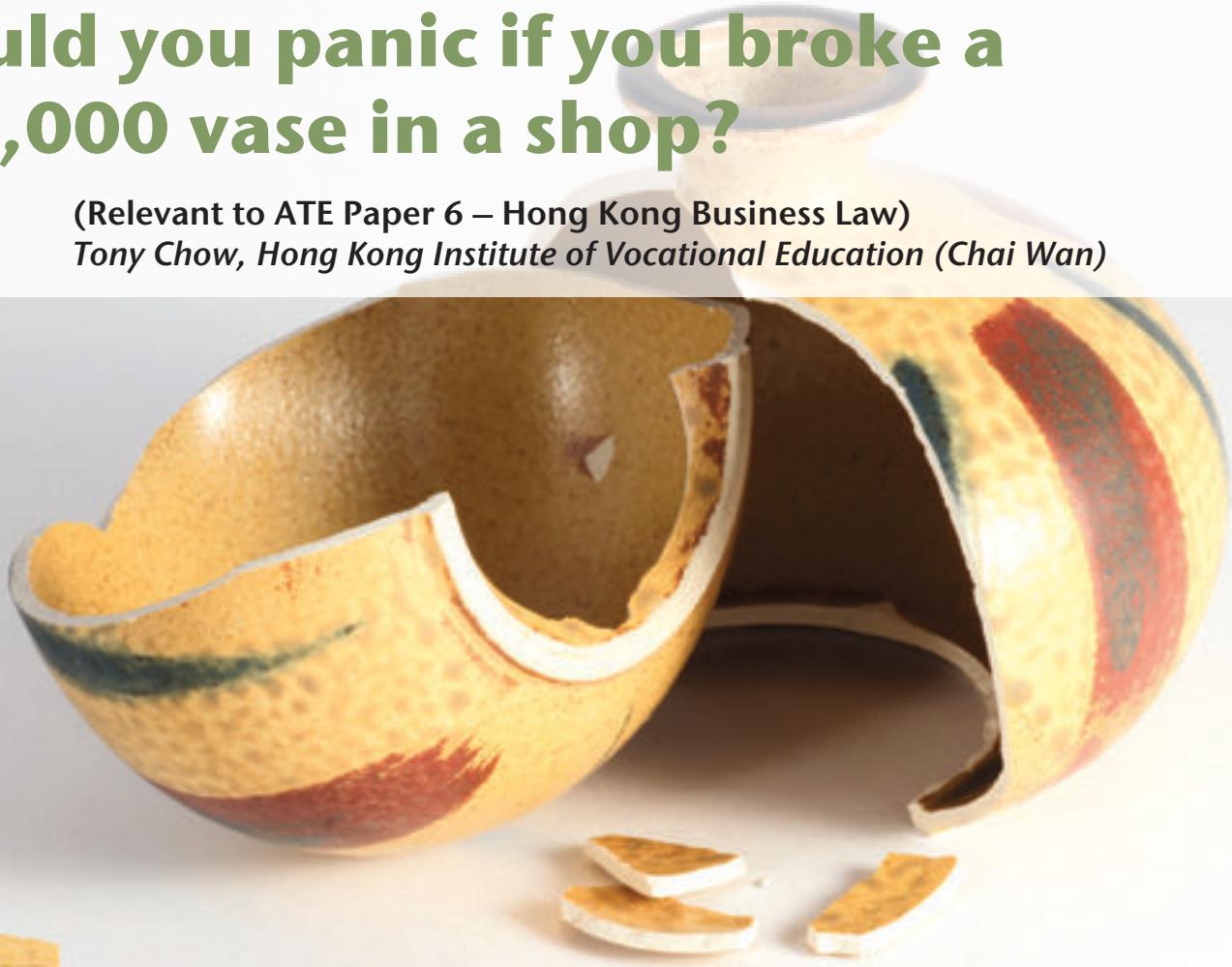


Would you panic if you broke a \$60,000 vase in a shop?

(Relevant to ATE Paper 6 – Hong Kong Business Law)

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Introduction

Jenny called me on a Saturday afternoon. She said she was in trouble because she had accidentally broken an expensive vase in a famous department store. \$60,000 was written on a price tag attached on the vase, and near the display board there was a small sign stating “**customers are liable for any damage in accordance with the price**” (如有損壞 照價賠償) in small print. The store manager demanded Jenny to pay \$60,000 or else he would call the police.

Legal Issues

Jenny was panicking when I talked to her. I immediately calmed her down by telling her that it was only a civil matter and there was no ground for criminal prosecution, even if the manager called the police.

Next, I advised Jenny to present her Hong Kong Identification Card and give her name card to the department store. Once the store had her contact details, they would be able to institute legal action in the future;

after that, the manager must let her leave the store immediately. Any further detention would constitute false imprisonment since a mere civil dispute is not a legal justification for detaining someone and a civil liability is not a valid reason for depriving a person of their liberty¹.

After Jenny left the store, we were entering into a further discussion. Two basic questions immediately arose:

1. The liability issue – is Jenny

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responsible for the damage?

2. The quantum issue – if there is a liability², how much does she have to pay to compensate the store for breaking the vase?

In order to determine the first issue, we needed to know whether Jenny was liable for the damage that she caused. In other words, what cause of action (legal basis) would the store have to enable it to sue Jenny?

There are only two causes of action possible in this case:

- Negligence under common law in tort
- Breach of contract

Liabilities

Common law negligence under tort

Negligence is straightforward in this case since Jenny had a duty of care towards the store.³ Her negligence caused the breaking of the vase and the store suffered a monetary loss as a result. Therefore Jenny is liable to compensate the store under the heading of common law negligence.

Was there a contract?

