

Summer School for PE Teachers 2018 (Conference)

Negligence and Apology Ordinance

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第I部

NEGLIGENCE AND SPORT AND OUTDOOR ACTIVITY

Elements of negligence

- a. Duty of care
- b. Breach of duty
- c. Causation
- d. Reasonably foreseeable

UK cases

- *Porter v City of Bradford Metropolitan Council* (unreported, but available through Lexis), 14 Jan 1985 (CA)

UK CA 1985: a teacher leading 12 students (aged 15-16) field trip, a boy threw stone 15 minutes and his classmate was seriously injured. .

- *Woodbridge School v Chittock* [2002] EWCA Civ 915, [2002]ELR 735

School trip (skiing) in Austria, permanently paralysed from waist down as going too quickly.

- *Kearn-Price v Kent County Council* [2002] EWCA Civ 1539, [2003] ELR 17

15 minutes before start of school day, a football hit a boy's eye (aged 14). Football ban not enforced.

HK cases

- *Wong Wing Ho v Housing Authority* [2008]1 HKLRD 352 (CACV 28/2007, 28/12/2007)

Climbed over the fence into an adjoining closed court to retrieve the ball but fell.

- *Amrol v Rivera* [2008]4 HKLRD 110 (DCPI 267/2007, 19/3/2008)

A boy aged 4 knocked down by a golden retriever (25 kg) in an open plaza.

- *HK Red Cross v HK Federation of Youth Groups* (DCCJ 2233/2007, 12 Feb 2010)

- *Lilley v HK & Kowloon Ferry Ltd.* (HCPI 811/2005, 20/1/2012)
Lamma Island fell from a ferry into sea

- Risk Assessment: careful examination of what could cause harm so that you can weigh up whether you have taken enough precautions.
- Risk: chance that one will be harmed by hazard.
- Hazard: anything can cause harm
- Instructors: qualified as a coach or trainer in a particular activity

-
- Purpose: ensure satisfactory precautions are made so that the risk is small.
 - Otherwise: examples of tragedy:
2003 (late June) Sai Kung incident,
1996 Pat Sin Leng incident,
1955 Tsung Tsai Yuen incident
-

Man Hin Fung case, 23 March 2018

HCPI 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”)

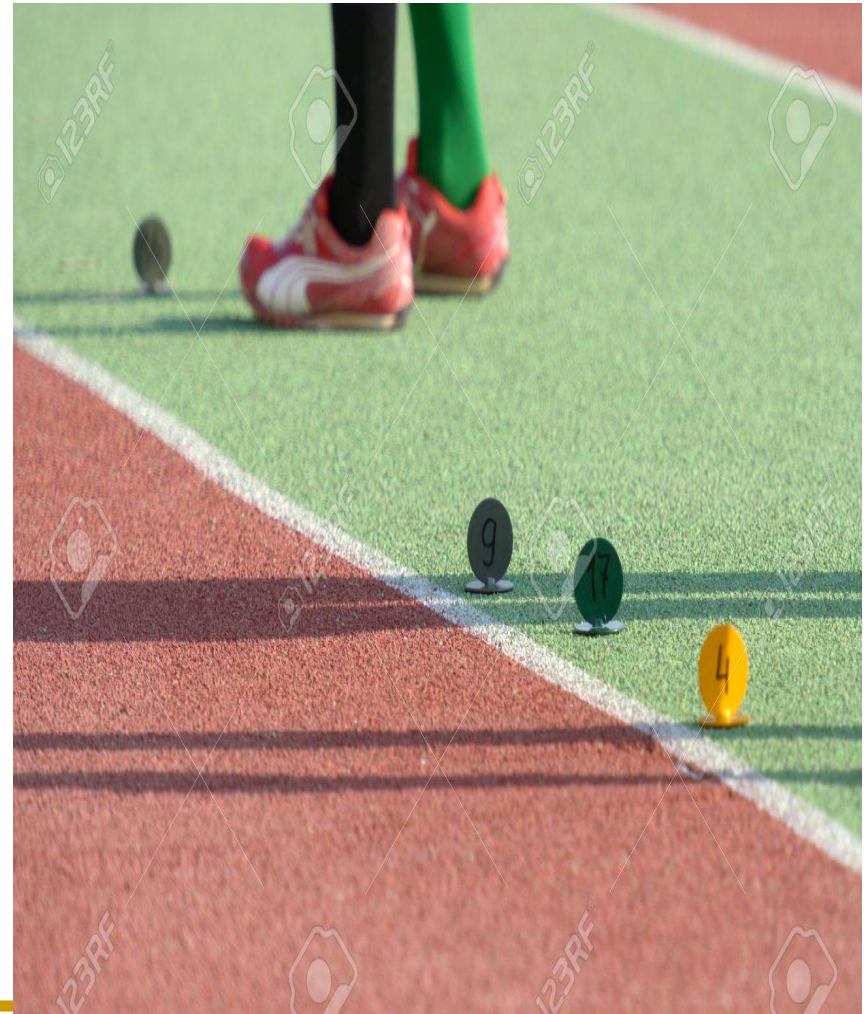
prepare Inter-School Athletics Championships, 2 teachers & 1 coach, 27 students (P3, 4)

