Should Hong Kong Introduce a Good Samaritan Food Donation Law?

I. Introduction

Food waste is a burgeoning issue for Hong Kong. It is estimated that more than 3,600 tonnes of food waste are produced every day.\(^1\) To put this into perspective, this is equivalent to the weight of about 250 double-decker buses.\(^2\) In marked contrast, over 1.5 million people in Hong Kong are suffering from food poverty.\(^3\)

Hong Kong is also paying an environmental price. Food waste, accounting for about 40% of municipal solid waste, accelerates the depletion of the limited landfill space.\(^4\) Two of the three strategic landfills in Hong Kong have already reached capacity respectively in 2014 and 2016, while the remaining one is expected to be exhausted in 2018.\(^5\) The greenhouse gases generated by food waste are imposing severe burden on environment as well.\(^6\)

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2 ibid.
4 Environmental Bureau (n 1).
5 Legislative Council, Panel on Environmental Affairs, *Paper on Management of Municipal Solid Waste in Hong Kong*, LC Paper No. CB(1) 1369/11-12(02).
Faced with this challenge, the Hong Kong Government has launched various programmes and public awareness campaigns to promote food waste reduction.\(^7\) In addition, there are growing calls in the Legislative Council for an enactment along the lines of the Bill Emerson Good Samaritan Food Donation Act (the ‘Emerson Act’)\(^8\) in the United States (the ‘US’) to encourage food donations, thereby reducing food waste in Hong Kong.\(^9\)

This paper seeks to provide the policymakers with an overview of Good Samaritan food donation law and a discussion of relevant issues surrounding its introduction in Hong Kong. Part II outlines the historical development of the Good Samaritan food donation law in the US, as it is where this series of law came from and what the subsequent lawmakers referred to. This is followed by Part III which draws a contour of the development in tackling food waste in different jurisdictions. Part IV discusses the possibility of introducing a Good Samaritan food donation law in Hong Kong by taking both its effectiveness and the concomitant public policy concerns into account. It is argued that Hong Kong should not introduce such legislation at this stage.

II. Historical Development of Good Samaritan Food Donation Law in the US

i. What is Good Samaritan Food Donation Law

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\(^7\) e.g. Food Wise Hong Kong Campaign. Launched on 18 May 2013, it is aimed at raising public awareness of food waste problem and effecting a behavioural change in different sectors of the society.

\(^8\) 42 U.S.C § 1791.

In the US, a staggering amount of 96 billion pounds of food, more than one quarter of the food annually produced for human consumption, was thrown away every year instead of being donated to those in need.\textsuperscript{10} One often-cited reason for not donating more is the fear of potential lawsuits arising out of donation, e.g. food poison. In response to this, one of the first steps taken by state governments to encourage donations was through what has become known as ‘Good Samaritan food donation law’, a legislation which limits the liability of donors should the food donated in good faith later causes harm to the recipients.\textsuperscript{11} It is intended to ease potential donors’ fear of liability, so as to increase donations for distribution to the needy.

\textbf{ii. Birth of the Emerson Act}

In 1997 the State of California became the first state to enact a Good Samaritan food donation law, followed by the remaining forty-nine states over the next decade.\textsuperscript{12} However, since state legislations varied in standards to which a donor would be held liable, multi-state corporations were reluctant to donate due to the inconsistency.\textsuperscript{13} The Congress attempted to address the need for greater uniformity by passing the 1990 Model Good Samaritan Food Donation Act (the ‘Model Act’), which was not binding but intended as a standard for states to follow. However, only one state adopted it in the ensuing five years.\textsuperscript{14} As a result, in 1996 the Congress passed the Emerson Act, a federal legislation which superseded the patchwork of state laws.

