#### DCPI 1468/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1468 OF 2008

BETWEEN

FANG GUO QUAN and Plaintiffs

YU YAN WEI

and

CHOI MING SANG 1st Defendant

WEISHENG BUS LIMITED 2nd Defendant

##### Before: Deputy District Judge J. Wong

Dates of Hearing: 19, 22, 23 and 24 November 2010

Date of Judgment: 23 December 2010

## JUDGMENT

Introduction

1. This is a claim by the Plaintiffs couple (referred to as “the Husband” and “the Wife” individually, if necessary) for loss and damages suffered by them at a traffic accident happened in PRC.

Background

1. The Court of Appeal succinctly summed up the background of the case when they dismissed the 2nd Defendant’s appeal that the proper forum was the Court in PRC.

“1. The plaintiffs were passengers on a coach travelling from Hong Kong to Guangzhou on tickets which were bought at the 2nd defendant’s office in Hong Kong. The plaintiffs are residents of Hong Kong. The driver of the coach was the 1st defendant, who is also a resident of Hong Kong. The coach was travelling on the Guangzhou–Shenzhen Highway whilst being driven by the 1st defendant, when it was involved in an accident as a result of which the plaintiffs have sustained personal injuries. The plaintiffs had received their medical treatment in Hong Kong.

2. In this action, the plaintiffs claimed against the 1st defendant for negligence, the 2nd defendant, a company incorporated in Hong Kong and resident here, for breach of contract, as well as being vicariously liable for the negligence of 1st defendant who was allegedly an:

“… employee and/or agent of the 2nd Defendant …”.

3. The accident occurred on 24 July 2005. The action was commenced on 7 July 2008. …”

(HCMP 1759/2009, Judgement dated 11.11.2009)

Preliminary matter

1. At the outset of the trial, Ms. C. Tong, Counsel for the 1st Defendant, applied to amend her defence to the effect of bringing up the issue as to whether the Plaintiffs did or did not wear safety belts at the material time. Ms. L. Lau, Counsel for the 2nd Defendant agreed to the application, but not Mr. A. Lam, Counsel for the Plaintiffs. Upon discussion, I allowed the application and agreed to give reasons later. Here are them:
2. The safety belt issue is important. It affects quantum to be assessed, if necessary. Without it, one of the real issues among the parties will not be determined by the Court.
3. The issue is factual and simple. It could be easily resolved by, for example, production of a photo taken, a certificate about the coach, and so forth. It was up to the parties to adduce evidence before this Court. In any event, at least, 3 witnesses would be able to testify before me.
4. I did not see any real or substantive prejudice suffered by the Plaintiffs.

The Defences

1. The Defences may be summarized in the followings.
2. 1st Defendant
   1. The accident was caused by the negligence of other drivers, not him.
   2. The Plaintiffs were estopped and precluded from claiming him because after the accident, a group of persons, including the Plaintiffs, executed a waiver in favour of him.
   3. If he would be however held liable, the Plaintiffs were contributory negligent because they failed to wear the seat belt.
   4. Further, in any event, the damages were excessive.
3. 2nd Defendant
   1. It was only an agent to sell tickets for and on behalf of its principal, the service provider 廣東奔力冠一旅遊客運有限公司 (“奔力冠一”). The coach licence 粵Z.BH04港was registered in the name of奔力冠一. It also provided the coach, the driver (i.e. the 1st Defendant) and the insurance coverage in PRC.
   2. The Plaintiffs were found sustaining no injures by the PRC hospital.
   3. Thereafter, they waived the rights of compensation. In reliance of it, 奔力冠一or the 2nd Defendant did not follow up the matter. The Plaintiffs were therefore estopped and precluded from claiming it.
   4. After all, the damages were also excessive.

Issues

1. With the above in mind, coupled with the assistance from Mr. Lam in his opening, I further set out the issues as below:
2. How did the accident happen? Was it caused by the negligence of the 1st Defendant, or some other drivers?
3. Did the Plaintiffs suffer injuries at the accident?
4. After the accident, what intimation did the Plaintiffs make to the Mainland traffic police? Under what circumstances they signed the “waiver” headed with “申請書”? To whom the document was written? What was written thereon and its legal effect?
5. What was the relationship between the 2nd Defendant and 奔力冠一?
6. Subject to (4), what was the relationship between the 2nd Defendant and the Plaintiffs? Was there a contract between them? If so, did the contract contain an implied term of safety? Further, if applicable, was the 2nd Defendant in breach?
7. As an alternative to the contractual claim, did the 2nd Defendant owe a duty of care in tort to the Plaintiffs? If so, was the 2nd Defendant in breach?
8. Was the 2nd Defendant vicariously liable for the negligence of the 1st Defendant, if any?
9. Subject to the determination of liability, were there safety belts available at the coach for the passengers at the material time? If so, did the Plaintiffs wear them?
10. Was the Plaintiffs’ claim excessive? What are the appropriate damages to be awarded?
11. It should be mentioned at this juncture that:
12. Ms. Lau kindly confirmed that Hong Kong law was applicable to the present disputes.
13. Subject to the determination of liability, all Counsel also kindly agreed the following quantum.
    1. The Husband:

