

Webinar on Guidelines and Support Measures on Conducting Physical Activities under COVID-19
預防2019冠狀病毒病進行體育活動的指引及支援措施網上研討會
(Primary & secondary Schools) 專題講座 (中小學)

Co-organized by HKPEA, HPE and EDB

**Legal Aspect & Risk Management in Physical
Education (PE) 學校體育的法律責任與風險管理**

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28 August 2020 (3:40-4:30pm)

Rundown

1. Negligence 疏忽
2. Risk Assessment 風險評估
3. Block Insurance 綜合保險
4. Vicarious Liability 轉承責任

PART I

NEGLIGENCE

Elements of Negligence 疏忽元素

- a. Duty of care 照顧責任
- b. Breach of duty 失責
- c. Causation 失責導致損失
- d. Reasonably foreseeable
可合理預見

Case 1: *Man Hin Fung* case, 23 March 2018

DCPI 2725/2015, [2018] HKDC 323

6 December 2014, plaintiff sustained **serious injury** to his left **eye** resulting in loss of a **larger portion** of **iris** (“the Accident”). The quantum of damages has been agreed at HK\$800,000 and the trial is only concerned with the issue of liability. (Paragraph 1 “P1”)

prepare Inter-School Athletics Championships, 2 teachers & 1 coach, 27 students (P3, 4)

Coach overseeing high jump practice, not witness Accident, suddenly heard the plaintiff screamed (P7)

Accident: Cheng and Lee started to **horseplay**. Lee mocking the act of an Olympic player and clapping his hands over his head. Cheng then threw a tennis ball at Lee, with Lee threw back a red round-shape plastic mat (“the Mat”) in return. Cheng managed to dodge (P9)

Man squatted down to tie his shoelaces, when he stood up, suddenly the **Mat** hit his face, breaking the glasses and **seriously injuring** his left **eye** (P8)

Mat involved in the Accident was only used as a spot marker for long jump practice (P28 (vi))



“(a) The **reasonableness** of the schoolteacher’s duty to take care of the students shall be determined in light of, inter alia, (i) the **conditions** of the **school life** as distinct from the home life, (ii) the **number** of children in the class, and (iii) **nature** of those **students**.

(b) It is also established that teachers **cannot** be **expected to insure** children **against injury** from **ordinary play** in the playground, as it would be impossible to supervise all the school students that they never fall down and hurt themselves (Clerk and Lindsell on Torts 21st ed, §8-209). (P24)

”

“(i) The School was and is a **Band 1 school** where most of the students were hardworking, focused in their learning, **well behaved** and **disciplined**.

(ii) That occasionally students would be playing amongst themselves at times, but there were **no serious disciplinary issues** at the School and there had **never** been any **accident** of a **similar nature** at the School before.” (P34)

I “ agree with, the group of **pupils** involved in the present case (including Cheng and Lee) are generally **well-behaved** and **harmless** who did **not** present themselves as a **high safety risk**. There were **no serious disciplinary issues**, **no occurrence of accidents** resulting in **serious injuries** during track and field practice or **dangerous horseplay**. The teachers or coaches of the defendant were simply not alerted nor put on inquiry to provide extraordinary supervision over Cheng and Lee”. (P39)

“it is **against public policy** and **damaging teacher-pupil relationship** by **removing the slightest element of trust** to **impose a duty** on the teacher to **constantly supervise students** like Cheng and Lee who are just being playful at times, **without** being **violence** or having a **history** of **causing injuries** while they were playing around (*Trustee of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* (2005) 216 ALR 415 (“Hadba”) at [25]).” (P43)

“I find that...the staff to **student ratio** in the present case is **appropriate.**” (P44)

I “find the **supervision** provided was **adequate**”. (P44)

“Bearing in mind that the **obligation** on the **School** and teachers does **not extend to constant supervision**, the evidence does not establish that had a teacher been on patrol in the playground, the incident would necessarily not have occurred.” (P50)

“**even if** there was one or **more teachers on duty** at the playground, he/they would **most likely** be **unable to stop** the Mat from **hitting** the plaintiff, given the time frame within which the incident occurred and the sudden and impulsive nature of the actions of Cheng and Lee.” (P51)

“Accident was a sudden, unfortunate but totally unexpected occurrence and there was little that the defendant could have done to prevent it.” (P60)

