policy, without more such a policy cannot be considered to be within the meaning of a Part IV policy as defined in s.38 and is not a policy to which a deemed employee pursuant to s.24 can have recourse against the principal contractor's insurers. (See *Leung Siu Mui v. Tai Ping Insurance Co. Ltd* [2002] 2 H.K.C. 314, Carlson D.C.J., applying *Woo Kin Wah v. Tugu Insurance Co. Ltd* [1993] 1 H.K.L.R. 300, CA, the majority decision in *Leung Chack v. Asia Insurance Co. Ltd* [1991] 2 H.K.L.R. 496, *Siu Yin-Kwan v. Eastern Insurance Co. Ltd* [1993] 2 H.K.L.R.D. 101 and *B+B Construction Co. Ltd v. Sun Alliance and London Insurance Plc* [2001] 1 H.K.L.R.D. 1, CFA, *Waan Chuen Ming v. Law King Nam trading as Kar Kin Engineering & Supplier Co.* (unrep., DCEC 505/2002, [2005] H.K.E.C. 713).

Application of this Part

39.—(1) Subject to subsection (2), this Part shall apply to all employments other than any employment exempted under subsection (3). **Q1/39**

(2) Notwithstanding section 4, this Part shall not apply to any employment by or under the State.

(3) The Chief Executive in Council may, by notice in the Gazette, exempt any employment from the application thereto of this Part.

(Amended 56 of 2000 s.3)

Compulsory insurance against employer's liability

40.—(1) Subject to subsections (1B) and (1C), no employer shall employ any employee in any employment unless there is in force in relation to such employee a policy of insurance issued by an insurer for an amount not less than the applicable amount specified in the Fourth Schedule in respect of the liability of the employer. *(Amended 47 of 1995 s.4)* **Q1/40**

(1A) Subsection (1) does not require an employer to obtain insurance for any liability he may have in respect of damages awarded by a court outside Hong Kong to an employee referred to in section 30B. *(Added 59 of 1988 s.12)*

(1B) A principal contractor who has undertaken to perform any construction work may, in compliance with subsection (1), take out a policy of insurance issued by an insurer for an amount not less than the amount specified in the Fourth Schedule in relation to a principal contractor in respect of the liability of the principal contractor and the liability of his sub-contractor. *(Added 47 of 1995 s.4)*

(1C) A group of companies may, in compliance with subsection (1), take out a policy of insurance issued by an insurer for an amount not less than the amount specified in the Fourth Schedule in relation to a group of companies in respect of the liabilities of the companies, bodies corporate and corporations in the group specified in the policy. *(Added 47 of 1995 s.4)*

(1D) For the purpose of this section, section 44B and the definition of "the available amount covered by the policy of insurance" (可得的保險單承保款額) in section 38, "accident" (意外) means an accident or a series of accidents arising out of one event, and in relation to an occupational disease—

(a) where incapacities or deaths of more than one employee are attributable to a cause that does not arise out of a sudden and identifiable event, the incapacities or deaths of such employees are regarded as being caused by separate accidents arising out of separate events; and

(b) where incapacities or deaths of more than one employee are attributable to a cause that arises out of a sudden and identifiable event, the incapacities or deaths of such employees are regarded as being caused by an accident or a series of accidents arising out of one event. *(Added 47 of 1995 s.4)*

(1E) For the avoidance of doubt, it is declared that—

(a) the amount required by subsection (1) is ascertained by reference to the number of employees in relation to whom the policy is in force and in accordance with the Fourth Schedule;

(b) the amount that may be taken out under subsection (1B) or (1C) is irrespective of the number of employees in relation to whom the policy is in force and in the case of subsection (1B), is also irrespective of the number of sites on which construction work undertaken by a principal contractor is performed;

(c) the amount required by subsection (1), (1B) or (1C) may be inclusive of interest, costs and expenses indemnified under the policy and other costs and expenses incurred by the employer (including a principal contractor, a sub-contractor, a holding company or a subsidiary) and recoverable from the insurer under the policy;

(d) where a principal contractor has taken out a policy of insurance under subsection (1B), the principal contractor and a sub-contractor insured under the policy shall be regarded as having complied with subsection (1);

(e) where a group of companies has taken out a policy of insurance under subsection (1C), all the companies, bodies corporate and corporations in the group insured under the policy shall be regarded as having complied with subsection (1). *(Added 47 of 1995 s.4)*

(1F) The reference in this section to the liability of a person is a reference to the liability of the person under this Ordinance and independently of this Ordinance for any injury to his employee by accident arising out of and in the course of the employee's employment. *(Added 47 of 1995 s.4)*

(2) An employer who contravenes subsection (1) commits an offence and is liable—

(a) on conviction upon indictment to a fine at level 6 and to imprisonment for 2 years; and

(b) on summary conviction to a fine at level 6 and to imprisonment for 1 year. *(Amended 52 of 2000 s.19)*

Q1/40/1 **Scope of obligation to have in force a policy of insurance in respect of an employee in the case of a principal contractor**—Section 40 obliges a principal contractor to have in force a policy of insurance in respect of its direct employees. However, nothing in Part IV of the Ordinance or in any other part of the Ordinance, in particular nothing in s.24, requires a principal contractor to have in force a policy of insurance in respect of persons who are deemed to be employees of the principal contractor by virtue of s.24. See para.Q1/38 above. In *Law Lai Ha v. Zurich Insurance Co* [2011] 2 H.K.L.R.D. 450, the Court held that it would be open to an insurance company to limit the ambit of the risk to which a policy of employees' compensation relates by restricting it to a business of a particular description, and the Employees Compensation Ordinance would not impose an obligation on an employer to insure against his statutory liability to all his employees in respect of all his businesses in one policy with one insurer. The singular "a policy of insurance" in section 40(1) would include the plural (section 7(2) of Interpretation and General Clauses Ordinance Cap. 1). Hence, the statutory obligation of the employer to take out compulsory insurance under section 40(1) of the Ordinance can be met by taking out more than one policy of insurance.

Mandatory information in policy

Q1/40A **40A.** An insurer shall include in a policy of insurance issued for the purposes of this Part the information referred to in paragraphs (a) to (g) of section 41(1).

(Added 66 of 1993 s.9. Amended 47 of 1995 s.5)

Notice of insurance

Q1/41 **41.**—(1) Subject to subsection (2), an employer to whom a policy of insurance is issued for the purposes of this Part shall display, in a conspicuous place on each of his premises where any employee is employed by him, a

notice, in such form as may be specified by the Commissioner, showing in both the English and Chinese languages—

(a) the name of the employer;
(b) the name of the insurer;
(c) the policy number;
(d) the date of issue of the policy;
(e) the dates of commencement and expiry of the period of insurance; *(Amended 47 of 1995 s.6)*
(f) the number of employees insured under the policy at the time of issue thereof; and *(Amended 66 of 1993 s.10; 47 of 1995 s.6)*
(g) the amount of the liability insured under the policy. *(Added 47 of 1995 s.6)*

(2) Subsection (1) shall not apply where the policy of insurance, in so far as it is issued for the purposes of this Part, relates solely to domestic servants employed in, or in connection with, the private household of the employer or relates to an employee referred to in section 30B whose work is performed outside Hong Kong. *(Amended 59 of 1988 s.13)*

(3) An employer who without reasonable excuse contravenes subsection (1) commits an offence and is liable to a fine at level 3. *(Amended 52 of 2000 s.20)*

(4) Any employer who without reasonable excuse provides any false or misleading information in a notice under subsection (1) commits an offence and is liable to a fine at level 5. *(Added 47 of 1995 s.6)*

Insurer's liability

42.—(1) Notwithstanding anything in a policy of insurance issued for the purposes of this Part, an insurer is liable, in a proceeding under section 36LA or 44, for the amount of the liability of the employer not exceeding the available amount covered by the policy of insurance. *(Amended 47 of 1995 s.7)* **Q1/42**

(1A) For the avoidance of doubt, it is declared that an insurer is liable, in a proceeding under section 36LA or 44, for the amount of the liability of the employer not exceeding the available amount covered by the policy of insurance issued for the purposes of this Part notwithstanding the obligation imposed upon the employer by section 40 to insure for an amount in excess of the amount insured. *(Added 47 of 1995 s.7)*

(2) This section does not apply to a policy of insurance issued for the purposes of this Part that is issued before the commencement of this section.

(3) Where under this Part an amount is paid by the insurer which would, but for this section, not be payable under the policy of insurance, the employer is liable to pay that amount to the insurer.

