

Wong Mee Wan (also known as Wong Shi (otherwise spelt Sai) Nui), the Administratrix of the estate of Ho Shui Yee, deceased

Appellant

v.

**(1) Kwan Kin Travel Services Limited
(2) China Travel Services Company (Zhong Shan) and
(3) Pak Tang Lake Travel Services Company
(Doumen County)**

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 6th November 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Slynn of Hadley
Lord Nolan
Lord Hoffmann

[Delivered by Lord Slynn of Hadley]

On 4th August 1988 Miss Ho Shui Yee, a resident of Hong Kong, was drowned whilst on holiday in the People's Republic of China. Her mother, the present appellant, brought proceedings in the High Court of Hong Kong against Kwan Kin Travel Services Company, whose registered office is in Hong Kong, China Travel Services Company and Pak Tang Lake Travel Services Company, both of which carry on business in China. As administratrix of her daughter and on behalf of herself and other dependants the plaintiff claimed damages for breach of contract and for negligence. The second and third defendants entered defences contending that the proceedings ought to have been brought in China and not in Hong Kong. On 15th March 1991 interlocutory judgment was given against them for damages to be

assessed, but it seems that no further steps had been taken in respect of those two defendants under those judgments.

On 25th October 1993 after trial Mayo J. gave judgment against the first defendant and assessed the damages at HK\$575,050.00. He ordered that such sum should be payable by the first, second and third defendants and he made a further order that the third defendant should contribute 100% towards the damages awarded under the Civil Liability (Contribution) Ordinance Cap. 377 on the basis that as between the three defendants the third defendant was the most culpable. The Court of Appeal on 31st May 1994 set aside the judgment holding that on the facts found the first defendant was not in breach of duty to the deceased but the Court gave the appellant leave to appeal to Her Majesty in Council.

In outline the facts found by the trial judge were these. Miss Ho and two school friends contracted to take a package tour to Pak Tang Lake offered by the first defendant. They left Hong Kong as part of a group of 24 persons first by ferry and then by coach. They were accompanied by a tour leader employed by the first defendant (a Miss Chan). At the border they were delayed for various reasons but on leaving the border they were accompanied by a Mr. Ho, an employee of the second defendant, who said that he was their tour guide. The coach took them to the Shanghai Guest House where they were to spend the first night. Because of the delays which had occurred Mr. Ho told them that they should leave their luggage at the guesthouse quickly so that they could go to visit the Ethnic Village at the lake. When they got to the pier at the lake they were told by Mr. Ho that the coach and ferry had already gone and that there was no alternative for the group but to cross the lake in a speedboat. Since the speedboat took only eight persons, three trips were involved, the return trip across the lake taking about fifteen minutes. Mayo J. had no hesitation in accepting that the group had no practical alternative but to take the speedboat across the lake and he rejected the written evidence of Mr. Ho that the whole idea of going by speedboat had been suggested by members of the group and that it was outside the arrangements for the package tour. The learned judge said:-

"... there can be no doubt in my mind that the journey on the speedboat was an integral part of the guided tour provided by the 1st Defendant."

The speedboat, driven by an employee of the third defendant, made the first two trips successfully. When it returned from taking the second group of eight people, that employee refused to do the third trip. A "volunteer", another employee of the third defendant, was found to drive the boat on the third trip. Miss Ho,

her two friends and Mr. Ho, the guide, were part of the third group. It seems that the boat went very fast, perhaps racing another speedboat. It hit a fishing junk which, because of the angle of the boat to the water, the driver probably never saw. The occupants were thrown into the water. Two were drowned, one of whom was Miss Ho; the others, including Mr. Ho, managed to get onto the junk and were taken to safety.

Mayo J. did not consider that the first defendant "undertook sufficient measures to ensure that members of their guided tours were adequately protected while they were in China" and in particular:-

"I do not consider that any adequate measures were taken to ensure that a safe system of operation was provided for the operation of the speedboat on the Lake which I have found to be an integral part of the Tour."

He ruled that the first defendant did owe Miss Ho:-

"a primary and contractual duty to take reasonable care for her safety which included taking satisfactory measures to ensure that if speedboats were used on the tour they would be operated by persons of reasonable competence and experience."

