DCPI 1615/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1615 OF 2009

(transferred from High Court Personal Injuries Action No. 250 of 2007)

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BETWEEN

LAM SUK HAN (林淑嫻) Plaintiff

and

NG SUK HAN (吳淑嫻) 1st Defendant

PIONEER INSURANCE & SURETY CORPORATION 2nd Defendant

and

ALLIANCE MANAGEMENT CONSULTING LTD 1st Third Party

PANG WAI LOK JIMMY 2nd Third Party

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Coram: His Hon Judge Leung in court

Date of hearing: 12, 15 and 18 March 2010

Date of judgment: 17 June 2010

**J U D G M E N T**

1. At the late night of 8 April 2005, a traffic accident occurred near the exit of the Hunghom Cross Harbour Tunnel in Kowloon involving the private car driven by **Ng**, the 1st Defendant, and a bus of which the Plaintiff was a passenger. The Plaintiff commenced legal proceedings in the High Court for damages against Ng. The insurer of the car joined as the 2nd Defendant.
2. Ng then commenced third party proceedings for an indemnity against the 1st Third Party, **Alliance**, her employer and the registered owner of the private car that she drove that night. The shareholder and Managing Director of the company, **Pang**, was joined as the 2nd Third Party.
3. In 2009, the main action was settled by payments made by Ng and the insurer of the car. The third party action was also transferred to the District Court.

**Undisputed background**

1. Alliance is a consultant on procedures for attaining the ISO 9000 and logistic operational security standard compliance. Pang was at the material time a shareholder and Managing Director of Alliance. Alliance was the registered owner of the car.
2. In February 2005, Ng joined Alliance as a consultant. By April 2005, Ng had worked for Alliance for a month and a half and was still in her probation. Driving was however not one of the duties that she was employed to perform.
3. Alliance’s office was at the material time situated at Lippo Tower, Queensway. Occasionally, Pang would park the car at the car park of the Bank of China Tower (“**the Car Park**”). Not being a tenant of that commercial building, Pang managed to use the Car Park with the assistance and arrangement of his friend Victor Lui (“**Lui**”). Lui was a manager of the management company there.
4. On 8 April 2005, which was a Friday, Pang had to catch an 8:25 pm flight for Shanghai on business. He asked Ng to come along to the Airport Express Station in Central (“**the Station**”). His instruction was that Ng had to drive the car to the Car Park after he was dropped off at the Station that evening.
5. However, hours later, the car was driven across the harbour to Kowloon. At about 11:15 pm, the car was on its way near the toll plaza after exiting the Hunghom Cross Harbour Tunnel. At a certain point, a double-decker bus apparently had to brake because of the car. Upon the bus braking, one of the passengers on board got injured. That passenger was the Plaintiff in the High Court action.
6. The car did not stop but carried on with its journey. The car was subsequently identified; and so was Ng as the driver at the time. For the traffic accident, Ng was subsequently prosecuted for careless driving, failing to stop after accident and failing to report after accident.
7. On 23 January 2006, Ng was tried on those charges (Kowloon City Magistracy Case No. KCS 21959-61/2005). She was convicted of careless driving on her own guilty plea; and was acquitted of the other charges after trial.
8. The Plaintiff commenced the main action claiming for common law damages against Ng. The insurer of the car joined as the 2nd Defendant. In May 2009, the main action was settled by payments made by Ng and the insurer in the sums of HK$30,000 and HK$190,000 respectively. The insurer also paid the Plaintiff’s costs of the main action.