$

* + 1. Pre-trial loss of earnings 1,008.0

(3 days of sick leave)

* + 1. Medical expenses 12,028.0
    2. Travelling expenses 1,000.0
    3. Purchase of nourishing food 12,581.5

26,617.5

======

* 1. The Wife:

$

* + 1. Medical expenses 22,232.0
    2. Travelling expenses 1,000.0
    3. Purchase of medical

equipment 2,695.0

* + 1. Purchase of nourishing food 12,581.5

38,508.5

======

The Evidence

1. To decide on the issues, one has to rule on the facts of the case upon available evidence before the Court, including documentation and oral evidence from witnesses. Without the question of authenticity, documents are generally more reliable than witnesses as the latter may elect not to tell the truth, exaggerate consciously or unconsciously, forget part of the facts as memory fades out as time goes on.
2. In the present proceedings, both documents and live witnesses were available. There was no argument that any of the documents was fabricated or untrue. There were however lots of arguments that the witnesses were not to be believed. Upon thought, it is my general observation that:
3. written documents are preferred to if there is a conflict between them and witnesses, and
4. the Plaintiffs’ evidence are preferred to if there is a conflict between them and those of the Defendants.
5. I say so for the following reasons.
6. The evidence of the 1st Defendant is important because he was the driver of the coach. “How did the accident happen?” and “Were there safety belts on the coach?” are two key factual disputes herein. However, he failed me in a number of aspects.
7. The 1st Defendant tried to suggest that the accident was caused by other drivers. He said that a truck in front of him stopped suddenly, forcing him to brake and swerve to the right to avoid a collision. He successfully did so, but it happened that there was another heavy vehicle being “stationary” on the road blocking him. In the words of his Counsel, it was an inevitable accident.
8. Such suggestion is contradictory to contemporaneous documents.
   1. The 1st Defendant was held wholly responsible for the accident:

“…蔡發現與前方同車道車輛距離過近，即往右打方向變入右邊主車道後，甲車車頭碰撞同車道前方由湖北省蒲圻市官塘驛鎮振興街87號的駕駛員徐輝鵬駕駛粵A•B3527號重型半挂牽引車（乙車）車尾，造成甲車駕駛員蔡明生、甲車乘客馮金英、曾人聰、曹金燕、鄧美華、姚杏萍、莫玉清七人受傷及甲、乙車兩車不同程度損壞的交通事故。

經我大隊調查後認為，駕駛員蔡明生駕車過程中沒有按照操作規範安全駕駛，其行為違反《中華人民共和國道路交通安全法》第二十二條第一款之規定；根據《交通事故處理程序規定》第四十五條第一款第一項之規定，駕駛員蔡明生應負該事故的全部責任；駕駛員徐輝鵬，乘客馮金英、曾人聰、曹金燕、鄧美華、姚杏萍、莫玉清不負事故的責任。

以上事實有當事人蔡明生、徐輝鵬的供述及身份證明、現場圖、現場照片、現場勘查記錄、機動車檢驗報告、車輛痕跡檢驗記錄、醫院診斷證明等證據證實，事實清楚，證據確鑿。”

(交通事故認定書dated 12 August 2005）

* 1. Somebody entered into a settlement agreement for the 1st Defendant with the driver of the heavy vehicle and one passenger on the coach:

“各方當事人在了解國家有關賠償政策規定後，達成以下協議：

* + - 1. 粵Z•BH04港號車因事故的拖車費（憑票）、停車費（憑票）、修配費由粵Z•BH04港號大客車方自行負責。
      2. 粵A•B3527號重型半挂牽引車因事故的拖車費（憑票）、停車費（憑票）、修配費：￥6330元、鍳定評 估費 ：￥310元由粵Z•BH04港號 大客車方負責。
      3. 粵A•B3527號重型半挂牽引車上貨物（麥芽糖漿）損失費：￥4980元，鍳定評估費：￥250元由粵Z•BH04港號大客車方負責。
      4. 傷者莫玉清因事故受傷的醫療費（憑票）、交通費（憑票）由粵Z•BH04港號大客車方負責。

以上費用自調解之日一次性付清，雙方互不追究其它經濟賠償責任。”

(交通事故調解書dated 11 September 2005)

There were some disputes over the exact identity of that “somebody”. However, in my view, for the present purpose, such question is not particularly relevant. On balance, the one who paid for the 1st Defendant had to be somebody who was responsible for the acts of him. The payment, without reservation, amounted to an admission of liability.

