DCPI 1399/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1399 OF 2009

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BETWEEN

LEUNG KWOK YIN VICTORIA Plaintiff

and

SECRETARY FOR JUSTICE

on behalf of

THE DIRECTOR OF DEPARTMENT OF HEALTH 1st Defendant

COUNTRY COACH LIMITED 2nd Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: Her Honour Judge Anthea Pang in Court

Dates of Hearing: 21-23 April 2010

Date of Judgment: 1 June 2010

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

***Introduction***

1. This is a claim for damages for personal injuries in respect of an accident which happened to the Plaintiff on 27 September 2006. The Plaintiff was then employed as a Health Surveillance Assistant by the Director of the Department of Health (“D1”) and was assigned to work at the Lo Wu Border Control Point (“the Control Point”).

1. The 2nd Defendant (“D2”) was an independent contractor engaged by D1 to provide transportation service to convey D1’s staff to and from the Control Point. There were various pick-up and drop-off points en route, including one near Sheung Shui KCR Station (“the Sheung Shui Stop”).
2. On 27 September 2006, the Plaintiff travelled on D2’s 29-seater coach bearing registration number KC 2764 (“the Coach”) from the Control Point to Sheung Shui. While she was alighting from the Coach at the Sheung Shui Stop, she lost her balance and fell onto the pavement, causing injuries to her left knee.
3. The Plaintiff says that the accident was caused by the negligence and/or breach of contract of employment and/or breach of statutory duty on the part of D1. Insofar as D2 is concerned, the Plaintiff says that the accident was caused by the negligence of D2.

***The Plaintiff’s Evidence***

* 1. *The Accident*

1. Since December 2005, the Plaintiff had been working as a Health Surveillance Assistant under the employment of D1. At the material time, she was posted to the restricted area of the Control Point to conduct temperature screening of travellers crossing the border.
2. On 27 September 2006, the Plaintiff was assigned to work on day shift from 6:15 am to 3:15 pm. At about 3:30 pm, after the Plaintiff had finished her work, she took the Coach arranged by D1 and operated by D2 to travel from the Control Point to Sheung Shui.
3. The Plaintiff said that the Coach was different from the 50-seater coach which she used to take in the past 9 months and that, as far as she could recall, it was the first time she took the Coach on the day of the accident. However, under cross-examination and when asked about the transportation list which showed that she had taken the Coach on 19 August 2006, the Plaintiff said that she could not remember.
4. After the Coach had arrived at the Sheung Shui Stop, the passengers on board then started to get off. Under cross-examination, the Plaintiff said that there were about 20 odd colleagues on board the Coach at that time. When the Coach arrived at the Sheung Shui Stop, some 7 to 8 colleagues alighted from the Coach. She said that colleagues got off the Coach one by one and she was the 5th or the 6th one to get off. At the time, nobody hurried her and she admitted that she could alight from the Coach slowly and at her own pace.
5. The Plaintiff recalled that for those colleagues alighting in front of her, some did so from the left and some from the right. The Plaintiff said as she thought that the 2nd step was a continuous one, she alighted from the right of the 2nd step but she then stepped into a void and lost balance.
6. When put to her that if she had paid attention, then the accident might not have happened, the Plaintiff agreed and said that if she had been more careful, then the accident could have been avoided. She further accepted that, as an adult, she should have exercised care when getting on/off a vehicle.
7. The Plaintiff, however, complained that before she met with the accident, neither D1 nor D2 had given any information/instruction to her about the void on the 2nd step. She also said that no warning notice was put up inside the Coach to warn passengers of the danger of the void. The Plaintiff said that after the accident, there was then such a warning notice put up inside the Coach.