\textsuperscript{12} Morenoff (n 10) 109-112.
\textsuperscript{13} ibid 116-117.
\textsuperscript{14} ibid 120.
The Emerson Act exempts food donors from civil and criminal liability if they donated ‘apparently wholesome’ food or grocery in good faith to nonprofit organisations for distribution to those in need.\textsuperscript{15} Liability is limited to acts of ‘intentional misconduct’ or ‘gross negligence’ only, the latter being defined as voluntary conduct by a person who knows that it is ‘likely to be harmful to the health or well-being of another person.’\textsuperscript{16} Food donors are thus afforded the ‘widest possible latitude of relief from liability’.\textsuperscript{17}

The Emerson Act was welcomed by food banks, which prior to the Act experienced inadequate food supplies and were in need of donation from time to time. Some critics, however, have pointed out that, in enacting the Emerson Act, the US Government has misguidedly shifted its responsibility of feeding the needy to private sector.\textsuperscript{18} Despite the criticism, the Emerson Act proves to be a source of inspiration for other jurisdictions.

### III. Development in Different Jurisdictions

Drawing on the US experience, some jurisdictions, such as Canada and Australia, have since enacted food donation laws in a similar fashion, whilst others, such as France, have demonstrated that a Good Samaritan food donation law is not the only option. The approach adopted by the United Kingdom (the ‘UK’) will also be discussed in this part.

#### i. Jurisdictions with Good Samaritan Food Donation Laws

\textsuperscript{15} 42 U.S.C. § 1791(c).
\textsuperscript{16} 42 U.S.C. § 1791(b)(7).
\textsuperscript{17} Zuiden (n 11) 249.
1. Canada

Except Quebec and Nova Scotia, equivalents of the Emerson Act are enacted in all provinces and territories of Canada (See Table 1). There is a high degree of uniformity among the statutory languages adopted by these legislations. In general, they provide that donors (including distributors of donated food) are not liable for damage caused by food unless the donors intended to injure or acted recklessly by donating food ‘adulterated, rotten or otherwise unfit for human consumption’.\(^{19}\) The director, officer, agent or employee of a corporate donor, or a volunteer who assists the donor or distributor is also afforded the same immunity.\(^{20}\)

### Table 1 Good Samaritan food donation laws in Canada

<table>
<thead>
<tr>
<th>Province/Territory</th>
<th>Legislation</th>
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<tbody>
<tr>
<td>Alberta</td>
<td>Charitable Donation of Food Act, R.S.A. 2000, c. C-8</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Food Donor Encouragement Act, S.B.C. 1997, c. 8</td>
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<tr>
<td>Manitoba</td>
<td>Food Donations Act, C.C.S.M., c. F135</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Charitable Donation of Food Act, R.S.N.B. 2011, c. 124</td>
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<tr>
<td>Northwest Territories</td>
<td>Donation of Food Act, SNWT 2008, c. 14</td>
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<tr>
<td>Nunavut</td>
<td>Donation of Food Act, SNu 2013, c. 8</td>
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<tr>
<td>Ontario</td>
<td>Donation of Food Act, S.O. 1994, c.19</td>
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<tr>
<td>Prince Edward Island</td>
<td>Donation of Food Act, R.S.P.E.I. 1988, c. D-31</td>
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\(^{19}\) See e.g. Donation of Food Act, S.O. 1994, c.19, s 2(1).
\(^{20}\) ibid s 2(2).
2. **Australia**

As part of a nationwide tort law reform since 2002, legislations which protect food donors from civil liability are enacted across Australia (See Table 2). These legislations follow the same general structure, exempting food donors from civil liability caused by donated food if the donation is:

- made in good faith;
- for charitable, benevolent or philanthropic purpose;
- safe to consume at the time of donation; and
- when necessary, the donor provides charity with information on handling requirements and time limits for consumption of the food.

Moreover, it appears that the Australian food donation laws have gone further than its US or Canadian counterparts by wholly exempting *bona fide* donors from liability. Except South Australia, none of the state or territory legislations provides any exceptions, such as gross negligence provided by the Emerson Act, to hold food donors liable. On the face of it, one would wonder that by closing the courtroom door, wouldn’t those who are already injured by the donated food be further harmed.