“Alternatively, even if there is a breach of such a duty, I am of the view that it was not causative of the Accident and/or the injuries suffered by the plaintiff.” (P61)

“I order that the plaintiff’s claim herein be dismissed with a costs order in favour of the defendant with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations.” (P62)

體育課安全考慮舉例

- 活動的性質
- 活動難度及所要求避達到的水平
- 恰當的指導
- 活動適合學生年齡和狀態
- 學生經過循序漸進的訓練
- 在足夠的監督下進行活動
- 學生紀律及是否有否殘疾
- 有隱獻疾或重病學生名單及注意事項

體育課安全考慮舉例

- 器材的性質和狀態
- 器材維修和檢查清單
- 安全裝備
- 分組人數
- 球證公正執法
- 執行適當球例
- 有效控制球賽

體育課安全考慮舉例

- 適切資格的導師 (實習老師?)
- 師生比例
- 場地安全
- 戴口罩 (中等或劇烈強度體能活動不宜戴/誰戴?)
- 急救、藥物裝備
- 事故發生的應變措施和行動方案
- 活動設計/教案
- 足夠的示範
- 風險評估

政府新聞稿 Government Press Release

「政府修訂《預防及控制疾病（佩戴口罩）規例》及延續社交距離措施」2020年8月25日

任何人在指明公眾地方(室內地方除外)進行相當消耗體力的體能活動包括運動，即屬在該處不佩戴口罩的合理辯解，鼓勵市民進行體能活動。」

“Government amends the Prevention and Control of Disease (Wearing of Mask) Regulation and extends social distancing measures” 25 August 2020
the Government amended the relevant legislation to provide that engaging in any **strenuous physical activity** in public places (except indoor areas) would be a **reasonable excuse for not wearing a mask**, to encourage members of the public to engage in physical activities.

<https://www.info.gov.hk/gia/general/202008/25/P2020082500780.htm>

《教育規例》第279A章

第53條: 表列傳染病*

- (1) 如**學校醫生證實**某教員、學生或僱員由於染上或於最近曾染上某種**表列傳染病**，或與染上表列傳染病的人接觸或與染上表列傳染病的人居住在同一屋內，因而**須禁止**留在校內，則在負責該學校衛生服務的醫生以書面提出要求時，管理當局須作出安排，禁止該教員、學生或僱員留在校內，禁止期間則視乎需要而定。(1974年第57號法律公告；2004年第27號第70條)
- (2) 學校內如**懷疑**或知悉有任何教員、學生或僱員染上表列傳染病，或在校長懷疑或知悉有任何教員、學生或僱員曾與患表列傳染病病人接觸，校長須立即向學校醫生報告。
(2008年第14號第18條)

<https://www.elegislation.gov.hk/hk/cap279A!en-zh-Hant-HK>

Education Regulations, Cap. 279A

Regulation 53: Scheduled infectious diseases*

- (1) If a medical officer of schools certifies that any teacher, pupil, or employee should be excluded from school by reason of suffering or having recently suffered from any scheduled infectious disease or by reason of having been in contact with or living in the same house as a person suffering from a scheduled infectious disease, the management authority shall, if so required in writing by the medical officer in charge of the school health services, cause such teacher, pupil, or employee to be excluded from school for such period as shall seem necessary. (L.N. 57 of 1974; 27 of 2004 s. 70)
- (2) The principal shall immediately report to a medical officer of schools any suspected or known case of scheduled infectious disease amongst teachers, pupils or employees of a school, or when he suspects or knows that any such person has been in contact with a case of scheduled infectious disease.

(14 of 2008 s. 18)

<https://www.elegislation.gov.hk/hk/cap279A!en-zh-Hant-HK>

第55條: 急救

- (1) 每間學校的房產內最少須備有一個**急救箱**。
- (2) 每間學校最少須有**2名教員**曾接受**急救訓練**。
- (3) 急救箱須裝置在所有鄰接科學實驗室及學校工場外地方。所有科學科教員、工場導師及其助手須**熟知急救箱**內所載物品及其**用途**。
- (4) 急救箱**無論何時**均須保持**設備齊全**。
- (5) 常任秘書長可規定任何學生人數逾**100名**的學校，須在房產內提供一間合適房間作**健康檢查及急救**之用。 (2003年第3號第14條)

Regulation 55: First aid

- (1) There shall be provided in the premises of every school at least one first aid box.
- (2) At least 2 teachers in every school shall be trained in administering first aid.
- (3) First aid boxes must be fitted outside and adjacent to all science laboratories and school workshops. All science teachers, workshop instructors and their assistants must be familiar with the contents and their use.
- (4) First aid boxes shall be maintained fully equipped at all times.
- (5) The Permanent Secretary may require the provision of a suitable room for medical inspection and first aid in the premises of any school which has more than 100 pupils.