He further found:-

"There was no evidence that any attempt was made to ensure that the speedboat which was being used as part of the Transportation was operated in a safe manner or that a safe system of operation was adhered to."

In the Court of Appeal there was no dispute that Miss Ho's death was caused by the negligent driving of the speedboat by an employee of the third defendant and that Mr. Ho, on behalf of the second defendant, was negligent in not preventing the speedboat from being driven by someone who was not seen to be reasonably competent and qualified to do so. Whilst accepting that the first defendant did more than merely put its clients in touch with the companies in China, the Court found that the first defendant did not hold out the second and third defendants and their employees as being its employees. Nor did it owe a primary contractual duty to Miss Ho in respect of what happened. Penlington J.A. said that it:-

"... must have been clear to all members of the tours that it could not provide all those services itself but would delegate to other companies in China its duty to provide the bulk of them It would, in my view, impose an

intolerable burden if the firm which put the tour package together was to be held liable for the negligence of a transport operator in another country on the basis of a breach of a non-delegable primary contractual duty."

He added that the first defendant could not reasonably have anticipated that the third defendant would use a speedboat driven by an inexperienced and negligent employee; nor could Miss Ho have expected and relied on the first defendant to make sure that the speedboat was safe. Providing the package tour "would include seeing that the transportation which it was aware would be used was supplied by reputable organisations". That the Court of Appeal accepted was done.

The issue is thus whether in this particular contract the first defendant undertook no more than that they would arrange for services to be provided by others as their agents (where the law would imply a term into the contract that they would use reasonable care and skill in selecting those other persons) or whether they themselves undertook to supply the services when, subject to any exemption clause, there would be implied into the contract a term that they would as suppliers carry out the services with reasonable care and skill (*Curtis v. Chemical Cleaning and Dyeing Co* [1951] 1 K.B. 805).

There are of course many contracts under which a person agrees to supply services when he may arrange for his obligations to be performed by others, and where it is indeed contemplated that he will do so. As Cockburn C. J. said in *British Wagon Co. v. Lea* (1880) 5 Q.B.D. 149 at pp 153-4:-

"Much work is contracted for, which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim *Qui facit per alium facit per se* applies."

The fact that the supplier of services may under the contract arrange for some or all of them to be performed by others does not absolve the supplier from his contractual obligation. He may be liable if the service is 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. The obligation undertaken is thus, if the person undertaking to supply the services performs them himself, that he will do so with reasonable skill and care, and that if, where the contract permits him to do so, he arranges for others to supply the services, that

they will be supplied with reasonable skill and care (see Chitty on Contracts (1994), 27th edition, pages 987-988, paras. 19-046 and 19-047).

The distinction between the two categories of case - where the party agrees merely as agent to arrange for services to be provided and where he undertakes to supply the services - is drawn in *Craven v. Strand Holidays (Canada) Limited* (1982) 40 O.R. (2d) 186. There the plaintiffs claimed damages for personal injury when a bus in which they were travelling in Colombia overturned due to the negligence of the driver. The driver was not the employee of the defendant but the bus trip had been arranged as part of a package tour sold by the defendant to the plaintiffs. The Court of Appeal held that there was no implied term that the plaintiffs would be carried safely (a claim in respect of which would in any event be excluded by the exemption clause in the contract), and that the defendant would be liable only if it had been negligent in the selection of the bus operator. Lacourciere J.A. said (at page 190):-

"If a person agrees to perform some work or services, he cannot escape contractual liability by delegating the performance to another. ... But if the contract is only to provide or arrange for the performance of services then he has fulfilled his contract if he has exercised due care in the selection of a competent contractor. He is not responsible if that contractor is negligent in the performance of the actual work or service, for the performance is not part of his contract."

It is thus clear that the fact that it is known that another person will or may perform the services or part of them does not mean that the contract is one of agency. In each case it has to be asked as a matter of construction into which category the contract falls. This may not always be easy. Indeed the appellant in the present case contends that *Craven v. Strand Holidays (Canada) Limited* was as a matter of construction of the contract wrongly decided - it should have been put into the first category referred to by Lacourciere J.A. in the passage cited above.