Does the statement in the sign “*customers are liable for any damage in accordance with the price*” bind Jenny? This statement is binding on the customer only if it constituted a contractual term and in order to be a contractual term, the sign must meet all the essential requirements to the creation of a contract. In

general, those essential requirements are contractual intention, offer, acceptance, consideration, contracting capacity of the parties and legality of the contract.

There are two types of contract: bilateral and unilateral. A bilateral contract exists where both parties offer and accept the contractual terms directly. A unilateral contract exists where a person puts up a notice to the general public and requests any person to perform a certain task for some consideration in return. The person who posts the notice is bound to give the consideration to any person who performs the task⁴.

I advised Jenny that the statement probably does not constitute a unilateral contractual term between her and the store for the following reasons:

Firstly, according to common law, in order for a statement to become a valid contractual term, Jenny must be aware of the statement and agree to it before breaking the vase. Nobody can unilaterally impose any term on another party after the act has taken place: the timing will simply be too late.⁵

Secondly, as Jenny was unaware of the sign before she broke the vase and she did not agree to the statement at any time, there was no consensus ad idem (meeting of the minds) with which the statement was accepted.

Thirdly, the writing on the sign was

too small: if clauses are considered to be onerous, the words must be large sized and conspicuous⁶.

Quantum

Quantum arising from the contract

If Jenny had been aware of the statement “*customers are liable for any damage in accordance with the price*” and had agreed upon it before she broke the vase, then it would constitute a contractual term which binds her. Thus we need to analyze the quantum arising from the contractual statement.

This statement in itself is an agreed damages clause payable on an occurrence of an event. If the \$60,000 figure represented the genuine pre-estimate of the loss in which the store suffered, then Jenny would be liable for the whole sum of \$60,000 (if the statement has a contractual effect).

However, if the \$60,000 clause exceeded the compensation for the actual loss the store suffered or was imposed as a threat to compel customers to be meticulous when shopping, then it would constitute a penalty clause and it would be unenforceable.

There is no formula or conclusive factor in law to decide the distinction between a penalty and liquidated damage; every case must be decided on its own facts⁷. The line drawn by the courts is that the sum stipulated cannot be extravagant and

unconscionable when compared with the greatest pre-estimated amount, or if the sum stipulated is greater than that which ought to have been paid⁸.

Another point to note is that contract law prohibits unjust enrichment, i.e. a party refrains from making a profit in compensation since the principle of damages is to put the injured party back into the position it would have been in if the damage had not occurred – any amount beyond that would seem to be unjust.

Since we concluded that the statement had no contractual effect, Jenny should not be liable for the damage written on the price tag. She need only be responsible for any damage

arising from the tort of negligence.

Quantum arising from the tort

The general principle approach

The general principle for the measure of damages in tort is to restore the injured party to the position it was in before the tort was committed: in other words, to put the plaintiff back into their pre-injury position.

The market price approach

For damage to property, compensation for the loss could be measured as the market value of the property at the time of destruction⁹.

Damages in tort are not an all-or-none affair. Damages can be apportioned on the percentage of the defendant's



liability. For example, if the court also found the store negligent for placing the vase in a dangerous spot and held the store to have 40% of the liability, then Jenny would only be responsible for 60% of the damages¹⁰.

Present Situation

Application of the general principle approach

The assessment of damages is the sum needed to restore the store into the position it was in just before Jenny broke the vase. In order to calculate this, Jenny must find out the actual cost of the vase. If the vase only cost \$10,000 then the compensation for the vase should also be \$10,000. The store could be fully restored to its pre-injured position by repurchasing

an identical vase, putting it back on display and putting a price tag of \$60,000 on it.

The \$60,000 figure was merely an asking price. The store could have asked for \$600,000 or \$6 million, but this price is meaningless until the vase has been sold or somebody undertakes to buy it at that price.

Application of the market price approach

The asking price of an item usually exceeds its market value. If it was really worth \$60,000 the item would have been sold already. The market price could be determined by valuation experts.

Conclusion

Jenny wrote a letter to the department store. She insisted that the store should provide her with the actual cost and stated she would pay whatever the figure was. She further affirmed her position that she would not pay the figure on the price tag. The store never contacted her; perhaps it did not want to reveal the cost of the vase or perhaps it had claimed the item on its insurance.

Note: The contents of this article reflect the author's opinion only. Any information contained in this article should not be used as legal reference or guidance. Readers should seek independent legal advice from qualified lawyers when dealing with legal matters.

Notes

1. Hong Kong Bill of Rights Ordinance section 8, Articles 5, 7
2. In litigation, the court will deal with the liability issue and the quantum issue in separate stages. The defendant can agree with one issue and dispute the other.
3. The neighbour principle laid down in *Donoghue v Stevenson* [1932] AC 592 is that we must take reasonable care to avoid acts which we can reasonably foresee would be likely to injure our neighbours. Neighbours are any persons who are closely and directly affected by our acts.
4. *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
5. In *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 CA, an exemption clause printed on the car park ticket and stated on the notice board inside the car park did not bind the customer since contract was already concluded when the motorist drove into the car park. Similarly in *Olley v Marlborough Court Ltd* [1949] 1 KB 532, a contract was made at a hotel reception desk as guests checked into the hotel. The terms of a notice in the bedroom were held to be too late to be incorporated into the contract.
6. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 CA and *Thornton v Shoe Lane Parking Ltd* [1971]
7. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 HL
8. *Ibid*
9. *Liesbosch Dredger v SS Edison* [1933] AC 449 and *Hall v Barclay* [1937] 3 All ER 620
10. The legal term is called contributory negligence; the department store's negligence contributed to the cause of the vase being broken.