#### DCPI 73/2004

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 73 OF 2004

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| BETWEEN | LUK CHUN WING formerly known as LUK CHUNG LIT | Plaintiff |
|  | and |  |
|  | INTERCONTINENTAL HIRE CARS LIMITED | Defendant |

##### Coram: Deputy District Judge W C Li in Court

Date of Hearing: 27th to 29th April 2005

Date of Judgment: 6th May 2005 (Handed down)

## J U D G M E N T

1. The Plaintiff claims damages for personal injuries sustained by him when he was unloading luggage from inside the luggage compartment of a tourist bus when he worked for the Defendant as a bus driver on 12th February 2001.

2. Both liability and quantum were in issue. This trial was on liability only though both quantum and liability were set down for trial. It transpired in the course of the evidence that the Plaintiff had suffered a subsequent back injury while employed in the same capacity by the Defendant and this was the subject matter of another civil litigation claim. However the medical evidence and the computation on the loss of incomes had not sufficiently taken into the account this new intervening factor and I took the view that in assessing quantum, updated medical reports and revised assessment on loss of incomes were necessary to enable me to see the full picture and to make a fair assessment. Quantum was therefore to be assessed after the trial on liability.

PLAINTIFF EVIDENCE OF THE ACCIDENT

3. The Plaintiff gave evidence as to how the accident occurred. No one else saw the accident. There was only the Plaintiff evidence as how the accident happened. He described and demonstrated that the back of his left hand just below the left thumb struck a metal pillar behind him, the metal pillar was about a foot distance to his right side behind him, when the whole handle of a suitcase came off as he pulled it from deep inside the luggage hold. He described the suitcase to weigh about 70-80 pounds and that the 4 rivets which held the handle broke off and the whole handle came off. He demonstrated that he was crouching inside the luggage hold which could be seen in the photographs on page 247 of the Plaintiff trial bundle, with his legs and knees on the floor in a crouching position and with his right hand supporting himself on the floor of the compartment, and his left hand extended in front of him to pull the handle when the accident occurred. He described and demonstrated how his left hand flew across his chest and went over his right shoulder. He testified that he fell backward though he did not fall over, and his left hand hit the metal pillar behind him. He gave evidence that the back of his left hand just below the left thumb suffered abrasion and swelling. He phoned the Control Room of the Defendant and informed them of the accident He was told to finish the unloading and to let his passengers check into the hotel before he sought medical treatment, and this he did. He testified that he first went to Kwong Wah Hospital and then went to Caritas Medical Centre where he had prompt medical attention from the nurse and the doctor.

4. It was the Plaintiff case that no proper training on safety and work was ever given to the Plaintiff in the loading and unloading of luggage from the bus. There were no safety equipment such as safety gloves provided to the bus drivers who had to work as luggage handlers as well. The drivers had to work with time constraint in that they were given about an hour to get to the hotel from the airport and drivers had to do 6-7 rounds each day. It was also the Plaintiff case that very often the Plaintiff had to work alone in the loading and unloading of luggage, though sometimes a bell boy at a five star hotel might do the unloading or at the airport, an extra hand might sometimes be available to help with the loading. The Plaintiff also gave evidence that at the time of this accident which was after 7.00 p.m., both the compartment lights inside the luggage hold had not worked, and it was dark inside.

5. The Defendant disputed the Plaintiff evidence on the accident. It was not denied that an accident occurred and the Plaintiff hand suffered injury on the night in question.