1. The oral evidence of the 1st Defendant turned to be unreliable under the cross-examination of Mr. Lam.
   1. The 1st Defendant told the Court that he started to notice the truck when it was at a distance of about 100 metres from him. Thereafter, before the swerving, it was about 20 metres. It therefore suggests that the 1st Defendant was driving faster than the truck.
   2. Within such period, he further told that there were some 10 to 20 small vehicles cutting the lanes in between. He had to be alerted by the then traffic condition.
   3. As pointed out by Mr. Lam,

“It is trite law and common sense that each and every driver has to keep a safe braking distance behind the vehicle immediately in front of it so that even if the driver of the vehicle in the front suddenly slowed down, the driver of the vehicle following it would have sufficient time to react to the situation. The duty is squarely upon D1 in the present situation.”

(para. 3(g) of Mr. Lam’s Final submission)

* 1. As to the heavy vehicle, to start with, I cannot understand how it could be “stationary” on a highway. There is no single piece of evidence suggesting the same, apart from that of the 1st Defendant. However, even if it were “stationary” there:

“… There is also no merits in D1’s allegation whatsoever because it was his duty to keep a safe braking distance behind the first vehicle (the truck), and part of the reasons for that was he would have been able to see the traffic condition on the right-hand-side lane, including the second vehicle.”

(para. 3(h) of Mr. Lam’s Final Submission)

1. Ms. Tong suggested that the accident was inevitable as far as her client was involved. She cited a number of authorities. They however cannot help the 1st Defendant because the argument is a factual one and depends much on the particular circumstances of the case.
2. Regarding the safety belt issue, the 1st Defendant said that there was such facility, lap belt (安全腰帶), on the coach for the passengers. The Plaintiffs just failed to use them. Nonetheless, the availability of the safety belts on the coach is not supported by any objective evidence, like photos or certificate of inspection. Quite to the contrary, one would expect that such live and important issue had to be appeared somewhere in the documents concerning investigation of the accident in PRC and compensation for the victims whose claim was either settled or lodged there, but it did not appear anywhere in these documents.
3. The 1st Defendant also said that the coach was examined in Hong Kong every year, including checking that safety belts were provided at the passenger seats. However, upon being put that the relevant Hong Kong legislation (viz. Regulation 8A(1) and (2) of the Road Traffic (Safety Equipment) Regulations, Cap 374F) did not require so, even at the date of the trial herein, not to mention years ago when the accident happened, the 1st Defendant was unable to give any further reply.
4. The 1st Defendant’s evidence in relation to the taking care of the safety belts every day is far from believable. As pointed by Mr. Lam in paragraph 8(h) of his Final Submission,

“… while he was driving the coach in 2003-2005, before he went off duty everyday, he would adjust all the safety belts on the 45 passengers seat of the coach to the shortest length and buckle up all the safety belts so that all the safety belts would rest neatly and tidily close to the gap of the vertical back and the horizontal seat of the passengers seat. With the greatest respect, this allegation is nothing but false. There is absolutely no reason, not to mention no good reason, for D1 to buckle up the safety belts knowing full well that the passengers coming on board the next journey would have to unbuckle the safety belt before they could buckle up. No driver would have done what D1 alleged to have done. It is clear that D1 made up the allegation with a view to beefing up his case that there were safety belts provided for the passengers seat of the coach …”