(Replaced 66 of 1993 s.12)

Conditions under which liability for payment by insurer arises

43.—(1) Subject to this section, where in relation to an employee there is in force a policy of insurance issued for the purposes of this Part and the employer of the employee becomes liable to pay any sum under this Ordinance or independently of this Ordinance in respect of an injury to the employee arising out of and in the course of his employment, such sum shall forthwith become due and payable by the insurer, including any sum payable in respect of interest and costs, notwithstanding anything to the contrary in the policy of insurance. *(Amended 66 of 1993 s.13)* **Q1/43**

(2) No sum shall be payable by an insurer under this section—

(a) unless, in the case of compensation agreed upon between the employer and an employee under section 16CA, such insurer has consented to pay the sum agreed upon as compensation to the employee; *(Amended 66 of 1993 s.13)*

(b) unless, in the case of compensation or damages determined or adjudged by a court or tribunal to be payable to the employee or any other person, the insurer had sufficient notice of the institution in the court or tribunal of proceedings for compensation or damages, as the case may be, to enable such insurer to be added as a party to the proceedings;

(c) in respect of any judgment to pay compensation or damages, while execution thereon is stayed by the court or pending appeal; *(Amended 47 of 1995 s.8)*

(d) if before the happening of the accident which was the cause of the injury giving rise to the liability, the policy of insurance was cancelled by mutual consent or by virtue of any provision contained therein; or *(Amended 47 of 1995 s.8)*

(e) in respect of the sum liable to be paid under subsection (1) in excess of the available amount covered by the policy of insurance. *(Added 47 of 1995 s.8)*

(2A)–(2B) *(Repealed 36 of 1996 s.22)*

(3) If sufficient notice of the institution of proceedings for the recovery of compensation or damages is given to an insurer to enable such insurer to apply to be added as a party to the proceedings, the court or tribunal, as the case may be, shall, on such application being made, add the insurer as a party and the insurer shall have the same right to defend the proceedings as if such insurer were the employer.

(4) Where under this Part an amount is paid by the insurer which would, but for this section, not be payable under the policy of insurance, the employer is liable to pay that amount to the insurer. *(Replaced 66 of 1993 s.13)*

Right of injured party to proceed against insurer

Q1/44 **44.**—(1) Every policy of insurance issued for the purposes of this Part shall be deemed to provide that any employee or other person having a claim against the person insured in respect of the liability in regard to which such policy was issued shall, subject to section 42, be entitled to recover in his own name, as though he were a party to the policy, directly from the insurer any amount which he would have been entitled to recover from the person insured. *(Amended 47 of 1995 s.9)*

(2) An employee or other person having a claim against the person insured under a policy of insurance issued for the purposes of this Part shall not commence proceedings against the insurer unless he also commences or has commenced proceedings against the person insured. *(Added 66 of 1993 s.14)*

(3) Notwithstanding subsection (2), where an employee or other person having a claim against the person insured has reasonable grounds to be satisfied that—

(a) the person insured cannot be readily located in Hong Kong;

(b) the person insured is insolvent; or

(c) the insurer has disclaimed liability under the policy of insurance,

he may take proceedings against the insurer without taking or having taken proceedings against the person insured. *(Added 66 of 1993 s.14)*

Q1/44/1 **Sections 42 to 44**—Section 44(1) is the primary provision entitling an employee in appropriate circumstances to claim direct from the insurer the amount of the employer's liability to the employee. This is a substantive right, imposing an absolute liability on the insurer, limited only by s.42(1), by a deeming provision interpolated in the insurance policy issued for the purposes of Part IV of the Ordinance. Section 44(1) created a distinct and direct right in an employee to sue his employer's insurer via the deemed provision in the policy. Section 44(1) is plainly not merely a procedural provision. Under s.43(1) the right to claim against the insurer arises when the sum which the employer is liable to pay is quantified in one of the manners described in s.43(2), *i.e.* from the date of quantification of the sum. This is the date on which the

limitation period for bringing a claim against the insurer begins to run (*King Tak On (by attorney Cheung Yin) v. Lau Chun Yip (t/a Kar Bun Metal Manufactory)* [1987] H.K.L.R. 126; *Wong Po Wah v. Pacific Insurance Co. Ltd* [1988] 2 H.K.L.R. 417, CA; *Pacific Insurance Co. Ltd v. Wong Po Wah* [1989] 2 H.K.L.R. 266, PC). See also *Siu Yin Kwan v. Eastern Insurance Co. Ltd* [1993] 2 H.K.L.R. 101.

In *Ernest Eduard Sprecher v. Zingrich Cabletrans Gmbh* (unrep., DCEC 1498/2006, [2007] H.K.E.C. 2133), the insurer intervened to join in the proceedings because it did not receive cooperative response from the respondents, who did not appear to defend the employees' compensation claim. When the respondents instructed solicitors to resist the applicant's claim, the insurer intervener withdrew the joinder application because from that point on its interests and those of the respondents were the same. The Court found that the fairest order would be no order for costs. The Court held that it had jurisdiction under r.24 of Employees' Compensation (Rules of Court) Rules to grant leave to the insurers to join as a respondent in the present proceedings. Meanwhile, like O.15, r.6 of Rules of District Court and s.43(3) of the Ordinance, the jurisdiction under r.24 of ECR is permissive, and the court must be assumed to have been given discretion to grant or refuse leave to an insurer to join as respondent.

In *Farman Khan v. Shun Sum Engineering Co.* (unrep., DCEC 89/2008), the Court dealt with an application taken out by the employee to join in the insurer with a view to enforce his Pt IV right under the policy. The joinder application was made before any judgment was entered against the employer. The Court was bound by the dicta of the Court of Appeal in *Pang Wai Chung v. The Tai Ping Insurance Co. Ltd* [1999] 2 H.K.L.R.D. 354, and held that the substantive right of the employee in bring a Pt IV claim only accrued after the quantification of compensation, and the Applicant had no locus to sue the insurer at that moment. The learned judge Lok also expressed his obiter dictum that the District Court would have exclusive jurisdiction on Pt IV claim (once regarded as a claim for compensation) by virtue of the provisions in ss.18A and 21. A more definite ruling from the higher courts was considered desirable by the learned judge, as the meanings of certain statutory provisions in Pt IV are far from clear.

The relevant questions that have to be addressed whenever an employee seeks to claim against an insurer under ss.43(1) and 44(1) are: (1) Was there in existence at the material time (*i.e.* the time of the accident giving rise to the death or injury) a policy of insurance providing the compulsory cover as required under Part IV of the Ordinance? (2) If so, has the relevant employer (namely the insured under this policy) become liable to pay a sum whether under the Ordinance or independently of it, in respect of an injury to an employee arising out of and in the course of employment? In other words, in relation to such liability, has this been quantified? (3) Do one or more of the exceptions set out in s.43(2) apply? (*Lam Chi Fat v. Liberty International Insurance* [2002] 3 H.K.L.R.D. 480, affirmed on appeal by the Court of Appeal, [2003] 2 H.K.L.R.D. 169).

Subsections 44(2) and (3) were introduced by way of addition to the previously freestanding s.44(1) by Ordinance 66 of 1993.

Note—Section 43 imposes an absolute liability on the insurer to pay the amount to the employee. The payment is imperative and immediate, and it is not open to the insurer to re-open issues (e.g. the issue of employment) that should have been litigated in the employees' compensation proceedings: *Wong Kam Fai v. Yu Sai-wan* [1993] H.K.D.C.L.R. 67, D.C.J. P. Cheung. Where there is clearly a potential liability under s.43(1), the insurer ought, on their application, to be joined as a defendant in the common law action (apart from the Employees' Compensation Ordinance proceedings itself) so that they have the right to be heard in respect of that potential liability. Such approval should not be made conditional upon the insurer giving an undertaking to pay any damages that may be awarded against them (as in *Gurtner v. Circuit* [1968] 2 Q.B. 587) since their liability under s.43(1) will only arise if the matter arose out of and in the course of the plaintiff's employment, which was still a live issue: *Sami'an Sutinah v. Leung Wai Kuen Katrina* [2002] 2 H.K.C. 706.

Effect of s.44(2) and (3)—The question arose in *Pang Wai Chung v. Tai Ping Insurance Co. Ltd* [1999] 2 H.K.L.R.D. 354 as to whether the addition of s.44(2) and (3) meant that the principle enunciated in the *Wong Po Wah* case (above) as to when the limitation period commenced running, was no longer applicable. The argument on behalf of insurers was that, save for the exceptions provided for by s.44(3), by reason of s.44(2) it was a prerequisite of any claim directly against insurers that the employee either had commenced or contemporaneously commences proceedings against the employer. Accordingly, since proceedings against the employer can be brought at any time from the date of the accident onwards, the commencement date for the limitation period is the date of the accident. The Court of Appeal held that s.44(2) and (3) are procedural provisions which merely serve to direct the employee as to how to go about enforcing his claim against the insurer. They do not in any way displace the substantive statutory right conferred by s.44(1). Time for bringing a claim runs from the date of quantification and not any later date, notwithstanding the introduction, and the wording, of s.44(2) and (3). **Q1/44/2**

Section 44(2) and (3) are not, however, without ambiguity. Two of the three members of the Court of Appeal in *Pang Wai Chung v. Tai Ping Insurance Co. Ltd* [1999] 2 H.K.L.R.D. 354 (Liu J.A. expressly so) limited themselves to determining that those subsections had not been intended to affect the substantive right provided by s.44(1). Liu J.A. indicated that

consideration of the full impact of s.44(2) and (3) would have to be stood over to another day. A difficulty is that, whilst s.44(2) only requires the proceedings against the employer to have been commenced, not concluded, and s.44(3) provides that in certain cases the employee can bring proceedings against the insurer without taking or having taken proceedings at all against the employer, s.43 requires quantification of the claim against the employer before any amount becomes due and payable by the insurer to the employee. However, there may be cases where, notwithstanding the fact that the conditions of s.44(2) or (3) are met, in order for quantification of the claim to have occurred for the purpose of s.43(2), proceedings do have to be pursued, and pursued to a judgment, against the employer. Indeed, it may be that in most cases that meet the requirements of s.44(2), and therefore on the face of it permit the employee to sue the insurer without bringing any proceedings against the employer, the requirement of s.43(2) would not be satisfied. This is because, as Leong J.A. observed, s.43(2) permits only two ways to achieve quantification of the claim. First, by agreement under s.43(2)(a). Secondly, by determination by a court or tribunal under s.43(2)(b). Leong J.A. went on to conclude that s.44(3) creates an exception to the requirements under s.43(2). If that is the correct interpretation of s.44(3), it is difficult on the face of it to see how Leong J.A. could also find that s.44(2) and 44(3) "do not change ... anything to the right of the employee under Section 43 ...". One can see why insurers considered it appropriate at least to test the impact of the introduction of s.44(3) in particular on the question of the accrual of the cause of action by the employee against the insurer pursuant to s.44.