*(2) The Void*

1. In her witness statement the contents of which she had adopted as her evidence, the Plaintiff claimed that while she was getting off the Coach, her sight was blocked by the other colleagues in front of her and she therefore could not clearly see the 2nd step. At trial, the Plaintiff, however, confirmed that there was no one standing on the 2nd step at that time and that she could see the entire 2nd step but she did not notice that there was a void.
2. The Plaintiff said that the staircase of the Coach had a total of three steps. The 1st step was on the same level as that of the floor of the Coach. The 2nd step, according to the Plaintiff, was about ¼ shorter than the 1st step. The 3rd step was the last step and one could reach the ground level after this step.
3. At trial, the Plaintiff explained that each step was about 3 feet in width but at the right side of the 2nd step, there was a void of about 9 inches. The void was formed by an abrupt cut of the 2nd step. She said that she first noticed this void when colleagues helped her up after the accident.
4. The Plaintiff told the Court that as she stepped into the void, she fell onto the ground, landing with her left knee which caused her severe pain.
5. The Plaintiff agreed under cross-examination that the void could have been part of the design to facilitate the opening and closing of the door of the Coach. She explained that although she had paid attention to the staircase when she boarded the Coach that day, she did not notice the void.
6. When asked about the doctor’s notes which recorded her telling the doctor that she had kicked on a metal bar and lost balance, the Plaintiff maintained that she did tell the doctor about stepping into the void, and perhaps, the doctor had misunderstood her and had wrongly recorded the cause of the accident. The Plaintiff further explained that she only made the report about stepping into the void 10 days after the accident as she had not been asked to do so earlier on. She said that if such a request had been made by D1, she could have provided the report on the day of the accident, explaining how she had met with the accident.

1. With regard to the 50-seater coach on which the Plaintiff said she usually travelled, she claimed that there was nothing unusual about the staircase and there was no void on the steps.

*(3) The Handrail*

1. The Plaintiff agreed that there was a handrail near the staircase of the Coach. She said that she had held onto it at the time but as she lost her balance, she lost grip of the handrail and fell onto the ground.

*(4) The Injuries*

1. Following the accident, the Plaintiff was sent to the Accident and Emergency Department of the North District Hospital for treatment. It was found that there were redness and swelling over her left knee. She was then given some sick leave and painkillers. Thereafter, the Plaintiff said she still suffered from her knee pain and she was given physiotherapy and occupational therapy treatments.
2. Between 28 September 2006 and 27 April 2007, intermittent sick leave was granted to the Plaintiff. On 26 November 2007, the Plaintiff was examined by the Employees’ Compensation (Ordinary Assessment) Board (“the Board”) and was assessed to have 10% loss of earning capacity. D1 objected to the assessment and, upon review by the Board, the assessment was revised to 5% by the Board’s Certificate of Review of Assessment dated 10 November 2008. Subsequently, the Plaintiff’s claim for employees’ compensation made against D1 was settled at the sum of HK$64,934.38.
3. In October 2006, the Plaintiff resumed work at the Control Point but due to her knee pain, she was later assigned to work in Hunghom in May 2007.
4. The Plaintiff said that since returning to work, the pain in her left knee spread to most of her left leg. She told the Court that she cannot now run/walk for more than 30 minutes or stand/squat for a long time.
5. In the physiotherapy report produced at trial, the physiotherapist noted that by December 2006, the Plaintiff had reported 40% of improvement in her knee pain.
6. Insofar as the occupational therapy treatment is concerned, the relevant report recorded that by May 2007, the Plaintiff had reported that her left knee pain gradually improved and therefore the reconditioning training was stopped with a home programme given. Further, it was recorded that by July 2007, the Plaintiff had reported that her left knee pain only occurred occasionally and she could cope with her job demand as a Health Surveillance Assistant.
7. In respect of the joint medical report dated 13 February 2009, both doctors opined that the Plaintiff’s left knee contusion and associated patella cortical fracture has healed satisfactorily. Both took the view that the Plaintiff does not require further medical treatment/surgery for her knee injury and that she is fit to resume her pre-accident work.
8. When asked about these reports and that she had stopped attending the Tai Po Jockey Club Clinic in April 2007, the Plaintiff denied that her knee injury recovered well by March/April 2007 and maintained that she is still suffering from her knee pain.