1. The evidence of the director of the 2nd Defendant, Mr. Chen, is also important for the purpose of determining the exact relationship among the parties, in particular that between the Plaintiffs and the 2nd Defendant. Unfortunately, I also find him unreliable.
2. The 2nd Defendant pleaded that it only sold the tickets as the agent of 奔力冠一. The staff at the counter would inform all customers as such.
3. However, no staff was called to give evidence to such effect.
4. The 2nd Defendant usually sold tickets for buses they managed. Mr. Chen told the Court that it had started selling tickets for 奔力冠一from 17 September 2004. Before the accident, they did not encounter any problem. After the same, they added something on the tickets to the effect that they were selling the same as agent only.
5. Without commenting whether the new practice could help the 2nd Defendant avoiding its liability in future, such change simply makes clear that the 2nd Defendant did not realize the importance of the difference between selling their own tickets and selling tickets for others. As such, it also makes the oral representation by all counter staff to customers not to be believed.
6. Having decided that the Plaintiffs’ case is more credible in considering the overall oral evidence before me, I cannot accept all of their factual propositions as some of them were either untrue or unreliable in light of the documents.
7. Both Plaintiffs maintained that the tickets did not contain any ticket end (票尾), but it cannot be true as both vertical edges of the original tickets produced by them (exhibit P2 to P4) clearly bear “dots”. It means that each ticket contains 3 parts: the ticket stub (票頭), the ticket itself (票身) and the ticket end (票尾).
8. The Plaintiffs disclosed not only 3 original tickets, but also a copy of the back sheet of another ticket being stuck with a round label containing: printed words of “冠一巴士” and hand written numbers of “7422”. The Plaintiffs could not come up with any explanation of the document but admitted that it was produced by them. With respect, it must be something coming into their hands or possession of any of their family members out of the subject trip.
9. With the above copy label in hand and coupled with the photos of the coach as shown in the investigation by the PRC traffic police (showing the name of 廣東奔力冠一旅遊客運有限公司 on the side of the coach), it makes one hard to agree that the Plaintiffs were entirely unaware of “冠一巴士”; “奔力冠一” or “廣東奔力冠一旅遊客運有限公司” at all. One of course must accept that all passengers had to get off and board the coach 3 to 4 times throughout the journey at the Hong Kong Immigration and PRC Immigration. The labels were provided to the passengers to help them identifying the “correct” coach to get on.
10. Upon consideration, I make the following finding of facts:
11. The 1st Defendant failed to keep a safe distance between his coach and the truck ahead. When the truck slowed down, the 1st Defendant had to swerve to the right lane to avoid a direct collision and as such, it rammed into the heavy vehicle.
12. After the accident, the Plaintiffs were sent to the local hospital there, receiving simple and initial treatment. It was late at night. They wanted better treatment in Hong Kong. They also wanted to take their mother and children back to Hong Kong.
13. The Mainland traffic police told them that they had to stay if they wanted to claim in PRC. The family was desperate to leave for Hong Kong. They did not have legal advice. The Plaintiffs’ injuries were relatively less serious than others, in the sense that they were still conscious and could walk themselves. They, together with other passengers in similar situation, signed the document to the police there headed “申請書”.

“本家庭方國權、余豔薇、方月衡、方中正於2005年7月24日乘坐粵Z•BH04港號大客車，途經廣深高速公路東莞路段時發生交通事故，事故後一家人進醫院檢查，經檢查後，無大礙。現向交警部門申請不立案處理，所有費用均由我們自行負責，不需要責任方賠償，不需交警出示證明材料。

申請書

方國權、余豔薇、

方月衡、方中正”

The Plaintiffs did not make any other intimation to the police apart from the above document. However, the Husband was barely aware of their right or possibility of claiming damages as, after all, they were injured. He therefore asked some one to help him writing down his position and asked the “responsible person”, i.e. the one who represented the coach and came to take them back to Hong Kong.

“道路交通事故筆錄紙

我們是香港人：姓名：方國權，男43歲，方中正，男9歲，方月衡，女11歲，余艷薇，女43歲，何麗華，女73歲。

我們在2005年7月24日下午15時，由廣州乘坐威盛直通巴士有限公司安排廣東奔力冠一旅遊客運公司，車牌號Z•BH04港大客車回香港，途中在廣深高速東莞路段發生交通事故，造成上述人員有不同程度的身體傷病。交通事故發生後，我們由虎門交警高速大隊負責送到東莞市虎門醫院附屬虎門創傷急救中心診治。但我們在醫院裏得不到積極之診治，現要求轉院回香港診治，現責任方威盛直通巴有限公司廣東奔力冠一旅遊客運公司負責人已同意我們的請求，同意我們回香港診治，直至我們的身體恢復健康才結案。同時在今次事故中之醫療費、誤認費、補償費、按香港機關法律條例進行賠償。上述協議請求交警部門進行監督作證。

|  |  |  |
| --- | --- | --- |
| 甲方（傷者）簽名確認： |  | 乙方威盛直通巴士有限公司  負責人簽名確認： |
| 余艷薇 方國權  方月衡 方中正  何麗華 |  | 蔡柱財  9485 9720 |

1. The 2nd Defendant sold coach tickets for 奔力冠一, as evidenced by their Agreement (代售班車票協議書) dated 27 September 2004.
2. Notwithstanding such agency relationship, it was not made known to the Plaintiffs at all material times. They bought their tickets from the counter of the 2nd Defendant under its name of “威盛直通巴士有限公司”. It was also the only name appearing on their tickets. The counter staff did not tell them that the 2nd Defendant only sold the tickets for and on behalf of 奔力冠一.