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))



Legal principles: “Duty of care exists so long as the school is aware that there will be students on the premises. That period must plainly include the period **before school**, when the school gates are opened to admit students prior to classes, and for the period at the end of either lessons or exams, during which students are permitted to **remain on the premises”**

Chan Kin Bun v Wong Sze Ming [2006] 3 HKLRD 208, 218B-C

“The amount of supervision required depends on the **age** of the pupils and what they are **doing** at the material time, but **no teacher** could reasonably be **expected** to keep a **close watch on each child every minute** of the day, **unless** there is some **reason** to be **alerted** or **put on inquiry**” *Tse Parc Ki v Atlantic Team Limited t/a Le Beaumont Language Centre* (2007) unrep, DCPI No 1981 of 2006, 11 December 2007, §17 (P18)

“In *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258 (a case referred to in ***Chan Kin Bun***, supra), a pupil was injured shortly before the commencement of instruction one morning when part of a **flagpole**, on the halyard of which boys had been swinging, **fell** on him. Evidence showed that the number of **staff** actually exercising **supervision** in the grounds at such a time was normally between **5 and 20**. However, on the date of the accident, all members of the teaching staff except one (who was supervising in the playground) (P20)

“were at a staff meeting called by the acting principal to inform the staff that the **principal** had **died** in the early hours of that morning. The meeting was called for **8:20 am** and lasted till about **8:25 am**, during which time the accident happened.” (P20)

“**900 pupils** in the recreation area in the half hour preceding the commencement of instruction. It would be unreal to suggest that **no supervision** was called for.” (P21)

“(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)

”

“to establish liability based on acts of **children horseplay, a very high degree of carelessness is required**, and that a child of 13 playing in the play area **without breaking any rules**, and is **not acting to any significant degree beyond the norms of that game**, is **insufficient to establish liability**” *Orchard v Lee* [2009] PIQR P16, 289, 11-12. (P26)

*“HammerslevGonsalves v Redcar and Cleveland Borough Council [2012] EWCA Civ 1135, where a pupil, during a golf class, accidentally struck the claimant when a **golf club** was swung causing **injury** to the same, the **teacher supervising** a golf lesson of **22 pupils of 12 years old** was found to be **not liable** because “**however observant a teacher is, however careful** the lookout he is keeping, he could not and **could not be expected to see every action of each of 22 boys**” (at §11).”*
(P30)

Coach oversaw 20 students. (P33 (xii))

Coach “ agrees that when he was paying his attention to the students in high jump training, he would **inevitably neglect** the students doing **long jump** and **running**.” (P33 (xvi))

“Ms Hui confirms that...Lee and Cheng...were playful -- they liked chasing and hitting each other -- and used to cause troubles in PE lessons...they occasionally chased and hit each other at the training.” (P33 (xxii))

“According to the plaintiff, he did not pay attention to the whereabouts of Lee and Cheng before the Accident. He only knew how the Accident had happened when he received the apology letters from Lee and Cheng.” (P33 (xix))

“I do **not accept Coach Yuen’s** evidence that he was **able to supervise** the **students** who were doing the long jump while he was supervising the students at the starting position doing the high jump.” (P34 (viii))

“(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.

(iii) The plaintiff did not disagree with the suggestion that the **occasional playing** and **chasing** of each other on the **playground** amongst the students were just “**normal school kids playing around**”.

