

# THE FAILURE OF THE HONG KONG COURT OF APPEAL TO RECOGNISE AND REMEDY DISABILITY DISCRIMINATION



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*This article critiques the recent decision of the Hong Kong Court of Appeal in *Ma Bik Yung v Ko Chuen*, the first case to be tried under Hong Kong's Disability Discrimination Ordinance. The Court of Appeal upheld the District Court's finding of disability harassment but granted the appeal from the finding of disability discrimination. The author argues that the Court erred, by introducing a hypothetical factual scenario that was inconsistent with the District Court's findings of fact and by failing to apply s 3 of the Ordinance. The article also criticises the Court's holding that an 'unwilling' apology is outside the scope of remedies allowed by the Ordinance. In fact, similar statutory language is regularly used in Australia as the basis for orders to apologise. The author concludes by considering the potential conflict between the right to free expression and court-ordered apologies and suggests two possible approaches to the issue.*

## Introduction

In a previous issue of the Hong Kong Law Journal,<sup>1</sup> I analysed *Ma Bik Yung v Ko Chuen*<sup>2</sup>, the first case to be tried under Hong Kong's Disability Discrimination Ordinance.<sup>3</sup> The District Court had held that the defendant, a taxi driver, had committed unlawful disability discrimination and harassment against his passenger, a woman who is a paraplegic and uses a wheelchair. The court ordered the defendant to pay \$20,000 in damages and to apologise to the plaintiff.

However, subsequently, in February 2000, the Court of Appeal allowed in part the defendant's appeal.<sup>4</sup> The Court rejected the appeal against the finding of disability harassment but granted the appeal from the finding of disability discrimination, on the ground that the Judge had not made an express finding that the defendant would treat a non-disabled passenger with luggage any

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<sup>1</sup> Carole J Petersen, 'Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws' (1999) 29 Hong Kong Law Journal 178.

<sup>2</sup> *Ma Bik Yung v Ko Chuen* [1999] 1 HKC 714.

<sup>3</sup> Cap 487, Laws of Hong Kong.

<sup>4</sup> *Ma Bik Yung v Ko Chuen*, CACV 267/99, decided 9 February 2000 (Court of Appeal). The Equal Opportunities Commission will apply, on 27 June 2000, for leave to appeal the decision to the Court of Final Appeal.

better than he treated this plaintiff. In the second part of this article, I argue that this finding was implicit in the Judge's findings of fact and that the Court of Appeal erred, by introducing an inconsistent hypothetical factual scenario and by failing to apply s 3 of the Disability Discrimination Ordinance.

The Court also allowed the appeal against the order that the defendant apologise for his conduct, on the ground that an insincere apology would not benefit the plaintiff, a conclusion that I challenge in the third part of this article. Moreover, the Court did not simply decide that the order to apologise was inappropriate in *this* case, but rather held (after a very brief discussion) that an unwilling apology is entirely outside the scope of remedies allowed under the Ordinance. I argue that this decision was reached too hastily, without adequate consideration of numerous Australian cases in which similar statutory language has been used as the basis for orders to apologise. In the final part of the article, I consider the potential conflict between a court-ordered apology and the right to free expression (which was not expressly analysed in the Court of Appeal's judgment) and suggest two possible approaches to resolve it.

### **Disability discrimination: unfavourable treatment and the role of the comparator**

The Court of Appeal allowed the appeal against the finding of disability discrimination because the Judge failed to make an express finding that the defendant had treated the plaintiff less favourably than he would have treated an able-bodied person with a heavy suitcase. In my view, a finding of 'less favourable treatment' was implicit in (and indeed an unavoidable inference from) the extensive findings of fact. Judge Wong found, *inter alia*, that:

1. The defendant saw the plaintiff hail him but ignored her and refused to drive toward her; he continued to ignore the plaintiff even as she crossed the road in her wheelchair to get to his taxi.
2. When the plaintiff reached the taxi the defendant made it clear that he did not welcome her patronage and refused to offer any assistance when she boarded and alighted.
3. The defendant refused to help (or summon help) to place the plaintiff's wheelchair in the boot. As a result, the plaintiff was compelled to call for help herself from the taxi, ultimately attracting passers-by, who folded and placed the wheelchair in the boot.
4. The defendant made rude, hurtful, and derogatory remarks about the plaintiff's physical disability during the journey.
5. Upon arrival, the defendant unreasonably delayed the plaintiff by again refusing to help (or to summon help) to unload the wheelchair. The defendant sat in his seat with his arms crossed and the meter still running,

until a passer-by (who had been summoned by the plaintiff), asked him to help her retrieve the wheelchair.

