#### DCPI 2078/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2078 OF 2009

BETWEEN

CHONG NGAN SENG Plaintiff

and

CHINA HARBOUR ENGINEERING 1st Defendant

COMPANY LIMITED

YIP YAT WO 2nd Defendant

UNION DUTY LIMITED 3rd Defendant

SUN GLORY ENGINEERING LIMITED 4th Defendant

and

UNION DUTY LIMITED 1st Third Party

SUN GLORY ENGINEERING LIMITED 2nd Third Party

##### Coram: Deputy District Judge Rebecca Lee in Court

Date of Hearing: 7th, 8th and 9th November 2011

Date of Judgment: 19th December 2011

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## JUDGMENT

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###### Background

1. On 26 November 2008, at about 1710 hours, the Plaintiff was a upper deck passenger on board a double-decker bus with registration number JA 449, route number 930 (“the Bus”). The Bus was travelling along the 2nd lane of Sha Tsui Road, Tsuen Wan, New Territories towards Tsuen Wan Pier. A light goods vehicle with registration number FH 2696 (“the LGV”) driven by the 2nd Defendant (“D2”) was travelling along the 1st lane of the Road towards the same direction.
2. When the Bus reached near lamppost FA1768, Bosun Industrial Building, 364-366 Sha Tsui Road, the Plaintiff left her seat and proceeded towards the stairs leading to the exit downstairs, and was standing on the upper deck and holding the handrail with both hands, the LGV suddenly cut into the Bus’s lane causing the Bus to brake sharply to avoid a collision. As a result of such a sudden brake, the Plaintiff lost her balance and was thrown into the front part of the Bus and sustained injuries to her head, shoulder and wrists (“the Accident”).
3. The 1st Defendant (“D1”) was the registered owner of the LGV. D1 was and is a main contractor employed by the Government of HKSAR via Highways Department under a Contract no.19/HY/2004 (“the Main Contract”) to carry out maintenance works in New Territories. On the day of the Accident, D2 was driving the LGV on the way back to a site at Tai Lin Pei owned by D1 (“the Site”).
4. The Plaintiff originally sued D1 and D2 as the registered owner and driver of the LGV. The 3rd Defendant (“D3”) and the 4th Defendant (“D4”) were joined as Defendants after D1 issued Third Party Proceedings against them, claiming contribution and/or indemnity from D3 and/or D4 pursuant to Civil Liability (Contribution) Ordinance, Cap. 377.
5. D1 also issued Notice to D2 claiming contribution from D2.
6. D2 has issued Notice of Contribution and/or Indemnity against D1, D3 and D4 pursuant to O.16, r.8 of the Rules of the District Court.
7. D3 was and is a subcontractor to D1 under a Sub-Contract No.SC-038 (“the Subcontract”) to the Main Contract. D4 was the subcontractor of D3. D1 and D2 state that the D2 was the employee of D4. D4 admitted it was the employer of D2.
8. The Plaintiff’s case is that the Accident was caused by the negligence of D2 for which D1, D3 and/or D4 were vicariously liable.
9. As a result of the Accident, D2 was charged with and convicted of careless driving.
10. D2 has, before trial, admitted liability. D2 maintains the defence of contributory negligence and also alleges the other Defendants are vicariously liable for his negligence. D2 admitted to be D4’s employee.
11. D4, before its solicitors ceased to act, has admitted liability on 20 October 2011. D4 acted in person and was absent in this trial. D4 also admitted to be D2’s employer.
12. D3 has all along been acting in person and was absent in the proceedings after filing its Defence and witness statement.
13. All Defendants allege that the Accident was caused or contributed to by the Plaintiff’s negligence and/or breach of statutory duty under Reg.13A(2)(b) of the Public Bus Services Regulations, Cap.230A, Laws of Hong Kong.

###### Liability

1. Mr. Wong for the Plaintiff has helpfully summarized the issues in his Opening Speech.
2. As pointed out by Mr. Wong, D2 pleaded guilty to careless driving and would have admitted to the brief facts stated by the Prosecution. And, in admitting liability, D2 is effectively admitting to the Plaintiffs facts leading to the Accident, i.e. that it was his negligence that caused the Accident and hence the Plaintiff’s injuries.
3. D4 also admitted liability before trial commenced. D4 thus admits to the Plaintiff’s allegation that it was vicariously liable for D2’s negligence.
4. In light of the above, the issues for this trial can be narrowed down as follows:-
5. whether D1 and/or D3 are vicariously liable for D2’s negligence;
6. whether there was contributory negligence on the part of the Plaintiff;
7. question of contribution and/or indemnity amongst the Defendants.

###### The Plaintiff’s Case against D1

1. It is common ground that D1 was the registered owner of the LGV at the material time.
2. In the Re-Amended Statement of Claim, it is pleaded that D2 was the driver of the LGV and was driving the same as the servant/agent/employee of D1.
3. As the registered owner of the LGV, Mr. Wong submits that D1 is prima facie vicariously liable for the negligent acts of D2.
4. However, for vicarious liability to attach, it must normally be established that the driver of the vehicle was driving it as the servant or agent of the owner.
5. Mr. Wong refers to ***Rambarran v. Gurrucharran*** [1970] 1 All ER 749, where it was held that to establish vicarious liability, the Plaintiff must establish that the driver was driving the car as the servant or agent of the owner and not merely on his own concerns. Whilst in absence of other evidence, an inference can be drawn from ownership that the driver was the servant or agent of the owner; this inference can nevertheless be rebutted should there be evidence that the owner had merely given his permission to another to use the vehicle for his own purposes.
6. Mr. Wong submits D1 should be held vicariously liable for D2’s negligence, as D2 was its employee or agent.