Q1/44/3 **Section 43(1)**—For the purpose of s.43(1) the sum becomes quantified even though the employee's claim for interest and costs may not be quantified, provided that an interest rate is specified by the court. The fact that costs have yet to be agreed or taxed does not mean that the employee's claim is not quantified for the purpose of s.43(1), at least not in any case where there is no suggestion of any untoward difficulty or dispute about costs (*Pang Wai Chung v. Tai Ping Insurance Co. Ltd* [1999] 2 H.K.L.R.D. 354).

For the purposes of s.43(1), there must be established liability on the part of an employer towards an employee. Where a judgment is relied on to seek to establish this liability, and there is a decision or reasons for the judgment whereby liability is established, the decision or reasons can be relied on to establish exactly the basis of liability, i.e. whether as employer or otherwise. Absent a decision or reasons, in particular if there is only a default judgment, judgment will have been entered on the basis that the facts as contained in the writ of summons were true and admitted by the defendant(s). The question is, therefore, whether the facts as contained in the writ of summons (or statement of claim as the case may be) disclosed a cause of action against the person concerned as employer or otherwise. See *Lam Chi Fat v. Liberty International Insurance* [2002] 3 H.K.L.R.D. 480, affirmed on appeal by the Court of Appeal, [2003] 2 H.K.L.R.D. 169, in which Ma J. held that, on the true construction of the statement of claim (modifying its language in so far as necessary to reconcile inconsistencies within it and to arrive at its true intention and meaning), the claim against the person concerned was against them in their capacity as employer, not, as the defendant insurer contended, only against them in their capacity as principal contractor. *Per* Rogers J.A. in [2003] 2 H.K.L.R.D. 169, where there has been an express and unequivocal plea against a respondent that the employee was employed by the respondent, and the respondent allows a default judgment to be entered against him, the respondent admits all of the allegations in the writ of summons and statement of claim, and must be taken to have admitted that he was an employer of the plaintiff, notwithstanding references in the statement of claim to the respondent being the principal contractor. The proper time to challenge the employment relationship was at the time the writ was received in the personal injuries case, failing which by seeking to set aside or appeal against the judgment.

Q1/44/4 **Claim by employee of sub-contractor against insurer of principal contractor, where policy of insurance limited to employees of principal contractor**—In *Leung Chack v. Asia Insurance Co. Ltd* [1991] 2 H.K.L.R. 496, a majority of the Court of Appeal affirmed the dismissal of an application by an employee of a sub-contractor to seek payment under s.44(1) (s.44 as it then was) in circumstances where the principal contractor had effected an employees' compensation policy with the insurer, but the policy was expressly confined to the employees of the principal contractor. The fact that the decision was only by a majority underlines the ambiguity in the wording of s.44(1). In *Lam Chi Fat v. Liberty International Insurance* (above), the Court of Appeal did not address the correctness or otherwise of the decision in *Leung Chack v. Asia Insurance Co. Ltd*, as the parties had not sought to re-argue the issue before it.

Employer must produce policy

Q1/44A **44A.** An employer insured under a policy of insurance issued for the purposes of this Part shall, within 10 days after receiving the written request of an employee or other person having a claim against the employer, produce for inspection to the employee or other person or his agent the policy of insurance and all other documents relating to the policy.

(Added 66 of 1993 s.15)

Application by summons for order compelling compliance with s.44A—If an employee does not comply with s.44A, notwithstanding a written request to do so, the employee may issue a summons in the proceedings seeking an order compelling the employer to produce a copy of the insurance policy, and shall normally be entitled to its costs of the application. It is not necessary or appropriate for the employee to issue originating proceedings merely for the purpose of enforcing s.44A where there are proceedings under the Ordinance already underway. See *Ting Pui Leung v. Eternal East Cross-Border Coach Mgt Ltd* (unrep., DCEC 996/2005, [2005] H.K.E.C. 2039), J. Ko D.D.J. **Q1/44A/1**

Holding company responsible for liability of subsidiary in certain cases

44B.—(1) Where— **Q1/44B**

(a) in relation to an employee there is in force a policy of insurance taken out by a group of companies pursuant to section 40(1C);

(b) the employee's employer, being a subsidiary of a holding company which is also insured under the policy, becomes liable to pay any amount of compensation or damages in respect of an injury to the employee by accident arising out of and in the course of his employment; and

(c) the employee is unable to recover payment of the amount or any part thereof from the employer or from the insurer,

the holding company is liable to pay the amount or part thereof to the employee.

(2) An employee employed by a subsidiary which is insured under a policy of insurance taken out by a group of companies pursuant to section 40(1C) may issue a written request to the subsidiary to supply to the employee the names and addresses of all its holding companies which are also insured under the policy.

(3) A subsidiary shall within 7 days after the date of issue of a written request under subsection (2)—

(a) supply to the employee the names and addresses of all its holding companies which are also insured under the policy; and

(b) deliver a copy of the written request to the holding companies.

(4) A subsidiary which without reasonable excuse fails to comply with subsection (3) commits an offence and is liable to a fine at level 3.

(Added 47 of 1995 s.10)

Inspection of premises other than domestic premises

45.—(1) The Commissioner, and any public officer authorized in writing by him in that behalf (which authority shall be produced by such public officer on demand) may for the purposes of this Part— *(Amended 68 of 1995 s.45)* **Q1/45**

(a) enter and inspect without a warrant at any reasonable time any premises of an employer where persons are employed, other than domestic premises;

(b) require the production of, inspect, examine or take copies of any record or other document on such premises, relating to the compliance by the employer with the requirements of this Part in respect of his employees;

(c) require any person who manages or appears to be in charge of such premises or of employees on such premises to furnish such information or particulars as he may specify relating to the compliance by the employer with the requirements of this Part in respect of his employees; and

(d) make such other inquiries from any other person on such premises as he thinks fit.

(2) In this section, "Commissioner" (處長) includes a Deputy Commissioner for Labour and an Assistant Commissioner for Labour. *(Added 68 of 1995 s.45)*

Inspection of domestic premises

Q1/45A **45A.** A magistrate may, if he is satisfied by information on oath that there may be found in any domestic premises any evidence of an offence under section 40, issue a warrant authorizing the Commissioner or any other person named in the warrant to—

(a) enter the domestic premises at any reasonable time; and

(b) require the production of, inspect, examine or take copies of any insurance policy, cover note or other document issued for the purposes of this Part in respect of any employee employed in such domestic premises.

Offences against sections 45 and 45A

Q1/45B **45B.** Without prejudice to section 45C, any person who in connection with any inspection under section 45 or 45A—

(a) fails without reasonable excuse to produce any record or other document referred to in that section when required to do so by the Commissioner or any person authorized under that section; or

(b) furnishes to the Commissioner or any such person any information which he knows or reasonably ought to know to be false or misleading in any material particular,

(c) *(Repealed 63 of 1992 s.13)*

commits an offence and is liable to a fine at level 5.

(Amended 36 of 1996 s.23)
(Amended 63 of 1992 s.13)

Notice to produce documents etc.

Q1/45C **45C.**—(1) The Commissioner may, by notice in writing to an employer, require the employer to produce for inspection by the Commissioner, on such date and at such time and place as is specified in the notice—

(a) a policy of insurance issued and in force for the purposes of this Part as at the date of the notice or as at a date specified in the notice or a cover note in respect of any such policy of insurance, or such other evidence as to the existence of any such policy as the Commissioner may specify in the notice; and *(Amended 59 of 1988 s.14)*

(b) any other document, or any article or record, specified in the notice, relating to employees of the employer or to such insurance.

(1A) An employer is not required to produce anything under subsection (1)(a) in respect of a date specified by the Commissioner in his notice that is earlier than 3 years preceding the date of the Commissioner's notice. *(Added 59 of 1988 s.14)*

(2) An employer who fails without reasonable excuse to comply with the requirements of a notice under subsection (1) commits an offence and is liable—

(a) where the offence relates to a document or matter referred to in subsection (1)(a)—

(i) on conviction upon indictment to a fine at level 6 and to imprisonment for 2 years; and

(ii) on summary conviction to a fine at level 6 and to imprisonment for 1 year; or *(Amended 52 of 2000 s.21)*

(b) where the offence relates to a document or matter referred to in subsection (1)(b), to a fine at level 5. *(Amended 63 of 1992 s.14; 36 of 1996 s.24)*

(3) The Commissioner may inspect, examine or take copies of any article, record or document produced under subsection (1).