**The third party action**

1. Ng claims for an indemnity by Alliance and Pang, jointly and severally, for the sum of HK$30,000 and her costs of defending the main action.
2. According to the pleadings, the basis of the claim for indemnity is as follows:
   1. Alliance was the owner of the car. It was a company car. On the day in question, Pang needed to go to the Station to catch a flight on business. He requested Ng in the course of her employment to drive the car to the Car Park after dropping him off at the Station.
   2. Notwithstanding her protest on the ground of lack of driving experience, Pang insisted. Pang suggested that Ng might drive the car home first and back to the Car Park the other day. Ng acceded to Pang’s request.
   3. Alliance and Pang were fully aware of the risk of accident, in view of the lack of driving experience of Ng. The accident happened in the course of Ng’s driving of the car at the request and for the interest of Alliance and Pang.
   4. Therefore Alliance and Pang are liable to indemnify Ng. Further or alternatively, it was an implied term of the employment contract that Ng should be so indemnified.

**The law**

1. In the context of an employer-employee relationship, *Halsbury’s Laws of England* (4th ed) Vol.16 at para.35 summarises the principle as follows:

“An employer is under an implied duty to indemnify or to reimburse the employee, as the case may be, against all liabilities and losses and in respect of all expenses incurred by the employee **either in consequence of obedience to his orders, or incurred by him in the execution of his authority, or in the reasonable performance of the duties of his employment**. Notwithstanding the fact that an employee was acting in the course of his employment, he may, however, lose his right of indemnity or reimbursement **where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out, but were solely attributable to his own default or breach of duty, or where, by reason of his conduct, he has forfeited his right to receive any remuneration for his services**.”

[*Emphasis added*]

1. In terms of agency, similar principles are summarised in *Halsbury’s* Vol.1:

At para.111:

“The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent **in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency**, provided that such implication is not excluded by the express terms of the contract between them, and **provided that such expenses and liabilities are in fact occasioned by his employment**.”

At para.112:

“The right of indemnity covers not merely the losses actually sustained by the agent, but also, in accordance with the principles of equity, **the full amount of the liabilities incurred by him……and extends to cases where they were incurred under an honest mistake of judgment**.”

At para.113:

“An agent is not entitled to reimbursement or indemnity **in respect of expenses or liabilities incurred in consequence of his own default or breach of duty, or transactions which are outside the scope of his authority**……

Where the agent’s conduct amounts to **a tort, but not a crime, he is at common law entitled to be indemnified against expenses and liabilities if the transaction was not manifestly tortuous or tortuous to his knowledge**……”

[*Emphasis added*]

See also *Boustead on Agency* (18th ed) at 7-062

1. In any other context where a person is entitled to be indemnified for the consequence of what was done at another person’s request, both parties cited *Sheffield Corporation v Barclay* [1905] AC 392 and *Yeung Kai Hung v HSBC* [1981] AC 787. In *Yeung Kai Hung* (at 798), Lord Scarman had this to say:

“……where an act has been done by the plaintiff under the express direction of the defendant which occasions an injury to third parties, yet, **if such act is not apparently illegal in itself but is done honestly and bona fide in compliance with the defendant’s directions**, he shall be bound to indemnify the plaintiff against the consequences thereof.”

His Lordship continued:

“Default only arises in the event of **dishonesty, lack of good faith, or failure to comply with “the request, direction, or demand”** which has been made.”

[*Emphasis added*]

**The issues**

1. Essentially, there are the following issues in dispute:
   1. What were the instructions regarding parking of the car that Ng received on 8 April 2005?
   2. Whether by driving the car along the route and/or in the manner she did that night, Ng acted outside the scope of such instructions; or attracted liability due to her own default or breach of duty?
   3. Whether Alliance or Pang or both should be liable for the indemnity?