###### The Plaintiff’s Case against D3

1. Pursuant to the terms of the Subcontract, D3 have purchased plant and equipment, including the LGV, from D1 before the Accident.
2. At the time of Accident, D3 has already taken delivery of the LGV and was in possession, control and management of the LGV. The legal ownership of the LGV was with D1 until D3 fully paid the purchase price by instalment.
3. Mr. Wong submits that D3 had an interest in the trip, and that D3 had control of the LGV and allowed D2 to drive.
4. D3 should therefore be vicariously liable for D2’s negligence.

D1’s Case

1. D1 denies that D2 at the time of the Accident was its employee nor its agent.
2. It is further contended that D1 was not vicariously liable. D1 avers that D3 and/or D4 was/were vicariously liable for D2’s negligence.
3. D1’s pleaded case under its Re-Amended Defence is:
4. D1 had no control and/or management of, no right to control and/or manage, or otherwise had abandoned or given up its right to control and/or manage the LGV.
5. D3, D4 and/or D2 had or otherwise was/were in complete control and/or management of the LGV.
6. D3 and/or D4 via D2 was/were driving the LGV in exercising an independent calling as subcontractor and/or sub-subcontractor.
7. D2 was driving the LGV as the servant and/or agent of D3 and/or D4.
8. In a nutshell, D1’s stance is that it should not be held vicariously liable for D2’s negligence, the employee of its sub-sub-contractor.
9. Mr. Chung for D1 relies on ***Hewitt v. Bovin*** [1940] 1 KB 188, ***Ormrod v. Crosville Motor Services Ltd.*** [1953] 2 All ER 765, ***Klein v. Caluori*** [1971] 2 All ER 79 ***Launchbury v.*** ***Morgan*** [1973] AC 127 and ***Norwood v. Navan*** [1981] RTR 457, and contends that D2 was not D1’s agent as D1 had no general control of the LGV. It is also contended that D1 did not give consent to D2 to drive the LGV.
10. Mr. Chung argues that D1 had no interest in D2’s trip as D2 was merely carrying out orders from D4, his employer.
11. D1 has issued a Third Party Notice against D3 and D4, claiming contribution and/or indemnity from D3 and D4. D1 also issued Notice to D2 claiming contribution from D2.
12. At trial, Mr. Chung pursues indemnity against D3 on the basis of the Subcontract. Mr. Chung did not pursue contribution and/or indemnity against D4, nor did he pursue D1’s claim for contribution against D2.
13. On the question of contributory negligence, Mr. Chung submits that the Plaintiff was in breach of Reg. 13A(2)(b) of the Public Bus Services Regulations, Cap.230A by standing next to the staircase on the upper-deck of the Bus before and at the time of the Accident.

D2’s Case

1. D2 does not dispute that the Accident was caused by his negligence. D2 claims that D1, D3 and D4 were vicariously liable for his negligence.
2. D2 pleads that he had no knowledge about D1 and that he was employed by D4 and the LGV was provided to D2 by D4.
3. Mr. Kau for D2 submits that D1 through D3 and D4 must be deemed to have permitted D2 to use the LGV for its benefit, which is to carry out work in relation to D3’s Subcontract with D1. On the day of the Accident, D2 was asked to transport equipment and workers to carry out maintenance work at various sites under the Subcontract. The purpose of the use of the LGV was therefore for the benefit of D1 as well as for D3.
4. Mr. Kau relies on ***Keung Kit Shing v. Star Synthetic Flowers Factory*** HCA 8967/1981 (which revisited English authorities like ***Launchbury v. Morgans***).
5. According to Mr. Kau, D1, D3 and D4 are all vicariously liable for D2’s negligence. It is further submitted that they should all indemnify D2 in respect of any claim or costs that the Plaintiff may recover from D2.
6. In respect of contributory negligence, Mr. Kau relies on Reg.13A(2)(b) of Cap.230A. He submits that the Plaintiff left her seat too early when the Bus was on the middle lane, that she should have waited until the Bus entered the slow lane to leave her seat.
7. Mr. Kau suggests that contributory negligence should be in the region of 30%. No authority was cited by Mr. Kau in this respect.

D3’s case & D4’s Case

1. The pleaded case of D3 is that D3 had no control over and/or abandoned the use of the LGV at the material time. It is alleged that the LGV was under the complete control of D1 and/or D4. The use by D2 was with the full knowledge or consent of D1 and D4. It is further said that the use of the LGV by D2 was pursuant to his employment with D4, who was exercising an independent calling as an independent contractor of D3.
2. D4’s pleaded case is that D1 through D3 retained control over the activities of D4 and/or its employees through the provision of the LGV and insurance coverage for the LGV and limiting its use for activities connected solely with the Main Contract. It is said that the use of the LGV by D2 was with the full knowledge or consent of D1 and/or D3.
3. Both D3 and D4 alleged that the Accident was caused wholly or contributed to by the Plaintiff’s own negligence.
4. Since both D3 and D4 were absent at trial, no evidence was adduced on their behalf.

Discussion

1. There are 4 witnesses at trial: the Plaintiff, Mr. Yeun Yee Tak (Project Manager of D1), Miss Law Po Yee (Administration Officer of D1) and D2.
2. D3 and D4 were not present at trial.

Whether D1 was vicariously liable for D2’s negligence

1. The Plaintiff’s case is that D2 was driving the LGV as the employee/servant/agent of D1, the registered owner.
2. Mr. Wong framed the Plaintiff’s case as follows:
3. D2 was D1’s employee; and
4. D1 had an interest in the trip as the purpose of the trip was also for D1’s project.

Whether D2 was employee of D1

1. Mr. Wong relies on Clause 10, Appendix G [B341] and Clause 13 of Appendix A [B293] of the Sub-Contract.
2. Clause 10 of Appendix G states that:-

“During the probation period, all Contractor Superintendence as shown on Appendix A are directly employed and paid by [D1]. [D1] will backcharge [D3] 50% of the salary shown on the Appendix for the first two months. Thereafter, [D3] shall bear the actual cost incurred according to the payroll”.