(iv) Whilst Mr Liu **would generally stop students** who were **playing** around during training when he carried out his patrol in the playground, both Ms Hui and Coach Yuen would also stop students who were being too playful and were doing anything wrong. ” (P34)

“**adequacy of supervision** in place is a question of a **balancing exercise** between (a) the **foreseeability of risk** of a particular accident and injury on one hand; and (b) the burden to be placed on the school authority on the other; bearing in mind factors such as **nature and number of pupils** involved, **frequency and magnitude of previous** occurrence of **accident** of similar nature, the nature of the activity is involved, **financial and other costs** of provision of staff: (see Chan Kin Bun...)” (P37)

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)

5 Steps to risk assessment

- a. Look for hazards
- b. Who may be harmed and how
- c. Evaluate the risks and decide whether the existing precautions are adequate
- d. Record your findings
- e. Review assessment and revise if necessary

Annex I

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.]

Annex I (Chinese)

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.]

Annex II 教育局課外活動指引 (1997年)

第五章 舉辦課外活動應該注意的事項

5.6 責任與法律問題

校方於學校舉辦的課外活動中負有監督的責任。活動中教師有責任照顧學生，如同一個父親或母親照顧其子女般。教署已於1988年起代各資助及按位津貼學校向保險公司投保綜合保險，綜合保險包括以下三部份：

1. 公眾責任保險 (保額上限為每所學校每宗事故港幣1億元)
2. 僱員補償保險 (保額上限為每間受保學校每宗事故港幣1億元)
3. 團體人身意外保險 (保額上限為每名學生港幣10萬元)

Annex III 綜合保險摘要說明

- 1.2 這保險的主要目的在於保障學校，以免學校因其行動使他人身體受到傷害而招致金錢上的損失。
- 1.3 在這些學校行動中受到傷害的人士，可向有關學校索償。受害人可以是：
 - 按政府補助薪金表支薪的學校僱員；
 - 任何並非受僱於學校的人士（例如學生、家長、訪客、或與學校接觸的市民）。
- 1.4 如法庭裁定學校疏忽，可下令學校支付賠償給受害人

Annex IV 教育局《戶外活動指引》(2008年)

引言

「重視學生安全是推展戶外活動的重要課題。因此，不同的戶外活動組織/團體都會清晰具列有關活動守則，如學生參加活動前的測試標準、又或因應天氣變化所作的應變計劃等資料，惟取捨之間，各組織團體可能稍有出入。假如學校本身是戶外活動的主辦者，則應依循《指引》的準則行事，並根據活動的性質及學生的體力和技能，制訂合適而周全的計劃。」

21 June 2017

L17a outdoor activities

怒水橋洪流肇禍記

松仔園一地山水清幽，遊者多，迨之一九五五年八月念八日，盛夏過人，士女雲集，遊興方濃，洪流突至，趨避不及，羣身狂流，者男、女、長、幼二十八人，將多險，其或然，致都人士恐慘，刻重演，狩勸禱，請之使後之，未遊者觸目驚心，而知所慎，或焉。

刻姓名列下

吳白明、張志勇、吳學在、吳法輝、吳元輝

吳丁加、吳富羅、馬仁志、謝振興、謝立民

邱榮德、邱煥真、李作彬、李金根、王故海

吳國樞、林德成、林行根、郭祥華、李祥雄

吳元輝、吳元輝、吳元輝

一九五五年十一月廿五日

埔七約辦公所委員會立



第II部

APOLOGY ORDINANCE

道歉法

Apology Ordinance, Cap. 631

Section 10: Contract of **insurance** or indemnity **not affected**

- (1) An apology made by a person in connection with a matter does **not void** or otherwise affect any insurance cover, compensation or other form of benefit for any person in connection with the matter under a contract of insurance or indemnity.
- (2) This section applies regardless of whether the contract of insurance or indemnity was entered into before, on or after the commencement date of this Ordinance.
- (3) This section applies despite anything to the contrary in any rule of law or agreement.

《道歉條例》(第631章)

第10條: **保險**或彌償合約**不受影響**

- 「(1) 如根據某保險或彌償合約，就某事宜對任何人提供保險保障、補償或其他形式的利益，則某人就該事宜作出的道歉，並不使該項保障、補償或利益無效，或受到其他影響。
- (2) 不論上述保險或彌償合約是在本條例生效日期之前、當日或之後訂立，本條仍然適用。
- (3) 儘管任何法律規則或協議中，有任何相反規定，本條仍然適用。」

Apology Ordinance

Section 7(1): **Effect** of **apology** for purposes of applicable proceedings

For the purposes of applicable proceedings, an **apology** made by a person in connection with a matter—

- (a) does **not constitute** an express or implied **admission** of the person's **fault** or **liability** in connection with the matter; and
- (b) must **not be taken into account** in **determining fault, liability** or **any other issue** in connection with the matter to the **prejudice** of the person.