*(5) The Depression*

1. In the meantime, on 17 January 2007, the Plaintiff said that owing to the conduct of her supervisor in reading out her sick leave certificates in front of other colleagues, she felt upset and was then referred for psychiatric assessment. She eventually attended the Psychiatric Department of Alice Ho Miu Ling Nethersole Hospital on 4 May 2007 and was diagnosed to have suffered from mild depression.
2. In the medical report of Tai Po Jockey Club Clinic dated 14 October 2008, it was stated that “*The referral to Psychiatric Clinic was based on patient’s request and was not directly related to the said injury.*” However, the Plaintiff maintained at trial that her depression was caused by the accident. She said that if there had not been the accident, then she would not have been granted sick leave in relation to her knee injuries, and if she had not been granted such sick leave, her supervisor would not have teased her about her sick leave certificates, and if so, she would not have developed depression. The Plaintiff denied that her depression had anything to do with her worries about her daughter or any other matter.

*(6) The Resignation from the Job*

1. In May 2009, the Plaintiff resigned from her job with the Department of Health on her own volition. Between 2 June and 28 July 2009, the Plaintiff worked for the Inland Revenue Department but she later quitted the job as she said she could not handle the work pressure there.
2. At the time of trial, the Plaintiff told the Court that she was studying but she would continue to seek work.
3. While accepting under cross-examination that she could cope with her work in Hunghom, the Plaintiff said there was then the incident of sexual harassment in Hunghom. She told the Court that if she had not been suffering from depression, she should have been able to handle the incident and she would not have resigned.

***D1’s Evidence***

1. Mr. Lee Wai Kit, who was the supervisor of the Plaintiff, gave evidence at trial. He confirmed that D1 had engaged D2 to provide transportation service for D1’s staff who worked at the Control Point. He said that at the Sheung Shui Stop, the place where the Coach pulled up was one where picking-up and setting-down of passengers were permitted and the driver would wait patiently for his colleagues to get off.

1. On the day of the accident, Mr. Lee said that he did not witness the Plaintiff’s accident. He only heard some sound and he then found that the Plaintiff had fallen onto the ground and some colleagues were helping the Plaintiff to get up. Mr. Lee said that, after the accident, he stayed on board the Coach and continued his trip.
2. Mr. Lee told the Court that, as far as he could recall, there was indeed a void on one of the steps but that was to give way for the opening/closing of the door. The design of the void was such that the 2nd step recessed progressively rather than abruptly. Mr. Lee said that he did notice the void at the time when he got on the Coach as the void was obvious. However, he did not remind colleagues of the void as he did not consider it to pose any danger. Nevertheless, after the Plaintiff’s accident, Mr. Lee said he then reminded his colleagues to take care.
3. Under cross-examination, Mr. Lee said that as a supervisor, he was responsible to communicate with the driver and to check the list of colleagues who took the Coach. However, he denied that he had a duty to remind his colleagues about the void.
4. Dr. Fu Yuk Ching also testified on behalf of D1. He said that although transportation service was provided to those colleagues working at the Control Point, it was not mandatory for them to take the transport. Dr. Fu said that the Coach was provided by D2, an independent contractor engaged by the Government Logistics Department under a government contract. The driver of the Coach was an employee of D2, not D1.
5. Dr. Fu said that according to D1’s records kept for the period January to September 2006, the Coach had been deployed by D2 to convey D1’s staff on many occasions and D1 had not received any report about a similar accident as that reported by the Plaintiff.

***D2’s Evidence***

1. Mr. Sin Hon Man, one of the directors of D2, told the Court that the Coach was a second-hand vehicle bought by D2 in about June 2004 for business use. After the purchase, the Coach was sent to a garage for thorough examination and was certified to be in good order. The Coach was also examined by the Transport Department and Mr. Sin said that all the specifications met the necessary safety requirements and a Certificate of Vehicle Licence Renewal was issued to D2. Thereafter, D2 carried out examination of the Coach every three months and the Coach also passed the annual examinations required by the Transport Department.
2. Mr. Sin said that the Coach was manufactured in 2001 by Mitsubishi Motors Corporation and before the Coach was bought by D2, the Transport Department had examined its design following which the Type Approval Examination Certificate and the Passengers Services Licence were issued. D2 had not made any alteration to the Coach’s staircase.
3. The Coach was sold in about June 2008 when Mr. Sin closed D2’s transportation business. Mr. Sin said that between June 2004 and June 2008 when the Coach was used by D2, D2 had never received any complaint about the Coach’s staircase or any report about accidents being caused by the void. Mr. Sin further stated that in his 34 years’ experience in the transportation business, he had not received any similar report or complaint.
4. According to Mr. Sin, the driver of the Coach on the day of the accident was Mr. Lin Kwong Lung but he left D2 in October 2008. Mr. Sin said that Mr. Lin had never reported the accident to D2. Therefore, D2 was only aware of it when D2 received the writ in this action.
5. Mr. Sin told the Court it was the Coach’s design that after the door was opened, it would fold inwards and towards the right of the staircase and would occupy the void on the 2nd step which recessed progressively. He estimated that if the void were of a measurement of 9 inches, then after the door was opened, the door would occupy about 2/3 of the void, leaving a gap of about 3 inches. Mr. Sin further said that this design was also found in some of the 50-seater coaches that D2 used for the provision of transportation service for D1’s staff.
6. Mr. Sin said that to the left of the staircase, there was a handrail. The handrail was an original design of the Coach and was at a distance of about 2 feet from the void. He said that in the normal course of events, if a passenger had held onto the handrail, he should not have been able to step into the void.
7. Under cross-examination, Mr. Sin maintained that he did not consider the void to be of danger. He further said that as D2 had never received any report about the accident, D2 had not put up any warning notice about the void inside the Coach.