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22 In South Australia, section 74A(3) of the Civil Liability Act 1936 provides that the immunity does not apply if the food donors ‘knew or was recklessly indifferent’ to the fact that the food was unsafe when they make donation.
Table 2 Good Samaritan food donation laws in Australia

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory</td>
<td>Civil Law (Wrongs) Act 2002 (ACT)²³</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Civil Liability Act 2002 (NSW)²⁴</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Personal Injuries (Liabilities and Damages) Act 2003 (NT)²⁵</td>
</tr>
<tr>
<td>Queensland</td>
<td>Civil Liability Act 2003 (Qld)²⁶</td>
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<tr>
<td>South Australia</td>
<td>Civil Liability Act 1936 (SA)²⁷</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Civil Liability Act 2002 (Tas)²⁸</td>
</tr>
<tr>
<td>Victoria</td>
<td>Wrong Act 1958 (Vic)²⁹</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA)³⁰</td>
</tr>
</tbody>
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3. New Zealand

The recent Food Act 2014 in New Zealand has introduced a ‘Good Samaritan’ clause. Under the Act, a *bona fide* food donor is exempted from civil and criminal liability caused by the donated food as long as it was ‘safe and suitable’ at the time of donation and, when necessary, the donor has provided information on how to keep the food safe and suitable.³¹

4. Italy

²³ ss 11A-11B.
²⁴ ss 58A-58C.
²⁵ s 7A.
²⁶ ss 38-38A.
²⁷ s 74A.
²⁸ ss 35D-35F.
²⁹ ss 34-42.
³⁰ s 74A.
³¹ Food Act 2014 (NZ), s 352.
The ‘Good Samaritan Law’ (‘Legge del Buon Samaritano’) in Italy serves the same purpose with its namesake in the US, yet it functions through a slightly different mechanism. Under the law in the European Union (the ‘EU’), food donors receive the same treatment with other market operators in terms of complying with regulations and remaining responsible for food safety. However, the Italian ‘Good Samaritan Law’ recognises food banks as the final consumer of the donated products. Accordingly, donors are only liable for food safety to food banks, instead of the ultimate food recipients. Considering that food banks usually have proper measures to guarantee food safety, many believe that this law provides ‘an extra level of reassurance to donors that stimulates donation, without compromising necessary safeguards’.

Further, Italy has recently relaxed food safety regulations to make food donation easier. Food passing its ‘sell-by’ date can still be donated. Besides, donors will have waste tax deducted based on how much they donate. Further, as one of the biggest cultural changes, people are encouraged to use doggy bags at restaurants to prevent food waste.

ii. Jurisdictions Without Good Samaritan Food Donation Law

1. France

36 ibid.
37 ibid.
There is no Good Samaritan food donation law in France. However, faced with an epidemic of food waste, France goes further than merely encouraging donations as the Good Samaritan food donation law tries to accomplish. On 2 February 2016, the French Senate passed a new law that bans retailers from throwing away or spoiling unsold but edible food. The law requires supermarkets with a footprint of 400 square metres or more to work in partnership with charities to donate unsold but edible food for distribution to those in need. Food that is unsafe for human consumption is to be donated to feed animals or for agricultural use. Non-compliance is punishable by a fine.²⁸

2. The United Kingdom

Not only lawmakers in the UK have rejected the need of introducing a Good Samaritan food donation law,³⁹ legislative attempts to impose an obligation to donate as has been implemented in France are also unsuccessful.⁴⁰ Instead, the UK Government has stated that it favours a ‘voluntary approach’, namely, it is looking to voluntary initiatives to reduce food waste.⁴¹ In this regard, the Government has funded the Waste and Resources Action Programme (‘WRAP’), which works in partnership with food industry players to realise food waste reduction. In particular, WRAP facilitates voluntary agreements