**The instructions**

1. According to Pang, he has known Lui since about 1997. There is no dispute that Lui was Ng’s boyfriend. There is also no dispute that as a favour, Lui would occasionally give Pang permission to park the car at the Car Park, though neither Alliance nor Pang had the right to do so. Pang had to call Lui one or two days in advance so that Lui could make arrangement with the management office to designate a space for the parking.
2. According to Pang, on 8 April 2005, he intended to park the car at the Car Park while he would be on business in Shanghai for a couple of days. This is in line with Ng’s evidence. The fact was that he did not return until 12 April 2005, which was Monday, as scheduled in the itinerary.
3. Sometime on 8 April 2005, Pang called Lui and obtained his agreement to arrange the car to be parked at the Car Park while he would be in Shanghai. As mentioned above, Pang asked Ng to come along with him to the Station so that she could drive the car to the Car Park after he had left.
4. There is dispute as to whether Ng protested against Pang’s request. According to Pang, Ng appeared to be an experienced driver. There was also suggestion that Ng had driven vehicles in her service as an auxiliary police constable.
5. The undisputed fact was that by then, Ng had started her employment for only a month and a half. She was still on probation. She had got her driving licence for about 8 months. It was also not disputed that she did not own a car; took public transportation to and from work; and had never driven the car before. In the circumstances, it is credible that Ng was reluctant and initially refused to accede to the request.
6. According to Ng, in order to persuade her, Pang suggested that she could use the car to drive home first and park it back to the Car Park the following day. In court, she added that Pang also made other suggestions that she could use the car for other personal purposes before parking it.
7. But as Ng showed her reluctance to drive for the relatively short distance from the Station to the Car Park because of lack of driving experience, it would be surprising that Pang would offer to her to drive the car further and elsewhere including her home which was in Kwai Chung.
8. Indeed it is also Ng’s case that Pang expressly promised to indemnify her if there was any trouble. But it should be noted that there is no such pleaded basis for her claim in the Third Party Notice. Nor is that mentioned in the Statement of Claim prepared by her counsel. This was mentioned for the first time in her statement.
9. In any event, Pang emphasized that Ng was expected to drive the car to the Car Park immediately after he had left the car. He gave no indication that Ng could use the car for any other purpose. On the contrary, Ng was clear that Pang did not say this had to be immediate. In my view, there had to be a reasonable range of time, however immediate Pang might intend. There could be contingencies. Pang contemplated that and hence he instructed Ng to contact Lui in case of difficulty.
10. Though Pang explained in court what he had in mind was the difficulty that might be caused by the management office when Ng sought to enter the Car Park, he did not actually spell out such difficulty when instructing Ng. I tend to believe that his instruction to Ng to contact Lui in case of difficulty was given in general terms.
11. There is no dispute that no one else in the office then had a driving licence. For Pang’s purpose, regardless of Ng’s driving experience, she appeared to be the only one whom he could turn to. It is not difficult to understand the situation as one of Ng acceding to a request from the boss. She did so, despite the fact that this was not what she was employed to do or what she professed to do.
12. I find that it was in these circumstances that Pang made the request and Ng acceded to it. I also find that his instruction to Ng was in general terms that she would drive the car to the Car Park after he had left; and should contact Lui if necessary.