6. The log book kept in the report room of the Defendant contained an entry at 19.20 hours on 11th February 2001 which recorded the Plaintiff reporting in to say his hand was caught in the car door and he went to see the doctor at the Accident & Emergency Department, and was given sick leave from 11th February to 17th February. It was not in dispute that the Plaintiff accident occurred on 12th February 2001 and not 11th February 2001 and that he was given 6 days of sick leave by the doctor at the A & E Department. The Defendant submitted that the date on the log book regarding the Plaintiff accident must have been wrongly recorded to be on the 11th instead of the 12th. This indeed appeared to be the case. The Plaintiff did not suffer an accident on 11th February. The entry in the log book immediately preceding the Plaintiff ‘s entry was deleted but it did contain a date and an entry number. The date of this deleted entry was 12th February 2001 (“01/02/12”). And the entry number was 111. The Plaintiff log book entry was also given this entry number. The Plaintiff entry also recorded Plaintiff given sick leave from 11/2 to 17/2. this appeared to be mistakened too as Plaintiff sick leave was for 6 days from 12/2 to 17/2. This log book entry recording the Plaintiff accident was made by a control room staff called Joyce Leung. She had since left the Defendant’s employ.

7. The record of the nurse and that of the doctor’s who attended the Plaintiff at the Caritas Medical Centre (“CMC”) on 12/2/2001 (page 511 of the Plaintiff bundle of documents) also indicated that the Plaintiff hand injury was caused by his left hand crushed or caught in the vehicle door or luggage compartment door. I noted that the nurse was the first person to attend the Plaintiff at the CMC and she recorded the Plaintiff cause of injury to be the left hand caught in the vehicle door. And the doctor who attended the Plaintiff subsequently went a little further to describe the door in his record and he noted down that the Plaintiff injury was caused by his left hand being caught in the luggage compartment door.

8. The Plaintiff in giving evidence said when he first pulled the handle of a suitcase, the handle came off. He gave a forceful pull and the handle came off suddenly and his hand hit back as his body moved backward. He testified that he estimated the suitcase in question weighed 70-80 pounds, he knew its weight because he had to move the suitcase out after the accident. He gave the impression that he had no idea that the suitcase was a heavy one and he had used a great deal of force to pull it, so when the handle came off, his hand hit back. In his latter evidence, the Plaintiff said he had first pulled the suitcase a little to the right and then he had wanted to pull the suitcase out towards the luggage compartment door so that he could get out before he took the suitcase out. His evidence was that when he pulled the suitcase a second time, this time to move the suitcase nearer the doorway, the handle came off. He first said it was the first pull, a forceful one, when the handle suddenly came off. Then he said he had pulled the suitcase a little to the right and his second pull was only to move the suitcase nearer the compartment door. The Plaintiff testified that his left hand hit back across his chest and over the right shoulder and the part of his left hand just below his left thumb struck a metal pillar behind him, and the metal pillar was a foot away to his right side. I also bore in mind that he was in a crouching position inside the luggage hold with his legs and knees touching the floor and his right hand supporting himself on the floor as well.

9. Plaintiff counsel referred me to the Form 2 filed by the Defendant a week after the accident on 19/2/2001 (page 204 of the Plaintiff bundle), and the cause of the accident was described as injury to left hand caused by the left hand being hit by the joint of the luggage compartment door. This injury was described to be caused by lifting or moving objects and the injury was bruising and injury caused by being struck.

FINDING OF FACT

10. The Plaintiff gave 2 versions on how he pulled the handle of a suitcase. He first impressed me to be saying he gave one forceful pull and the handle suddenly came off. Then he gave a slightly different version in his latter evidence. He then said he had pulled the suitcase slightly to the right before he pulled it again to move it closer to the doorway. I also had serious reservation about his description on how his left hand hit back across his chest and over his right shoulder, and especially the part of his left hand just below his left thumb, and this part was able to hit a metal pillar behind him and a foot away to his right side. I carefully observed his demonstration more than once and I saw this part of his left hand to reach the right side of his head. Of course, I also noted that he had moved his body as his left hand swung backward. I do not think it is likely that his hand was able to hit a pillar about a foot distance to his right rear side. As to the force he was able to apply when he was in a crouching position and also with his right hand on the floor to support himself, I do not think one could exert great force with such a posture.

11. The log book of the Defendant which was recorded by a girl called Joyce Leung also showed the Plaintiff to have suffered an accident very different in nature to the one the Plaintiff claimed to have suffered. I was aware that the Plaintiff said he spoke to a different girl called Ah You and not to Joyce Leung. The log book entry also appeared to be made sometime after the Plaintiff had phoned in because it also recorded the sick leave days given to the Plaintiff. That would mean the Plaintiff had already seen the doctor at CMC by then. The nature of the accident suffered by the Plaintiff in the log book record was that his left hand was caught and crushed by a door.