(3 of 2003 s. 14)

三段式界定是否有「照顧責任」

Caparo v Dickman [1990] 2 A.C. 605

1. 損失可合理預見
(reasonable foreseeable)
2. 雙方關係相當密切
(sufficiently proximate)
3. 加諸照顧責任是公平、公正和合理
(fair, just and reasonable)

PART II

RISK ASSESSMENT

5 Steps to Risk Assessment

風險評估五步曲

- a. Look for hazards 找出危險
- b. Who may be harmed and how 誰會受損
- c. Evaluate the risks and decide if the existing precautions are adequate 評估風險
- d. Record your findings 記錄評估
- e. Review assessment and revise if necessary 覆核評估

<https://www.labour.gov.hk/tc/public/pdf/os/D/FiveSteps.pdf>

Risk Assessment

Schools need to assess and manage the risks from **injury** and **coronavirus (COVID-19)**. Schools should think about the risks the staff and pupils face and do everything **reasonably practicable** to **minimize** the **risks**, recognizing they cannot completely eliminate the risks. **School employers** should make sure that a risk assessment has been undertaken to identify the measures needed to reduce the risks from coronavirus (COVID-19) so far as is **reasonably practicable** and **make the school, its staff and pupils and its activities safe and COVID-secure.**

Risk Assessment

A **risk assessment** is **not** about **creating huge amounts of paperwork**, but rather about **identifying sensible measures** to **control the risks**, and the **role of others** in supporting that. The risk assessment will help school leaders and employers decide whether they have done everything they need to. Employers should **consult** their **employees** on health and safety in good time. It also makes good sense to involve **pupils** (where applicable) and **parents** in discussions around health and safety decisions to help them understand the reasons for the measures being put in place. Employers can do this by listening and talking to them about how the school will manage risks from injury and coronavirus (COVID-19) and make the school safe and COVID-secure.

Risk Assessment

Schools should **share** the **results** of their **risk assessment** with their **workforce**. If possible, they should consider publishing it on their website to provide transparency of approach to parents, carers and pupils.

Monitoring and review of risk controls

It is important that employers know how effective their risk controls are. They should **monitor** and **review** the **preventive** and **protective measures regularly**, to ensure the measures are working, and taking action to address any shortfalls.

Reference: *Guidance for full opening: schools*. Updated 7 August 2020. Annex A: Health and safety risk assessment: <https://www.gov.uk/government/publications/actions-for-schools-during-the-coronavirus-outbreak/guidance-for-full-opening-schools#A>

PE lesson at **school** under COVID-19

Examples of Risk Factors and Preventive measures

- Pupils should be kept in consistent groups, sports equipment thoroughly cleaned between each use by different individual groups, and contact sports avoided.
- Make sure that the space and any equipment children will use for these activities are safe.
- Comply with social distancing.

PE lesson at **home** under COVID-19

Examples of Risk Factors and Preventive measures

- Draft a guideline for PE lesson at home sending to parents and students for consultation.
- Work with parents where they are satisfied that it is safe to do the activities in light of his child's ability and the environment.
- Assess by teachers, parents and students if the environment is suitable for the **particular** physical activities to be taught (How?)
- Plan carefully the activities to be taught including pupils' abilities, environment including the height, around the house, etc. (How? Whether a checklist can be developed?)
- Ensure an **adult accompanies** the student during the PE lesson. (How to ensure? Becoming a term in the Agreement signed by parents? Any more terms should be included? Ensure certain activities are safe when doing at home?)

PE lesson at **home** under COVID-19

Examples of Risk Factors and Preventive measures

- Make sure all pupils are captured their camera in the platform without using virtual background. (**Capture the face only?** Pro (notice the facial expression, identity) & Cons. (cannot see the bodily movement and if injured, how) Video-recording?)
- Ensure all the pupils, student teacher and their environment should be captured within one page of your screen. (specify the number)
- More than a teacher monitoring the screen? Any division of labour between the teachers? Any teacher-student ratio should be set?
- In case of accident, stop the activities and clarify with the condition of the injured. (Develop a procedure? E.g. dial 999 in case of serious injury.)
- Can home-school agreement operate as an exemption clause?