6. The defendant made further rude remarks, in connection with the plaintiff's disability, when she paid the fare.<sup>5</sup>

The Court of Appeal rejected the defendant's application to adduce further evidence,<sup>6</sup> as well as the submission that the Judge's findings of fact should be set aside.<sup>7</sup> The Court then dismissed the defendant's appeal from the finding that he had committed unlawful disability harassment. The driver's conduct clearly satisfied the definition of unlawful harassment as it was unwelcome conduct (which may include oral statements) on the account of the plaintiff's disability, and a reasonable person would anticipate that she would be offended, humiliated, or intimidated by it.<sup>8</sup> As the Court of Appeal noted, the 'defendant was rude and offensive and specifically referred to the plaintiff being a disabled person. There was ample evidence available to the Judge to enable her to find that the remarks ... were "on account of" the plaintiff's disability.'<sup>9</sup>

The analysis of direct discrimination is somewhat more complicated. Under the Ordinance, direct discrimination occurs when a person treats another person, on the ground of his disability, less favourably than he would treat a person without a disability.<sup>10</sup> The court must identify a suitable 'comparator' and then consider how the defendant would have treated that comparator. The District Court held that the correct comparator was a person without a disability who was travelling with a heavy piece of luggage. As the defendant himself had a physical problem that made him unable to lift heavy objects on his own, the plaintiff did not allege that he should have single-handedly installed her wheelchair in the boot of the taxi. Rather she alleged that he should have given her the assistance that he was capable of giving. In particular, he should have acknowledged her when she hailed him, driven his taxi toward her, treated her politely, and summoned help from passers-by to assist him with her wheelchair.

<sup>5</sup> Note 2 above, pp 721-22 and 726-27.

<sup>6</sup> The defendant sought to adduce evidence that the plaintiff had not disclosed a research bursary when she applied for financial assistance from the Department of Social Welfare. However, the Court of Appeal held that even if the allegation could be substantiated, it need not mean that she acted dishonestly or that the judge would have viewed her evidence with suspicion.

<sup>7</sup> The Court of Appeal acknowledged that one particular finding (that the taxi driver had not informed the plaintiff of his own physical problem) was incorrect, but it viewed this as an 'aberration' as Judge Wong had noted elsewhere in her judgment that this information had been communicated and was not in dispute. The Court of Appeal concluded that 'it is clear from reading the judgment as a whole that the Judge did not misapprehend the case'. It also rejected an argument that the Judge was biased against the taxi driver. See note 4 above, pp 3-4.

<sup>8</sup> Disability Discrimination Ordinance, s 2(6).

<sup>9</sup> Note 4 above, p 9.

<sup>10</sup> Disability Discrimination Ordinance, s 6(a) (defining direct discrimination). See also ss 26-27 (prohibiting discrimination in the provision of services, including transportation). Indirect discrimination is also prohibited (and defined in s 6(b)) but was not alleged in this case.

The Court of Appeal agreed that the District Court had identified the correct comparator. However it allowed the defendant's appeal on the ground that the Judge did not then proceed to the second step, which was to expressly consider whether the defendant would have treated an able-bodied person with a heavy piece of luggage more favourably. Counsel for the plaintiff argued that this conclusion was implicit within the Judge's findings of fact and from the fact that after identifying the correct comparator the Judge had then clearly stated that she found the defendant had committed disability discrimination.<sup>11</sup> However, the Court of Appeal disagreed, observing that while the Judge had expressly rejected the defendant's testimony that he had rendered all of the assistance he could to the plaintiff, the Judge had not made a *separate* finding rejecting his testimony that he would have treated an able-bodied person in the same manner as he treated the plaintiff. Thus the Court of Appeal believed that it was *possible* that had she expressly addressed the issue, Judge Wong would have accepted the taxi-driver's testimony that he treats all passengers with heavy luggage in the same manner that he treated the plaintiff.

With respect, it is inconceivable that the Judge would have reached such a conclusion. First, Judge Wong's findings of fact make it clear that she rejected the defendant's testimony on all issues that were in dispute. The Judge noted that the defendant was hesitant, uncertain and evasive during cross-examination and gave vague and contrived answers. She concluded her summary of his testimony by stating that she found him to be 'a completely unreliable witness and his evidence unconvincing'.<sup>12</sup> In view of this comment and her general rejection of his testimony, it is highly unlikely that she would have accepted his testimony that he treated the plaintiff no worse than he treats other passengers with luggage.

Moreover, the hypothetical factual finding suggested by the Court of Appeal is logically impossible. The Judge found that the defendant ignored the plaintiff, refused to drive his taxi toward her, refused to give her *any* assistance with her wheelchair, made rude comments and unreasonably delayed her journey. Thus, the Judge could only conclude that the defendant would give *equivalent* treatment to an able-bodied comparator if she concluded that when this defendant encounters an able-bodied woman with a heavy suitcase (which must happen regularly to every taxi driver) he avoids serving her, is deliberately rude, refuses to give her any assistance, and delays her journey. But the Judge could not possibly have reached such a conclusion because there was no evidence on the record to support it. The defendant himself did not testify that he treats other passengers in this manner (but rather that he treats all customers reasonably, giving them the assistance that he is capable of giving) and there was no other testimony regarding his general behaviour towards customers.