**What happened after Pang had left**

1. There is no dispute that in the evening of 8 April 2005, Pang and Ng set out to another car park where the car was then parked. Pang then drove the car to the Station and left. Ng had stated that this was about 8:00 pm. But in court, she accepted that it had to be earlier, as Pang was catching the 8:25 flight. She corrected the time to about 7:30 pm.
2. According to Ng, she then called Lui. Lui asked her to wait for him at the International Finance Centre (“**IFC**”) (which is adjacent to the Station) and he would help her drive the car. Lui had to come out of Cheung Chau. In court, Ng explained that she then parked the car first by the roadside near the IFC. She then parked it somewhere between the piers for Cheung Chau and Ping Chau to wait for Lui.
3. According to Ng, by the time when Lui arrived, it was already 10:30 pm. Lui told her that it was too late to park the car back to the BOC Tower. In court, she added that according to Lui then, it was after office hours and the car without permit could not be parked at the Car Park without special reasons. Lui suggested that they drove themselves home that night; and he would drive the car from his home back to the Car Park the following morning.
4. There seems to be dispute as to whether Lui was in fact present that night. Indeed, the existence of Lui in the car at the time of the accident was never revealed to the police and in the criminal trial. At one point, I too had doubt, particularly in the case of Ng and Lui who were both auxiliary police constables.
5. However, the auto-toll record produced shows the movement of the car in line with Ng’s version. In the small hours of 9 April 2005, the car headed towards Shatin where Lui lived (at Ma On Shan). In the morning of the same day, the car was driven from the New Territories to Kowloon and then to the Hong Kong Island.
6. According to Ng, it was Lui who parked the car at the Car Park on 9 April 2005. She did not go to work that day which was a Saturday. When she returned to work on 12 April 2005, Ng sent an email to Pang, who was still in Shanghai, informing him that Lui had deposited the key to the car at the management office of the Car Park; and Lui would contact him regarding the exact location where the car was parked.
7. I find that Ng did call Lui after Pang had left; and Lui was indeed present with Ng subsequently at the night in question.
8. There is dispute as to whether the car could not be parked at the Car Park because it was too late as alleged. According to Pang, the Car Park should be open 24 hours and he never had any difficulty in parking the car there on the previous occasions.
9. However, Pang confirmed in court that when he talked to Lui that day on the telephone, he was not specific about the exact time when the car would be parked at the Car Park. Pang was not entitled to use the Car Park (irrespective of its open hours); and had to count on Lui’s arrangement for the parking on every occasion. Therefore, whilst Ng’s evidence of the impossibility of parking the car at the Car Park that night was hearsay, Pang is not really in a position to positively say otherwise.
10. Ng was asked by Lui to wait for him and eventually for at least 3 hours without a clue that the car could not be parked at the Car Park by the time when Lui came out of Cheung Chau. Ng accepted that Lui ought to know that. She also accepted that somehow Lui made no mention of that during their telephone conversation before she left the office or their telephone conversation after Pang had left. This might sound odd, but not inherently improbable, I find.
11. It was suggested that Ng waited for Lui to effectively give him a lift. But there is no dispute that Lui had his own car. The inescapable fact was that the car had to taken care of that night and Lui was supposed to be the one to arrange to have the car parked at the Car Park.
12. The fact, as I find, was that Ng was not prepared to drive the car on her own any further. According to her, and I find, Lui had advised her of the potential difficulty in parking at the Car Park because of the narrow space there. In view of the then relationship between Ng and Lui, I would not be surprised that Lui would ask Ng to wait for him and Ng would be prepared to do so even for hours.
13. The fact was that after picking up Lui, Ng and Lui made use of the car to go home first. As mentioned above, the auto-toll record shows that. Did the detour take the driving of the car outside the scope of Ng’s authority?
14. It was submitted on behalf of Ng that it did not. My impression is that this was also Ng’s belief. This explains why in her email dated 12 April 2005, she openly informed Pang that it was Lui who deposited the key to the car at the management office of the Car Park. Pang did not seem to have taken issue as to how that came to be the case afterwards.
15. Pang gave instruction to Ng in general terms that in case of difficulty, she should contact Lui. Pang had to count on Lui to arrange for the parking of the car. So did Ng. Lui remained the only one who was in a position to do that. It was not for Ng to disagree with Lui’s suggestion but to entrusted the car to Lui to park at the Car Park.
16. Much was said about whether they could have parked the car somewhere in Central overnight instead of driving it to their homes. I believe they could have. But in the absence of clear instruction from Pang in such event, this would be a matter of judgment. The fact that the car could not be parked at the Car Park that night necessitated an alternative arrangement for the night and probably a detour. The decision to take the car home first per se was not a manifestly bad judgment.

1. A detour is a detour, whether it was to a nearby car park or to their homes. Traffic accident could have happened in whatever detour taken. It was not the choice to take the car to their homes, as opposed to any other route or destination, per se that gave rise to the traffic accident. It was how the car was driven at the material time that did. I conclude that by taking the detour in the circumstances at the night of 8 April 2005, Ng did not act outside her authority.