1. Clause 13 of Appendix A provides:-

“Site Organization

* 1. [D3] is aware that all the Contractor’s Superintendence as listed in Appendix I are directly employed and paid by [D1]….
  2. [D1] may continue to employ all staff and workers for [D3] in April and May 2007 to ensure smooth handover in the gearing up period. [D3] shall bear the actual costs of these staff and workers accordingly and [D1] shall deduct such costs as contra charge from the monthly payments due to [D3]…
  3. After the gearing up period, i.e. from June 2007 onwards, [D3] shall employ its own staff and workers except the following staff for the execution of the Sub-Contract Works:
  4. Contractor’s management staff as listed on Appendix J…
  5. Site staff required to be directly employed by [D1] as listed on Appendix K…
  6. Site staff provided for the Employer as listed in Appendix L…
  7. For those staff in items 13(c)(ii) and (iii), [D3] shall have an option to replace the existing staff with prior approval from [D1] and the Employer. For items 13(c)(iii), [D3] is entitled to employ its own staff to replace existing staff.
  8. For staff working in [D1]’s head office or other site offices but whose names are shown in the site organization chart a listed in Appendix M…
  9. All staff as shown on Appendix I, Appendix J, Appendix K and Appendix L are indicative and exhaustive. [D3] shall be fully aware of the numbers and details of staff members provided by [D1] and shall have an obligation to provide and maintain all necessary staff and workers in accordance with the requirements of the Main Contract.”

1. Under Appendix I, D2 was listed as a “daily labour” with staff number CWF470 [B352].
2. Mr. Wong submits that D3 had agreed with D1 to use some of D1’s staff. While D3 will be responsible for payment of these staff (including D2), under the Subcontract, D2 remained directly employed by D1.
3. It was agreed by Yuen that “Contractor’s Superintendence” means D1’s staff. He also agreed that according to the list in Appendix I, D2 was a staff directly employed by D1 at the time of the agreement.
4. That is why, according to Mr. Wong, under Motor Accident Insurance Claim Form [B411], D2 was “employee” of D1.
5. Mr. Chung argued that under Clause 10 and Clause 13, D3 could elect whether to continue to employ those persons. Yuen and Law testified that D2’s employment with D1 had been terminated before the Accident. They said that a letter of termination was issued to D2 in March 2007 but there is no such document produced.

Findings

1. Simply by reading the above Clauses, it is inconclusive as to whether D2 remains employed by D1 after the probation period or that D2 was under the employ of D3.
2. Although D2 was directly employed by D1 during the probation period, it seems that D3 had a choice whether to employ D1’s staff after the gearing up period under Clause 13(c), as D2 does not fall within one of the exceptions stated thereunder.
3. On the other hand, it is uncertain whether D2’s employment was terminated by D1 before the Accident as alleged by Law and Yuen.
4. However, as pointed out by Mr. Chung, D1 had been provided with payroll records from D4 [B415-425] showing that D2 was an employee of D4 and that D4 had paid his salary punctually.
5. Further, D2 himself confirmed in the witness box that he received salary direct from D4, that D4 was his employer under the MPF Scheme. It is also said that he took instruction from D4’s staff, a Mr. Leung.
6. In the light of the evidence, it is more probable than not that D4 was D2’s employer at the time of the Accident.
7. I am not convinced, on balance, that D1 was D2’s employer at the time of the Accident.

Whether D1 had an interest in D2’s Trip

1. Mr. Wong submits that since D1 is the main contractor and that it seeks indemnity from D3 based on the Subcontract, it is likely that D2 was driving the LGV for the business of all other Defendants.
2. Mr. Wong relies on the following evidence:-
3. both Yuen and Law of D1 regarded D2 as an employee of D1 as he was driving in the business of D1’s project;
4. the ownership of the LGV was not passed to D3 until 8 months after the Accident. D1 remained the registered owner of the LGV at the material time;
5. at the time of the Accident, D1 remained responsible for all expenses incurred in connection with the LGV such as insurance, licensing, annual examination, fuel, maintenance, etc, which shall be charged to D3 [B342].
6. Mr. Wong also submits D3 had physical possession of the LGV. It is unlikely for D3 to provide the LGV to D4 merely for the purpose of carrying out D4’s business only.
7. In other words, D2 must have been driving the LGV for the businesses for all the other Defendants, including D1, the main contractor.
8. Mr. Kau for D2 submits that D1 should be vicariously liable for D2’s negligence. The LGV was being used for the benefit of D1.
9. Mr. Chung refers to ***Hewitt v. Bonvin, Ormrod v. Crosville Motor Services Ltd*.**, and ***Klein v. Caluori***. He submits that there is no evidence that D1 had given consent to D2 to drive the LGV.
10. It is said that at the material time the general control of the LGV was passed on to D3. Mr. Chung relied on ***Morgans v. Launchbury*** and ***Norwood v. Navan***, and submits that there is no evidence that there was a specific act of delegation and/or direct delegation between D1 and D2.
11. The only controversial issue, according to Mr. Chung, is the purpose of D2’s driving of the LGV at the material time.
12. Mr. Chung points out that D2 was instructed by D4 to carry out his task.
13. Mr. Chung refers to ***Ip Shuk Hing v Yuen Yuk Wai*** HCPI 216 of 1999. In that case, there was no evidence to show how or in what circumstances the driver came into possession of the car (a private vehicle), nor was there any evidence as to the purpose or reason for the driver to be driving the owner’s car at the material time. Apart from the unchallenged fact that he owned the car, there was no other evidence capable of throwing light upon the question of liability for the negligence of the driver.
14. Mr. Chung’s case is that D4 is an independent sub-contractor of D3, who is in turn the independent sub-contractor of D1. As main contractor, D1 should not be held vicariously liable for the act of the negligence of the employee of its sub-sub-contractor.