Their Lordships have been referred to a number of other cases in which the courts have had to decide the nature of the liability undertaken.

In *Stewart v. Reavell's Garage* [1952] 2 Q.B. 545 a car owner took his car to have the braking system repaired. He agreed, on the recommendation of the repairers, that certain parts of the work should be done by specialists who in the event carried out

faulty work. Sellers J., at page 551, found that it was the defendants' duty:-

"...in the circumstances, to provide good workmanship, materials of good quality and a braking system reasonably fit for its purpose, and they failed to do so by reason of the faulty off-side front brake drum liner." (The latter was supplied by the specialist sub-contractors.)

In *Rogers v. Night Riders* [1983] R.T.R. 324 the plaintiff telephoned a minicab service to ask for a car to take her to Euston Station. The defendants contacted an owner-driver of such a car to whom the defendants rented a car radio. The plaintiff was injured when the door opened. The trial judge found that the defendants had simply put the plaintiff in touch with the driver and they were not liable for his negligence. The Court of Appeal reversed that decision. The claim was primarily pleaded in tort and is discussed by Potter J. in *Aiken v. Stewart Wrightson Members Agency Limited* [1995] 1 W.L.R. 1281 in relation to liability in tort for the negligence of independent contractors, but both Eveleigh L.J. at pages 328-329 and Dunn L.J. at page 331 consider that the claim could have been put either in contract or in tort. They were satisfied that the defendant had undertaken to provide a car and driver to take the plaintiff to her destination. Eveleigh L.J. said at page 328:-

"We are concerned to consider a case of primary duty on the part of the defendants. It was never suggested, and it was not put to the plaintiff, that she knew that the defendants were simply a kind of post box to put her in touch with someone else with whom she would be able to make an independent contract. On the facts of this case, in my opinion, the defendants undertook to provide a car and driver to take the plaintiff to her destination...so they owed a duty arising out of this relationship to take care to see that the vehicle was safe. They relied upon the driver to do this."

Dunn L.J. considered that, whether the claim was put in contract or in tort, there was a primary duty owed to take reasonable steps to ensure that the car was reasonably fit for that purpose.

This again was a difficult case but one where the Court of Appeal was entitled to find that the obligation undertaken was one which could be performed by another and where the defendants remained liable for the performance of the service with reasonable skill and care.

These questions have arisen in three English cases concerned with the provision of package tours. In *Jarvis v. Swans Tours Limited* [1973] Q.B. 233 the Court of Appeal held that travel agents had on the terms of their brochure made it clear that what they were contracting to provide was not merely air travel, hotel accommodation or meals of a certain standard. "They went further than that. They assured and undertook to provide a holiday of a certain quality." Edmund Davies L.J. at page 239 said:-

"If in such circumstances travel agents fail to provide a holiday of the contracted quality, they are liable in damages."

That was so although plainly some of the services were not to be provided by the defendants themselves.

In *Wilson v. Best Travel Limited* [1993] 1 All E.R. 353 Phillips J. held that, for the purposes of section 13 of the Supply of Goods and Services Act 1982 which implied into a contract for the supply of service a term "that the supplier will carry out the service with reasonable care and skill", the duty of care owed by a tour operator to its customers was a duty "to exercise reasonable care to exclude from the accommodation offered any hotel the characteristics of which were such that guests could not spend a holiday there in reasonable safety". The duty was thus recognised but the judge held at page 358 that the standards set were those applicable in the country in question, unless "the absence of [a feature which will be found in an English hotel] might lead a reasonable holiday-maker to decline to take a holiday at the hotel in question". In that case local standards had been complied with.

Their Lordships have been referred to the unreported decision of Hodgson J. of 18th November 1981 in *Wall v. Silver Wing Surface Arrangements Limited (trading as Enterprise Holidays)* a decision not cited to the trial judge or to the Court of Appeal. That was a case where the plaintiffs were injured when they had to jump from a hotel bedroom because a means of escape otherwise available had been barred by the locking of a gate which was normally open. It had been open when the defendant's representative had visited the hotel. The plaintiffs claimed damages initially on the basis of an implied term in their contract with the package tour operator that the plaintiffs would be reasonably safe in using the hotel, alternatively by late amendment they claimed in tort.