(4) Any person who hinders or impedes the Commissioner in the exercise of his powers under subsection (3) commits an offence and is liable to a fine at level 5. *(Amended 63 of 1992 s.14; 36 of 1996 s.24)*

Notice of premium increases

45D.—(1) Notwithstanding anything in section 49, the Chief Executive in Council may by regulations require an insurer to give notice in advance to the Commissioner of any increase proposed in the premium generally charged by the insurer for a policy of insurance issued for the purposes of this Part, whether or not such increase is to apply in relation to a particular trade, industry or occupation. *(Amended 56 of 2000 s.3)* Q1/45D

(1A) Regulations made under this section may require the insurer referred to in subsection (1) to also provide details of current premiums in a form that will enable the Commissioner to compare the proposed increase with the current premiums. *(Added 66 of 1993 s.16)*

(2) Regulations made under this section may provide that a contravention of any specified provision shall be an offence, and may prescribe penalties therefor not exceeding a fine at level 4 and imprisonment for 6 months. *(Amended 52 of 2000 s.22)*

(3) When at any time a body corporate commits an offence under regulations made under this section with the consent or connivance of, or because of neglect by, any individual, the individual commits the like offence if at that time—

(a) he is a director, manager, secretary or similar officer or main agent of the body corporate or is purporting to act as such officer or as agent of such body corporate; or

(b) the body corporate is managed by its members, of whom he is one.

(Part IV replaced 76 of 1982 s.28)

PART V

MISCELLANEOUS

(Added 19 of 1964 s.6)

Compensation not to be assigned, charged or attached

46.—(1) Compensation payable under the provisions of this Ordinance shall not be capable of being assigned, charged or attached, and shall not pass to any other person by operation of law nor shall any claim be set off against such compensation. *(Amended 63 of 1992 s.15)* Q1/46

(2) Notwithstanding subsection (1), compensation payable under the provisions of this Ordinance to any person who is or has been an aided person within the meaning of the Legal Aid Ordinance (Cap. 91) shall be subject to the first charge for the benefit of the Director of Legal Aid under section 18A of that Ordinance in respect of any unpaid contribution or deficiency referred to in that section. *(Added 63 of 1992 s.15)*

Survival of claims of employee following death—Where an employee dies following an accident, but for reasons unconnected with the accident, i.e. from unrelated causes, the right to claim compensation will only pass to his estate if it is regarded as vested by the date of the employee's death. The right will only be regarded as vested if payment of compensation is the subject of an agreement between the employee and the employer or is the subject of a formal determination by the Commissioner or an assessment board or an order of the District Court (*TNT Australia Pty Ltd v. Janice Horne, Executrix of the Estate of the late Douglas Horne*, unreported, Nos. CA 40258/94; CC 5434/92, June 7, 1995, Sup Ct (NSW), distinguishing *United Collieries Ltd v. Simpson* [1909] A.C. 383). Q1/46/1

Deduction of insurance premiums from earnings to be an offence

Q1/47 **47.**—(1) An employer who, for the purpose of defraying or partly defraying the cost of insurance in respect of his liability to pay compensation under the provisions of this Ordinance, makes any deduction from the earnings of an employee in his employ, shall be guilty of an offence and shall be liable on summary conviction to a fine at level 3 and to imprisonment for 6 months. *(Amended 44 of 1980 s.15; 76 of 1982 s.29; 63 of 1992 s.16; 52 of 2000 s.23)*

(2) An employer convicted of an offence under subsection (1) shall, in addition to any penalty imposed under that subsection, if the court or magistrate before which the conviction was obtained so orders, pay to the employee any sum deducted from the employee's earnings—

(a) in respect of which the offence was committed; and

(b) which has not at the time of the conviction been repaid.

(Added 76 of 1982 s.29)

Contract of service not to be terminated during incapacity

Q1/48 **48.**—(1) An employer shall not, without the consent of the Commissioner—

(a) terminate the contract of service or apprenticeship of an employee who has suffered incapacity in circumstances which entitle him to compensation under this Ordinance; or

(b) give notice to the employee of such termination,

before—

(i) the Commissioner has issued a certificate under section 16A(2), to the employer and the employee; or

(ii) the employer has entered into an agreement under section 16CA(1), with the injured employee; or

(iii) an Ordinary Assessment Board or a Special Assessment Board, as the case may be, has issued a certificate under section 16F or 16G(3), to the employee, the employer and the Commissioner,

whichever occurs first. *(Replaced 1 of 1995 s.15)*

(1A) Further to subsection (1), an employer shall not, without the consent of the Commissioner—

(a) terminate the contract of service or apprenticeship of an employee who has suffered temporary incapacity for a period not exceeding 3 days in circumstances which entitle him to compensation under this Ordinance; or

(b) give notice to the employee of such termination,

before—

(i) the period of temporary incapacity has expired; and

(ii) the compensation has been paid under section 10 to the employee or to the Court. *(Added 67 of 1996 s.7)*

(2) Any employer who contravenes any of the provisions of subsection (1) or (1A) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. *(Added 55 of 1969 s.26. Amended 44 of 1980 s.15; 76 of 1982 s.30; 63 of 1992 s.17; 36 of 1996 s.25; 67 of 1996 s.7)*

Q1/48/1 In *Ngan Yu Chiu v. New World First Bus Services Ltd* [2008] 1 H.K.L.R.D. 293, the Court of Appeal, by a majority (Cheung J.A. and Johnson Lam J., Tang V.-P. dissenting), held that the purpose of s.48(1), when read in the context of the Ordinance, is to ensure that the assessment process, involving both the Ordinary and Special Assessment Boards, is completed before the employee's contract could be terminated. So an employer could not terminate the contract where it was notified of a timely s.16G objection. Cheung J.A. and Johnson Lam J., constituting the majority in relation to the main question, disagreed, however, in relation to the subsidiary question of whether an employee could terminate during the 14 days objection period provided for following the issue of a s.16F certificate. Tang V.-P.'s minority view was that the employer needed to wait for the issue of a s.16G(3) certificate only where he had notice that the employee had objected to the s.16F certificate on the basis that not only was he not suffering from any permanent disability, but also that he had not recovered from his temporary incapacity.

Legislative Council may amend amounts of compensation etc.

48A. The Legislative Council may by resolution amend— Q1/48A

(a)–(b) *(Repealed 36 of 1996 s.26)*

(c) *(Repealed 68 of 1995 s.2)*

(d) *(Repealed 36 of 1996 s.26)*

(e) the amount specified in section 23(2);

(f) *(Repealed 36 of 1996 s.26)*

(fa) the First Schedule; *(Added 66 of 1993 s.17)*

(g) the daily rates specified in the Third Schedule;

(h) the minimum amount of insurance cover specified in the Fourth Schedule; *(Added 47 of 1995 s.11)*

(i) the amounts and percentages specified in the Sixth Schedule. *(Added 36 of 1996 s.26)*

(Replaced 76 of 1982 s.31)

Amendment of Seventh Schedule

48B. The Commissioner may, by order in the Gazette, amend the Seventh Schedule. Q1/48B

(Added 52 of 2000 s.24)

Protection of public officers

48C.—(1) A public officer is not personally liable in respect of any act or omission of his if it was done or made by him in the honest belief that it was required or authorized in the exercise of any function or power under this Ordinance. Q1/48C

(2) The protection conferred on public officers by subsection (1) in respect of any act or omission shall not in any way affect any liability of the Government in tort for that act or omission.

(Added 52 of 2000 s.24)

Regulations

49.—(1) The Commissioner may make regulations— *(Amended 66 of 1993 s.18)* Q1/49

(a) requiring employers to make periodic or other returns as to such matters as he may think fit, and prescribing a time limit for the making of such returns;

(b) *(Repealed 76 of 1982 s.32)*

(c) *(Repealed 76 of 1982 s.32)*

(d) prescribing procedure and fees; *(Amended 13 of 1966 Schedule)*

(e) prescribing anything which is to be or may be prescribed under this Ordinance;

(f) generally, for carrying into effect the provisions of this Ordinance and of any regulations made thereunder.

(2) Any regulations made under this Ordinance may provide that such contraventions thereof as may be specified shall constitute an offence and may provide for the punishment of any such offence on summary conviction by a fine at level 3 and by imprisonment for a term of 3 months and, in the case of a continuing offence, by a fine of $200 for every day during which the default continues. *(Amended 76 of 1982 s.32; 63 of 1992 s.18; 52 of 2000 s.25)*

Rules of Court

50. The Chief Justice may make Rules of Court for regulating proceedings before the Court and appeals to the Court under the provisions of this Ordinance, and for the fees payable in respect thereof. Q1/50

(Amended 76 of 1982 s.33)

Q1/50/1 **General**—See paras Q1/21/1 *et seq*.

