

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO. 22 OF 2002
(Heard in conjunction with DCPI 23 OF 2002)

BETWEEN	Sami'an Sutinah	Plaintiff
	and	
	Katrina Leung Wai-kuen	Defendant

Coram: H H Judge Carlson in Chambers

Date: 20 March 2002

Present: Mr George Sit, of Messrs Boase, Cohen & Collins,
assigned by the Legal Aid Department, for the
Plaintiff
Ms L.W. Leung, of Messrs Waller Ma Huang & Yeung, for
the intended party

R U L I N G

1. This summons raises an interesting point. In these two actions the plaintiff, who was employed as a domestic helper in the home of the defendant, alleges that on two separate days she was assaulted by the defendant and, as a result of those assaults, she sustained serious injuries.

2. The history of the matter can be stated very shortly. The police were called and the defendant was prosecuted for those assaults. She was convicted before a Magistrates' Court and sentenced to terms of imprisonment. She is at present serving those terms of imprisonment.

3. The defendant had taken out an employee's compensation insurance policy with the Hongkong & Shanghai Banking Corporation Insurance Company Limited. For a number of reasons which I need not go into, that insurance company have purported to repudiate their liability under the terms of the policy.

4. The plaintiff seeks damages from the defendant in respect of these assaults in these two actions and she has also

taken out an application for employee's compensation under the relevant sections of the Employees' Compensation Ordinance.

5. The position of an insurer in respect of a policy for employees' compensation is regulated by section 43(1) of the Employees' Compensation Ordinance, which is in these terms:

"Subject to this section, where in relation to an employee there is in force a policy of insurance issued for the purposes of this part, and the employer of the employee becomes liable to pay any sum under this ordinance, or independently of this ordinance, in respect of an injury to the employee arising out of and in the course of his employment, such sum shall forthwith become due and payable by the insurer including any sum payable in respect of interests and costs, notwithstanding anything to the contrary in the policy of insurance."

6. Subsection (2) deals with exceptions to that liability. Suffice it to say that none of the exceptions which are set out in paragraphs (a) to (e) of subsection (2) apply here.

7. There is now an application by the insurance company to be joined as 2nd defendants in these two actions. I should also relate that they have, by consent, been joined as 2nd respondents in the Employees' Compensation Ordinance proceedings. The application to be joined in these two actions is made under Order 15 Rule 6(2)(b)(i) of the Rules of the District Court, the relevant part of the rule being in these terms:

"Court may order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon."

8. Miss Leung, who appears on behalf of the insurers submits that given the potential liability which is cast upon an insurer by virtue of section 43(1) of the Employees' Compensation Ordinance, I ought to exercise my discretion in favour of allowing a joinder. She relies in particular on two cases: firstly, the case of Gurtner Circuit & Anor [1968] 2 QB 578, a decision of the Court of Appeal in England.

9. That case related to the position of the Motor Insurers Bureau where, under the relevant statutory provisions in England, the Motor Insurers Bureau were liable to indemnify an injured motorist. The court allowed the bureau to be joined as a defendant but on their undertaking to pay all damages awarded to the plaintiff.

10. Attention is also drawn to the case of Chiu Yuen Wah v Lee Kwok Kee [1995] HKCA 315, which decided, on fairly similar facts, that the insurers should be joined. In the course of the judgment in that case, the court referred to another Court of Appeal decision in Hong Kong, Wu Kin Wah v Somec (Hong Kong) Limited [1993] 1 HKLR 300, where at page 305 Kempster J.A. indicated that had the insurers in that case demonstrated that they were liable to the plaintiff under a policy of insurance, they would have been entitled to apply to be added as a party having the same right to defend the proceedings as if such insurer were the employer.

11. It seems to me that in this case where there is clearly a potential liability under section 43(1) that the insurer ought to be joined so that they have the right to be heard in respect of that potential liability. The question then arises as to whether I should put them on terms or oblige them to give an undertaking to pay any damages that may be awarded against the defendant in the way that was ordered in the case of Gurtner Circuit.

12. I take the view that I ought not to ask for such an undertaking because, of course, under section 43(1) their liability will only arise if it is shown that in fact the assault which is complained of in this case arose out of and in the course of the plaintiff's employment with the defendant. That is a matter which remains a live issue in these two common law actions as it does in the application for employee's compensation and so I don't think it would be right to call for an undertaking to be given in the terms that are sought by Mr Sit who appears on behalf of the plaintiff.

13. So I shall make the order that the insurance company seek in their summons.

14. I shall also make an order under the terms of this summons that the name of the insurance company will be changed to reflect its present name. There will then be an order in terms of paragraphs 1, 2 and 3 of the summons, save of course that the name of the insurance company will reflect its present name.

Ian Carlson
District Court Judge