Chapter:	71	Title:	CONTROL OF EXEMPTION CLAUSES ORDINANCE	Gazette Number:
Section:	7	Heading:	Negligence liability	Version Date: 30/06/1997

PART II
CONTROL OF EXEMPTION CLAUSES
Avoidance of liability for negligence, breach of contract, etc.

- (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
- (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk. (Enacted 1989) [cf. 1977 c. 50 s. 2 U.K.]

章：	71	標題：	管制免責條款條例	憲報編號：	
條：	7	條文標題：	疏忽的法律責任	版本日期：	30/06/1997

第II部

管制免責條款

逃避因疏忽、違約等而引致的法律責任

- (1) 任何人不得藉合約條款、一般告示或特別向某些人發出的告示，而卸除或局限自己因疏忽引致他人死亡或人身傷害的法律責任。
- (2) 至於其他損失或損害方面，任何人亦不得藉上述各項而卸除或局限自己因疏忽而引致的法律責任，但在該條款或告示符合合理標準的範圍內，則不在此限。
- (3) 如合約條款或告示看來是用以卸除或局限因疏忽而引致的法律責任，則雖然某人同意或知道該條款或告示的存在，亦不得單憑這點認為該人表示自願承擔任何風險。
(1989年制定) [比照1977 c. 50 s. 2 U.K.]

PART III

BLOCK INSURANCE

綜合保險計劃摘要說明（2019/20 及2020/21 學年）

1. 綜合保險計劃是教育局為資助學校及按位津貼學校安排的一項保險計劃。該計劃包括三部分：(1) 公眾責任保險；(2) 僱員補償保險；(3) 團體人身意外保險。
2. 第 (1) 及 (2) 部分屬責任保險，旨在保障學校日常運作時，引致任何人及學校僱員因意外受傷而招致金錢上的損失，及/或因意外導致財產損失或損毀。
3. 公眾責任保險
 - 3.1 公眾責任保險是保障學校在意外事故中引致任何人（不包括學校僱員）受傷或財產損失或損毀而須承擔的法律責任(但不包括道義上的責任)。

(本摘要說明只概述綜合保險計劃的精神，並不構成保險計劃內容的任何部分。如有任何爭議，以保單原來用詞的實際釋義為準。)

<https://www.edb.gov.hk/tc/sch-admin/admin/about-sch/sch-safety/index.html>

Insurance Specifications 計劃承保範圍的簡介

III) BUSINESS OF THE INSURED:

Schooling, **educational activities** and any other activities incidental or otherwise directly related to any schooling or educational activities including training, curricular and extra-curricular activities (outdoor or indoor, within or **outside** the **premises** of the **Insured**, during or outside school time, within or outside Hong Kong) organised or endorsed by an Insured School (including, without limitation, any schooling and/or educational activities jointly held with the Education Bureau or otherwise at the instruction of the Education Bureau).

(This document provides only a brief description of the coverage of the Block Insurance Policy and does **not form part** of the **policy**. It is **subject to** the **interpretation** of the **original wording** of the **policy**.)

Exclusions:

The Insurer will not indemnify the Insured in respect of –

16. **losses** of any kind directly or indirectly caused by, arising from, or consisting of, in whole or in part:-

(i) the **use** or misuse of the **Internet** or similar facility;

(ii) any electronic transmission of data or other information;

綜合保險計劃的常見問題和答案

教育局 2019年8月

以下答案是基於簡單的假設問題而擬備的，旨在提供一般資料作參考之用。保險計劃的承保範圍視乎實際情況而定，並以**保單**內列明的保額、條款、條件及不受保範圍**為準**。