12. The log book entry was supported by the nurse record in CMC. I do not think the nurse would make any record of the cause of the accident unless the Plaintiff had told her how he suffered the injury to his left hand. The nurse record showed the Plaintiff left hand to be caught in the vehicle door.

13. The doctor’s record of the cause of injury to the Plaintiff’s left hand was not exactly the same as the nurse’s, it contained just a little bit more detail. The nurse record was that the Plaintiff’s hand was caught by a vehicle door. The doctor’s note recorded that the Plaintiff hand was caught in the luggage compartment door. Again, I do not think the doctor would make such an entry in his note unless he had spoken to the Plaintiff about it.

14. The Form 2 document in the Employee’s Compensation Claim referred to me by the Plaintiff also referred to the Plaintiff hand injured by a vehicle door, albeit struck by the joint of a luggage compartment door.

1. In all the documentary records shown to the court, there was

nothing to say that the Plaintiff injury was caused when he pulled a suitcase and the handle came off and his hand struck a metal pillar behind him.

16. In light of all the evidence which showed that the Plaintiff had suffered injury as a result of his left hand caught by the luggage compartment door and that I have grave doubt on the likelihood of his left hand swinging all the way across his chest and went over his right shoulder to hit a pillar behind and to his right side, I do not accept the Plaintiff evidence that the injury to his left hand was caused when the handle of a suitcase came off and his left hand swung backward and hit a metal pillar.

LIABILITY

17. The case of the Plaintiff was that he was injured when he had to unload luggage from inside the luggage hold of the bus, and he was not assisted most of the time, he had to work against time constraint, he was not given proper training, he was not supplied with protective tools of work like protective gloves, and was not adequately warned of the risk of injury. The Plaintiff had not claimed that his injury was caused by his left hand being caught by the luggage compartment door.

18 I found against the Plaintiff that the injury to his left hand was not caused by the handle of a suitcase coming off as claimed by him, it was caused by his left hand caught by the luggage compartment door, as evidenced in the log note kept by the girl in the Defendant Control Room, and as recorded in the medical notes of the nurse and the doctor who attended him at the CMC. My finding of facts was not just a variation, modification or development, but something new, separate and distinct, and not a mere technicality. The cause of the accident had so radically departed from what the Plaintiff pleaded. The Plaintiff is bound to fail in this case. If the Plaintiff had pleaded the accident to be caused by his hand been caught in the luggage compartment door, the defence and its presentation would have been different.

19. Although I did not accept the Plaintiff evidence as to how the injury to his left hand was caused, I would still ponder on the question whether the Defendant had been negligent in the accident to the Plaintiff’s hand being caught by the luggage compartment door. It is hard to see how lack of training, failure to provide tools of work, failure to provide adequate assistance, lack of warning and the alleged unsafe system of work had anything to do with an accident of this nature. Getting one’s hand caught in a car door or a compartment door was more likely to be a moment of one’s own inadvertence than the fault of one’s employer. I believe the Plaintiff knew very well that this accident was not the fault of his employer and it was most likely to be the reason why he alleged that he was injured by the handle of a suitcase suddenly became disengaged from the suitcase inside the luggage compartment.

20. In the circumstances of this case, I do not find the Defendant to be in breach of any duty owed by an employer to its employee, and the Defendant was not negligent to the Plaintiff for this accident.

21. I therefore dismiss the Plaintiff ‘s claim with costs order nisi for costs to be for the Defendant with Certificate for Counsel, to be taxed if not agreed.

(W.C. Li)

Deputy District Judge

Representation:

Ms. Sylvia Tung, instructed by Messrs. Huen & Partners, for Plaintiff.

Mr. Patrick Lim, instructed by Messrs. So, Lung & Associates, for Defendant.