**Ng’s manner of driving**

1. Ng admitted driving the car. According to her, Lui was sitting by her side in the front seat. The first destination was Ng’s home at Kwai Chung. She took the Cross Harbour Tunnel to Kowloon.
2. As a result of the accident, Ng was convicted of careless driving on her own guilty plea. Now she claimed to have done so by mistake because of the lack of legal representation and the intention to save time and costs. This is regrettable, if not a shame, for Ng with her auxiliary law enforcement background to make such suggestion. Having said that, I am entitled to consider the evidence in respect of how Ng contributed to the occurrence of the accident. After all, the evidence in this respect was really tested in the criminal trial,
3. In her statement, Ng explained how she was controlling the car and keeping her lookout after exiting the tunnel. Both she and Lui were unaware of any contact with the double-decker bus or an accident. Hence she did not stop. But upon their arrival at her home in Kwai Chung, she inspected the car out of caution. She found a scratch. She believed that that was the aftermath of another accident to the car the day before. On the following day, she telephoned Pang who allegedly confirmed her such belief.
4. Pang could not recall such telephone call from Ng on 9 April 2005. The telephone records produced show no such telephone call to him from Ng on that day either. However, Pang did confirm that when he returned to Hong Kong and collected the car, he noticed no damage to the car except for that caused by the traffic accident on 7 April 2005 as Ng said. Also the bus company has never filed any claim against Alliance or Ng for damage to the bus.
5. All the evidence tend to show that objectively, there was no or minimal contact between the car and bus. It was the braking of the bus that caused the injury to its passenger, not any impact of contact, not to mention collision, between the two vehicles. Indeed it might still be the manner in which Ng controlled the car that caused the bus driver to apply the brake. But the following two things should be noted.
6. In principle, in the present context of indemnity, the concern is whether Ng drove the car in a manner and to a standard as reasonably expected of her by Pang in the circumstances. The answer could be yes, though this may constitute no defence in terms of liability of Ng or her employer to other road users who expect the same standard of reasonable care applicable generally.
7. To begin with, it was not one of Ng’s duties to drive for Alliance or Pang. Ng also did not profess to have the skills to do so in the course of her work. She acceded to Pang’s request with reluctance. Pang either knew the lack of driving experience of Ng or did not care to satisfy himself of her skills to drive, perhaps apart from the fact that she possesses a driving licence. This was the risk Pang took by putting Ng to drive the car.
8. In fact, in the absence of contrary evidence including perhaps that of the bus driver, it cannot be said that Ng drove the car in a manner below what she was reasonably expected to do by Pang, and not the other road users, in the circumstances of this case.
9. Considering all the evidence, I am satisfied that neither the detour Ng took nor her manner of driving the car that night amounted to the grounds that would have deprived her of the right to an indemnity as explained in the authorities discussed above.

**Liability of Alliance and Pang**

1. The claim for indemnity is against Alliance and Pang jointly and severally. In her answers to the notice to admit facts dated 23 March 2009, Ng confirmed her understanding that she accepted the instruction of Pang to drive the car as that of Alliance. Objectively, it also cannot be said that in giving his instruction to Ng, Pang did so in his personal capacity or for his personal interest in the circumstances of this case.

**Conclusion and order**

1. For the above reasons, I enter judgment in favour of Ng against Alliance in the sum of HK$30,000 together with her taxed costs of defending the main action on the District Court scale. Interest on such sums shall run at the judgment rate from 29 April 2009 (date of the consent order in the main action). The claim against Pang is dismissed.
2. I make a nisi order that Alliance shall pay Ng’s costs of the third party proceedings. There should effectively be one set of costs incurred by Alliance and Pang. I therefore make no order as to costs between Ng and Pang. Costs shall be taxed on the District Court scale, if not agreed, with certificate for counsel. In the absence of application within 14 days to vary, the nisi order shall become absolute.

Simon Leung

District Judge

Mr Simon H W LAM instructed by Messrs Yu Hung & Co for the 1st Defendant

Mr NASIR of Messrs Nasirs for the 1st and the 2nd Third Parties