³⁹ House of Lords EU Committee, Counting the Cost of Food Waste: EU Food Waste Prevention (2014) para 133.
⁴⁰ Kerry McCarthy MP has introduced two private members’ bills which require, inter alia, that large food manufacturers and retailers to reduce their food waste and to donate unsold foods to charities. Both bills failed to pass through the Parliament before the end of its session. See Food Waste Bill 2010-12<http://services.parliament.uk/bills/2010-12/foodwaste.html>accessed 3 February 2017; Food Waste (Reduction) Bill 2015-16<http://services.parliament.uk/bills/2015-16/foodwastereduction.html>accessed 3 February 2017.
between them by acting as an independent convener.\textsuperscript{42} One example of this is the Courtauld Commitment (the ‘Commitment’), a voluntary agreement aiming at reducing food and packaging waste across the UK grocery industry. Signatories to the Commitment include manufacturers, retailers and big bands such as Unilever and Nestlé, representing 92% of the whole UK grocery market.\textsuperscript{43} Launched in 2005, the Commitment has achieved a total reduction of 2.9 million tonnes of food and packaging waste by 2013.\textsuperscript{44} ‘Courtauld 2025’, another ten-year voluntary agreement targeting at a 20% reduction in food and drink waste in the UK, was launched on 15 March 2016.

IV. Good Samaritan Food Donation Law in Hong Kong?

Although measures designed to promote food donations seem welcome at the first glance, to build a regime alone the lines of the Emerson Act is not free from controversy. Whilst some would consider it a move that brings positive results, others may argue that such legislation will lead to a reform into an area of law concerning product safety, depriving food recipients of remedies against negligent conducts of food donors. Given its magnitude, caution must be exercised to introduce it into Hong Kong. In this part, the paper will look into the different legal contexts between the US and Hong Kong, evaluating its potential effectiveness and addressing some major public policy concerns. This paper tries to argue that Hong Kong should not enact a Good Samaritan food donation law.

i. Different Legal Contexts

\textsuperscript{42} House of Commons Library, \textit{Food Waste} (Briefing Paper, CBP07552, 2016) 22.
\textsuperscript{44} House of Commons Library (n 41) 34-35.
A quick overview of Good Samaritan food donation laws in different jurisdiction reveals that the hallmark of this series of law is an immunity for negligence. Liability, if any, is limited to the most egregious conducts only, such as intentional misconduct or gross negligence. Consequently, by becoming a donor, the same ginger beer manufacturer in Donoghue v Stevenson would acquire a right to be negligent. Hence Good Samaritan food donation law leads to a reform of tort law concerning product safety. This is an area of law that has a close impact on daily lives of people in Hong Kong.

In Hong Kong, the existing law in this area is nothing more than a mere illustration of the broader principles of the law of negligence. The law holds persons liable for their failures to act with reasonable care when it is reasonably foreseeable that the lack of care would cause harm to others. On the other hand, the defining characteristic of the US product liability law is the imposition of strict liability for defective products, meaning that manufacturers are liable for damage caused by defective products irrespective of whether reasonable care has been exercised.

If strict liability, together with the willingness of the US courts to award punitive damages, means too great a burden for bona fide food donors to bear and thus justifies greater relief from liability through a Good Samaritan food

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47 Most states in US have adopted strict liability based on § 402A of the Second Restatement of Torts, which imposes liability for physical harm by ‘any product in a defective condition unreasonably dangerous to the user or consumer or his property’ even if the manufacturer has exercised all possible care.
donation law, it is certainly not the case for Hong Kong. The law of negligence in Hong Kong holds donors liable only when their acts fail to meet the standard of care that is reasonably expected by the society. It is not a heavy burden that would discourage donations—food donors need not do anything extraordinary to protect them from liability; all they have to do is ensure the safety of products by exercising reasonable care no matter whether they are for sale or for donation.