Hodgson J. rejected the argument that such a term had to be implied:-

"If an officious bystander had suggested either to the tour operator or, I think, to most customers that the tour operator would be liable for any default on the part of any of these people both would, to put it mildly, have been astonished."

Having reviewed a number of authorities he concluded that:-

"Before the court will impose obligations as a matter of general law upon parties to a contract, there must be some element of necessity present."

He thought that it would be wholly unreasonable to saddle a tour operator with an obligation to ensure the safety of all the components of a package over none of which he had any control at all. He rejected a claim based on the implied term alleged and, whilst accepting that a tour operator could be liable in negligence, he found that the duty of care owed by the package tour operator to its customers in that case had been fulfilled. It must be said at once that the implied term alleged in that case is not the one relied on here. Whether it is "wholly unreasonable" to impose an obligation that the services will be performed with reasonable skill and care their Lordships discuss subsequently in this judgment.

The Court of Appeal thought in the present case that it would impose an intolerable burden if the firm which put the package tour together was to be held liable for the negligence of a transport operator in another country on the basis of a breach of a non-delegable primary contractual duty. This reflects what was said by Mr Justice Hodgson in the passage to which reference has been made. Penlington J.A. in a careful analysis of the evidence thought that the third defendant could never reasonably have anticipated that the speedboat would be driven by an inexperienced and negligent employee; nor could the members of the tour group, when they saw that a speedboat was to be used to get them to the resort, have expected and relied on the first defendant to make sure that it was safe. He read the first defendant's contract as being "to provide a reasonable package tour and that would include seeing that the transportation which it was aware would be used was supplied by reputable organisations". He added "that in my opinion does not make them liable for the irresponsible action of the second and third defendants in allowing a speedboat to be driven by an apparently unqualified and, as it turned out, negligent driver when the appellant was not aware that speedboats might be used at all during the tour."

On the basis of the authorities to which reference has been made, the question is into which of the two categories referred to the present contract falls.

The first defendant's brochure, which is accepted to contain the contractual terms between Miss Ho and the first defendant, describes the itinerary for the three days. It is necessary to refer only to parts of it.

"First day: Hong Kong - Zhu Hai - Pat Teng
Lake

On that day, we will firstly gather at the China Hong Kong Ferry Pier, or the concourse, the 3rd Floor of the Macau Ferry Wharf, with the receipt of our company, you can receive the steamer ticket. ... We will board the deluxe double jet hydrofoil ... Upon arrival there, our staff will handle the customs formalities for (you). After getting through the customs, we will board the deluxe coach to Pat Teng Lake Holiday Village at Zhu Hai City. ...

Second day: Pat Teng Lake Holiday Village -
Chong Shan Hop Spring - Pearl
Amusement Park - Chui Hang
Village - Shi Qi Fu Wah Hotel

After breakfast, accompanied by the tourist guide, we will visit the rustic and beautiful Holiday Village, ... Following that we will go to Chong Shan Hot Spring for lunch by coach. After lunch, we will go to Pearl Amusement Park, ... Then, we will get on the coach at the designated time ... Then we will go back to Fu Wah Hotel, ... We will have supper at the restaurant in the hotel. ... We will then live in Fu Wah Hotel at Shi Qi ..."

The price was said to include:-

- "1. Transportation as specified in itinerary.
2. Breakfast, lunch and dinner for each day as specified in itinerary.
3. Sightseeing as specified in itinerary.
4. Accommodation as specified in itinerary."

The receipt stated:-

"Our company provides second class seat in Fai Tat Ferry for the departure and return journeys."

It was clearly always the first defendant's intention that parts of the package tour would be carried out by others and, in particular, in their respective spheres, by the second and third

defendants. Miss Ho and her colleagues may have appreciated that someone other than the first defendant would carry out some parts of the tour. That does not, however, conclude the question. It still has to be considered whether the first defendant was in reality doing no more than "arranging" the tour so that they undertook no liability for any default by those providing the goods and services or, at the most, a liability to take reasonable care in the selection of those who provided the services. In the present case there are in the terms of the brochure, which are treated as part of the contractual arrangements, no clear statements that the first defendant was doing no more than arranging the tour as agent for the travellers.