Findings

1. I remind myself that there is no evidence to show how D4 and/or D2 came into possession of the LGV after D3 took delivery/possession of the same.
2. The following evidence from D2 and D1 are relevant.
3. D2 testified that:-
4. D2 worked as a labourer driving vehicles on the Site for 10 odd years before the day of the Accident;
5. D1 was all along the main contractor;
6. there had been change of sub-contractors who paid D2’s salary, but there was no change of job or post on his part;
7. he cannot recall whether he received any termination letter from D1 in March 2007;
8. he had to punch work cards at both D1 and D4’s site office each day when he reported duty;
9. at the time of the Accident he was on his way back to the Site and he had to punch work cards at both D1 and D4’s site office to sign off work;
10. the LGV was carrying road signs, cones and fences etc. provided by D1 at the material time, they were to be transported from one site of D1 to another site of D1.
11. Yuen agreed that the LGV is an “on site vehicle” under the Subcontract. It was stationed at the Site and if necessary it would travel to another site of D1, to transport traffic signs, cones and fences etc. from site to site.
12. D3 in its Defence admits that D4 was its subcontractor. It is common ground that D4 instructed D2 to carry out project work, which D1, D3 and D4 were contractors.
13. Further, as pointed out by Mr. Wong, at the time of the Accident, not only did D1 remain the registered owner of the LGV, it was also responsible for all the expenses incurred in relation to the LGV.
14. The fact that D2 (who had been working at D1’s site for over 10 years) were transporting D1’s road signs and fences etc. between different sites of D1 should not be ignored.
15. In the light of the evidence before me, I find it more probable than not that D1 must have permitted its sub-contractor (D3) to arrange its own employees and/or its sub-contracts (and their employees) to use the LGV for the purpose of the Subcontract. At the very least, it was within D1’s knowledge or expectation that the LGV would be so used.
16. This is irrespective of the fact that D1 had parted with possession of the LGV.
17. I find assistance from Deputy Judge Longley’s decision in ***So Wing Kwong v. Cheng Chi Kwong*** [1999] 3 HKLRD 689.
18. The learned Judge at p.692 to p.693 held that:

“Even if the retention of a right to control had been a necessary element before there could be vicarious liability, I am satisfied that the mere fact of a bailment would not in itself mean the owner of the vehicle (or a person in the position of a owner) had abandoned the right to control. It would depend in each case on the purpose of the bailment.

In any event, I am not satisfied that the retention of a right to control beyond that implicit in the delegation of a task or duty to an agent is a necessary element before vicarious liability can be established. In *Norton v. Canadian Pacific Steamships Ltd.* [1961] 1 WLR 1057, Lord Justice Pearson had referred to the evidence before the court that the Defendants did not exercise or have any right of control of the use of the bogies to which that case related. Yet he made no reference to that factor when setting out the test (at p.1063):

“In my opinion, the reason in *Ormrod*’s case is based on the same principle. The owner of a car when he takes or sends it on a journey for his own purposes, owes the duty of care to other road users and if any of them suffers damage from negligent driving of the car whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable.”

My view is strengthened by the remarks of Lord Wilberforce in *Launchbury v. Morgans* [1973] A.C. 127 at 135 in which he set out the circumstances in which the common law has attributed vicarious liability.

“The owner ought to pay, it says, because he has authorised the act, or requested it or because the actor is carrying out a task or duty delegated or because he is in control of the actor’s conduct.”

In other words, control is simply an alternative basis for vicarious liability.”

1. In the light of the evidence, I am satisfied D1 has authorised D2 to drive the LGV, or that D2 was carrying out task or duty delegated from D1.
2. I find it is more probable than not that D2 was driving the LGV as D1’s agent at the time of the Accident.
3. It follows that D1 should be held vicariously liable for D2’s negligence.

Whether D3 is vicariously liable for D2’s negligence

1. It is common ground that D3 took delivery of the LGV on 7 November 2006. D3 admits D4 to be its subcontractor. D4 also instructed D2 to use the LGV to carry out the project work.
2. Mr. Wong submits that at the time of the Accident, D2 was in the course of duty in relation to a project which D1, D3 and D4 were contractors. The irresistible inference is that D3 on the day of the Accident allowed D4 to assign workers to use the LGV.
3. Mr. Kau also submits that D3 is vicariously liable.
4. I repeat my findings under “Whether D1 had an interest in D2’s trip” of hereiabove.
5. I find that it is more probable than not that D3 have authorized or knowingly permitted D4, its sub-contractor, to use the LGV for the purpose of performing the Subcontract. I agree with Mr. Wong’s submission that at the time of the Accident D2 was driving the LGV in relation to a project where D1, D3 and D4 were contractors.
6. And, while D2 was driving the LGV in the course of employment with D4, D2 was also performing D4’s duty under the Subcontract as delegated by D3.
7. I find, on balance of probability, that D3 also had an interest in D2’s trip, that D2 was driving the LGV as D3’s agent.
8. It follows that D3 should be held vicariously liable for D2’s negligence.

Contributory Negligence

1. Mr. Chung submits that the Plaintiff, in standing on the upper deck of the Bus while it was moving, was in breach of Reg.13A(2)(b) of Cap.230A. This was also an act of negligence on her part.
2. Reg. 13A provides that:-

“(2) No passenger shall stand

* 1. on any part of a bus other than the gangway;
  2. on the upper deck of a bus; or
  3. on a single-decked bus or on the lower deck of a double-decked bus, forward of the rearmost part of the driver’s seat, while the bus is moving.”