Legal Principles

1. With the above facts findings, they can resolve most of the disputes of facts among the parties. Before approaching to answer the issues identified hereinabove, as far as they are relevant, I also set out the following applicable legal principles.
2. Inevitable accident is:

“…where a person does an act, which he lawfully may do, but causes damages, despite there having been neither negligence nor intention on his part. … However, it has been doubted whether much advantage is gained by the continued use of the expression “inevitable accident”. To quote the words of Lord Greene.

“I do not feel myself assisted by considering the meaning of the phrase ‘inevitable accident’. *I prefer to put the problem in a more simple* way, namely has it been established that the driver of the car was guilty of negligence?”…”

(Charlesworth & Perey on Negligence, 10th ed. at P. 218)

1. (i) Waiver in the context of contract is:

“… where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of “waiver by estoppel” rather than “waiver by election” may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

(Chitty on Contracts, Vol. 1, 13th ed. at p. 1469-1470)

Mr. Lam added, and I agreed that:

“… two pre-requisites must be satisfied – (i) the waiver must be clear and unequivocal, and (ii) D2 must have altered its position in reliance on the waiver, or at least acted on it.”

(para. 22 of Mr. Lam’s Final Submission)

It should also be noted that:

“… the word “waiver” is used in the law in a variety of different senses and so bears “different meanings”. Two types of waiver are relevant here. The first type may be called “waiver by election” and waiver is here used to signify the “abandonment of a right which arises by virtue of a party making an election”. Thus it arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them… It is important to appreciate that, in this context, the party who makes the election only abandons his right to treat the contract as repudiated: he does not abandon his right to claim damages for the loss suffered as a result of the breach. A second type of waiver may be called “waiver by estoppel” and it arises when the innocent party agrees with the party in default that he will not exercise his right to treat the contract as repudiated or so conducts himself as to lead the party in default to believe that he will not exercise that right …”

(Chitty on Contracts, Vol. 1 13th ed. at p.1543-1544)

(ii) Waiver in the context of tort:

“**Wavier by an election inconsistent with a tort claim**. By contrast a tort is discharged when the claimant chooses a right that is inconsistent with complaining about the tort. In Lord Atkin’s words in *United Australia Ltd v Barclays Bank Ltd*, “it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights … if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose”.

(Clerk & Lindsell on Torts, 19th ed. p. 1952)

1. Promissory estoppel, in the words of Ms. Tong:

“The elements to be satisfied to find promissory estoppel are as follows: (1) a clear and unequivocal promise which is intended to be binding, (2) where there is an existing legal relationship between the parties, (3) which was acted on in reliance (4) to the detriment of the other party.”

(para. 123 of Ms Tong’s final submission)

1. Mr. Lam kindly agreed that the Plaintiffs could not sue the 2nd Defendant on contract if they at the material time knew that the 2nd Defendant was only agent for 奔力冠一.
2. Ms. Lau also kindly agreed that the 2nd Defendant could be held liable under contract if the Plaintiffs at the material time did not know that the 2nd Defendant was only agent for 奔力冠一.
3. There must be an implied term of safety under the ticket to carry all passengers, including the Plaintiffs with reasonable care for the journey.
4. The Privy Counsel decision *Wong Mee Wan v Kwan Kin Travel Services Ltd & Others* [1995] 3 HKC 505 is the leading authority confirming that Hong Kong tour operator can be held liable for negligence of its independent contractor. It was held that:

“(1) The fact that the supplier of services may under the contract arrange for some or all of them to be performed by others did not absolve the supplier from his contractual obligation. He may be liable if the service was performed without the exercise of due care and skill on the part of the sub-contractor just as he would be liable if the sub-contractor failed to provide the service or failed to provide it in accordance with the terms of the contract. *British Wagon Co v Lea* (1880) 5 QBD 149 applied (at 510C-D).

(2) A distinction had to be drawn between cases where the party agreed merely as agent to arrange for services to be provided and where he undertook to supply the services. The fact that it was known that another person would or might perform the services or part of them did not mean that the contract was one of agency. In each case it had to be asked as a matter of construction into which category the contract fell. *Craven v Strand Holidays (Canada) Ltd* (1982) 40 OR (2d) 186 applied (at 510E-I).

