WISDOM

TSUI & CO solicitors

Personal Injury

Cheung Shuk Wah Jessica & Lai Po Lam Desiree, Administratrices of the estate of Man Chung Wah, deceased v Wong Kang Hung Darwin formerly trading as NEW VOICE PUB, HCPI 12 of 2009 (Hon Yam J, 9 June 2010)

The deceased was murdered shortly after work and in the course of escorting his female colleague, Elle, away from work. They worked for the Defendant at New Voice Bar (the Pub).

At about 3 a.m. on 10 July 2005, one customer, Koo Chai quarreled with Elle as Koo Chai was dissatisfied with Elle's response because Elle declined to take order for any beer from Koo Chai after the Pub's last order. Koo Chai suddenly grabbed an empty bottle and acted as if he was about to attack Elle with the bottle. The deceased immediately stopped him by taking the empty bottle away from Koo Chai. At the time, the Defendant did not in the Pub but was told by Elle over the phone that someone customers were making trouble. The deceased told him the matter had settled down.

When the Defendant returned to the Pub shortly after 4 a.m., he did not enquire what the matter was there and then, but instead he apologised to the customers in the hope of securing their return. When leaving the Pub, the Defendant just offered a lift in a taxi to the deceased but not Elle. The deceased declined as he had to escort Elle to meet her boyfriend. When they walked to a net café, 2 men including Koo Chai attacked the deceased with long-bladed knives. The decease died as a result of the attack.

In the ECC proceedings, the court found in favour of the Plaintiffs that the deceased's fatal accident happened in the course of his employment. The administratrices of the estate of the deceased commenced this action against the Defendant for negligence in the discharge of his duty.

<u>Held</u>

The Court found that the deceased was expected by the Defendant to make sure that Elle would leave work safely.

The Court found that the Defendant owed a duty of care to the deceased as it was reasonably foreseeable that Elle and the deceased, who would be accompanying Elle, would be attacked after the heated quarrel with customers as some customers would stay outside the Pub and stalk the female workers.

The Defendant knew that an attack might follow after the quarrel and the deceased would escort Elle, and thus owed a duty to the deceased in making sure that he would be safe while discharging his duty of protecting Elle as she was leaving with the deceased.

Following *Morris v West Hartlepool Steam Navigation Co. Ltd*, the ease of taking the precaution against the risk is one of the considerations when assessing whether an employer owes a duty to his employees. The precaution herein could be discharged easily by offering to Elle a ride in the taxi, which would be a safer alternative to walking to the net café with just the two of them at 4 a.m. The Defendant should know there was a risk that customers after the quarrel (when drunk and had a heated debate) might come back for revenge.

It was held that the Defendant had clearly breached his duty ensuring that the deceased would be safe in discharging his duty in protecting Elle. His breach of duty came from his failure to offer both of them a ride in the taxi.

Insurance

New World Harbourview Hotel Company Ltd & others v Ace Insurance Ltd. & others, HCA 46 of 2007 (Hon Reyes J, 8 April 2010)

The Plaintiffs own or operate convention centres, hotels, car parks and related businesses. The Plaintiffs were insured under one of 2 "Composite Mercantile Policies" issued by the Defendants as insurers, except the 5th Plaintiff which was insured under both policies. The period of insurance under the policies was from 1 July 2002 to 1 July 2003.

The Plaintiffs claimed under the policies in respect of business interruption loss suffered as a result of the outbreak of SARS in Hong Kong in 2003. The Defendants accepted in principle that the Plaintiffs were entitled to be indemnified under the policies but there was a dispute as to the scope of the Plaintiffs' coverage. The Court directed a trial of 5 preliminary issues concerning the construction of the policies in light of undisputed facts relating to the SARS outbreak in Hong Kong as set out in a Summary Report entitled "SARS in Hong Kong: From Experience to Action" released by the Government. Among other things, it was not disputed that it became mandatory under the Quarantine and Prevention of Disease Ordinance for SARS cases to be notified to the Government on 27 March 2003.