***Findings***

1. There is no dispute between the parties that an accident indeed happened to the Plaintiff while she was alighting from the Coach on the day in question. Although there were some suggestions that the Plaintiff met with the accident as a result of her tripping on a metal bar, rather than stepping into the void, I am prepared to accept that she did step into the void which then caused her to fall.

1. However, as the Plaintiff admitted that there was no one standing on the 2nd step at that time, it would mean that if she had paid attention to the 2nd step, she would have seen the void as it was not blocked by anyone or anything. Therefore, I do not accept her claim that she had watched her step but could only see part of the 2nd step and had assumed that the step was a complete step without any void. On the evidence before me, I find that she did not pay attention or sufficient attention to the 2nd step and therefore, she failed to notice the void at the time when she alighted from the Coach. As admitted by the Plaintiff, the accident could have been avoided if she had been more careful.
2. At trial, the Plaintiff maintained that she should have held onto the handrail while alighting but as she fell, she lost her balance and lost grip of the handrail. If the Plaintiff had held onto the handrail at the time, it would be natural for her to alight either near the left side of the staircase where the handrail was or alight from the middle of the step. However, for her to have stepped into the void, she must have been very close to the door at that time. In other words, the Plaintiff must have alighted from the extreme right although, as she said, there was no one on the 2nd step at the time and that no one was hurrying her to get off. On the evidence before me, I find that the Plaintiff was not holding onto the handrail at the time when she chose to alight from the extreme right of the 2nd step.
3. I also accept the evidence of Mr. Lee and Mr. Sin that the void was part of the design of the Coach and that the formation of the void was by way of a progressive recession of the 2nd step rather than an abrupt cut as described by the Plaintiff. I find Mr. Sin a credible and reliable witness and I accept his estimate that after the door of the Coach was opened, the door would occupy about 2/3 of the void. Therefore, no matter what the actual size of the remaining gap was, it should not be a big gap although it should have been noticeable if one paid attention to it. The estimate of Mr. Sin that the gap should be about 3 inches if the void were of 9 inches does not appear to me to be an unreasonable estimate for it should be remembered that the void was there to accommodate the door after it was opened. If so, there should not be much space left after the door was opened and upon the door filling up the void.
4. I also accept that both Mr. Lee and Mr. Sin did not see any need for raising an alarm about the void as it was just an ordinary design of the staircase which did not create any danger. I further accept Mr. Sin’s evidence that as D2 was not aware of the Plaintiff’s accident until the time of the writ, no warning notice had ever been posted inside the Coach after the accident as alleged by the Plaintiff.
5. Insofar as the Plaintiff’s injuries are concerned, I do not accept that her depression was caused by the accident. It is plain and obvious that she only had her emotional problem after resumption of work. She also admitted that she felt upset and aggrieved because of the way her supervisors/colleagues treated her. It is evident from the Plaintiff’s own evidence and from the medical records that the cause of her depression was related to the stress she encountered in her interpersonal relationships. It was not caused by the accident.