(5) Taking the contract as a whole, the first defendant had undertaken to provide and not merely to arrange all the services included in the programme, even if some activities were to be carried out by others. The first defendant’s obligation under the contract that services would be provided with reasonable skill and care remained even if some of the services were to be rendered by others, and even if tortuous liability may exist on the part of those others (at 515A-C).

(6) It was an implied term of the contract that reasonable skill and care would be used in rendering the services to be provided under the contract. The trip across the lake was clearly not carried out with reasonable skill and care in that no steps were taken to see that the driver of the speedboat was of reasonable competence and experience and the first defendant was liable for such breach of contract (at 515C-E).

(7) …”

1. The facts of *Foulkes v The Metropolitan District Railway Company* [1879] 4 CPD 267 closely resemble the present case. In the authority, the Plaintiff bought his ticket from A Company. On his return trip, he boarded the train provided by Company B. The Plaintiff chose to sue the carrier. He won the case. Nonetheless, as observed by Lords J.:

“… the plaintiff might have two remedies, one against the defendant company on their implied contract or undertaking (I do not think it much matters whether we call it a contract or an undertaking, especially after the cases of Marshall v York, Newcastle, and Berwick Ry. Co n(1), and Austin v Great Western Ry. Co n(2)), the other remedy against the South Western Company who issued the ticket. I cannot see any difficulty in that. Take this illustration: railway A issues tickets for railway A and railway B. The traffic is sometimes worked by carriages and servants belonging to railway A, and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A and gets into a carriage belonging to railway B, drawn by railway B’s engines, and manned by railway B’s servants. The passenger traverses some portion of railway B’s line, an accident is caused by the negligence of railway B’s servants, and through some defect in railway B’s carriages not being properly adapted to the exigencies of the traffic. Now, although not necessary perhaps, to go that length for the decision of this case, I think that, according to the authorities, the passenger could sue either railway A or railway B. He could sue railway A on the contract arising from the ticket issued by the company to carry him the whole distance with reasonable care or caution, or he could sue railway B as the immediate authors of the negligence, on the implied contract or undertaking which would arise from his having been received into the carriage, or from his having been invited to go into the carriage of railway B and become a passenger on the railway.”

1. Service provider may attract liability under the concept of holding out. In *Rogers v Night Riders (a firm) and others* [1983] RTR 324:

“**Held**, allowing the appeal, that, on the facts, the defendants had held themselves out to the general public as a car-hire firm undertaking to provide a vehicle to convey the plaintiff to her destination; that the defendants could foresee that the plaintiff might be injured if the vehicle provided for her was defective and, accordingly, they owed the plaintiff a duty to take reasonable steps to ensure that the vehicle so provided was properly maintained and reasonably fit for that purpose (p. 328 H-L); and that the duty could not be delegated by the defendants to a third party, such as the driver, whether an employee or an independent contractor, so as to evade responsibility for breach of that duty.”

Answers to the Issues

1. I now apply the above principles to the facts found by me and answer the issues:
2. The accident was solely caused by the negligence of the 1st Defendant. He failed to keep a proper distance with the truck in front. He also failed to pay proper attention to the heavy vehicle. The accident was not an inevitable one.
3. The Plaintiffs did suffer injuries at the accident.
4. The Plaintiffs are not estopped from bringing proceedings against both Defendants in Hong Kong. “申請書” has to be understood in light of the circumstances they signed, together with “道路交通事故筆錄紙”. There is no clear and unequivocal statement made by the Plaintiffs to let go both Defendants in Hong Kong. Quite to the contrary, they did reserve their position.
5. The 2nd Defendant was agent for selling tickets for its principal 奔力冠一.
6. Such agency relationship was not known to the Plaintiffs. Hence, the 2nd Defendant was still their contracting party in the eyes of the Court. The contract contained an implied term of safety. The 2nd Defendant breached it as the 1st Defendant had been held negligent in the accident under the principle of *Wong Mee Wan.*
7. As an alternative, the 2nd Defendant did owe a duty of care in tort under the principles as stated in the said authority of *Foulkes and Night Riders*. Such duty was also breached as a result of the negligence of the 1st Defendant.
8. The 2nd Defendant was vicariously liable for the negligence of the 1st Defendant.
9. There were no safety belts available to the passengers on the coach. The Plaintiffs were not contributory negligent to their injuries suffered.
10. Having determined the liability against both Defendants, I now turn to the assessment.

The injuries

1. Upon return to Hong Kong, the Plaintiffs immediately went to the A&E Department of North District Hospital at about 1:30 a.m. on 25 July 2005. From the reports, the Husband suffered:

“1cm laceration (already sutered) over right supraorbital region, no conjunctival haemorrhage bruised left forehead, loosened teeth, right knee abrasion with mild effusion, tenderness over medical aspect, range of movement decreased probably due to pain, X-rays of his skull, right orbit and right knee showed no fracture.