問題21：上體育課時，學生間發生身體碰撞，令其中一位學生眼鏡碎裂，其家長要求賠償眼鏡費用，學校可否向保險公司索償？如果有學生因此受傷，又可否索償？

綜合保險計劃的常見問題和答案

答案21：

(a) 如能證明**因學校疏忽引致學生受傷或財物損毀**，該學生可以按綜合保險計劃的「公眾責任保險」提出索償。

(b) 學生在上課時發生意外事故引致死亡或永久傷殘，可以循綜合保險計劃的「團體人身意外保險」提出索償。

綜合保險計劃的常見問題和答案

問題45： 學校籃球場屬房屋署管轄範圍，但在上課天供學校優先使用。當該校學生在籃球場上體育課時受傷，會否受綜合保險計劃保障？

答案45： **學生在參與學校活動時**，不論是在校內或**校外**、上課期間或課堂以外發生意外，都會受綜合保險計劃保障。如能證明因學校疏忽引致學生受傷或財物損毀，該學生可以循綜合保險計劃的「公眾責任保險」提出索償。如學生因參加學校活動發生意外，不幸導致永久傷殘或死亡，可以循綜合保險計劃的「團體人身意外保險」提出索償。

綜合保險計劃的常見問題和答案

此外，籃球場屬房屋署管轄範圍，學生如在球場發生意外，如能證明是因場地負責人疏忽管理而引致，可向房屋署提出索償；但如果證明是因場地佔有人的疏忽而引致，亦可向學校提出索償。

教育局

2019年8月

<https://www.edb.gov.hk/tc/sch-admin/admin/about-sch/sch-safety/index.html>

PART IV

VICARIOUS LIABILITY (NEGLIGENCE & HARASSMENT)

Vicarious liability 轉承責任

Close Connection Test 緊密連繫測試

1979-82:	in a boarding school, a warden sexually abused some boys aged 12-15.
1990s:	the warden was sentenced to seven years' imprisonment.
1997:	the former school boys sue the employer of the warden for personal injury.

On 3 May 2001 UK House of Lords, upheld vicarious liability for the warden's intentional tort, though the employer is free from blame. The warden's **wrongful act** were so **closely connected** with his **employment** that it would be **fair** and **just** to hold the employers **vicariously liable**.

(*Lister v Hesley Hall Ltd.* [2001] UKHL 22 cited in *Ming An Insurance Co (HK) Ltd. v Ritz-Carlton Ltd.*, FACV 4/2002, 4 Dec 2002)

Ming An Insurance Co (HK) Ltd. v Ritz-Carlton Ltd. [2003]1
HKC 225 (FACV 4/2002, 4 Dec 2002)

Fact: 9 March 1998, a hotel doorman drove a limousine (which provides service to hotel guest) to buy food for forecourt staff. The limousine was out of control and he seriously injured two pedestrians.

Held: The employee's **unauthorized act** was **so closely connected** with his **employment** that it would be **fair** and **just** to **hold** his **employer** vicarously **liable**.

Ming An Insurance Co (HK) Ltd. v Ritz-Carlton Ltd.

- The court should take a **broad approach** to the nature of employment and **not focus** upon the **employee's duty**. Collecting food was not only for the staff but also in the **interest** of the **hotel**. It is **incidental** to the **employment** of the hotel staff. Further, it was **known** to the **hotel** and not disapproved. Hence, driving is part of the doorman's job and he was acting within his authority and **within** the **scope** of his **employment**.
- Disputes on post-judgment interest and costs were ruled by the Court of Final Appeal. ((2009)12 HKCFA 158, CFA judgment dated 19 Dec 2008, and (2009)12 HKCFAR 745, CFA judgment dated 9 Mar 2009)

性騷擾定義 I

Definition of Sexual Harassment I

According to Section 2(5) of the Sex Discrimination Ordinance (Cap. 480, LHK) :

香港法例第480章《性別歧視條例》第2(5)條：

A person (howsoever described) sexually harasses a woman if -

(a) the person –

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or

任何人

(a) 如 –

(i) 對一名女性提出不受歡迎的性要求，或提出不受歡迎的獲取性方面的好處的要求

性騷擾定義 II

Definition of Sexual Harassment II

(ii) engages in other unwelcome conduct of a sexual nature in relation to her,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated;
(Case:IBM, Cheng Yin Fong)

(ii) 就一名女性作出其他不受歡迎並涉及性的行徑，

而在有關情況下，一名合理的人在顧及所有情況後，應會預期該女性會感到受冒犯、侮辱或威嚇；

該人即屬對該女性作出性騷擾。
(IBM案、鄭燕芳案)

性騷擾定義 III

Definition of Sexual Harassment III

(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her.