1. The Plaintiff, under cross-examination, agreed that it would only have saved her 1 second’s time by leaving her seat at that point. Her seat was already very close to the stairs leading to the lower deck.
2. The Plaintiff also said that she would walk downstairs when the Bus stopped before the traffic light (before it reached her desired stop).
3. Mr. Chung argues that the Plaintiff had failed to keep sufficient regard to her own safety and put herself at unnecessary risk.
4. D2’s position as advanced by Mr. Kau was that the Plaintiff should have enough time to walk down the stairs by leaving her seat when the Bus entered the slow lane.
5. Mr. Wong contends that the Plaintiff had to leave her seat at some point in order to alight from the Bus.
6. Mr. Wong submits that Reg.13A(2)(b) refers to the general conduct of passengers, which is an administrative rather than a safety regulation. Mr. Wong says that it relates more to the capacity of the bus.
7. Mr. Wong further submits that it makes little or no difference to an upper deck standing passenger to that of a lower deck standing passenger in terms of individual safety.
8. It is not necessary for me to decide the intention behind the Regulations.
9. I accept that the Plaintiff was in breach of Reg.13A(2)(b) by standing on the upper deck. However, I agree with Mr. Wong’s analysis that it does not make any difference if the Plaintiff was standing on lower deck rather than the upper deck. She would still have been thrown forward by a sudden brake even if she were standing on the lower deck.
10. It is not disputed that once she stood up, the Plaintiff grabbed hold of the horizontal rails with both of her hands. What more could she have done?
11. It is not the case of D1 or D2 that the Plaintiff’s grip was so inadequate as to involve a failure to take reasonable care for her own safety. The argument was that she should not have stood while the Bus was moving.
12. I find that it does not make any difference whether the Plaintiff was standing on lower deck or the upper deck. The breach of Reg.13A(2)(b) is not determinative of the question of contributory negligence.
13. I find that the Plaintiff was not guilty of a failure to take care of her own safety.

Third Party Proceedings

1. At the beginning of trial, Mr. Chung and Mr. Kau invited the Court to apportion liability amongst the Defendants.
2. According to the Plaintiff’s case as pleaded and as put forward by Mr. Wong, the only act of negligence complained of was committed by D2 the driver. D1, D3 and D4 were vicariously liable for D2’s negligence. Neither the Plaintiff nor any of the Defendants pleaded that the Accident was somehow caused or contributed to by the acts of negligence of D1 and/or D3 and/or D4.
3. The Defendants are therefore liable as joint tortfeasors. It is not a case of separate torts combined to produce the same damage (to the Plaintiff).
4. The question of apportionment of liability amongst the Defendants does not arise.
5. Both Mr. Chung for D1 and Mr. Kau for D2 accepted the same and pursued their respective Third Party Proceedings on the basis of indemnity or full contribution only.

D1’s Third Party Proceedings

1. Mr. Chung only sought indemnity against D3 by relying on the terms of the Subcontract.
2. The relevant provision is Clause 14 of the Subcontract [B261]:

“(1) [D3] shall at all times indemnify [D1] against all liabilities to other persons (including the servants and agents of [D1] or [D3]) for bodily injury, damage to property or other loss which may arise out of or in consequence of the execution, completion or maintenance of the Sub-Contract Works and against all costs, charges and expenses that may be occasioned to [D1] by the claims of such persons. Provided always that [D1] shall not be entitled to the benefit of this indemnity in respect of any liability or claim if he is entitled by the terms of the Main Contract to be indemnified in respect thereof by the Employer.

Provided further that [D3] shall not be bound to indemnify [D1] against any such liability or claim if the injury, damage or loss in question was caused solely by the wrongful acts or omissions of [D1], his servants or agents.”

1. In my view, the wordings of the above the above Clause is wide enough to cover the present situation.
2. However, in the light of my findings that D2 was driving the LGV as D1’s agent at the material time, Clause 14 can have no application to the present case by reason of the proviso.
3. I dismiss D1’s Third Party Notice against D3.
4. D1’s Third Party Notice against D4, and D1’s Notice of Contribution against D2 were not pursued at trial.

D2’s Notice of Contribution

1. Mr. Kau maintained that D1, D3 and D4 should indemnify D2.
2. D2’s case against D4 as put forward by Mr. Kau is on the basis of an implied term of contract of employment between D2 and D4. It is submitted by Mr. Kau that D4 as employer should indemnify its employee (D2) against the Plaintiff’s claim.
3. No authorities were cited to the Court in support of his proposition.
4. I am not aware of any principles in support of Mr. Kau’s contention.
5. Quite the contrary, where an employee commits a tort in the course of his employment, he and his employer are joint tortfeasors and, accordingly, if the employer meets the claimant’s claim for damages he is entitled to claim contribution from his employee under the Civil Liability (Contribution) Act 1978: *para. 4-36, Clerk & Lindsell on Torts, 20th ed.*
6. ***Lister v. Romford Ice and Cold Storage Co. Ltd.*** [1957] AC 555 held that independent of the statute, the employers of a lorry drive for whose negligence they were had been held liable were entitled to claim damages from the driver, equivalent to an indemnity, on the basis of a breach by the driver of an implied term in his contract of employment to the effect that he would exercise reasonable care in the performance of his duties.
7. It is clear that it is the right of the employer to claim contribution or indemnity from its employee who committed the tort in the course of his duty, not the other way round.
8. In the light of the above, I did not find Mr. Kau’s argument in this respect has any substance.
9. In addition, D2 also claims against D4, together with D1 and D3, that they should indemnify him against the Plaintiff’s claim since they have failed to inform the insurer in time such that D2 would have to compensate the Plaintiff out of his own pocket if he was found liable to the Plaintiff.
10. Again, Mr. Kau did not refer to any authorities in support of his proposition.
11. Note 16/1/3 of Hong Kong Civil Procedure 2012, Vol.1 states that:-

“A right to indemnity may arise:

* + 1. from express contract;
    2. from some statute; or
    3. implied from some principle of law.