《道歉條例》

第7(1)條: **道歉**對適用程序的**效果**

「就適用程序而言，某人就某事宜作出的**道歉**

-
- (a) **並不構成**以明示或默示的方式，**承認**該人在該事宜方面的**過失**或**法律責任**；及
 - (b) 在就該事宜裁斷過失、法律責任或**任何其他爭議事項**時，**不得列為不利於該人的考慮因素**。」

Apology Ordinance

Section 8: Admissibility of **evidence** of **apology**

- (1) Evidence of an apology made by a person in connection with a matter is **not admissible** in **applicable proceedings** as **evidence** for determining fault, liability or any other issue in connection with the matter to the **prejudice** of the person.
- (2) However, if in particular applicable proceedings there is an **exceptional case** (for example, where there is no other evidence available for determining an issue), the **decision maker** may exercise a **discretion** to admit a statement of fact contained in an apology as evidence in the proceedings, but only if the decision maker is satisfied that it is **just** and **equitable** to do so, having regard to the **public interest** or the **interests** of the **administration of justice**.

《道歉條例》

第8條: **道歉證據**是否可予接納

(1) 某人就某事宜作出的道歉的證據，**不得在適用程序中**，為就該事宜裁斷過失、法律責任或任何其他爭議事項，而**接納為不利於該人的證據**。

(2) 然而，如在個別適用程序中，出現特殊情況(例如沒有其他證據，可用於裁斷爭議事項)，有關的裁斷者可行使**酌情權**，將道歉所包含的事實陳述，在該程序中接納為證據，但該裁斷者須信納，行使該酌情權，在顧及**公眾利益或公義原則**之後，屬**公正公平**之舉，方可行使該酌情權。

Apology Ordinance

Section 2: The object of this Ordinance is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution.

第2條：「條例的目的提倡和鼓勵作出道歉，以期防止爭端惡化，和促進和睦排解爭端。」

Apology Ordinance

Section 8: Admissibility of evidence of apology

(3) This section applies despite anything to the contrary in any rule of law or other rule concerning procedural matters.

(4) In this section— **decision maker**(裁斷者), in relation to applicable proceedings, means the person (whether a court, a tribunal, an arbitrator or **any other body** or **individual**) having the authority to hear, receive and examine evidence in the proceedings.

《道歉條例》

第8條: 道歉證據是否可予接納

(3) 儘管任何法律規則或其他關於程序事宜的規則中，有任何相反規定，本條仍然適用。

(4) 在本條中— 裁斷者 (decision maker) 就適用程序而言，指具有權限在該程序中聆聽、收取和審查證據的人(不論是法院、法庭、審裁處、仲裁員或任何其他團體或個人)。

Apology Ordinance

Section 6: Meaning of applicable proceedings

(1) In this Ordinance, the following proceedings are **applicable proceedings**—

(a) judicial, arbitral, administrative, **disciplinary** and regulatory **proceedings** (whether or not conducted under an enactment);

(b) other proceedings conducted under an enactment.

(2) However, applicable proceedings **do not include**—

(a) **criminal** proceedings; or

(b) proceedings specified in the Schedule.

《道歉條例》

第6條: (1) **適用程序**的涵義:

- (a) 「司法、仲裁、行政、**紀律處分**及規管性程序(不論是否根據成文法則進行) ;
- (b) 根據成文法則進行的其他程序。」

(2) 適用程序**並不包括**—

- (a) **刑事**法律程序 ; 或
- (b) 附表指明的程序。

Apology Ordinance

Section 4: **Meaning** of **apology**

- (1) In this Ordinance, an apology made by a person in connection with a matter means an expression of the person's **regret**, sympathy or benevolence in connection with the matter, and includes, for example, an expression that the person is **sorry** about the matter.
- (2) The expression may be **oral**, **written** or by **conduct**.
- (3) The apology also includes any part of the expression that is—
 - (a) an **express** or **implied** admission of the person's fault or liability in connection with the matter; or
 - (b) a **statement of fact** in connection with the matter.
- (4) In this Ordinance, a reference to an apology made by a person includes an apology made on behalf of the person.
- (5) Section 5 specifies the apologies to which this Ordinance applies.