<sup>11</sup> Note 2 above, p 727.

<sup>12</sup> *Ibid*, p 721.

Thus when the Court of Appeal suggested in its judgment that the defendant might simply be an 'unco-operative and ill humoured' person generally, it was actually introducing (perhaps unconsciously) a new hypothetical factual scenario, one which is inconsistent with the actual findings of fact. The Judge's findings all lead to the conclusion that the defendant treated this plaintiff particularly badly and with special contempt *because* she is a disabled person. Indeed, he treated her so badly that she was left in tears in his taxi. Moreover, he treated her in this unfavourable manner while *simultaneously* harassing her on the ground of her disability. It is inconceivable that the Judge would have concluded (without any supporting evidence) that the defendant dishes out equally bad treatment to all passengers with heavy luggage. Indeed, the Judge's legal conclusion, based upon all of the evidence, was exactly the opposite.

The Court of Appeal also failed to consider the impact of s 3 of the Disability Discrimination Ordinance. Section 3 provides that if an act is done for two or more reasons and *one* of the reasons is the disability of a person (even if it was not the dominant or substantive reason) then the act will be taken as having been done on the ground of the person's disability. This provision (which the Court of Appeal did not mention in its judgement) was added to the Ordinance to ensure that a person who treats a disabled person unfavourably on the ground of disability does not escape liability by claiming that he was also motivated by other 'non-discriminatory' grounds. Thus even if there had been evidence (which is not reflected in the Judge's findings) that the defendant's conduct was significantly influenced by factors unrelated to the plaintiff's disability (such as the general bad temper hypothesised by the Court of Appeal), this would not have changed the finding of direct discrimination as the Judge would then have been obligated to apply s 3 and hold that the acts would be taken as having been done on the ground of the plaintiff's disability. The Judge could not have concluded otherwise unless she had decided that the unfavourable treatment might have been entirely unrelated to the disability — which the Judge would not have done as her findings make it abundantly clear that the plaintiff's disability was at least one (and very likely the primary) cause of the unfavourable treatment.

As a result of the Court of Appeal's failure to take into account s 3 and the full implications of the Judge's findings of fact, the plaintiff lost the determination that she had suffered discrimination, as well as one-half of her damages. Her ultimate award, of only \$10,000, is extremely meagre and cannot possibly compensate her for the ill treatment she received and the stress of litigating. Indeed, I would argue that it trivialises the legislation and will discourage other victims from pursuing their complaints in court.

In terms of the long-term development of the law, one might argue that the primary impact of this part of the Court of Appeal's judgment will be to remind

judges that they must expressly find that the defendant would have given more favourable treatment to the comparator. But in my opinion, the judgment reveals something deeper and more troubling than a simple insistence that judges be more explicit in their findings. It reveals a lack of appreciation of the realities of everyday life for disabled people. The hypothetical factual scenario posed by the Court of Appeal (that the defendant might treat everyone with luggage equally horribly) was not only inconsistent with the Judge's findings, but also so unrealistic as to strain one's imagination. The Disability Discrimination Ordinance was enacted in Hong Kong because the legislature recognised that disabled people regularly face *special* hostility and unfavourable treatment in our society. Discrimination by a taxi driver is not a trivial matter but rather is especially important because people who use wheelchairs depend so heavily on taxi services. When a victim of this type of discrimination has the courage to come forward and litigate, it is fundamentally wrong to dismiss her suffering as though it were no different from the occasional unpleasant encounter that any non-disabled person might experience. Quite simply this plaintiff did not suffer the everyday rudeness of a grouchy taxi driver. She suffered unlawful discrimination and it should be acknowledged as such, and be accorded an appropriate remedy.

### **Remedying discrimination and harassment: the authority to order an apology**

In addition to ordering damages, the District Court ordered the defendant to apologise to the plaintiff for his conduct, a remedy that had been requested by the plaintiff. The authority for such an order can be found in the broad language of s 72(4)(b) of the Disability Discrimination Ordinance, which provides that the District Court may:

order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant.

This language was borrowed from Australian anti-discrimination legislation and comparable provisions are regularly relied upon as the basis for ordering defendants to apologise.<sup>13</sup> Indeed, such orders are being made with increased

<sup>13</sup> See, eg Meredith Wilkie, 'Australia's Human Rights and Equal Opportunity Commission', in Martin MacEwen, ed, *Anti-Discrimination Law Enforcement: A Comparative Perspective* (Aldershot, England: Avebury Ashgate Publishing Limited 1997), pp 88-89, where she notes that the range of remedies that can be awarded by equal opportunities tribunals varies little across Australia and generally includes 'an order that the respondent perform any reasonable act', which can be used as the basis of orders of reinstatement and promotion, and orders to publish an apology. Appendix 1 to the chapter sets forth the reported tribunal and court outcomes of complaints brought under the Australian Race Discrimination Act from 1982 to 1995: 19 complaints were successful and of these apologies were ordered as part of the remedy in 7 cases. Thus, apologies were ordered in approximately 37% of the successful cases.

frequency by Australian equal opportunities tribunals and courts.<sup>14</sup> It appears that the Court of Appeal was not fully aware of the extent to which this remedy is used in Australia (as it referred to only one case, which it did not find helpful). However, before considering these Australian authorities, I will analyse the Court of Appeal's stated reason for overruling Judge Wong's apology order.