<u>Held</u>

On Issue 1, the Court confirmed that the word "notifiable" under notifiable human infectious disease imports a legal or mandatory requirement to notify. The word does not merely connote a course of conduct which everyone is urged but not obliged to follow. Given the importance of certainty, it is more plausible that the parties entered into the policies on the basis that they were agreeing a clear-cut test for ascertaining whether a disease was "notifiable". SARS became a "notifiable" human infectious or contagious disease within the terms of the policies on 27 March 2003.

On Issue 2, the Court affirmed that subject to a Time Excess, the date of commencement of coverage should be the date when SARS became notifiable. There was no retrospectivity in coverage found in the terms under the policies.

On Issue 3, the loss period could not pre-date when SARS became notifiable disease. Where a business does not close but continues through the currency of an insured peril, the business is only covered for a period of 180 days under the policies. The initial period from date of loss to date of "resumption of the business" is irrelevant and inapplicable as none of the Plaintiffs' businesses closed or stopped during the currency of SARS.

On Issue 4, the calculation of Standard Revenue under the policies should be assessed by reference to a business' prior revenue up to at least the date of 27 March 2003. That had included the effect which SARS had on the revenue of the Plaintiffs before 27 March 2003. The parties had to draw the line somewhere for the purposes of comparing what a business earned before and after the advent of an infectious disease and of measuring the business' consequent loss due to the disease's occurrence. They chose to draw the line at the date when actual damage covered by the insurance is incurred.

On Issue 5, the Court held that the policies constituted composite insurance as each of the Plaintiffs had a different insurable interest. Thus, each Plaintiff was entitled to be indemnified for the costs of claim preparation up to a limit of $100,000 under the policies.

Shipping

Yue Kit Group Limited v SYMS Containers Line Agencies (HK) Limited, HCA 1579 of 2008 (Hon Fok J, 9 February 2010)

The Plaintiff, as the shipper under a bill of lading, shipped 7 reefer containers from Hong Kong to Haiphong, Vietnam. It engaged a freight forwarder as its agent ("the Freight Forwarder") to make bookings with the Defendant. The Defendant was not named as carrier under the bill of lading. The Plaintiff complained that the Defendant refused to release a damaged container at local terminal before shipment and the remaining 6 containers upon arrival in Haiphong, but instead required the Plaintiff to pay or give security for certain charges and extra fees, which the Plaintiff claimed that the Defendant was not entitled to raise. The Defendant, however, contended that it was simply exercising its lien over the goods and was entitled to demand payment or security for payment. The damaged container and other containers were found to be overweight. As a result, the Defendant asked for payment of further charges in connection with the overweight before releasing the containers.

In the end, the Plaintiff's consignee in Vietnam agreed to pay an additional sum to cover further charges of carriage and the containers were released. The Plaintiff also paid into the Court a certain sum as security for fees and expenses incurred in respect of the handling of the goods in the damaged container.

Held

The first and decisive issue was whether the Defendant was the contractual carrier or a bailee for reward. Since the Defendant was not named as carrier under the bill of lading, where the Defendant's principal in Shanghai was named instead, it was held that the Defendant was neither. Where an agent makes a contract with a third party on behalf of a disclosed principle, whether identified or unidentified, that agent is not liable to the third party on that contract. The Freight Forwarder was held to have knowledge that the Defendant was acting as agent only based on the provisions on the shipping orders, the signatory on the bill of lading, and the signatory on the invoices previously issued by the Defendant. Such knowledge was enough to treat the contract of being made with the Defendant's principal, not the Defendant.

The second and more interesting issue was whether the Defendant, if held to be contractual carriers, was entitled to exercise a lien over the goods. The lien clause of the bill of lading allowed the carrier to have lien on the goods for "all sums earned or due or payable to the Carrier". It was held that the Defendant's claim in respect of the damaged container arose as a result of the Plaintiff misstating its weight and loading it with excessive weight, and the Defendant's claim in respect of the six containers which arrived in Haiphong to be overweight fees which it was entitled. Even though total value of all the goods far exceeded the sum claimed, it was held that the Defendant was entitled to exercise the lien.

Finally, the Court refused to order that the money in the Court should be paid out to the Defendant. The reason was that the Defendant was not a carrier. Any order of payment out to the Defendant would result in an award of a sum of damages due to SYMS to another party. SYMS should have joined in.

WISDOM OF THE ISSUE

Pleasure in the job puts perfection in the work.

~Aristotle

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