Q1/51 **51.** *(Repealed 66 of 1993 s.19)*

Q1/52 **52.** *(Repealed 1 of 1995 s.16)*

Q1/53 **53.** *(Repealed 63 of 1992 s.19)*

Amendment of references in Ordinances and documents to Workmen's Compensation Ordinance or Workmen's Compensation Regulations

Q1/54 **54.** Every reference in an Ordinance or in any document to the Workmen's Compensation Ordinance or the Workmen's Compensation Regulations shall, unless the context otherwise requires, be read as a reference to the Employees' Compensation Ordinance (Cap. 282) or the Employees' Compensation Regulations (Cap. 282 sub. leg.), as the case may be.
(44 of 1980 s.15 (2) incorporated)

Transitional

Q1/55 †**55.**—(1) Nothing in the Workmen's Compensation (Amendment) Ordinance 1980 (44 of 1980) (hereinafter called the "amending Ordinance") shall apply with respect to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the date of commencement* of sections 4, 5, 8 and 12 or of section 14 of the amending Ordinance, as the case may be; and without limiting the provisions of the Interpretation and General Clauses Ordinance (Cap. 1), the provisions of the Workmen's Compensation Ordinance repealed or deleted by the amending Ordinance shall continue to apply to such claims, rights, obligations or liabilities as if such provisions had not been repealed or deleted by the amending Ordinance. *(44 of 1980 s.16 incorporated)*

(2) Nothing in the Employees' Compensation (Amendment) Ordinance 1982 (76 of 1982) shall apply with respect to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement* of that Ordinance; and the provisions of this Ordinance in force immediately before the commencement of that Ordinance shall continue to apply to such claims, rights, obligations or liabilities as if such provisions had not been repealed or amended by that Ordinance. *(Added 76 of 1982 s.35)*

† The operation of this Ordinance is affected by the transitional provision contained in the Employees' Compensation (Amendment) Ordinance 1995 (1 of 1995). Such transitional provision reads as follows:—

> **"18. Transitional**
>
> The amendments made by sections 2 to 10 and 13 and 14 of this Ordinance do not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement of this Ordinance; and the provisions of the principal Ordinance in force immediately before that commencement continue to apply to those claims, rights, obligations or liabilities as if they had not been repealed or amended by this Ordinance."

* Note: Commencement of—

(a) Workmen's Compensation (Amendment) Ordinance 1980—
  (i) sections 4, 5, 8 & 12: 1 November 1980 *(See L.N. 209 of 1980)*;
  (ii) section 14: 1 November 1981 *(See L.N. 209 of 1980)*;
(b) Employees' Compensation (Amendment) Ordinance 1982: 1 July 1983 *(See L.N. 107 of 1983)*;
(c) Employees' Compensation (Amendment) Ordinance 1988—
  (i) section 8: 8 July 1988;
  (ii) sections 9, 10, 12 & 13: 6 October 1988 *(See L.N. 226 of 1988)*;
  (iii) sections 4(a) & (b), 5 & 6: 1 January 1989 *(See L.N. 226 of 1988)*.

(3) The amendments made by sections 4(a) and (b), 5, 6, 8, 9, 10, 12 and 13 of the Employees' Compensation (Amendment) Ordinance 1988 (59 of 1988) do not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement* of the amendments; and the provisions of this Ordinance in force immediately before the commencement of the amendments continue to apply to those claims, rights, obligations or liabilities as if they had not been repealed or amended by that Ordinance. *(Added 59 of 1988 s.15)*

(4) The amendments made by sections 2, 3 and 21 of the Employees' Compensation (Amendment) Ordinance 1993 (66 of 1993) do not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement of the amendments; and the provisions of this Ordinance in force immediately before the commencement of the amendments continue to apply to those claims, rights, obligations or liabilities as if they had not been amended by that Ordinance. *(Added 66 of 1993 s.20)*

(5) Despite the repeal of section 42 by section 12 of the Employees' Compensation (Amendment) Ordinance 1993 (66 of 1993), section 42 as it was before its repeal shall be deemed not to have been repealed in respect of policies of insurance issued before the commencement of section 12 of the Employees' Compensation (Amendment) Ordinance 1993 (66 of 1993). *(Added 66 of 1993 s.20)*

(6) The amendments made by sections 2, 3, 9, 11, 13, 14, 15, 16, 17, 19, 22, 29, 30, 31 and 32 of the Employees' Compensation (Amendment) Ordinance 1996 (36 of 1996) ("the amending Ordinance") do not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents occurring before the commencement* of the amending Ordinance, and the provisions of this Ordinance in force immediately before the commencement of the amending Ordinance continue to apply to those claims, rights, obligations or liabilities as if they had not been repealed or amended by the amending Ordinance. *(Added 36 of 1996 s.27)*

(7) The amendments made by sections 2 to 7 of the Employees' Compensation (Amendment) (No. 2) Ordinance 1996 (67 of 1996) ("the amending Ordinance") do not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents occurring before the commencement of the amending Ordinance, and the provisions of this Ordinance in force immediately before the commencement† of the amending Ordinance continue to apply to those claims, rights, obligations or liabilities as if they had not been repealed or amended by the amending Ordinance. *(Added 67 of 1996 s.8)*

(8) Subject to subsection (9), nothing in the Employees' Compensation (Amendment) (No. 2) Ordinance 2000 (52 of 2000) ("the amending Ordinance") shall apply with respect to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement△ of the amending Ordinance; and the provisions of this Ordinance in force immediately before the commencement△ of the amending Ordinance shall continue to apply to such claims, rights, obligations or liabilities as if such provisions had never been repealed or amended by the amending Ordinance. *(Added 52 of 2000 s.26)*

(9) Subsection (8) shall not apply to section 16A(12), 24, 40(2), 41(3), 45C(2)(a), 45D(2), 47(1) or 49(2) as amended by sections 11, 13, 19, 20, 21, 22, 23 and 25 respectively of the amending Ordinance. *(Added 52 of 2000 s.26)*

** Commencement date: 1 July 1996.
†† Commencement date: 1 January 1997.
# Commencement date: 1 August 2000.
*** Commencement date: 1 September 2008.

(10) An amendment to this Ordinance made by any provision of Part 3 of the Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance 2006 (16 of 2006) ("2006 Ordinance") does not apply to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before the commencement*** of that provision. The provisions of this Ordinance as were in force immediately before that commencement shall continue to apply with respect to claims for compensation or other rights, obligations or liabilities in respect of accidents happening before that commencement as if the amendment had not been made. (Added 16 of 2006 s. 22 and replaced 10 of 2008 s. 62)

(11) Despite subsection (10), as soon as any provision of section 10AB(5), (6) and (10)(d) and (e) ("relevant provision") has commenced, the relevant provision shall apply with respect to claims for compensation or other rights, obligations or liabilities in respect of accidents happening on or after the first commencement of section 10AB as far as cost of medicines incurred on or after the commencement of the relevant provision is concerned. (Added 16 of 2006 s. 22 and 10 of 2008 s. 62)

(12) In subsection (11)—

(a) the commencement of a provision of section 10AB means the day appointed for the coming into operation of section 15 of the 2006 Ordinance in so far as that section 15 relates to the adding of that provision of section 10AB;

(b) the first commencement of section 10AB means, where different days are appointed for the cominginto operation of section 15 of the 2006 Ordinance in so far as that section 15 relates to the adding of different provisions of section 10AB, the earliest of those days. (Added 16 of 2006 s. 22 and 10 of 2008 s. 62)

SCHEDULE 1 [s.9]

Q1/56

Item	Injury	Percentage of loss of earning capacity	
1.	Loss of 2 limbs	100	
2.	Loss of both hands or of all fingers and both thumbs		
3.	Loss of both feet		
4.	Total loss of sight		
5.	Total paralysis		
6.	Injuries resulting in being permanently bedridden		
7.	Paraplegia		
8.	Any other injury causing permanent total disablement		
9.	Loss of arm at shoulder	75	80 (preferred hand)
10.	Ankylosis of shoulder joint—		
	in optimum position	35	
	in worst position	55	
11.	Loss of arm between elbow and shoulder	75	80 (preferred hand)
12.	Loss of arm at elbow	75	80 (preferred hand)
13.	Ankylosis of the elbow joint—		
	in optimum position	30	
	in worst position	50	
14.	Loss of arm between wrist and elbow	70	75 (preferred hand)
15.	Loss of hand at wrist	70	75 (preferred hand)
16.	Ankylosis of wrist joint—		
	in optimum position	30	
	in worst position	40	
17.	Loss of 4 fingers and thumb of one hand	70	75 (preferred hand)
18.	Loss of 4 fingers of one hand	60	65 (preferred hand)
19.	Loss of thumb—		
	both phalanges	30	
	one phalanx	20	32 (preferred hand)
	guillotine loss of tip without loss of bone	8	22 (preferred hand)
20.	Ankylosis of—		
	interphalangeal joint of the thumb	4	
	metacarpophalangeal joint of the thumb	8	
	all these 2 joints of the thumb	12	
21.	Loss of index finger—		
	3 phalanges	14	15 (preferred hand)
	2 phalanges	11	12 (preferred hand)
	one phalanx	9	10 (preferred hand)
	guillotine amputation of tip without loss of bone	4	
22.	Ankylosis of—		
	distal interphalangeal joint of the index finger	2	
	proximal interphalangeal joint of the index finger	3	
	metacarpophalangeal joint of the index finger	4	
	all these 3 joints of the index finger	9	
23.	Loss of middle finger—		
	3 phalanges	12	
	2 phalanges	9	
	one phalanx	7	
	guillotine amputation of tip without loss of bone	2	
24.	Ankylosis of—		
	distal interphalangeal joint of the middle finger	2	