Essentially, the Court of Appeal held that an apology was not an appropriate remedy in this case because the defendant was not one bit 'contrite or repentant'. Under these circumstances, the Court believed that no useful purpose would be achieved by requiring the defendant to give an apology. Rather, the apology:

[W]ould be nothing more than a meaningless and empty gesture and it should not have been ordered as it would not, in the circumstances, have constituted redress to the plaintiff's loss and damage which ought reasonably to be ordered.<sup>15</sup>

Thus the essence of the Court of Appeal's reasoning is that an insincere apology would not actually benefit the plaintiff. I disagree, partly because the plaintiff herself sought the remedy (and presumably is in a better position than the Court of Appeal to determine what brings her satisfaction). In this respect the plaintiff is similar to other victims of discrimination or harassment, who often view an apology as an important means of helping to repair the damage to their dignity that was done by the unlawful behaviour. Indeed, I would submit that most people recognise the potential benefits of an apology, sincere or otherwise. Life is full of situations in which we seek and happily accept what we know are insincere apologies. For example, if you were accused by your co-worker (unfairly in your opinion) of being lazy and incompetent, you might well demand an apology. Even if no one else heard her accusation and you knew that nothing could change her opinion of you, you might still want that apology — because it would constitute partial vindication and help restore your dignity.

Of course, the value of your co-worker's apology would significantly increase if her original accusation was heard by others and caused you public embarrassment. Indeed, it is widely recognised that most people who threaten to sue for defamation are not really interested in obtaining money damages, but rather in persuading the potential defendant to retract the negative statement and apologise. In terms of its 'sincerity', an apology given under threat of litigation is no different than an apology given to comply with a court order. Both are made by people who may not be the least bit contrite or repentant (to use the words of the Court of Appeal). But that does not make the apology a

<sup>14</sup> See Chris Ronalds, *Discrimination Law and Practice* (Sydney: The Federation Press 1998), p 201.

<sup>15</sup> Note 4 above, p 9.

meaningless gesture from the point of view of the recipient. Sincere or otherwise — an apology has value, particularly to a person who has been humiliated in public.

Similarly, the plaintiff in this case requested the order to apologise because she believed it would help redress her injury and the Judge agreed. Under these circumstances, it was not appropriate for the Court of Appeal to substitute its judgment for that of the District Court. What is particularly ironic is that although the Court of Appeal chastised Judge Wong for ordering an apology (because it did not agree that it would adequately redress the injury), the Court of Appeal actually reduced the damages by half (when it granted the appeal from the finding of disability discrimination). The Court of Appeal acknowledged that an apology offered by the defendant can be used to mitigate damages. Thus, one would expect that when the Court granted the defendant's appeal from the order to apologise, it would at least have refrained from decreasing the damages that had been awarded.

However, what is particularly worrying about the Court of Appeal's judgment is that it did not simply hold that an apology was not appropriate in this particular case, but rather that an unwilling apology simply 'is not the within the scope' of the Ordinance. This means that the Court of Appeal has essentially ruled out the possibility of any judge ordering an unwilling apology — not only in cases of disability harassment, but also in any case brought under the Disability Discrimination Ordinance or the Sex Discrimination Ordinance (which contains virtually identical language regarding the orders that a court can make).<sup>16</sup> The Court of Appeal made this decision, rather hastily in my view, having given inadequate consideration to the Australian cases in which apologies have been ordered on the basis of almost identical statutory language.

The Court of Appeal referred only to the case of *De Simone and Ors v Bevacqua*,<sup>17</sup> which it stated was distinguishable from the present case because the defendant was not entirely unwilling to apologise. Actually, I am surprised that the Court of Appeal did not find this case more relevant to the question of unwilling apologies, as the original order to apologise (made by the Victoria

<sup>16</sup> See Sex Discrimination Ordinance (Cap 480), s 76(3A)(b) and Family Status Discrimination Ordinance (Cap 527), 54(4)(b). It should be noted that the District Court also ordered an apology in *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731, the first case of sexual harassment under Hong Kong's Sex Discrimination Ordinance. Although that case differed from *Ma Bik Yung v Ko Chuen* (in that the defendant was willing to apologise in open court) Judge Wong did order the written apology over the objection of the defendant. For further analysis of the sexual harassment claim, see Petersen, note 1 above.