A right to indemnity exists where there is an obligation either at law or in equity upon one party to indemnify the other…

The following are instances of a right of indemnity arising by implication of law. Where an act is done by one person at the request of another, and in consequence of such act the person doing it suffers loss; also where such act, though not tortious, is injurious to the rights of a third party; or where two parties have become bound, the one by contract and the other by estate, to perform the same covenant; or where, as in equity an obligation arises from the relation between the parties, as between trustee and cestui que trust….”

1. D2 is not relying on any express contract or statute. Mr. Kau did not refer me to any specific principle of law which allows the Court to find a right to indemnity.
2. Section 6 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, cap 272, provides:

“ The policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on a road and arising out of one event for an amount not less than that as may be prescribed; a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.”

1. The purpose of the motor insurance policy was for the benefit of third parties (like the Plaintiff) in respect of death or bodily injury. It is not intended to protect the economic interest of the driver in case he was found liable to the third parties.
2. Mr. Chung argues that there is no pleaded basis of D2’s claim against D1 and D1 owes no duty, whether in tort or in contract, to D2.
3. I agree with Mr. Chung. The same applies to D2’s claim against D3 and D4.
4. I therefore dismiss D2’s Amended Notice of Contribution and/or Indemnity against D1, D3 and D4.

Quantum

Injuries and Treatment

1. Immediately after the Accident, the Plaintiff was taken to the Accident & Emergency (“A&E”) of Yan Chai Hospital (“YCH”) for treatment. Upon examination, there were bruises over her left forehead and tenderness over both hands and both wrists. The Plaintiff was diagnosed to have suffered from multiple contusions. She was treated with medications and discharged.
2. The Plaintiff re-attended the A&E Department of YCH on a number of occasions due to persistent headache and serious pain in her left shoulder. She received 25 physiotherapy treatment sessions at YCH. The Plaintiff was also referred to receive occupational therapies at the Princess Margaret Hospital.
3. Due to persistent left shoulder pain and stiffness, the Plaintiff attended the General Practice Clinic, Mrs. Wu York Yu General Outpatient Clinic and Lady Trench Polytechnic of YCH for treatment. X-ray of her left shoulder taken in December 2008 revealed decreased subacromial space, with osteoarthritic changes of inferior border of acromion and this was diagnosed to be compatible with impingement syndrome. The Plaintiff was treated with analgesics and given sick leave.
4. The Plaintiff was given intermittent sick leave from 27 November 2008 to 3 June 2009 (6 months and 7 days).
5. The Plaintiff was jointly examined by her own orthopaedic expert Dr. Ko Put Shui Peter and D1’s expert Dr. Fu Wai Kee. They prepared a joint medical report dated 10 February 2010 (“the JMR”).
6. During the joint examination, the Plaintiff complained of :
7. Left shoulder pain – continuous left shoulder pain after the injury. The pain was aggravated by weight lighting more than 3 pounds, elevation or internal rotation of shoulder and lying on left side. She had difficulty scratching her back. However, stiffness had improved after treatment but still complained of mild subjective weakness.
8. Pain in both wrists – continuous wrist pain after the injury. Right wrist pain was more severe than the left side. The pain was aggravated by weight lifting more than 2-3 pounds with thumb movement.
9. Headache – frontal headache during change of weather.
10. At trial, the Plaintiff complains that she has difficulty in flexing her right ring finger. This has not been recorded in the JMR nor was it mentioned in any of the medical reports submitted to the Court.
11. In the JMR, both doctors agree that the clinical diagnosis of the Plaintiff is compatible with soft tissue injury of both wrists and left shoulder. The doctors agree that the injuries are a result of the Accident.
12. As for the head injury, the doctors opine that it should be assessed by neurologists and they limit their comment on the Plaintiff’s limbs injury.
13. No neurologist report was prepared nor relied on by the Plaintiff.
14. Both experts opine that the injuries the Plaintiff sustained should be minor ones. The X-ray all along revealed osteoarthritic changes are pre-existing and not caused by the Accident. The Accident caused the asymptomatic degeneration to turn into symptomatic shoulder pain after the injury.
15. Dr. Fu states that the shoulder injury is mild and recovery should be fast. He supports his opinion with the medical report of Dr. Ng Ming Shing stating that by 28 March 2009 the Plaintiff only had residual mild pain with improved range of movement. The shoulder was non-tender. The Plaintiff also expressed that she wished to resume work in view of the recovery and planned to return to work from 1 April 2009. The Plaintiff defaulted physiotherapy after March 2009 which confirmed that her shoulder condition had well recovered at that time.
16. Dr. Ko on the other hand opines that it develops into frozen shoulder resulting in pain, stiffness and weakness which needs a relatively long period for recovery (varies from 6 months up to 18 months).
17. Dr. Ko does not agree that the Plaintiff defaulted from physiotherapy after March 2009 could confirm that her shoulder condition had well recovered. From the physiotherapy report, it is noteworthy that at the latest assessment, the range of motion of both shoulders was still limited and not yet fully recovered.
18. Regarding the wrist pain, Dr. Fu remarked that the Plaintiff had not reported any wrist pain after the day of injury, which reflects that any wrist injury should be mild and should have well recovered after a few days of rest. During examination there was no abnormality detected except the reported pain and tenderness over the wrist region.
19. Both doctors agree that treatment received so far is appropriate and the Plaintiff does not need further treatment in view of her current condition.
20. Dr. Ko opines the prognosis for the soft tissue injury involving the Plaintiff’s left shoulder and both wrists should be satisfactory in the long run. Based on the present condition and also the physical findings in the joint assessment, the Plaintiff may have further improvement in the range of motion of her left shoulder with appropriate conservative treatment and continue to have self-mobilization exercise.
21. With regular stretching and strengthening exercises, Dr. Ko believes that the Plaintiff should have further improvement although she may not be able to have full recovery of the range of motion of the shoulders and the strength of the wrists. Dr. Fu opines that the prognosis for this kind of mild soft tissue injury is good. With regular stretching and strengthening exercise, the Plaintiff should regain her normal range of movement and power. She should recover will with minimal residual impairment.
22. Dr. Fu opines that the Plaintiff’s original work did not require heavy manual lifting. In view of her current condition she should be able to return to her original work as cleansing worker. Her efficiency will be decreased in the first few months as she has not worked for so long and has de-conditioned. However, with further exercise and training she should be able to return to her original working capacity with minimal impairment.
23. Dr. Ko opines that the Plaintiff’s original duty as a cleaning worker and cook in an old aged home does not require heavy manual work. However, this kind of job requires the worker to have repetitive, stereotyped work with the same tasks repetitively throughout the working hours. This is the exact situation which precipitates attacks of the wrist tendinitis as well as her shoulder pain. The Plaintiff’s work efficiency and effectiveness will be affected in a mild to moderate degree. In fact, the Plaintiff stated that she had tried to resume work on 1 April 2009 but found herself unable to cope with the job demand after half day of work due to her wrists and shoulder pain.
24. Dr. Ko recommends that the Plaintiff consider changing to other jobs that requires less physical demand and decreased requirement of repetitive, stereotyped work in her job task including cashier at shroff, storekeeper, worker at gas petrol station, security guard, etc.
25. Dr. Ko opines that sick leave period up to 1 year is considered to be appropriate and reasonable for treatment and investigation of the Plaintiff’s multiple injuries involving her wrists and also left shoulder.
26. Dr. Fu opines that the sick leave from the day of injury to 31 March 2009 should be appropriate.
27. Dr. Fu opines that the Plaintiff’s total impairment of whole person and loss of earning capacity as a result of the Accident should both be 1%.
28. Dr. Ko recommends that for the left shoulder residual pain, stiffness and weakness to have 5% upper extremity impairment which is equivalent to 3% whole person impairment. Dr. Ko recommends 1% whole person impairment for the Plaintiff’s bilateral wrist pain and weakness. Therefore the total whole person impairment should be 4%.