The provisional diagnosis was head and right knee injuries in road traffic accident.

The following treatment were given, intramuscular tramadol injection for immediate pain relief dologesic, triact, hirudoid cream.”

(Report dated 11 August 2008)

And, the Wife:

“Abrasion was noted at left face. Bruises were noted at both knee. The range of movement of shoulders were normal. X-ray of facial bone and both knee showed no fracture.

The provisional diagnosis was multiple injuries.

The following treatment was given – analgesics.”

(Reported dated 11 August 2008)

1. The Wife’s neck pain was further recorded in a physiotherapy report prepared by Caritas Medical Centre dated 19 November 2005:

“… During the initial visit, this patient presented with deep stretching pain over neck and left shoulder especially on right neck rotation and left shoulder elevation. The treatment she received were intermittent neck traction, hot pack, neck and thoracic mobilization and stretching exercise. Up till 17/11/2005, she has received 7 sessions of physiotherapy treatment. Objectively, range of motion (ROM) of neck flexion and extension was full but with blocking pain on end range of neck extension. For neck side flexion, right side was ¼ ROM and left side was ½ ROM with pain elicited. For neck rotation, left side ROM was full but right side was 2/3 ROM with pain elicited. On palpation, muscle spasm was found and stiffness over upper thoracic spine.”

1. Finally, the Plaintiffs and the 2nd Defendant did also arrange for joint reports from orthopaedic expert Dr. Henry Lo. The Husband was said:

“**Diagnosis**

Mr. Fang sustained the following injuries:

1. Right peri-orbital skin laceration

2. Right knee soft tissue contusion

3. Traumatic loss of teeth

…

**Treatment**

The laceration was sutured and has healed uneventfully without residual symptoms or obvious cosmetic deformity. The right knee contusion has healed up completely without specific treatment. The right lower limb balance is slightly impaired compare lower limb as demonstrated by the right leg being less stable during single. However, overall, the recovery is excellent. He can squat fully and there is right knee. The dental trauma resulted in loss of more than half his teeth and he needs to use a denture to help him speak and eat. His speech is easily comprehensible.

**Prognosis**

The prognosis of his dental injuries should be assessed by a dental surgeon. In terms of his right knee and right peri-orbital facial injuries, the prognosis is excellent. No long-term complication is expected in these areas.

**Employability**

He is fully able to continue his work as a warehouse manager and perform all the lifting tasks as before. He claims that his speech is slightly affected when he is talking on the telephone at work but I did not find him difficult to understand. His speech is not slurred.

…

**Whole person impairment and loss of earning capacity**

From an orthopaedic perspective, he has not suffered any whole person impairment or loss of earning capacity.”

On the other hand, the Wife:

“**Diagnosis**

Madam Yu sustained a strain injury of the muscles of the neck and shoulders, namely the trapezius muscles and a strain of the midline cervical ligaments namely the superior nuchal ligament, and interspinous ligaments. She also has radiological evidence of degeneration of the cervical spine which is unrelated to the accident. The MRI findings of mild disc prolapses from C3/4, C4/5, C5/6 and C6/7 levels are part of the natural degenerative process and not caused by the accident. Her present symptoms are related to the soft tissues as mentioned and are not likely to be caused by the degenerative changes, which are quite common even in people without neck symptoms. She has pain during movement of the neck and the range is slightly reduced.

She also suffered minor abrasions to her face and both knees, which have all resolved uneventfully.

…

**Treatment**

The soft tissue injuries of the neck were treated by physiotherapy. This was standard and appropriate treatment. For her future treatment, she should be observed of her posture and avoid prolonged forward bending (looking down) or extension (looking up) of her neck and stretch her neck muscles and change her head and neck position regularly. This would reduce the frequency of neck discomfort. She may benefit from short courses (around six sessions) of physiotherapy to alleviate her neck symptoms on an as required basis. Surgery is not required.

**Prognosis**

The prognosis of her neck injury is good provided she observes her head and neck posture. She has recovered well from her injury and at present she does not need to take painkillers. She can manage house chores and shop for groceries and she is independent in her activities of daily living.

…

**Employability**

She is fully able to continue working as a warehouse manager but she may experience mild neck discomfort if she has to lift and carry heavy rolls of fabric repetitively but this should settle with rest and self-stretching exercise.

**Whole person impairment and loss of earning capacity**

From an orthopaedic perspective, she has suffered approximately 1% whole person impairment and 1% loss of earning capacity.