《道歉條例》

第4條：道歉的涵義

(1) 在本條例中，某人就某事宜作出的道歉，指該人就該事宜表達**歉意、懊悔、遺憾、同情或善意**，並包括(舉例而言)該人就該事宜表達**抱歉**。

(2) 上述表達可屬**口頭或書面**形式，亦可藉**行為**作出。

(3) 如上述表達有任何部分符合以下說明，則上述道歉亦包括該部分—

(a) 該部分是以**明示或默示**的方式，承認上述的人
在上述事宜方面的過失或法律責任；或

(b) 該部分是與上述事宜相關的**事實陳述**。

(4) 在本條例中，凡提述某人作出的道歉，包括代表該人作出的道歉。

(5) 第5條指明本條例適用的道歉。

Apology Ordinance

Section 5: Apology to which this Ordinance applies

- (1) This Ordinance applies to an apology made by a person on or after the **commencement date** of this Ordinance in connection with a matter, regardless of whether—
 - (a) the matter arose before, on or after that date; or
 - (b) applicable proceedings concerning the matter began before, on or after that date.
- (2) However, this Ordinance does not apply to—
 - (a) an apology made by a person in a document filed or submitted in applicable proceedings;
 - (b) an apology made by a person in a testimony, submission, or similar oral statement, given at a hearing of applicable proceedings; or
 - (c) an apology adduced as evidence in applicable proceedings by, or with the consent of, the person who made it.

《道歉條例》

第5條: 本條例適用的道歉

- (1) 凡某人在本條例**生效日期**當日或之後，就某事宜作出道歉，本條例適用於該道歉，不論—
- (a) 該事宜是在該日期之前、當日或之後出現的；或
 - (b) 關於該事宜的適用程序，是在該日期之前、當日或之後展開的。
- (2) 然而，如—
- (a) 某人在適用程序中送交存檔或呈交的文件中，作出道歉；
 - (b) 某人在適用程序的聆訊中作出的證供、陳詞或類似的口頭陳述中，作出道歉；或
 - (c) 某人作出道歉，並在適用程序中，援引該道歉為證據，或該道歉於該人同意下，在適用程序中被援引為證據，則本條例不適用於該道歉。

Apology Ordinance

Schedule: Proceedings that are **Not Applicable Proceedings**

1. Proceedings conducted under the Commissions of Inquiry Ordinance (Cap 86).
2. Proceedings conducted under the Control of Obscene and Indecent Articles Ordinance (Cap 390).
3. Proceedings conducted under the Coroners Ordinance (Cap 504).
4. Proceedings of the **Legislative Council**, including proceedings of a committee, panel or subcommittee established or mandated by the Legislative Council to discharge a function or exercise a power of the Legislative Council.

《道歉條例》

附表: **不屬適用程序**的程序

1. 根據《調查委員會條例》(第86章)進行的程序。
2. 根據《淫褻及不雅物品管制條例》(第390章)進行的程序。
3. 根據《死因裁判官條例》(第504章)進行的程序。
4. **立法會程序**，包括由立法會為執行其職能或行使其權力而成立或委托的委員會、事務委員會或小組委員會的程序。

參考資料

社區法網: <http://www.hkcliv.org/ch/> (並參考刑事法律)

立法會: <http://www.leaco.gov.hk/>

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

判案書: <http://legalref.iudiciary.gov.hk/lrs/common/lu/iudament.jsp>

兒童死亡個案檢討委員會發表首份報告:

<http://www.info.gov.hk/gia/general/201305/28/P201305280324.htm>

《教師慎防誤墮法網之道歉篇一》(Facebook video 快樂教與學 The Joy of Education)12 March

2018: https://www.facebook.com/FEHD.EdUHK/videos/1024607131010846/?hc_ref=ARS0B7j25btGL6XAXZX8DZRCWmUf04aB_UOqNkoLOjAeZd-

[SPGig1u9j19F6ZIK1qSiv](https://www.facebook.com/FEHD.EdUHK/videos/1024607131010846/?hc_ref=ARS0B7j25btGL6XAXZX8DZRCWmUf04aB_UOqNkoLOjAeZd-SPGig1u9j19F6ZIK1qSiv)

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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，更能了解講義和講解內容。
- 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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