Law reform cannot be done in a vacuum. Instead, it requires deliberation in its context. The difference in tort law concerning product safety between Hong Kong and the US seems to indicate an answer in the negative regarding the possible transplant the US experience with Good Samaritan food donation law into Hong Kong.

ii. Uncertain Effectiveness

The effectiveness of the Good Samaritan food donation law in promoting food donations in Hong Kong is contingent upon whether and to what extent it is the potential legal liability that deters possible donations, and studies have indicated that failure to donate results from interaction of multiple considerations.

To donate or not to donate? For businesses, the bottom line appears to be that so long as the food can be sold, it will not be donated. For instance, Feeding America, the largest food bank in the US, often receives donations when the market is already flooded with the same products companies are unable to sell.

49 Usually jurisdictions that have enacted Good Samaritan food donation laws, such as Australia, are those with regimes of strict liability for defective products in place. See Australian Consumer Law, Pt 3-5.
50 Cohen (n 18) 475.
51 ibid.
Even when there is surplus food that cannot be sold, a company may choose not to donate for different reasons. According to a survey conducted by the Oxfam Hong Kong on surplus food handling and donation (the ‘Oxfam Survey’), the most cited reason for failure to donate by the 128 surveyed food companies is a lack of knowledge of food donation channels.\(^{52}\)

Besides, extra costs of donation are another key consideration that further discourages possible donations. The Oxfam Survey shows that difficulties in bearing extra expenses on transportation and manpower are among the most common obstacles to donation faced by food companies.\(^{53}\) Absent economic incentives, a company would rather choose to dump surplus food at almost zero cost than donate them to food banks bearing extra costs.

Potential lawsuits, on the other hand, do not play a role as important as one would expect in a donor’s decision-making. In this respect, it is revealing to see how potential donors respond to exemption of liability. According to the Oxfam Survey, among food companies so far have not been in the practice of donating surplus food, more than half of them consider deductions (57.5%), better promote channels (56.8%) and assistance in transporting the food (52.8%) ‘very effective or effective’ to encourage them to donate.\(^{54}\) By contrast, a barely 36% hold the same opinion for exemption of liability.\(^{55}\) Hence it is argued that without addressing those more important considerations, a Good Samaritan food donation law may hardly be helpful in promoting donations.

Furthermore, even if potential lawsuits prove to be an important consideration in the decision-making of potential donors, relief from liability provided by


\(^{53}\) ibid.

\(^{54}\) ibid para 3.5.14.

\(^{55}\) ibid.
legislation may not be sufficient to persuade donors. Reputation remains a major concern. Just because a donor is free from legal liability does not mean it can evade from long-lasting negative publicity if the food it donated later causes harm to recipients.\textsuperscript{56} As one retailer has explained, ‘[i]t doesn’t matter if I can’t be sued; it’d almost be worse to have the company’s name on the front page of the Wall Street Journal in conjunction with someone dying from eating out food.’\textsuperscript{57}

Therefore, given the multiple considerations and their hierarchy in the decision-making of potential donors, enacting a law that exempt donors’ liability while turning a blind eye to other more significant considerations may not serve as an effective solution.

\textbf{iii. Public Policy Concerns}

Even if a Good Samaritan food donation law is effective in promoting food donations, a close examination from the perspective of public policy is still needed in order to evaluate the appropriateness of its implementation in Hong Kong. Several concerns it raised have made a Good Samaritan food donation law not an ideal public policy choice.

\textbf{1. A solution in search of problem}

The key impetus behind the Good Samaritan food donation law is to ease the fear of legal liability on the part of potential donors. It appears that the lawmakers were convinced that such fear is realistic since there was little discussion on a further and relevant question—how frequent donors are sued for

\textsuperscript{56} Zuiden (n 11) 249.
damage caused by donated food. On a quick research, so far there is no record of such lawsuit in Hong Kong. If it is the mere spectre of lawsuits that purportedly impedes donations, it begs the question whether it is necessary to have in place an immunity from liability that has never been contested in courts. In this regard, lawmakers in the UK answered in the negative. While aware of the legislative intent of the Emerson Act, the House of Lords EU Committee rejected the need of introducing a similar legislation in the UK since ‘such an Act should only be proposed if there is a clear problem to be addressed’.  

