

The Swimmer - Part II

Trial without jury - Hong Kong jurisprudence

Already very knowledgeable about the translated facts surrounding the case of the ill-fated swimmer I attended his trial at the Hong Kong Eastern District Magistracy. He was found guilty on three charges of common assault.¹ After his bail had been revoked and he was placed under custody, his case was reopened. He was then fined HK\$1,000 and sentenced to fourteen days in jail for each of the three accounts. It must have been a sorry day for him, because he apparently had no previous criminal record and was living on borrowed money from friends and relatives. Although his jail sentence was later suspended, the judge's stated reason for the suspension contradicted the apparent severity of the crime for which he was convicted.

Having sat through three days of testimony and defense, and understanding well the legal issues of the case and both sides of the story I was amazed by how such a well-intended, well-behaved, and thoughtful individual could be so easily turned into a common criminal. Not only did the written and oral testimonies of the witnesses emphatically contradict one another, but the swimmer's many years of experience in the water, his more than two year's of experience without reported mishap at the pool where the incident occurred, and his good relationship with the pool's management actually played in his disfavor. Rather than viewing the swimmer as a wise, serious swimmer, who was seeking to maintain a safe environment for everyone, he was portrayed as a stubborn, reckless, unremorseful individual, who wilfully and knowingly caused harm to others.

What was worse, the message sent by the Hong Kong Justice Department to the Ma On Shan Police Department and other users of Hong Kong's public recreational facilities was that anyone can purposefully interrupt another's physical activity free of recrimination. For if the offended party admits to taking physical action to remove the obstructing party, the obstructing party has only to state that he or she was afraid, felt pain, and was ignorant of the obstruction. As a result the person whose activity was interrupted automatically becomes a criminal offense before the law. No visible evidence of physical damage, injury, or even pain to anyone is required. Only the words of the obstructor.

In this particular case the reasonableness of the fear, pain, and impending danger expressed by the witnesses' frequent contradictory claims became a matter of judgement between a recreational athlete and teacher with decades of experience and a single officer of the court whose own athletic experience and knowledge of pool instruction and management remains unknown. There was no jury, other than that reported by the negligent swimming instructor, who resisted being pulled into the water. Her obvious negligence with regard to her own students and the swimmer, and her very probable attempt to force the swimmer from his lane were legally irrelevant. The intention of the swimmer to signal through acts of strategically applied, mild force

¹ R. A. Stegemann. EARTH's Viewpoint. My Region. The English Language in East Asia. [online document] The swimmer: A failed communication. 28 November 2004.
<<http://homepage.mac.com/moogoonghwa/earth/viewpoint.html#regional>> (07 March 2004).

to all obstructing parties that they were hindering his activity and should move to a different lane usually set aside for the purpose of teaching was completely ignored. That these same acts under any other circumstances would have been considered pool horseplay by the most reasonable of observers made absolutely no difference.

I later learned that the reason the defendant did not appeal the case was because the fine was far too small, and his picture had already appeared in at least two Chinese language newspapers with only the prosecution's testimony as recorded and misrepresented fact. In other words the professional damage to the swimmer was not something the court could easily undo by reversing the decision. In addition I learned that the defendant had approached the Hong Kong Amateur Swimming Association, the Hong Kong Amateur Athletic Association, the Physical Fitness Association of Hong Kong, the Hong Kong Sports Development Board, and the Hong Kong Sports Federation and asked them to testify on his and their own behalf with regard to proper behavior and appropriate pool conditions for long-distance swimmers and endurance athletes at public facilities. He was turned away on all five attempts with various comments including: "You are not a member of our club." "Although we are publicly funded, we are an elite organisation that does not cater to amateur needs." "We have no provisions for legal service." "Why don't you seek a legal counsel?"

To the best of my knowledge the swimmer intends to return to the pool when it reopens in April. Hopefully the lack of adequate pool management that resulted in the swimmer's long-standing corrective action and ultimately the unfortunate incident, alleged harm, and resounding convictions will have improved by then. I wish the swimmer my very best, because as far as I can tell he could have been treated little worse by the Ma On Shan Police Department, Hong Kong's athletic community, Hong Kong's Eastern District Magistrate, and Hong Kong's Chinese press corps. Moreover, when he approached the Legal Aid Office in Mong Kok about suing the Shatin District Leisure and Cultural Services Department for administrative negligence, he was told that children are a privileged class in Hong Kong, and that adults must show them the right of way. Never mind that areas created for adults are improperly administered, and adults who use them are placed at risk by poor management.² Apparently Hong Kong adults have no authority over children, unless they are their parents, teachers, or some other state approved authority. Certainly this can explain in part why so many Hong Kongers are so poorly mannered and quick to blame outsiders for their own shortcomings and obtrusive behavior.

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Word count: 1036

² R. A. Stegemann. EARTH's Viewpoint. My Region. East Asia trends. [online document] Aspiring to be global, or perspiring to be healthy: An essay on form and function in East Asia. 8 November 2003. <<http://homepage.mac.com/moogoonghwa/earth/viewpoint.html#regional>> (08 March 2004)