<sup>17</sup> The Court of Appeal referred (see note 4 above, p 9) to the case as *Simone and Ors v Bevacqua*, unreported case no 8555 of 1993 of the Supreme Court of Victoria. A digest and extracts of the Supreme Court's decision on the employer's appeal can be found at *De Simone and Ors v Bevacqua* (1994) EOC ¶92-630 (Australian & New Zealand Equal Opportunity Law & Practice, CCH Australia Ltd). Digests and extracts of the Equal Opportunity Board of Victoria's decisions in the case can be found at (1993) EOC ¶92-515 (deciding upon liability) and ¶92-516 (ordering damages and the apology).



Equal Opportunity Board) was actually appealed to the Supreme Court of Victoria by the employer. The plaintiff had brought a successful complaint for sexual harassment (by one of her co-workers) and also for discrimination, as the employer had treated her unfavourably after she complained of the sexual harassment.<sup>18</sup> The employer appealed, arguing, *inter alia*, that the Board did not have the power to order it to apologise to the complainant in the terms that she had requested or to publish the apology to all employees. The Supreme Court rejected the appeal against the order to publish the apology to all employees, holding that there was evidence that the plaintiff had felt humiliated and stigmatised by the discriminatory treatment she suffered after she made the complaint of sexual harassment and that publishing the apology to all employees of the company would help to vindicate her. The Supreme Court did partly grant the appeal against the terms of the court-ordered apology, but only to remove the language apologising for something for which the employer had not been found liable.<sup>19</sup> The Supreme Court thus established a standard for the terms of court-ordered apologies, which is that a defendant can be ordered to apologise for actions that either directly contravene the relevant legislation or for which the defendant has been held liable (including vicariously liable).

There are many additional Australian cases (not cited in the Court of Appeal's judgment) in which defendants have been ordered to provide an apology as part of the remedy for unlawful discrimination, harassment, or vilification. The remedy is considered particularly (but not exclusively) appropriate in cases where the unlawful acts or the resulting complaint attracted public attention. For example, in *Skellern v Colonial Gardens Resort Townsville & Anor*,<sup>20</sup> a woman successfully sued her former employer for discriminating against her on the grounds of pregnancy (by dismissing her). In addition to damages, the tribunal ordered the general manager to publish an apology in a prominent position in a local newspaper. The tribunal stated that the apology was an important part of the complainant being vindicated in her complaint. Similarly, in *Krepp v Valcic (t/a Capel Bakery)*,<sup>21</sup> a respondent in a sexual harassment complaint was ordered to place an advertisement in the newspaper apologising to the complainant. The tribunal took into account the

<sup>18</sup> The employer was found to have treated the plaintiff less favourably because she had made an allegation (about her co-worker) that would amount to a violation of Victoria's Equal Opportunity Act. This form of discrimination, commonly known as 'victimization', is also prohibited in Hong Kong law; see, eg, s 7 of the Disability Discrimination Ordinance and s 9 of the Sex Discrimination Ordinance.

<sup>19</sup> At the request of the complainant, the Board had ordered the employer to apologise for not having a programme in place to prevent sexual harassment. However the Supreme Court held that this was not appropriate (as the employer had not been held vicariously liable for the acts of sexual harassment on the ground that it had taken reasonable steps to prevent such acts). Thus the employer was only required to apologise for what it had been held liable for — discriminating against the woman after she made the complaint of sexual harassment. See (1994) EOC ¶92-630, at pp 77360-62.

<sup>20</sup> (1996) EOC ¶92-792.

<sup>21</sup> (1993) EOC ¶92-520.

fact that the complainant still lived in the area and had suffered embarrassment and social discomfort, which an apology would help to redress. In *Woomera Aboriginal Corporation v Edwards & Anor*,<sup>22</sup> the respondents were found liable for race discrimination after they withdrew their property for sale because they were unwilling to sell to an Aboriginal Association. They were ordered to publish an apology in a local newspaper.

In several of the Australian judgments it is clear that the defendants had not offered to apologise (eg in an effort to reduce the damage award), but rather were ordered to apologise against their will. For example, in *Bull & Anor v Kuch & Anor*,<sup>23</sup> the respondents refused to rent premises to an Aboriginal couple and were found liable for unlawful race discrimination in the provision of accommodation. The respondents' lawyer argued strongly that the Human Rights and Equal Opportunity Commission should not order an apology because (1) the act of discrimination had taken place in a private telephone call and not in public; and (2) an order to apologise might receive a racist reaction and therefore make things worse for the complainants in the community. The Commission rejected both arguments and ordered a public apology. Similarly, in *R v D & E Marinkovic*,<sup>24</sup> a couple was found liable for homosexual vilification and HIV/AIDS vilification (under the New South Wales Anti-Discrimination Act) of a man who had lived in their apartment building. The defendants did not express remorse and were extremely unco-operative in the proceedings. The Equal Opportunity Tribunal awarded damages of A\$50,000 and also ordered both respondents to apologise, in terms drafted by the Tribunal. In that case the Tribunal had also made an order suppressing the name of the complainant and therefore a fully published apology was not appropriate. However, the Tribunal ordered that the written apologies (with the complainant referred to simply as 'R') be posted for one month in a prominent position on the notice boards of the apartment building where he had experienced the unlawful vilification. The complainant had since moved away from the building, but the Tribunal realised that many residents would have been aware of the unlawful acts and believed that it was important that that he be vindicated before his former neighbours.