PSLA

1. The Plaintiff claims a sum of $230,000.00. Mr. Wong relies on ***Wong Ching Ha v. Manbright Co. Ltd. t/a Ngan Lung Restaurant*** DCPI 886/2007, ***Tsui Kwan Fai v. Goldfield N &W Construction Co. Ltd.*** DCPI 97/2006, ***Ali Shoukat v. Hang Seng Bank Ltd.*** HCPI 3/2003, ***Yeung Sze v. Win Art Design & Decoration Co. Ltd.*** HCPI 6/2000 and ***Ho Chi Ming v. Union Life Hong Kong Ltd.*** HCPI1204/1996.
2. Mr. Chung submits that a sum of $140,000.00 would be reasonable. Mr. Chung refers to ***Yu Ki v. Chin Kit Lam*** (1981) HKLJ 412, ***Lau Choi v. Szeto Wai Hung*** (1984) HKLJ 265, ***Lam Man Yin v. Choy Tak Fu*** (1985) HKLJ 241, ***Hong Kong Macao Hydrofoil Co. Ltd. v. Ng Chun Wai*** (1989) HKLRD L55, ***Lee Lap Pang v. Yuen Tat Wah t/a Chong Hkng Motor Company*** HCA 1111/1997, ***So Chung Kwong v. Ng Ming Fong*** [2000] HKLRD (Yrbk) 406 and ***Ho Bing Cheung v. Lam Yin Tuk*** [2005] HKLRD (Yrbk) 370.
3. Mr. Kau submits that PSLA should be in the range of $80,000.00 to $120,000.00. He relies on ***Ho Kin Keung v. Tong Kin Wa*** DCPI 2620/2008, ***So Cho Yin v. MTR Corp. Ltd.***DCPI 1069/2006, ***Ng Cheung Sou Chun Cecilia v. Savills Property Management***DCPI 2367/2008 and ***Lee Yuk Man v. Hilllberg Ltd. t/a Tsui King Lau Restaurant*** DCPI 1988/2006.
4. From the available medical evidence, and in particular the JMR, I find that the Plaintiff suffers soft tissue injury to her shoulder and wrists.
5. The views of Dr. Fu and Dr. Ko are in fact similar. In so far as the medical opinion of Dr. Fu and Dr. Ko differs, I prefer the opinion of Dr Fu.
6. I disregard the Plaintiff’s evidence at trial that there is problem with her right ring finger since it is not recorded any of the medical reports and the JMR.
7. Of all the authorities cited by Counsels, I find that only ***Wong Ching Ha***and ***Tsui Kwan Fai*** are suitable comparables.
8. The Plaintiff’s injuries are similar to those in ***Wong Ching Ha***and less serious than those in ***Tsui Kwan Fai***.
9. I award the sum of $200,000.00 for PSLA.