Item	Injury	Percentage of loss of earning capacity	
	proximal interphalangeal joint of the middle finger	2	
	metacarpophalangeal joint of the middle finger	3	
	all these 3 joints of the middle finger	7	
25.	Loss of ring finger—		
	3 phalanges	8	
	2 phalanges	6	
	one phalanx	5	
	guillotine amputation of tip without loss of bone	2	
26.	Ankylosis of—		
	distal interphalangeal joint of ring finger	1	
	proximal interphalangeal joint of ring finger	2	
	metacarpophalangeal joint of ring finger	2	
	all these 3 joints of the ring finger	5	
27.	Loss of little finger—		
	3 phalanges	7	
	2 phalanges	6	
	one phalanx	5	
	guillotine amputation of tip without loss of bone	2	
28.	Ankylosis of—		
	distal interphalangeal joint of little finger	1	
	proximal interphalangeal joint of little finger	1	
	metacarpophalangeal joint of little finger	2	
	all these 3 joints of the little finger	4	
28A.	In the case of a loss of a whole finger of one hand, the following percentages shall be awarded in addition to those provided for the loss of a single finger. In this item "finger" does not include "thumb". These additional percentages shall be awarded when 2 or more fingers of the same hand are lost in the same injury; or when one or more fingers of the same hand are lost in the same injury to a hand of which one or more fingers were lost in a previous injury, whether or not the previous injury was work related or whether compensation was paid or is payable for the loss—		
	loss of a second finger of the hand	6	7 (preferred hand)
	loss of a third finger of the hand	6	7 (preferred hand)
	loss of the last finger of the hand *(Added 66 of 1993 s.21)*	7	9 (preferred hand)
29.	Loss of metacarpals—		
	first (additional)	8	
	second, third, fourth or fifth (additional)	3	
30.	Loss of leg at hip	80	
31.	Loss of leg at or above knee	75	
32.	Ankylosis of hip joint—		
	in optimum position	35	
	in worst position	50	
33.	Loss of leg below knee	65	
34.	Ankylosis of knee joint—		
	in optimum position	25	
	in worst position	35	
35.	Loss of foot	55	
36.	Ankylosis of ankle joint—		
	in optimum position	15	
	in worst position	25	
37.	Loss of toes—		

Item	Injury	Percentage of loss of earning capacity
	all of one foot	20
	great, both phalanges	14
	great, one phalanx	4
	other than great, for each one toe lost	3
38.	Loss of sight of one eye	50
39.	Loss of hearing of one ear	30
40.	Total loss of hearing, both ears	100
41.	Loss or deformity of outer ear *(Added 66 of 1993 s.21)*	2
42.	Loss of entire nose *(Added 66 of 1993 s.21)*	25
43.	Apparent deformity of nose *(Added 66 of 1993 s.21)*	5
44.	Loss of spleen *(Added 66 of 1993 s.21)*	5
45.	Loss of one kidney—	
	if the other kidney is normal	15
	if the other kidney is abnormal *(Added 66 of 1993 s.21)*	65-90
46.	Urethral injury—	
	if urethral stricture requires dilation less frequently than once every 2 weeks	5
	if urethral stricture requires dilation once every 2 weeks or more frequently	10-20
	if urethra is severed *(Added 66 of 1993 s.21)*	20
47.	Impairment of urinary bladder function—	
	impairment in form of urgency or other mild urinary bladder disorder	5-12
	good reflex activity without voluntary control	13-22
	poor reflex activity without voluntary control	23-27
	no reflex and no voluntary control *(Added 66 of 1993 s.21)*	38—60
48.	Impairment of anorectal function—	
	limited voluntary control	0-7
	has reflex regulation but no voluntary control	8-17
	no reflex regulation and no voluntary control *(Added 66 of 1993 s.21)*	18—25

Note: (1) Total permanent loss of the use of a member shall be treated as loss of such member.

(1A) Partial loss of a member or partial permanent loss of the use of a member shall be treated as the loss of such proportion of the percentage of loss of earning capacity prescribed in this Schedule as the partial loss of the member, or partial permanent loss of the use of the member, bears to the total loss of that member. *(Added 49 of 1985 s.5)*

(2) Where there is loss of 2 or more parts of the hand, the percentage shall not be more than the loss of the whole hand.

(3) Loss of remaining arm, leg or eye, if one has already been lost, shall be the difference between the compensation for the total incapacity, and compensation already paid or that which would have been paid for the previous loss of limb or eye.

(4) Where there is loss of a thumb and one or more fingers of the same hand, the aggregate percentage shall not be more than that in respect of the loss of 4 fingers and the thumb of the same hand.

(5) Where there is loss of a great toe and one or more other toes of the same foot, the aggregate percentage shall not be more than the percentage for the loss of all toes of one foot. *(Added 66 of 1993 s.21)*

(6) Where a range of percentage is provided in this Schedule, the highest percentage shall be applied in the most severe case, the lowest percentage in the least severe case and percentages in between according to the degree of severity. *(Added 66 of 1993 s.21)*

(Replaced 44 of 1980 s.14. Amended 66 of 1993 s.21)

SCHEDULE 2 [ss.3, 32, 33 & 34]