I would argue that the case of *R v D & E Marinkovic* should be given particular attention by the Hong Kong courts in any consideration of the remedial value of court-ordered apologies. The Hong Kong Disability Discrimination Ordinance also prohibits vilification, in terms that are very similar to the Australian legislation.<sup>25</sup> This prohibition was included in the Disability Discrimination Ordinance in 1995 in recognition of the fact that

<sup>22</sup> (1994) EOC ¶92-653.

<sup>23</sup> (1993) EOC ¶92-518.

<sup>23</sup> (1996) EOC ¶92-841.

<sup>25</sup> Disability Discrimination Ordinance, s 46; see also s 47, which creates the criminal offence of 'serious vilification'.

people with disabilities (both physical and mental) suffer from significant prejudice, which often rises to the level of vilification. The Equal Opportunities Commission's recent report on the shocking acts of harassment and vilification towards patients and nurses of the Kowloon Bay Health Centre is testimony to the continued seriousness of this problem in Hong Kong.<sup>26</sup> In cases involving vilification, an apology is often precisely what the victims need to help restore their dignity in the community. A published apology can also play an important role in educating the community about the wrongfulness of discrimination, harassment, and vilification. This is why the remedy of court-ordered apologies should not be dismissed without full consideration of the issue. Certainly it deserves more analysis than the few brief paragraphs in the Court of Appeal's judgment.

### Resolving potential conflicts with the right to free expression

There is no doubt that the remedy of a court-ordered apology raises certain concerns, including problems of enforcement and the right to free expression (neither of which were discussed in the Court of Appeal's judgment). Full consideration of these concerns could easily constitute an article in itself — however I will raise here what I see as the primary issues and suggest two possible approaches.

The right to free expression in Hong Kong is protected by Articles 27 and 39 of the Basic Law, Hong Kong's constitution. Article 27 provides, in relevant part, that 'Hong Kong residents shall have freedom of speech, of the press and of publication'. Moreover, Article 39 provides that the International Covenant on Civil and Political Rights (the 'ICCPR') shall remain in force in Hong Kong and the Court of Final Appeal has held that this Article has the effect of incorporating Article 19 of the ICCPR into the Basic Law.<sup>27</sup> Article 19 provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be

<sup>26</sup> Equal Opportunities Commission, *Report on Case Study of Kowloon Bay Health Centre* (Hong Kong: Equal Opportunities Commission, November 1999).

<sup>27</sup> See *HKSAR v Ng Kung Siu & Anor* [1999] 3 HKLRD 907, 920 (HK Court of Final Appeal). See also Article 16 of Part II of the Hong Kong Bill of Rights Ordinance (Cap 383), which is identical in terms to Article 19 of the ICCPR.

subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for the respect of the rights and reputations of others;
- (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

The right to free expression includes the right not to express a particular opinion. Thus a court-ordered apology, *prima facie*, constitutes a restriction on the defendant's freedom of expression. However, this does not end the enquiry. The next question is whether it constitutes a permissible restriction under Article 19(3)(a) — whether it can be considered necessary for the respect of the rights and reputations of others. There is no doubt that the right to non-discrimination is one of the rights that can justify restrictions on free speech. For example, in *Wagga Wagga Aboriginal Action Group & Ors v Eldridge*<sup>28</sup> the defendant raised his right to free speech as a defence against an action for racial vilification. The New South Wales Equal Opportunity Tribunal considered his argument but concluded that the statute fell within the ICCPR's scope of permissible restrictions and ordered the respondent to publish an apology. Similarly, in Hong Kong, our anti-discrimination legislation contains numerous restrictions on our freedom of expression. The Disability Discrimination Ordinance prohibits vilification and also disability harassment, which is defined to include unwelcome written or oral statements relating to a person's disability which a reasonable person would anticipate would offend, humiliate, or intimidate that person. The Sex Discrimination Ordinance defines sexual harassment in similar terms and prohibits it in a wide range of fields, including employment, education, and the provision of goods and services. All three anti-discrimination ordinances prohibit the publication of advertisements (eg sex-specific job advertisements) that indicate an intention by a person to violate certain provisions of the legislation. The Equal Opportunities Commission is expressly empowered to issue an enforcement notice to prevent their publication. In certain cases of serious and persistent discrimination, vilification, or harassment, the Commission may apply to the District Court for an injunction restraining a person from further unlawful acts. These are just a few examples of the ways in which our anti-discrimination legislation — both in terms of its substantive provisions and in terms of the remedies — may restrict our right to free expression. These restrictions are accepted in our community as necessary for the protection of the rights of others.

