

HONG KONG / JUDGMENT

JERRY CHEN v. WHIRLPOOL (HONG KONG) LTD

COURT

Court of Final Appeal

DECIDED

26 October 2007

CASE / FILE NUMBER

FACV23/2006

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bjbj FACV No. 23 of 2006 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FINAL APPEAL NO. 23 OF 2006 (CIVIL) (ON APPEAL FROM CACV NO. 325 OF 2005)

Between: JERRY CHEN Appellant

- and - WHIRLPOOL (HONG KONG) LIMITED Respondent

Court : Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ
Dates of Hearing : 16 October 2007
Date of Judgment : 26 October 2007
J U D G M E N T
Chief Justice Li : I agree with the judgment of Mr Justice Bokhary PJ.
Mr Justice Bokhary PJ : The appellant was seriously injured in a traffic accident in Beijing on 13 October 1998. It happened when the car in which he was travelling as a passenger was negligently driven onto its incorrect side of the road and collided with an oncoming motor vehicle. He was in the employ of the respondent, designated as commercial director. The respondent is a Hong Kong company in the Whirlpool group. This group is centred in the United States, but is also present and active in many other parts of the world. As the appellant's contract of employment with the respondent expressly provided, he was based in Shanghai with responsibilities to a Mainland company headquartered in Shanghai. This company is named Whirlpool Narcissus (Shanghai) Co. Ltd (). It served as the corporate vehicle for a joint venture in the Mainland between the Whirlpool group and a Mainland company named Shanghai Narcissus Electric Appliances Co. Ltd. By an express term of the appellant's contract of employment with the respondent, he was entitled to a car and driver. That implies, he says, a professional driver or a driver who can be regarded as a reasonably competent driver even though not a professional one. He also relies on the common law rule that employers are duty-bound to take reasonable care for their employees safety. This duty (as was pointed out in the Court of Appeal in England by Lord Greene MR in *Davidson v. Handley Page Ltd* [1945] 1 All ER 235 at p.237G-H) is not confined to the time when employees are

performing the precise acts that they are employed to perform. It extends to cover all such acts as are normally and reasonably incidental to [an employee s] day s work . The standard of care demanded is (as we said in *Cathay Pacific Airways Ltd v. Wong* (2006) 9 HKCFAR 371 at p.376 F-G) naturally a high one since personal safety is at stake . As for the content of the duty, it is of course a single duty on the part of employers to take reasonable care for their employees safety. But it is (as we said in the *Cathay Pacific* case at p.382 H-J) conveniently thought of as involving the provision of safe co-workers, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision and (where called for) adequate training. The duty is non delegable in that the employer remains responsible for the performance of the duty even if he has delegated its performance. When in Shanghai where he was normally based, the appellant was driven by a full-time driver in a company car. At the time of the accident, he was being driven from Beijing airport to a nearby resort for the purpose of attending a sales conference there organised by WNS. The car in which he was being driven to the resort had been hired for that purpose by WNS through its Beijing office. And the driver was Mr Zheng Guo Bin, a person employed by WNS at that office as a technical administration representative in the service section of the commercial department. Mr Zheng held a driving licence which he first obtained on 14 February 1996. But he was not a professional driver. What is known about him as a driver comes from a statement of his which the appellant adduced in evidence at the trial. In that statement Mr Zheng says this about himself : I am the most senior licensed driver in the Beijing region and had no accident record, and I was always the person to pick up senior officers when they came to Beijing in the past. It is common ground between the appellant and the respondent that this accident was due to Mr Zheng s negligence. Two claims were brought by the appellant against the respondent in respect of this accident. His first claim was one commenced in the District Court against the respondent for employees compensation. It was compromised by way of a consent judgment for employees compensation in the sum of \$2,294,015.75. Then the appellant commenced a claim in the High Court against the respondent for damages for breach of contract and in the tort of negligence. The writ was of course served on the respondent in Hong Kong. And it has never been suggested that the law applicable in Beijing was such as to leave the double actionability rule unsatisfied in the present case. Out of this High Court claim has arisen the present appeal. It comes to us from the judgment of the Court of Appeal (Cheung and Tang JJA and Barma J) affirming the judgment of the High Court (Suffiad J) dismissing the appellant s claim in a trial as to liability only. Strictly speaking, three bases have been put forward on the appellant s behalf as ones on which he can hold the respondent responsible for this mishap. Of these three bases, the first is employers common law duty of care. The second is contractual liability despite delegation of performance. And the third is vicarious liability. As the appellant s case was presented, there is no practical distinction between the first two bases. Both boil down to the appellant s contention that he was entitled to a professional driver or a driver who can be regarded as a reasonably competent driver even though not a professional one. Reasons why the courts below decided against the appellant At first instance Suffiad J found as a fact that Mr Zheng was a reasonably competent driver, saying this : the evidence is to the effect that [Mr Zheng] had held a valid driving licence in [the Mainland] for some two years before the accident and during this period, he had never been involved in a traffic accident. There is also evidence that [Mr