Loss of Earnings

1. As said, I prefer Dr. Fu’s opinion.
2. It is Dr. Fu’s view that the Plaintiff can resume her pre-accident job. Her efficiency will be decreased in the first few months but she can return to her original work capacity with minimal impairment with further exercise and training.
3. I should also add that Dr. Ko opines that the Plaintiff’s work efficiency and effectiveness will be affected in a mild to moderate degree.
4. Dr. Fu opined that 4 months sick leave is adequate.
5. Sick leave was granted intermittently from 27 November 2008 to 3 June 2009 (6 months and 7 days).
6. I find that the Plaintiff should be entitled to loss of earnings for the sick leave period as granted.
7. She should not be entitled to any future loss of earnings in the light of the medical evidence (in particular Dr. Fu’s opinion) before me. The Plaintiff herself admitted that her age and her education level affects the prospect of her getting a new job.
8. The Plaintiff’s average earnings at the time of the Accident was $7,490.00 per month [B432-433].
9. At trial, the Plaintiff testified that the going rate for her pre-accident job was in the region of $8,300.00. She said she obtained such information from the Labour Department. She also said that but for the Accident, her earnings would have been increased by 5% per annum.
10. It is common ground that there was no documentary evidence to support such allegation.
11. I am not convinced that the Plaintiff could use $8,300.00 as the basis to calculate her loss of earnings.
12. I therefore find that her pre-accident earning was $7,490.00 and that her loss of earnings should be calculated on that basis.
13. I agree with Mr. Chung that the Plaintiff shall be entitled to loss of earnings plus MPF for the period from 27 November 2008 to 3 June 2009 at:

$7,490 x (6 + 7/30) x 105% = $49,022.05.

1. I also agree with Mr. Chung that the earnings of $8,600.00 [B434-435] should be deducted.
2. Pre-trial loss of earnings and MPF should be:

$49,022.05- $8,600 = $40,422.05

1. I allow the Plaintiff 3 months’ time to look for a job after her sick leave expired. Her loss for that period is:

$7,490.00 x 3 x 105% = $23,593.50

1. I award the Plaintiff pre-trial loss of earnings and MPF at:

$40,422.05 + $23,593.50 = $64,015.55

Loss of Housekeeping Ability

1. The Plaintiff claims a lump sum of $50,000.00.
2. Mr. Chung submits that there should be no award as both experts agree that the Plaintiff is independent of daily living.
3. Mr. Kau for D2 submits that the appropriate award should be $10,000.00.
4. In the light of the opinion expressed in the JMR, I find that the Plaintiff does not suffer any loss of housekeeping ability.
5. The claim under this head is disallowed.

Loss of Earning Capacity

1. The Plaintiff claims a lump sum of $80,000.00.
2. Both Mr. Chung and Mr. Kau submit that 3 months loss at $7,490.00 (i.e. $22,470.00) is appropriate.
3. In the light of the expert opinion under the JMR, I am prepared to allow a nominal sum under this head.
4. I find that 3 months’ loss of earnings as submitted by Mr. Chung and Mr. Kau is appropriate in the circumstances.
5. I award $22,470.00 under this head.

Special Damages

1. The Plaintiff claims a total sum $18,630.00, which is agreed by D1.
2. D2 did not admit the Plaintiff’s claim in its Answer to Revised Statement of Damages. There was no submission by Mr. Kau in this regard.
3. The Plaintiff has provided sufficient documentary evidence in support of her claim. I shall allow the claim of $18,630.00 in full.

Summary on Quantum

1. Quantum is summarized as follows:

PSLA $200,000

Pre Trial Loss of Earnings & MPF $64,015.55

Loss of Earning Capacity $22,470

Special Damages $18,630

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$305,115.55

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1. Interest on general damages would be awarded at 2% per annum from date of writ to date of judgment and thereafter at judgment rate. Interest on pre-trial loss of earnings, loss of earning capacity and special damages would be awarded at half judgment rate from date of Accident to date of judgment and thereafter at judgment rate.

Conclusion

1. I find that the Accident and the Plaintiff’s injuries were caused by D2’s negligence, to which D1, D3 and D4 are vicariously liable.
2. I find that there is no contributory negligence on the part of the Plaintiff.
3. There will be judgment for the Plaintiff against D1, D2, D3 and D4.
4. In respect of the Third Party Proceedings taken out by D1, I dismiss D1’s claim against D3.
5. D1 did not puruse its Third Proceedings against D2 and D4 at trial. They are accordingly dismissed.
6. I dismiss D2’s Claim of Contribution/Indemnity agaisnt D1, D3 and D4.

Order

1. Judgment for the Plaintiff in the sum of $305,115.55 against D1, D2, D3 and D4.
2. I order costs nisi that D1, D2, D3 and D4 pay the Plaintiffs’ costs of the action, with certificate for Counsel, to be taxed if not agreed. The costs order nisi shall become absolute after 14 days from the date of handing down the judgment.
3. D1’s Third Party Proceedings against D3 and D4 is dismissed. D1’ Notice to D2 claiming contribution is dismissed.
4. So far as the Third Party Proceedings issued by D1 is concerned, I order costs nisi that D1 pays the costs of D2, D3 and D4 in defending the same, with certificate for Counsel, to be taxed if not agreed. The costs order nisi shall become absolute after 14 days from the date of handing down the judgment.
5. D2’s claim of contribution and/or indemnity against D1, D3 and D4 is dismissed.
6. Regarding D2’ claim of contribution and/or indemnity against D1, D3 and D4, I order costs nisi that D2 pays the costs of D1, D3 and D4 in defending the same, with certificate for Counsel, to be taxed if not agreed. The costs order nisi shall become absolute after 14 days from the date of handing down the judgment.
7. The Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.
8. I thank you Counsels for their assistance.

# (Rebecca Lee)

# Deputy District Judge

Mr. Charles T.C. Wong, instructed by Messrs. Szwina Pang, Edward Li & Co., assigned by the Director of Legal Aid, for the Plaintiff

Mr. Jerry Chung, instructed by Messrs. K.H. Lam & Co., for the 1st Defendant

Mr. Kevin Kau, instructed by Messrs. Huen & Partners, for the 2nd Defendant

3rd Defendant in person, absent

4th Defendant in person, absent