If an order to apologise were challenged in Hong Kong on free speech grounds, it is likely that the court would consider the extent to which such remedies are used in discrimination cases in other jurisdictions that have

<sup>28</sup> (1995) EOC ¶92-701.

ratified and adhere to the ICCPR. As in most areas of the law, different societies take different approaches to the issue. In Australia, a country that has ratified the ICCPR and is considered a free and democratic society, apologies have been ordered in discrimination, harassment, and vilification cases for many years. In contrast, in the United States (another democratic society, which permits very little interference with the right to free expression), it is generally accepted that First Amendment concerns would prevent orders to apologise in discrimination cases<sup>29</sup> (although apologies have sometimes been ordered and upheld where the defendant failed to make a timely First Amendment objection).<sup>30</sup> It must be remembered, however, that courts in the United States have broad equitable powers to fashion remedies for discrimination and frequently issue orders that a plaintiff be reinstated or promoted (a very powerful form of vindication).<sup>31</sup> While Hong Kong's anti-discrimination legislation also expressly empowers the court to order reinstatement, I do not expect Hong Kong courts to be as assertive as United States courts in issuing such orders.<sup>32</sup> Moreover, the damage awards in the United States are very substantial (far higher than Hong Kong or Australia) and thus it is easier for American plaintiffs to view damages as sufficient vindication. It should also be noted that the threat of large damages (combined with the fact that lawyers can represent plaintiffs on a contingency fee basis in the United States) means that victims of discrimination and harassment have considerably more bargaining power and can very likely obtain an apology during settlement negotiations. In contrast, in Hong Kong, the damage awards are likely to remain very low. As a result, plaintiffs have little bargaining power in the conciliation process. Thus, in Hong Kong, a strong argument can be made that the remedy of a *court-ordered* apology is more necessary to protect

<sup>29</sup> See *Griffith v Clarke*, Case No LT-460-2, 30 Va Cir 250, 1993 Va Cir LEXIS 41 (Circuit Court of the City of Richmond, 4 March 1993).

<sup>30</sup> See *Desjardins v Van Buren Community Hospital*, 969 F 2d 1280 (1st Cir 1992) (in which the US Court of Appeals refused to consider the defendant's argument that the district court's order to apologise to the plaintiff violated the First Amendment because the defendant waived the objection in the district court). See also *Imperial Diner v State Human Rights Appeal Board*, 52 NY 2d 72, 417 NE 2d 525 (NY Court of Appeals 1980) in which the majority upheld an order requiring an employer to apologise for discrimination and vilification against an employee. Justice Meyer, in a dissenting opinion, maintained that the order violated the First Amendment of the United States Constitution unless it could be shown that it was essential to a constitutionally permissible purpose of the law. However, the majority did not address this point as the petitioner did not argue it, but rather relied on the argument that the Commissioner did not have the authority to order an apology (which the court rejected, noting the Commissioner's broad powers to fashion relief).

<sup>31</sup> See, eg, *Hopkins v Price Waterhouse*, 737 F Supp 1202 (DDC 1990), affirmed, 920 F 2d 967 (DC Cir 1990) in which the judge ordered that the plaintiff be admitted as a partner in the firm despite his clear recognition that Price Waterhouse would not voluntarily admit her.

<sup>32</sup> See Disability Discrimination Ordinance, s 72(4), Sex Discrimination Ordinance, s 76(3A), and Family Status Discrimination Ordinance, s 54(4). The remedy of reinstatement was initially not included in the Sex Discrimination Ordinance (due to opposition from the government) but was added by Christine Loh's Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996, which was enacted in June 1997. For a discussion of the impact on remedies of this bill see Carole J Petersen, 'Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market' (1997) 27 Hong Kong Law Journal 324, 349-51.

the rights of victims of discrimination, harassment, and vilification than it would be in the United States — and thus more likely to be considered a justifiable restriction here under the analysis required by Article 19(3)(a) of the ICCPR.