The heading of the brochure "Kwan Kin Travel Tours everything more comprehensively and thoughtfully worked out" gives some indication that it is the first defendant who has undertaken the task of supplying the package tours. Throughout the detailed itinerary it is always "we" who will do things - board the bus, go for lunch, live in the hotel. Their Lordships do not think that "we" is to be read simply as referring to the customers - i.e. in an attempt to lay the foundation for a friendly atmosphere on the tours. "We" includes the company offering the tour and integrates the company into each stage of the tour. At Zhu Hai it is "our staff" who will handle the customs formalities for you. There is nothing to indicate that "the tourist guide" who is accompanying the group to the Village is other than an employee of the first defendant and in paragraph 7 it is the "escorts of our company" who may request a member to leave the tour. The price - an all in price - includes "Transportation as specified in the itinerary" and the learned trial judge accepted that the trip across the lake fell within that description. Meals, sightseeing and accommodation all are set out in the first defendant's itinerary. It is the first defendant who has the right to change the means of transport provided for in the itinerary.

Taking the contract as a whole their Lordships consider that the first defendant here undertook 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 the services would be provided with reasonable skill and care remains even if some of the services were to be rendered by others, and even if tortious liability may exist on the part of those others. It has not been suggested that Miss Ho was in contractual relations with the others.

In their Lordships' view it was an implied term of the contract that those services would be carried out with reasonable skill and

care. That term does not mean, to use the words of Hodgson J., that the first defendant undertook an obligation to ensure "the safety of all the components of the package". The plaintiff's claim does not amount to an implied term that her daughter would be reasonably safe. It is a term simply 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 is liable for such breach of contract as found by the learned trial judge.

Their Lordships of course appreciate the desire of the Court of Appeal to avoid imposing a burden which is "intolerable" on package tour operators. It must, however, be borne in mind that the tour operator has the opportunity to seek to protect himself against claims made against him in respect of services performed by others by negotiating suitable contractual terms with those who are to perform those services. He may also provide for insurance cover. He may include an appropriate exemption clause in his contract with the traveller. It also has to be borne in mind, in considering what is "tolerable" or reasonable between the parties, that a traveller in the position of Miss Ho could have no influence on the terms negotiated by the tour operator with third parties, and if injured by their lack of care would, if having no right against the package tour operator, be obliged to pursue a claim in a foreign country. The difficulty involved in doing so does not need to be elaborated. In considering what is or is not tolerable as between traveller and tour operator it is of some relevance to note the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992 No. 3288) made pursuant to Council Directive 90/314/EEC. The organiser or retailer of the package tour:-

"15-(1)...is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

15-(2). The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract..."

There is an obligation under the regulations for the person providing the package tour to ensure that a bond is entered into in respect of monies paid for services not provided and to provide insurance under which the insurer agrees to indemnify the person who takes or agrees to take the package or the person on whose behalf the package is being purchased against the loss of money paid over by them under or in contemplation of contracts in the event of the insolvency of the contractor.

These terms do not of course apply to the present contract but they do throw some light on the contention that an unreasonable burden would be imposed if the contract were held to contain a term that reasonable skill and care would be used. Their Lordships are satisfied that in the present case such a term was to be implied in respect of the services provided, and, to quote Cockburn C.J., whether the work "is...done by the immediate party to the contract, or by someone on his behalf". Their Lordships accordingly conclude that, if the tour operator agrees that services will be supplied whether by him or others on his behalf, to imply a term that those services will be carried out with reasonable skill and care is not imposing on the tour operator a burden which is "intolerable", as the Court of Appeal thought. Nor is it wholly unreasonable, as Hodgson J. thought in *Wall v. Silver Wing Surface Arrangements*.

It was not pleaded in the defence that clause 1 of the brochure constituted a valid exemption clause upon which the first defendant could rely. The judge refused the late application to amend to plead that clause. There was no appeal to the Court of Appeal from that refusal (perhaps because the judge indicated that he thought that "the clause is couched in vague and unsatisfactory terms") and the point was not raised before their Lordships' Board. Nor has any question been raised as to the amount of damages found by the trial judge.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of Mayo J. restored. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' Board.