(b) 如自行或聯同其他人作出**涉及性的行徑**，而該行徑造成對該名女性屬有**敵意**或具**威嚇性**的**環境** (由**2008**年第29號第91條修訂)

該人即屬對該女性作出性騷擾。

《性別歧視條例》適用範疇

Applicable areas of Sex Discrimination Ordinance

1. **Employment** 僱傭
2. **Education** 教育
3. **Goods, facilities, services and premises**
貨品、設施、服務及處所
4. **Advisory bodies** 諮詢團體
5. **Barristers** 大律師
6. **Clubs** 會社
7. **Government** 政府

(all relations under legal protection: ss23, **23A**, 24, 39, 40)

性騷擾對義工適用範疇

Applicable Areas of Sexual Harassment on volunteer

Section 23A(1): Sexual harassment at workplace

It is unlawful for a person who is a **workplace participant** to sexually harass a woman who is also a workplace participant at a **workplace** of them both.

第23A(1)條: 在工作場所的性騷擾

凡某屬**場所使用者**的人，在其**工作場所**，對亦屬場所使用者並同樣以該處為工作場所的某女性，作出性騷擾，該人即屬違法。

Section 23A(2): Sexual harassment at workplace
第23A(2)條: 在工作場所的性騷擾

Workplace (工作場所), in relation to a person, means a place—

(a) at which the person works as a workplace participant; or

(b) that the person attends as a workplace participant;

工作場所(**workplace**)就某人而言，指 ——

(a) 該人作為場所使用者而工作的所在地方；或

(b) 該人作為場所使用者而置身的地方；

Section 23A(2): Sexual harassment at workplace 第23A(2)條: 在工作場所的性騷擾

workplace participant means—

- (a) an employee;
- (b) an employer;
- (c) a contract worker;
- (d) the principal, within the meaning of section 13(1), of a contract worker;
- (e) a commission agent;
- (f) the principal, within the meaning of section 20(1), of a commission agent;
- (g) a partner in a firm;
- (h) an **intern**; or
- (i) a **volunteer**. (Added 8 of 2020 s. 20)

場所使用者指 ——

- (a) 僱員；
- (b) 僱主；
- (c) 合約工作者；
- (d) 合約工作者的主事人
(第13(1)條所指者)；
- (e) 佣金經紀人；
- (f) 佣金經紀人的主事人
(第20(1)條所指者)；
- (g) 商號合夥人；
- (h) **實習人員**；或
- (i) **義工**；(由2020年第8號第20條增補)

Section 23A(2): Sexual harassment at workplace

Intern (實習人員) means a person who is engaged by another person for an internship but is not an employee of that other person;

Internship (實習) means—

(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other work that is usually described as an internship;

volunteer(義工) means a person who **performs volunteer work** other than in the capacity of an employer or employee;

第23A(2)條: 在工作場所的性騷擾

義工 (volunteer) 指並非以僱主或僱員身分進行義工工作的人；

實習 (internship)指 ——

(a) 在一段期間從事的工作，而在該期間完成該等工作，是取得某專業或學術資格所必需的，並包括見習職位；或

(b) 通常稱為實習的任何其他工作；

實習人員 (intern)指符合以下說明的人：該人獲另一人任用從事實習，但該人並非該另一人的僱員。

轉承責任: 僱主/主事人需為僱員/代理人行為負責
Vicarious Liability: Employers(Principal) have to be responsible for the Behavior of Employees (Agent): Section 46

1. Any act done or practice engaged in by a person in the course of his employment

受僱用中

2. Whether or not it was done or engaged in with the employer's knowledge or approval.

不論僱主是否知悉或批准

Shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him
須視為亦是由僱主所作出

轉承責任: 僱主(主事人)需為僱員(代理人)行為負責
Vicarious Liability: Employers(Principal) have to be responsible for the Behavior of Employees (Agent)

Employer's Defence:

僱主免責辯護 :

Reasonably practicable steps have been taken to prevent sexual harassment of employees.

已採取合理地切實可行的步驟以防止該僱員性騷擾 (s46, SDO)

B v King of the King Group Limited
B 對 皇上皇集團有限公司 (DCEO 9/2010, 2012.6.6)

Who is an Agent?