Zheng] had always been the person chosen to drive executives of [WNS] when they were on business in Beijing. That fact alone that [Mr Zheng] holds a valid driving license in [the Mainland], in my view, makes him a reasonably competent driver. Suffiad J then referred to all other circumstances. I pause to mention the case of *Sweeney v. Kennedy* (1948) 48 Ll LR 294 (decided by the Divisional Court of the High Court of Eire). The respondent cites what Kingsmill Moore J said at p.297 for the proposition that anyone who has a driver's licence is deemed to be reasonably competent to drive. What that case decided is that where a proposal form contained an accurate statement that none of the assured's drivers were under the age of 21, the insurance policy issued pursuant to that proposal was not avoided by the subsequent employment of a driver under the age of 21. And what Kingsmill Moore J actually said at p.297 as to competency is this: The law provides that licences to drive motor vehicles may be given to persons of specified ages, the ages varying with the class of the vehicle; and when a person is driving a vehicle of the category which by his age he is entitled to drive, there is, I think, some presumption that, as far as age reflects on competency, he is competent to drive it. In his book *Negligence on the Highway*, 4th ed. (1962) at p.336 Dr Mazengarb QC (an experienced practitioner as well as the writer of a textbook much used by practitioners) observes that it does not follow that everyone possessed of a licence to drive, issued after an examination and test, has the skill and ability to drive. It is important to note therefore that Suffiad J did not actually confine himself to the fact of Mr Zheng having held a driving licence. The Court of Appeal affirmed Suffiad J's finding that Mr Zheng was a reasonably competent driver. Cheung JA (with whose judgment the other members of the Court of Appeal agreed) said this: In this case the evidence showed that [Mr Zheng] was a Beijing resident and had a driving licence for two years. During this period he had never been involved in a traffic accident. [Mr Zheng] had always been the person chosen to drive executives of [WNS] when they were on business in Beijing. In my view [WNS] had properly discharged this duty when it chose [Mr Zheng] to be driver. The available evidence showed that he was a reasonably competent driver to be given the task by [WNS] to transport [the appellant]. On vicarious liability, the appellant has pleaded that Mr Zheng was at all material times an employee or agent of the respondent alternatively an employee of WNS, the agent of the respondent. This chain of agency averment of vicarious liability was rejected by the courts below. Respondent's stance The respondent asks that the result reached by the courts below be affirmed. It is said in terms in the respondent's printed case that its submissions are in substance the same as the reasoning to be found in Cheung's judgment. In addition to supporting the Court of Appeal's reasons, the respondent contests this appeal by way of two special objections. The first special objection consists of the respondent's contention that the appellant is asking this Court to review concurrent findings of fact in the absence of any circumstances that would warrant such an exercise. And the second special objection consists of the respondent's contention that the appellant's arguments before us are new ones which are either absolutely barred by the state of the evidence or at least incapable of surmounting the hurdle of not having been raised on intermediate appeal. Save that unfamiliarity with local conditions will never be a factor, this Court's practice in regard to concurrent findings of fact is (as we said in *Sky Heart Ltd v. Lee Hysan Co. Ltd* (1997-98) 1 HKCFAR 318 at pp 333F-333B) the same as that of the Privy Council (as explained by their Lordships in *Devi v. Roy* [1946] AC 508 at p.521-522). So this Court will not

review concurrent findings of fact save in rare and exceptional circumstances. Such circumstances arose, for example, in regard to the concurrent finding of dishonesty which was reviewed and reversed in *Aktieselskabet Dansk Skibsfinansiering v. Brothers* (2000) 3 HKCFAR 70 at pp 90G-93C. As to new points, this Court's approach appears from our decisions in *Wong Tak Yue v. Kung Kwok Wai (No.2)* (1997-98) 1 HKCFAR 55 and *Flywin Co. Ltd v. Strong & Associates Ltd* (2002) 5 HKCFAR 356. It was held in the *Flywin* case at p.369B-J as follows :- Where a party has omitted to take a point at the trial and then seeks to raise that point on appeal, he will be barred from doing so unless there is no reasonable possibility that the state of the evidence relevant to the point would have been materially more favourable to the other side if the point had been taken at the trial. Even where a new point is not barred on that basis, the circumstances must be very exceptional before this Court will entertain a point not taken on intermediate appeal, especially if entertaining and accepting it would constitute a major development of the law.