In any event, it is clear that Hong Kong courts do not necessarily have to follow the American approach to the issue of court-ordered apologies. This was demonstrated in the Hong Kong Court of Final Appeal's recent decision in *HKSAR v Ng Kung Siu* upholding the constitutionality of two ordinances prohibiting desecration of the regional and national flags. The Hong Kong Court of Appeal had struck down the two ordinances (as violating Article 39 of the Basic Law), relying primarily on American case law upholding the right to burn the American flag.<sup>33</sup> In over-ruling the Court of Appeal, the Court of Final Appeal noted that Hong Kong courts need not restrict the enquiry of what constitutes a permissible restriction to American case law, but rather should also consider the extent to which other free and democratic countries that generally adhere to the ICCPR have legislation prohibiting desecration of their national flags.<sup>34</sup>

Similarly, if a court-ordered apology were challenged on free speech grounds in Hong Kong, I would argue that our courts should give careful consideration to the Australian example — both because the statutory provision on which Judge Wong relied was borrowed from Australian legislation and because Australia is a free country that abides by the ICCPR and has extensive experience with this remedy. I believe that the remedy of an order to apologise under Hong Kong's anti-discrimination legislation could be justified under Article 19(3)(a) of the ICCPR where the court determines, in its discretion, that (1) the apology is necessary in the particular case to vindicate and/or protect the rights of the plaintiff, having regard to the circumstances of the case and the ability of alternative remedies to provide full redress; and (2) the terms of the apology ordered do not unduly interfere with the defendant's right to free expression. In the case of *Ma Bik Yung v Ko Chuen* the damages award was very small and the plaintiff suffered disability harassment in a public setting, during the provision of what is clearly an *essential* service for a woman with her disability. Thus, there is a strong argument that an order to apologise is necessary to protect and vindicate her legal rights. And while the defendant might successfully argue that he should not be required to admit to *facts* that he disputes, I would argue that an order requiring him to make a general apology would not unduly interfere with his right to free expression.

<sup>33</sup> *HKSAR v Ng Kung Siu & Anor* [1999] 1 HKLRD 783 (HK Court of Appeal), especially at 790-91.

<sup>34</sup> *HKSAR v Ng Kung Siu & Anor* [1999] 3 HKLRD 907, 926, noting that 'a number of democratic nations which have ratified the ICCPR have enacted legislation which protects the national flag by criminalising desecration or similar acts punishable by imprisonment. These instances of flag protection indicate that criminalisation of flag desecration is capable of being regarded as necessary for the protection of public order (*ordre public*) in other democratic societies.'

Of course, if such an order were challenged on free speech grounds, it would have to be acknowledged that it is a content-based interference with free expression. In contrast, the Court of Final Appeal concluded that the flag desecration ordinances prohibited only a particular form of expressing an opinion and not the opinion itself.<sup>35</sup> It should also be noted that Justice Bokhary emphasised (in his separate concurring opinion) that the ordinances prohibiting flag desecration 'lie just within the outer limits of constitutionality', strongly implying that greater interference in the right to free expression would not be permitted.<sup>36</sup> I must confess that I have sympathy for this position, particularly in Hong Kong's current political context. Australia does not face significant threats to free speech. In contrast, in Hong Kong, it is probably only a matter of time before the Hong Kong government proposes legislation to 'implement' Article 23 of the Basic Law. In such an environment courts may be reluctant to uphold remedies that could be viewed as weakening our law of free expression.

For this reason, I conclude this article by suggesting an alternative 'mid-way' approach for Hong Kong, which could be adopted if the remedy of a court-ordered apology was found to violate the right to free expression. If a plaintiff is successful and seeks an apology, the court should make a determination as to whether the requested apology would be an appropriate remedy under the circumstances of the case. If the court decides that it would be appropriate, then the court should ask the defendant whether he is willing to give the apology, making it clear that if he is unwilling to do so the court will increase the award of monetary damages by a specified amount (which should be a substantial amount, particularly in cases in which the plaintiff has suffered real humiliation or public embarrassment). This would give the defendant the opportunity to decide whether he is willing to give an apology and an incentive to do so. However, it would not put the court in the position of having to take coercive steps (such as holding the defendant in contempt) if he decides not to make the apology. Rather the court would simply order damages at the higher level, to compensate for the fact that the defendant was unwilling to give an apology, although the court had determined that it was an appropriate remedy in the circumstances.

In my view, this approach would answer any objections to the remedy made on the grounds of enforcement problems or free speech. Indeed, I believe that it would not run afoul of the decision of the Court of Appeal in this case — as the apology would not be 'unwilling', but rather given in the full knowledge that it would mitigate the damages. However, this approach will only work if the courts are willing to make *substantial* damage awards in cases of discrimination,

<sup>35</sup> *Ibid*, especially p 921.

<sup>36</sup> *Ibid*, p 933.

harassment, and vilification and to increase the damages where the defendant refuses to apologise. In my view, Judge Wong's initial award of \$20,000 was itself too low and the Court of Appeal's decision to reduce the damages by half and overrule the order to apologise must have come as a terrible blow to this plaintiff. I see a dangerous tendency to trivialise cases in which specific economic losses are not alleged. Of course many discrimination cases arise in the context of employment, where economic losses will be alleged. However, many disability discrimination cases arise in connection with access to facilities and the provision of services — in this case, a service that is essential for the plaintiff if she is to lead a meaningful life. Our courts need to be more cognisant of these facts when calculating damages. Otherwise, as Judge Wong acknowledged, the awards will be so small as to discourage potential plaintiffs from bringing actions and thereby diminish respect for the law.