2. Loss distribution

One of the functions served by tort law is distribution of losses resulting from the defendant’s actions, be it personal injury or damage to property. For instance, in case of negligence, the most common tort, the law dictates that the person who owes a duty of care but fails to take reasonable care should bear the cost of losses and compensate the victim.

Since 1950s, tort law theorists have maintained that public policy demands that greater liability should be fixed on businesses as they are in a better position than the public to spread the cost of losses either by raising price or by purchasing insurance. Based on this, strict liability, for example, as a means of

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59 House of Lords EU Committee (n 38) para 133.
60 Paula Giliker, Tort (5th edn, Sweet & Maxell, 2014) 2.
ensuring loss distribution is particularly fashionable in some jurisdictions, although not in Hong Kong.62

By depriving food recipients of right to sue donors for negligence, a Good Samaritan food donation law seems to deliver the message that, in return for food supply, they must accept the risk of negligent conduct of donors.63 This is questionable as the loss is ultimately borne by those who are the least capable to guard or insure against it.

3. Relegation of the Needy

Furthermore, one might feel that the recipients of donated food, usually the poorest in our society, are relegated by a Good Samaritan food donation law.64 Why should they accept food of a lower quality? Shouldn’t the same food safety requirements be applied to all products, no matter who the intended recipients are?

One argument repeatedly heard during the legislative process of the Emerson Act was that the benefit of feeding the needy outweighs the safeguard provided by a right to sue for injury or damage caused by donated food.65 However, this argument has mischaracterised the policy alternatives. The real choice is not ‘food supply with small risk’ versus ‘no food at all’.66 Instead of depriving their rights to sue, a lot more could be done to feed the needy. For instance, the

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62 e.g. the EU Product Liability Directive (85/374/EEC) is expressly concerned with loss distribution. In its preamble, it states: ‘[[l]iability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production’.
63 Phillips (n 58).
65 Morenoff (n 10) 111 & 116.
66 Phillips (n 58).
Government could play a more active role in providing food assistance by subsidising food banks in Hong Kong. Meanwhile, non-food measures, such as increasing minimum wages and supply of public housing, would also be helpful, as they enable the individuals in need to allocate more resources to food.67

V. Conclusion

Food waste is an issue yet to be adequately addressed in Hong Kong. While the Good Samaritan food donation law appears to be in vogue in some jurisdictions, introducing it into Hong Kong requires deliberation on difference in legal contexts, inquiry into how effectively it fulfills the legislative intent as well as examination from the perspective of public policy.

First, different from the jurisdictions which have adopted a strict liability regime, the existing law concerning product safety in Hong Kong does not impose burden on donors heavy enough to justify a greater relief from liability through a Good Samaritan food donation law.

Second, given the interaction of multiple considerations in a potential donor’s decision-making, it is unlikely that food waste in Hong Kong can be alleviated simply by a single piece of legislation which only addresses the purported fear of legal liability while turns a blind eye to other considerations.

Third, as a matter of public policy, the law should have a clear object in its view, advocate a fair distribution of loss and treat every person in an equal manner. However, a close examination reveals that the Good Samaritan food donation law is not an ideal public policy choice.

67 Cohen (n 18) 457.
Therefore, it is argued that Hong Kong should not introduce a Good Samaritan food donation law at this stage. Hopefully, in the near future, more empirical studies on incentives for food donation could be conducted in order to generate a more comprehensive view of the food waste problem in Hong Kong and facilitate the policymakers to develop corresponding strategies.