Employers duty of care/contractual liability Whatever else employers common law duty of care and contractual liability despite delegation of performance involves in a case like the present, the appellant cannot succeed under either of these two bases of liability or both of them combined unless he can persuade us to reverse the concurrent findings of the courts below that Mr Zheng was a reasonably competent driver. After giving the matter anxious consideration, I have come to the conclusion that there are no circumstances that would justify us in the exceptional course of disturbing those concurrent findings. It is true that there is no evidence as to when Mr Zheng joined WNS, how long he had driven executives on his behalf or how often he did so. But the main thrust of the appellant's case in the courts below in regard to the sort of driver required was that a professional one was required. That was the focus below, most significantly at the trial. Otherwise there might have been more evidence about Mr Zheng's activities as a driver.

Vicarious liability On appeal to us, the main thrust of the argument for the appellant on vicarious liability was not the chain of agency argument advanced on his behalf in the courts below. Instead it was in effect an argument on what is sometimes described as enterprise liability, and runs along the following lines :- Both the respondent and WNS were throughout engaged together in the enterprise of furthering the overall interests of the same group of companies. The appellant and Mr Zheng were co-workers at the time of the accident in the sense that they were working together within that group, one going to a sales conference and the other driving him to that conference. So Mr Zheng was no less a representative of the relevant enterprise than the bicycle courier paid per delivery in *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 (decided by the High Court of Australia). As to the decision of the High Court of Australia in *Sweeney v. Boylan Nominees Pty Ltd* (2006) 226 CLR 161, the position regarding an employed person like Mr Zheng in these circumstances is not to be equated with the position regarding a person in business on his own account like the mechanic in that case in those circumstances. WNS and by extension Mr Zheng were agents for the respondent in performing for it the legal obligation which it owed to the appellant to provide him with transportation by car and driver. Decisions like that of the High Court of Australia in *Colonial Mutual Life Assurance Society v. Producers and Citizens Co-operative Assurance Co. of Australia* (1931) 46 CLR 41 and of the Queen's Bench Division in *Nottingham v. Aldridge* [1971] 2 QB 739 show that such agency suffices for vicarious liability even in the absence of controlled employment. But such control, if necessary, is in any event to be

found in the control exercised at the holding company level over all subsidiary companies within the Whirlpool group. There was sufficient proximity between all concerned, and sufficient close connection between all the matters concerned, for the purposes of vicarious liability. In the circumstances, it is legally sound and neither unfair nor unduly burdensome that the respondent be held vicariously liable to the appellant for Mr Zheng's negligent driving. Accordingly that is the just course. The two problems which the appellant faces on the foregoing argument as to vicarious liability are these. First of all, it cannot be said that there is no reasonable possibility that the state of the evidence relevant to the point would have been materially more favourable to the other side if the point had been taken at the trial. Secondly, entertaining that point would certainly involve entertaining a point which was not taken in the courts below but which, if accepted, would constitute a major development in the law. For those reasons, I do not think that the appellant can in the circumstances succeed on vicarious liability. I say nothing on how the law of vicarious liability may develop in future.

Conclusion

The appellant has recovered employees compensation. Hopefully he will find some solace in that. I can find no basis on which to enable him to recover more. In the result, I would dismiss the appeal with costs and make an order for legal aid taxation of the appellant's own costs. It is common ground that costs should be dealt with that way if, as it has turned out, the appeal is dismissed. Mr Justice Chan PJ : I agree with the judgment of Mr Justice Bokhary PJ. Mr Justice Ribeiro PJ : I agree with the judgment of Mr Justice Bokhary PJ. Lord Woolf NPJ : I agree with the judgment of Mr Justice Bokhary PJ. Chief Justice Li : The Court unanimously dismisses the appeal with costs and makes an order for legal aid taxation of the appellant's own costs. (Andrew Li) Chief Justice (Kemal Bokhary) Permanent Judge (Patrick Chan) Permanent Judge (R.A.V. Ribeiro) Permanent Judge (Lord Woolf) Non-Permanent Judge Mr Anthony Neoh SC and Mr KM Chong (instructed by Messrs Christine M Koo & Ip and assigned by the Legal Aid Department) for the appellant Mr John Bleach SC and Mr Stewart KM Wong (instructed by Messrs Clyde & Co.) for the respondent

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