PSLA

1. Counsel referred to me and commented on a number of authorities. I find *So Sau Man v Leung Ming Kwong and Another* (DCPI 376/2005, 18 October 2005, unreported) a good starting point for the Husband’s injury. In that case, a right lip laceration lost of 3 teeth justified $100,000 PSLA. The Husband asked $200,000 for, among others, loss of 5 teeth instantly and losing of a further 10 later. His claim must be allowed in full.
2. On the other hand, *Muhammad Saddiq v Cheung Chi Keung* (HCPI 1018/2006, 8 April 2008, unreported) is a better comparable to the Wife’s case, save that she, among other minor injuries, suffered only a whiplash to the neck, but not a sprained back. I will grant her also $200,000.

Cost of part-time domestic helper

1. The engagement of domestic helper must be reasonable in light of the injuries of the Plaintiffs. However, how far should they go? After all, she had 79 days of sick leave and Dr. Ho only agreed a period of 8 weeks sick leave was reasonable to the Wife. Upon thought, I take the view that the assistance of a part-time domestic helper for 1 year is reasonable in the circumstances, and hence will allow the sum of $27,000 ($50 x 45 hours x 12 months). Hence, $13,500 will be awarded to the Husband and the Wife individually.

Pre-trial loss of earnings and MPF for the Wife

1. The Husband and the Wife worked together. The former was the manager and the latter, the director. The Husband only claimed 3 days of loss of earnings for $1,008 as he only took 3 days sick leave. However, the Wife had a total of 79 days of sick leave certificate. She therefore had a bigger claim of $45,622.50 ($16,500 x 79/30 + 5% MPF). Further, she said that thereafter she easily lost her attention, made mistakes at work easily and could not carry out some manual work requiring strength. As a result, her elder brother, the other director of the employer, decided a salary deduction. She had no choice but to accept it as she did perform “worse” than before. She asked for a further sum of $137,025 ($16,500 - $12,000 x 29 months + 5% MPF). The Defendants disagreed and challenged the claim. However, the Wife’s case is well supported by IRD documents and I also find her generally a credible witness, her claim under this head is allowed without deduction.

Costs of future medical expenses by the Husband

1. When Mr. Lam started his clients’ case in the opening, he asked for a new head of damages for the Husband, namely $85,000 for replacement and re-fixing of the dentures from time to time, say a total of 10 times ($8,000 - $9,000/time x 10 times). Upon careful consideration, I take the view that it is not to be allowed, both as a matter of pleadings and on facts.
2. It is trite law that a party is “bound” by his pleadings. He cannot go beyond the case he pleaded. (Amended) Statement of damages is part of the pleadings herein and I cannot locate any reference of the claim for future medical expenses by the Husband.
3. There is no proper medical evidence before me from any dental surgeon to explain the expenses.
4. The witness statement of the Husband did not contain any reference of such expenses. Although he did “supplement” it when he was in the witness box, only little weight should be given to it.

Summary

1. In conclusion, I will allow the followings to the Plaintiffs against both of the Defendants.
2. The Husband:

$

* 1. Damages for PSLA 200,000.0
  2. Pre-trial loss of earnings 1,008.0

(3 days of sick leave)

* 1. Medical expense 12,028.0
  2. Travelling expenses 1,000.0
  3. Purchase of nourishing food 12,581.5
  4. Costs of hiring part-time 13,500.0

domestic helper

240,117.5

=========

1. The Wife:

$

* 1. Damages for PSLA 200,000.0
  2. Pre-trial loss of earnings and MPF 182,647.5
  3. Medical expense 22,232.0
  4. Travelling expenses 1,000.0
  5. Purchase of medical equipment 2,695.0
  6. Purchase of nourishing food 12,581.5
  7. Costs of hiring part-time 13,500.0

domestic helper

434,656.0

========

Interest and costs

1. Regarding interest, the Plaintiffs are entitled to interest at 2% per annum from the date of writ to the date hereof on PSLA, pre-trial loss of earnings and MPF. As to other damages, interests are to be calculated at half of the judgment rate from the date of the accident to the date hereof.
2. There is also an order nisi that both Defendants shall pay cost of the Plaintiffs for the whole proceedings, including Certificate for Counsel for the hearings before me, to be taxed, if not agreed.

# (Jack Wong)

# Deputy District Court Judge

Mr. A. Lam instructed by Messrs. S.H Chan & Co. for the Plaintiff

Miss C. Tong instructed by Messrs. Ho, Tse, Wai & Partners for the 1st Defendant.

Miss L. Lau instructed by Messrs. H.L. Wong & Co. for the 2nd Defendant.