***D1’s Liability***

1. Although the evidence of both the Plaintiff and Mr. Lee confirmed that the staff of D1 were not under a mandatory requirement to take the coach to and from work and that the provision of the coach service was only there to facilitate D1’s staff, the Plaintiff contends that D1 had a non-delegable duty in respect of the provision of such service. The Plaintiff says that, in the circumstances, D1 could not escape liability simply by saying that a competent contractor, D2, had been employed.
2. Paras. 6-52 and 6-53 of *Clerk & Lindsell on Torts* (19th ed.) 2006 read,

“***Introduction*** *If the employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work … Of course, even though the damage complained of may have been caused by the wrongful act or omission of an independent contractor or his employee, it may also be attributable to the negligence or other personal fault of the employer. If, for example, he has negligently selected an incompetent contractor, or has employed an insufficient number of men, or has himself so interfered with the manner of carrying out the work that damage results, he will himself have committed a tort for which he can be held liable….*

***Exceptions to the general rule : non-delegable duties*** *To the general rule that an employer is not liable for the negligence of an independent contractor there are certain apparent exceptions. … they are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to the claimant…. If the circumstances are such that the law imposes a strict or absolute duty upon the employer, then he cannot discharge his duty by delegating performance of the work in question to an independent contractor. … Such duties are often described as “non-delegable” and may arise either by statute or at common law. For present purposes, they are to be contrasted with the ordinary duty to take reasonable care which can be discharged by the employment of a contractor reasonably supposed by the employer to be competent. Often, indeed, a non-delegable duty will be a strict duty. At the very least, the non-delegable duty is “a duty not merely to take care, but a duty to provide that care is taken,” so that, if care is not taken, the duty is broken.*”

1. In the present case, I cannot see how the provision of transportation service to employees in order to facilitate their travelling to and from work could be said to involve a non-delegable duty or a duty which D1 personally owed to the Plaintiff, whether by way of statute or at common law. Clearly, we are not talking about a work place here. Nor are we talking about a system of work. The Plaintiff’s work place was at the Control Point and any system of work which would be of relevance had to be by reference to the work carried out by the Plaintiff at the Control Point, not by reference to the Plaintiff sitting on the Coach as a passenger.
2. In the circumstances, I do not accept that D1 had a non-delegable duty in respect of the provision of the coach service. On the evidence before me, I accept that D1 had taken steps to choose a competent contractor to provide the coach service. In fact, the Plaintiff’s complaint was the absence of warning/instruction/supervision about the void. It was never suggested that D2 was an incompetent contractor or that D2 had carried out the provision of the service in an incompetent manner. I therefore reject the Plaintiff’s claim that D1 was negligent.
3. Now, I turn to the position of D1 as the Plaintiff’s employer. It is true that, as an employer, D1 has a duty to take reasonable care of the safety of his employees while at work. However, as mentioned earlier, I do not accept that the employee’s taking of a coach provided by the employer and operated by an independent contractor to/from the place of work would turn the coach itself into a place of work or into part of the system of work as argued by the Plaintiff. Therefore, I reject the Plaintiff’s claim made against D1 on the basis of any alleged breach of an employer’s duty of care.
4. The Plaintiff also contends that D1 should be liable as there were alleged breaches of the statutory duties under sections 6(2)(a), 6(2)(c) and 6(2)(e) of the Occupational Safety and Health Ordinance, Cap. 509, of the Laws of Hong Kong.
5. It is, however, noted that section 6(1) of Cap. 509 refers to the duty of every employer to ensure the safety and health ***at work*** of all the employer's employees so far as reasonably practicable. Section 3(1) of Cap. 509 then defines "workplace" to mean “***any place where employees work***”.
6. Further, section 3(4) of Cap. 509 stipulates that, “*For the purposes of this Ordinance, a person is at work only during the time when the person is actually at a workplace. However, a person is not to be regarded as being at work at a workplace for those purposes when the person is being conveyed as a passenger in a vehicle referred to in paragraph (b) of the definition of "workplace" in circumstances no different from those applicable to persons being so conveyed who are not at work at a workplace.*”
7. In this case, when the Plaintiff met with the accident, she had already finished her work at the Control Point. Clearly, she was not “***at work***”. At the time of the accident, the Plaintiff was being conveyed as a passenger no different from any other passengers on board a vehicle. In the circumstances, I cannot see how the sections pleaded are applicable to this case and I reject the Plaintiff’s claim that D1 was in breach of an employer’s duties under Cap. 509 as alleged.
8. To conclude, the Plaintiff has failed to prove on a balance of probabilities that D1 is liable in any way in respect of the accident which happened to her on 27 September 2006.