An agent is a person authorised to act on behalf of another (referred to as the "principal"). If the **agent** is **acting in accordance** with the express, implied or ostensible **authority** conferred on them, the **principal** is **bound by their actions** and can be held **vicariously liable** for their **wrongs**. Volunteer workers, board directors, consultants or contractors, including recruitment agents, are likely to be considered agents of an employer. (3.2.4 Vicarious liability)

The Australian Human Rights Commission (2004) *Sexual Harassment - Code of Practice for Employers* <https://humanrights.gov.au/our-work/sexual-harassment-code-practice-liability>

轉承責任: 任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

Section 46A

(6) **An act done by a volunteer in the course of performing volunteer work** is to be **treated as** an act **done**—

(a) by the volunteer; and

(b) **by the person who engaged the volunteer to perform the work**, whether or not the act was done with the knowledge or approval of that person.

(6) 義工在進行義工工作的過程中作出的**作為**，**須視為**由以下的人**作出**——

(a) 該義工；及

(b) **任用該義工進行該項工作的人**(不論該人是否知悉或批准作出該作為)。

轉承責任: 任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

Section 46A

(5) Subsections (6) and (7) apply if a volunteer is engaged by another person to perform volunteer work.

(7) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by a volunteer engaged by the person, it is a **defence** for the person to prove that the person took **reasonably practicable steps** to prevent the volunteer—

(a) from doing that act; or

(b) from doing acts of that description in the course of performing volunteer work. (Added 8 of 2020 s. 21)

轉承責任: 任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

Section 46A

(5) 如義工獲另一人任用進行義工工作，則第(6)及(7)款適用。

(7) 凡就某人任用的義工被指稱作出的作為，而根據本條例對該人提出法律程序，則在該法律程序中，該人如證明自己已採取**合理地切實可行的步驟**，以防止該義工——

(a) 作出該作為；或

(b) 在進行義工工作的過程中，作出該類別的作為，

即為**免責辯護**。

轉承責任: 任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

Section 46A

(3) An **act** done by an **intern** in the course of an internship is to be **treated as** an act **done**—

(a) by the intern; and

(b) **by the person who engaged the intern for the internship**, whether or not the act was done with the knowledge or approval of that person.

(3) **實習人員**在實習的過程中作出的**作為**，**須視為**由以下的人作出——

(a) 該實習人員；及

(b) **任用該實習人員從事該項實習的人**(不論該人是否知悉或批准作出該作為)。

轉承責任: 任用實習人員及義工的人的法律責任

Vicarious Liability: Liability of persons engaging interns and volunteers

Section 46A

(4) In proceedings brought under this Ordinance against a person in respect of an act alleged to have been done by an intern engaged by the person, it is a **defence** for the person to prove that the person took **reasonably practicable steps** to prevent the intern—

(a) from doing that act; or

(b) from doing acts of that description in the course of the internship.

(4) 凡就某人任用的實習人員被指稱作出的作為，而根據本條例對該人提出法律程序，則在該法律程序中，該人如證明自己已採取**合理地切實可行的步驟**，以防止該實習人員——

(a) 作出該作為；或

(b) 在有關實習的過程中，作出該類別的作為，
即為**免責辯護**。

N.B.: similar provisions were newly added to **DDO** and **RDO**.

結語 Concluding Remarks

Teach Safely 安全教導

Teach safety 教導安全

參考資料

莊耀洸律師，「學校的法律責任與疏忽」，輯於吳迅榮、黃炳文主編《廿一世紀的學校領導：持續與創新》，香港，學術專業圖書中心，2009

莊耀洸「戶外活動」輯於趙文宗、洪雪蓮、莊耀洸編(2011.12)《社會福利與法律應用:溝通與充權(增訂再版)》。香港：紅投資有限公司。

林壽康、余惠萍《香港教育法：疏忽侵權篇（增訂版）》香港: 基道出版社。2017年

電子版香港法例: <http://www.elegislation.gov.hk/chi/index.htm>

判案書: <http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>

Youth Sport Trust “Primary Physical Education Response to COVID-19”

<https://www.youthsporttrust.org/system/files/Primary%20PE%20Response%20ideas.pdf>

聲明

講義只作輔助講解及參考之用。倘同時參閱法例條文及判案書原文，更能了解講議和講解內容。

此講義、講解內容、問答環節，以至討論，均非作出法律意見，而是旨在提高對有關問題的認識，如有需要，請另行尋求律師意見

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