OCCUPATIONAL DISEASES

Q1/57

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
	A. CAUSED BY PHYSICAL AGENTS		
A1	Inflammation, ulceration or malignant disease of the skin or subcutaneous tissues or of the bones, or blood dyscrasia, or cataract, due to electro-magnetic radiations (other than radiant heat), or to ionising particles	Any occupation involving exposure to electro-magnetic radiations other than radiant heat, or to ionising particles.	10 years.
A2	Heat cataract	Any occupation involving frequent or prolonged exposure to rays from molten or red-hot material.	3 years.
A3	Dysbarism, including decompression sickness, barotrauma and osteonecrosis	Any occupation involving subjection to compressed or rarefied air or other gases or gaseous mixtures.	1 year. In the case of arthritis —5 years.
A4	Cramp of the hand or forearm due to repetitive movements	Any occupation involving prolonged periods of handwriting, typing or other repetitive movements of the fingers, hand or arm.	1 year.
A5	Subcutaneous cellulitis of the hand (Beat hand)	Any occupation involving manual labour causing severe or prolonged friction or pressure on the hand.	1 year.
A6	Bursitis or subcutaneous cellulitis arising at or about the knee due to severe or prolonged external friction or pressure at or about the knee (Beat knee)	Any occupation involving manual labour causing severe or prolonged external friction or pressure at or about the knee.	1 year.
A7	Bursitis or subcutaneous cellulitis arising at or about the elbow due to severe or prolonged external friction or pressure at or about the elbow (Beat elbow)	Any occupation involving manual labour causing severe or prolonged external friction or pressure at or about the elbow.	1 year.
A8	Traumatic inflammation of the tendons of the hand or forearm (including elbow), or of the associated tendon sheaths *(Amended L.N. 146 of 1999)*	Any occupation involving manual labour, or frequent or repeated movements of the hand or wrist.	1 year.
A9	Carpal tunnel syndrome *(Added L.N. 146 of 1999)*	Any occupation involving repetitive use of hand-held powered tools whose internal parts vibrate so as to transmit that vibration to the hand, but excluding those which are solely powered by hand.	1 year.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
	B. CAUSED BY BIOLOGICAL AGENTS		
B1	Anthrax	Any occupation involving contact with animals infected with anthrax or the handling (including the loading and unloading or transport) of animal products or residues.	1 month.
B2	Glanders	Any occupation involving contact with equine animals or their carcasses.	1 month.
B3	Infection by leptospira	Any occupation involving— (a) work in places which are, or are liable to be, infested by rats, field mice or voles, or other small mammals; (b) work at dog kennels or the care or handling of dogs; (c) contact with bovine animals or their meat products or pigs or their meat products.	3 months.
B4	Pulmonary disease due to the inhalation of the dust of mouldy hay or other mouldy vegetable produce, and characterized by symptoms and signs attributable to a reaction in the peripheral part of the bronchopulmonary system, and giving rise to a defect in gas exchange (Farmer's lung)	Any occupation involving exposure to the dust of mouldy hay or other mouldy vegetable produce by reason of employment— (a) in agriculture, horticulture or forestry; or (b) loading or unloading or handling in storage such hay or other vegetable produce; or (c) handling bagasse.	1 year.
B5	Infection by organisms of the genus brucella	Any occupation involving contact with— (a) animals infected by brucella, or their carcasses or parts thereof, or their untreated products; or (b) laboratory specimens or vaccines of, or containing, brucella.	1 year.
B6	Tuberculosis	Any occupation involving close and frequent contacts with a source or sources of tuberculosis infection by reason of employment— (a) in the medical treatment or nursing of a person or persons suffering from tuberculosis, or in a service ancillary to such treatment or nursing;	6 months.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
		(b) in attendance upon a person or persons suffering from tuberculosis, where the need for such attendance arises by reason of physical or mental infirmity; (c) as a research worker engaged in research in connection with tuberculosis; (d) as a laboratory worker, pathologist, or post-mortem worker, where the occupation involves working with materials which are a source of tuberculosis infection, or in any occupation ancillary to such employment.	
B7	Parenterally contracted viral hepatitis	Any occupation involving contact with— (a) human blood or human blood products; or (b) a source of viral hepatitis.	6 months.
B8	Infection by streptococcus suis	Any occupation involving contact with pigs infected by streptococcus suis, or with the carcasses, products or residues of pigs so infected.	1 month.
B9	Avian chlamydiosis	Any occupation involving contact with birds infected with chlamydia psittaci, their remains or untreated products.	1 month.
B10	Legionnaires' disease *(Added L.N. 146 of 1999)*	Any occupation involving the repair, maintenance or service of— (a) cooling systems that use fresh water; or (b) hot water service systems.	1 month.
B11	Severe acute respiratory syndrome	Any occupation involving close and frequent contacts with a source or sources of severe acute respiratory syndrome infection by reason of employment— (a) in the medical treatment or nursing of a person suffering from severe acute respiratory syndrome, or in a service ancillary to that treatment or nursing; (b) in attending to a person suffering acute respiratory syndrome, where the need for attendance arises by reason of the person's physical or mental infirmity; (c) in identifying, detecting, tracing, isolating, detaining, supervising or surveillance of a person suffering from severe acute respiratory syndrome;	1 month.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
		(d) as a research worker engaged in research in connection with severe acute respiratory syndrome, or in a service ancillary to that research; or as a laboratory worker, pathologist, post-mortem worker or funeral services worker, where the employment involves the handling of any human body or other materials that are a source of severe acute respiratory syndrome infection, or in a service ancillary to that handling. *(Added L.N. 213 of 2004)*	
B12	Avian influenza A	Any occupation involving close and frequent contacts with a source or sources of avian influenza A infection by reason of employment— (a) as a worker engaged in the handling of poultry or birds in their uncooked remains or residues, or their untreated products, that are a source of avian influenza A infection, or in a service ancillary to that handling; *(Amended L.N. 13 of 2005)* (b) as a research worker engaged in research in connection with avian influenza A, or in a service ancillary to that research; or (c) as a laboratory worker engaged in the handling of material that is a source of avian influenza A infection, or in a service ancillary to that handling. *(Added L.N. 213 of 2004)*	14 days.
	C. CAUSED BY CHEMICAL AGENTS		
C1	Poisoning by lead or a compound of lead	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, lead or a compound of lead, or a substance containing lead.	2 years. In the case of nephritis —4 years.
C2	Poisoning by manganese or a compound of manganese	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, manganese or a compound of manganese, or a substance containing manganese.	2 years.
C3	Poisoning by phosphorus or an inorganic compound of phosphorus or the anti-cholinesterase or pseudo anti-cholinesterase action of organic phosphorus compounds	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, phosphorus or a compound of phosphorus, or a substance containing phosphorus.	3 years.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
C4	Poisoning by arsenic or a compound of arsenic	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, arsenic or a compound of arsenic, or a substance containing arsenic.	1 year.
C5	Poisoning by mercury or a compound of mercury	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, mercury or a compound of mercury, or a substance containing mercury.	2 years.
C6	Poisoning by carbon bisulphide	Any occupation involving the use or handling of, or exposure to the fumes, or vapour of, carbon bisulphide or a compound of carbon bisulphide, or a substance containing carbon bisulphide.	1 year.
C7	Poisoning by benzene or a homologue of benzene	Any occupation involving the use or handling of, or exposure to the fumes of, or vapour containing, benzene or any of its homologues.	1 year.
C8	Poisoning by a nitro- or amino- or chloro-derivative of benzene or of a homologue of benzene, or poisoning by nitro-chlorobenzene	Any occupation involving the use or handling of, or exposure to the fumes of, or vapour containing, a nitro- or amino- or chloro-derivative of benzene or nitro-chlorobenzene.	1 year. In the case of neoplasm —10 years.
C9	Poisoning by dinitrophenol or a homologue or by substituted dinitrophenols or by the salts of such substances	Any occupation involving the use or handling of, or exposure to the fumes of, or vapour containing, dinitrophenol or a homologue or substituted dinitrophenols or the salts of such substances.	1 year.
C10	Poisoning by halogen derivatives of hydrocarbons of the aliphatic series	Any occupation involving the use or handling of, or exposure to the fumes of, or vapour containing, halogen derivatives of hydrocarbons of the aliphatic series.	1 year.
C11	Poisoning by diethylene dioxide (dioxan)	Any occupation involving the use or handling of, or exposure to the fumes of, or vapour containing, diethylene dioxide (dioxan).	1 year.
C12	Poisoning by chlorinated naphthalene	Any occupation involving the use or handling of, or exposure to the fumes of, or dust or vapour containing, chlorinated naphthalene.	1 year.
C13	Poisoning by oxides of nitrogen	Any occupation involving the use or handling of, or exposure to the fumes of, or dust or vapour containing, oxides of nitrogen.	1 year.
C14	Poisoning by beryllium or a compound of beryllium	Any occupation involving the use or handling of, or exposure to the fumes, dust or vapour of, beryllium or a compound of beryllium or a substance containing beryllium.	1 year.
C15	Poisoning by cadmium	Any occupation involving the use or handling of, or exposure to the dust or fumes of, cadmium.	1 year.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
C16	Dystrophy of the cornea (including ulceration of the corneal surface) of the eye	Any occupation involving the use or handling of, or exposure to, arsenic, tar, pitch, bitumen, mineral oil (including paraffin), soot or any compound, product, (including quinone or hydroquinone) or residue of any of these substances.	1 year.
C17	Primary epitheliomatous cancer of the skin	Any occupation involving the use or handling of, or exposure to, arsenic, tar, pitch, bitumen, mineral oil (including paraffin), soot or any compound, product, or residue of any of these substances.	10 years.
C18	Chrome ulceration including perforation of nasal septum	Any occupation involving the use or handling of chromic acid, chromate or bichromate of ammonium, potassium, sodium or zinc, or any preparation or solution containing any of these substances.	1 year.
C19	Primary neoplasm of the epithelial lining of the urinary tract, (renal pelvis, ureter, bladder and urethra) including papilloma, carcinoma-in-situ and invasive carcinoma	Any occupation involving the production, use or handling of alpha-naphthylamine, beta-naphthylamine or methylene-bis-ortho-chloraniline, or diphenyl substituted by at least one nitro or primary amino group or by at least one nitro and primary amino group (including benzidine) and any of the above substances if further ring substituted by halogeno methyl or methoxyl group and the salts of any of the above substances and the production of auramine and magenta.	20 years.
C20	Peripheral poly-neuropathy	Any occupation involving the production, use or handling of, or exposure to, any physical form of or any preparation or solution containing n-Hexane or methyl-n-butyl ketone.	1 year.
C21	Localised new growth of the skin, papillomatous or keratotic	Any occupation involving the use or handling of, or exposure to, arsenic, tar, pitch, bitumen, mineral oil (including paraffin), soot or any compound, product or residue of any of these substances.	10 years.
C22	Occupational vitiligo	Any occupation involving the use or handling of, or exposure to, paratertiary-butyl phenol, paratertiary-butyl catechol, para-amyl-phenol, hydroquinone or the monobenzyl or monobutyl ether of hydroquinone.	1 year.

Item	Description of occupational disease	Nature of trade, industry or process	Prescribed period for purposes of section 32
	D. CAUSED BY MISCELLANEOUS AGENTS		
D1	Inflammation or ulceration of the skin produced by dust, liquid or vapour (including the condition known as chloracne but excluding chrome ulceration)	Any occupation involving exposure to dust, liquid or vapour, capable of irritating the skin.	1 year.
D2	Inflammation or ulceration of the mucous membrane of the upper respiratory passages or mouth produced by dust, liquid or vapour	Any occupation involving exposure to dust, liquid or vapour.	1 year.
D3	Carcinoma of the nasal cavity or associated air sinuses (nasal carcinoma)	Any occupation involving the manufacture or repair of wooden goods or the manufacture or repair of footwear or components of footwear made wholly or partly of leather or fibre board.	10 years.
D4	Byssinosis	Any occupation involving exposure to raw cotton dust.	1 year.
D5	Occupational asthma	Any occupation involving the use or handling of, or exposure to, any of the following agents which may irritate or sensitise the respiratory system— (a) isocyanates; (b) platinum salts; (c) fumes or dusts arising from the manufacture, transport or use of hardening agents (including epoxy resin curing agents) based on phthalic anhydride, trimellitic anhydride or triethylenetetramine; (d) fumes arising from the use of rosin as a soldering flux; (e) formaldehyde; (f) proteolytic enzymes; (g) animals or insects used for the purposes of research or education or in laboratories; (h) dusts arising from the sowing, cultivation, harvesting, drying, handling, milling, transport or storage of barley, oats, rye, wheat or maize, or the handling, milling, transport or storage of meal or flour made therefrom. (i) any other sensitising agent inhaled at work. *(Added L.N. 146 of 1999)*	1 month.