***D2’s Liability***

1. The Plaintiff’s case against D2 is put on the basis of negligence. The Plaintiff contends that there was insufficient prior warning or instruction about the void which caused the accident.
2. As I have mentioned above, I accept that the void was part of the original design of the Coach. It was not an alteration, nor an addition. The void was for a functional purpose, that is, to make room for the folding door when the door was opened. Such is a rather common design and as Mr. Sin said, a similar void could be found in some of D2’s 50-seater coaches. Such a void is not something one would consider to be dangerous, especially when we are, in this case, talking about the relatively small gap which remained after the opening of the door. Mr. Sin, whose evidence I accept, also said that the Coach was regularly examined and passed all the examinations required by the Transport Department. Moreover, Mr. Sin told the Court that in the 4-year period during which the Coach was used by D2, no accident involving the void was reported. Further, in his 34 years’ experience in the transportation field, Mr. Sin was not aware of any such accident. In the circumstances, I do not accept that the void posed any foreseeable risk to passengers using the Coach.
3. The Plaintiff did not adduce any expert evidence to say that the design of the void was defective or unsafe. Counsel for the Plaintiff argues that since D2 had sold the Coach in June 2008, the burden was shifted to D2 to prove that the Coach was safe. Counsel, however, was unable to provide any authority in support of such a proposition. I do not accept such an argument. The burden is on the Plaintiff to prove her case against the Defendants. The Plaintiff met with the accident in September 2006. There were ample opportunities for the Plaintiff to ask for the Coach to be examined before it was sold by D2 in June 2008. Even if the Coach was not available for examination, it would appear that it was still open for the Plaintiff to brief an expert and to have an expert report prepared in relation to the void if the Plaintiff considered it necessary. This, however, was not done.

1. On the evidence before me, I find that the void should be readily noticeable by any passenger who exercised reasonable care for his/her safety and who cared to pay attention to the staircase. Further, one would not normally expect a passenger to alight from where the void was since it was at the extreme right and was at a distance from where the handrail was.
2. As submitted by both counsel for D1 and D2, getting on and off a vehicle is one of those simple activities an adult engages in his/her daily life. To suggest that an adult would require instruction or warning or supervision as to how to perform such a simple task is quite beyond comprehension. To further argue that D2 was in breach of a duty of care by not giving such instruction/supervision or by not posting any warning is to ignore the fact that it was not reasonably foreseeable by D2 that an accident would happen in this way. Here, it should be remembered that it was the Plaintiff’s own evidence that when she was alighting from the Coach, she was doing so at her own pace; there was no one hurrying her; there was no one standing on the step where the void was; and she could see the entire 2nd step. In other words, the accident only happened because the Plaintiff failed to exercise reasonable care to watch her step and to notice the void, but at the same time, choosing to alight from the extreme right of the staircase without holding onto the handrail. As the Plaintiff herself admitted, if she had been more careful, the accident would not have happened.
3. Having considered all the relevant circumstances, I find that there was no breach of duty on the part of D2 and the Plaintiff has failed to prove that D2 was negligent in not instructing/warning its passengers about the void.

***Conclusion***

1. For the reasons set out above, the Plaintiff’s claim against both Defendants is dismissed. As liability is not proved, there is no need for me to deal with the issue of quantum.
2. The Plaintiff is to pay the costs of this action to the 1st and the 2nd Defendants, to be taxed if not agreed, with a certificate for counsel. In the absence of an application to vary the order within 14 days from the date of this judgment, the costs order nisi shall become absolute.

(Anthea Pang)

District Judge

Mr. Wan Yiu Kee, instructed by Messrs. Shea & Co., for the Plaintiff

Miss Jennifer Tsui, instructed by the Secretary for Justice, for the 1st Defendant

Miss Alice Tsang, instructed by Messrs. Tong & Tsui, for the 2nd Defendant