(Replaced L.N. 386 of 1983. Amended L.N. 52 of 1987; L.N. 397 of 1991; L.N. 410 of 1993)

SCHEDULE 3 [ss.10A & 48A]

MEDICAL EXPENSES PAYABLE BY AN EMPLOYER IN RESPECT OF AN INJURY DUE TO ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Q1/58

1. Subject to paragraph 3, where an employee is given medical treatment as an in-patient in a hospital, the medical expenses payable by the employer are—

(a) the total amount of medical expenses incurred in respect of the medical treatment; or

(b) the to amount at the rate of $200 for each day of stay in the hospital,

whichever total amount is the less.

2. Subject to paragraph 3, where an employee is given medical treatment other than as an in-patient in a hospital, the medical expenses payable by the employer are—

(a) the total amount of the medical expenses incurred in respect of the medical treatment; or

(b) the total amount at the rate of $200 for each day on which medical treatment is given,

whichever total amount is the less.

3. Where an employee is given medical treatment on any day both as an in-patient in a hospital and other than as an in-patient in a hospital, the daily rate for the purpose of this Schedule shall be $200.

(Added 74 of 1977 s.4. Amended 44 of 1980 s.15; 76 of 1982 s.36; L.N. 321 of 1985; L.N. 390 of 1987; L.N. 386 of 1989; L.N. 435 of 1991; L.N. 463 of 1993; L.N. 566 of 1995; L.N. 285 of 1998; L.N. 98 of 2003)

SCHEDULE 4 [ss.40 & 48A]

MINIMUM INSURANCE COVER FOR THE PURPOSE OF SECTION 40

Q1/59

1.	For the purpose of section 40(1)	
	Where the number of employees in relation to whom the policy is in force	Applicable amount
	does not exceed 200	$100 million per event
	exceeds 200	$200 million per event
2.	For the purpose of section 40(1B)	
	Where a principal contractor takes out a policy of insurance	$200 million per event
3.	For the purpose of section 40(1C)	
	Where a group of companies takes out a policy of insurance	$200 million per event

(Added 47 of 1995 s.12)

SCHEDULE 5 [s.38]

SPECIFIED STRUCTURES AND WORKS

Q1/60

1. Any building, edifice, wall, fence, or chimney, whether constructed wholly or partly above or below ground level.
2. Any road, motorway, railway, tramway, cableway, aerial ropeway or canal.
3. Any harbour works, dock, pier, sea defence work, or lighthouse.
4. Any aqueduct, viaduct, bridge, or tunnel.
5. Any sewer, sewage disposal works, or filter bed.
6. Any airport or works connected with air navigation.
7. Any dam, reservoir, well, pipeline, culvert, shaft, or reclamation.

8. Any drainage, irrigation, or river control work.

9. Any water, electrical, gas, telephonic, telegraphic, radio, or television installation or works, or any other works designed for the manufacturing or transmission of power or the transmission or reception of radio or sound waves.

10. Any structure designed for the support of machinery, plant, or power transmission lines.

(Added 47 of 1995 s.12)

SCHEDULE 6 [ss.6, 6C, 6D, 6E, 7, 8, 11, 16A, 36C, 36J & 48A]

SPECIFIED AMOUNT OF COMPENSATION

Q1/61

Section	Amount $	Percentage
6(1)(a)	28,360	
6(1)(b)	28,360	
6(1)(c)	28,360	
6(2)	408,960	
6(5)	83,700	
6C(8)(a)	660	5
6C(8)(b)	1330	10
6D(3)(a)	660	5
6D(3)(b)	1330	10
6E(9)(a)	660	5
6E(9)(b)	1330	10
7(1)(a)	28,360	
7(1)(b)	28,360	
7(1)(c)	28,360	
7(2)	464,360	
8(1)(a)	556,700	
8(1)(b)	556,700	
11(5)	4,090	
16A(10)(a)	660	5
16A(10)(b)	1330	10
36C	40,010	
36J	121,230	

(Sixth Schedule replaced 52 of 2000 s. 27. Amended L.N. 93 of 2010; L.N. 126 of 2012; L.N. 31 of 2015; L.N. 30 of 2017)
(Format changes—E.R. 2 of 2012)

SCHEDULE 7 [ss.6A & 48B]

APPORTIONMENT OF COMPENSATION PAYABLE TO ELIGIBLE MEMBERS OF THE FAMILY

Q1/62 1. If the only eligible members of the family are spouses or cohabitees, or any combination thereof, then the compensation shall be paid to all of them in equal amounts.

2. If the only eligible members of the family are children, then the compensation shall be paid to all of them in equal amounts.

3. If the only eligible members of the family are parents or grandparents, or any combination thereof, then—

(a) the compensation shall be paid to all of those parents in equal amounts if there are no grandparents;

(b) the compensation shall be paid to all of those grandparents in equal amounts if there are no parents;

(c) in any other case—

(i) 70% of the compensation shall be paid to all of those parents in equal amounts; and
(ii) the remaining 30% of the compensation shall be paid to all of those grandparents in equal amounts.

4. If the only eligible members of the family are members other than spouses, cohabitees, children, parents and grandparents, then the compensation shall be paid to all of those eligible members in equal amounts.

5. If the only eligible members of the family are—
(a) spouses or cohabitees, or any combination thereof; and
(b) children,

then—
(i) 50% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts; and
(ii) the remaining 50% of the compensation shall be paid to all of those children in equal amounts.

6. If the only eligible members of the family are or the eligible members of the family include—
(a) spouses or cohabitees, or any combination thereof;
(b) children; and
(c) parents or grandparents, or any combination thereof,

then, whether or not there is any other eligible member of the family—
(i) 45% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts;
(ii) 45% of the compensation shall be paid to all of those children in equal amounts;
(iii) the remaining 10% of the compensation shall be paid—
(A) to all of those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents and grandparents such that 70% of that 10% is paid to all of those parents in equal amounts and 30% of that 10% is paid to all of those grandparents in equal amounts.

7. If the only eligible members of the family are—
(a) spouses or cohabitees, or any combination thereof; and
(b) parents or grandparents, or any combination thereof,

then—
(i) 80% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts;
(ii) the remaining 20% of the compensation shall be paid—
(A) to all of those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents and grandparents such that 70% of that 20% is paid to all of those parents in equal amounts and 30% of that 20% is paid to all of those grandparents in equal amounts.

8. If the only eligible members of the family are—
(a) spouses or cohabitees, or any combination thereof; and
(b) other members who are not children, parents or grandparents,

then—
(i) 95% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts;
(ii) the remaining 5% of the compensation shall be paid to all of those other members in equal amounts.

9. If the only eligible members of the family are—
(a) spouses or cohabities, or any combination thereof;
(b) parents or grandparents, or any combination thereof; and
(c) other members who are not children,

then—
(i) 75% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts;
(ii) 20% of the compensation shall be paid—
(A) to all those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents or grandparents such that 70% of that 20% is paid to all of those parents in equal amounts and 30% of that 20% is paid to all of those grandparents in equal amounts;
(iii) the remaining 5% of the compensation shall be paid to all of those other members in equal amounts.

10. If the only eligible members of the family are—
(a) spouses or cohabitees, or any combination thereof;
(b) children; and
(c) other members who are not parents or grandparents,

then—
(i) 50% of the compensation shall be paid to all of those spouses or cohabitees in equal amounts;
(ii) 45% of the compensation shall be paid to all of those children in equal amounts;
(iii) the remaining 5% of the compensation shall be paid to all of those other members of the family in equal amounts.

11. If the only eligible members of the family are—
(a) children; and
(b) parents or grandparents, or any combination thereof,

then—
(i) 80% of the compensation shall be paid to all of those children in equal amounts;
(ii) the remaining 20% of the compensation shall be paid—
(A) to all of those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents and grandparents such that 70% of that 20% is paid to all of those parents in equal amounts and 30% of that 20% is paid to all of those grandparents in equal amounts.

12. If the only eligible members of the family are—
(a) children; and
(b) other members who are not spouses, cohabitees, parents or grandparents,

then—
(i) 95% of the compensation shall be paid to all of those children in equal amounts;
(ii) the remaining 5% of the compensation shall be paid to all those other members in equal amounts.

13. If the only eligible members of the family are—
(a) children;
(b) parents or grandparents, or any combination thereof; and
(c) other members who are not spouses or cohabitees,

then—
(i) 75% of the compensation shall be paid to all of those children in equal amounts;
(ii) 20% of the compensation shall be paid—
(A) to all of those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents or grandparents such that 70% of that 20% is paid to all of those parents in equal amounts and 30% of that 20% is paid to all of those grandparents in equal amounts;
(iii) the remaining 5% of the compensation shall be paid to all of those other members in equal amounts.

14. If the only eligible members of the family are—
(a) parents or grandparents, or any combination thereof; and
(b) other members who are not spouses, cohabitees or children,

then—
(i) 95% of the compensation shall be paid—
(A) to all of those parents in equal amounts if there are no grandparents;
(B) to all of those grandparents in equal amounts if there are no parents; and
(C) in any other case, to all of those parents or grandparents such that 70% of that 95% is paid to all of those parents in equal amounts and 30% of that 95% is paid to all of those grandparents in equal amounts;
(ii) the remaining 5% of the compensation shall be paid to all of those other members in equal amounts.

(Seventh Schedule added 52 of 2000 s.28)