#### DCPI 1508 / 2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1508 OF 2008

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| BETWEEN | SIU WAI CHEUNG ROCKY | Plaintiff |
|  | and |  |
|  | 李偉坤 (transliterated as LEE WAI KWUN) | 1st Defendant |
|  | MULTI EXPRESS (HK) LIMITED | 2nd Defendant |

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##### Coram: His Honour Judge Thomas Au in Court

##### (open to public)

Dates of Trial: 4,5,6 & 7 May 2009

Date of Handing Down of Judgment: 2 June 2009

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### J U D G M E N T

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A. Introduction

1. In the morning on 3 September 2005, Mr Siu (the Plaintiff) was working at a loading bay of a warehouse at Super Terminal 1 at the airport uploading cargoes onto a cargo truck parked there. Mr Siu was then employed by Multi Express (the 2nd Defendant) as a pick up operator, and Mr Lee (the 1st Defendant) was the driver of the cargo truck also employed by Multi Express.
2. Mr Siu injured his left leg as a result of a fall from the truck compartment onto a lowered tailgate of the cargo truck, when he had just completed loading the last batch of the cargoes onto the truck’s cargo compartment.
3. By this action, Mr Siu claims damages in the sum of HK$169,502 against Mr Lee for common law negligence, and Multi Express for vicarious liability and/or common law negligence.
4. In essence, Mr Siu says at the material time when he was loading the cargoes onto the truck’s compartment, it was Mr Lee who was controlling the tailgate’s position using the control located within the truck’s cargo compartment. When Mr Siu uploaded onto the cargo compartment the last batch of the cargoes using a pallet truck, Mr Lee lowered the tailgate for about 2 feet from the compartment without informing him. As a result, without being aware that the tailgate had been lowered, and when he was turning around at the edge of the compartment trying to look for some ropes to secure the pallet truck in the compartment, he stepped into the gap between the tailgate and the edge of the compartment and fell onto the tailgate, injuring his left leg.
5. Mr Siu says Mr Lee was negligent in lowering the tailgate without informing him, and Multi Express as Mr Lee’s employer was vicariously liable for that. Alternatively, even if Mr Lee was not liable, it is Mr Siu’s case that Multi Express was negligent in failing to provide adequate training for him or in failing to provide adequate supervision.
6. Both Defendants deny liability and quantum. The Defendants’ case in gist is that it was Mr Siu himself *but not* Mr Lee who controlled the tailgate at the time of the accident. Thus, the accident was caused by Mr Siu’s own negligence. Multi Express also denies any failure to provide adequate training or supervision as alleged.
7. The Defendants do not dispute that if Mr Lee was in fact in control of the tailgate at the time of the accident, he was negligent and Multi Express would be vicariously liable for that.
8. Given the above, the principal issues for trial are thus:
9. Whether Mr Lee was in control of the tailgate at the time of the accident.
10. Whether Mr Lee was negligent in causing the accident.
11. If not, whether Multi Express was negligent in failing to provide adequate training or supervision as alleged.
12. If Mr Lee or Multi Express was negligent, whether there was any contributory negligence on the part of Mr Siu.
13. Quantum of damages.

B. Background facts

1. Unless otherwise stated, the following are uncontroversial background facts leading to the accident.
2. Multi Express is a logistics company which operates with a fleet of cargo trucks. The cargo trucks would go to various warehouses including the one at Super Terminal 1 (“ST1”) to pick up cargoes for onward delivery.
3. It also employs workers entitled as pick up operators, whose main duties include uploading cargoes from the warehouse onto the cargo trucks. These are usually done at the loading bay area of the warehouses.
4. The immediate supervisor of the pick up operators at each warehouse site is someone holding the title “controller”. The controller is responsible to assign the jobs to specific pick up operators and the drivers of the trucks.
5. The cargo truck has a large cargo compartment. At the end of the compartment is a tailgate, which when closed seals off the compartment exit.
6. The tailgate is electrically operated by two controls, one located at the rear left inside the cargo compartment (“the inside control”), and the other at the rear left outside and underneath the truck cargo compartment (“the outside control”).
7. On the date of the accident, Mr Lee drove the cargo truck to the loading bay of the warehouse at ST1 to pick up certain cargoes.
8. After parking the cargo truck there with its rear facing close to the loading bay, he opened the tailgate with the outside control for the pick up operators to upload cargeos.
9. There were about 8 to 10 pick up operators stationed at that warehouse of ST1. Mr Siu was assigned by the controller to load the cargoes onto the truck.
10. Mr Siu uploaded the cargoes onto the truck compartment in rounds as follows.
11. As the floor level of the compartment was about 6 inches above the platform of the loading bay, in order to enable the cargoes to be loaded onto the truck compartment, the opened tailgate had to be first lowered horizontally by one of the two controls to land onto the platform. Mr Siu then pushed the cargoes on the pallet truck onto the tailgate from the platform. Once that was done, the tailgate would need to be elevated up to the level of the floor of the truck compartment again by the use of one of the two controls. After the tailgate was levelled with the compartment floor, Mr Siu would further push the pallet of cargoes into the truck compartment, and offload the cargoes there. He would then return to the tailgate with the empty pallet truck and, after the tailgate was lowered back to the platform, went back to the loading bay to pick up another batch of cargoes. This process had to be repeated in rounds until all the cargoes had been loaded onto the truck compartment from the loading bay.
12. As I mentioned above, it is Mr Siu’s case that all along it was Mr Lee who operated the tailgate up and down by the use of the inside control to enable Mr Siu to upload the cargoes in the aforesaid manner. Mr Lee denies the same and says that after parking the truck there, he left the loading bay area to take a rest and have a smoke. It is Mr Lee’s case that it was Mr Siu himself who operated the tailgate.
13. After loading the last batch of the cargoes onto the truck compartment, Mr Siu turned around to look for the ropes usually put inside the compartment for the use of securing the pallet truck (which was to be left within the compartment). He was by then standing at the edge of the truck compartment facing inside.
14. However, by that time, the tailgate was not on the same level with the compartment floor but had already been lowered down to the loading bay platform. Thus, when Mr Siu turned at the edge of the compartment, he stepped into the gap between the lowered tailgate and the compartment edge. He fell onto the tailgate with his left leg hitting onto it. His left leg was injured with a wound at the shin area.
15. He was in pain and shouted for help. After sitting on the tailgate for one minute or so, the other workers came by to help. Mr Siu was later sent to the A & E department of Tuen Mun hospital for treatment.

C. The issues

C1. Was Mr Lee in control of the tailgate when the accident occurred

*C1.1. The Plaintiff’s case and evidence*

1. Only Mr Siu gave evidence at trial as to how the accident occurred. In addition to the common background facts set out above, his case and material evidence could be summarized as follows.
2. On the date of the accident, he was assigned by the controller to upload cargoes at ST1 onto the cargo truck driven by Mr Lee. He said in his oral evidence that there were in fact at least two other colleagues known to him as “Ah Wah” and “Pak Tau Lo”, who were also assigned to upload cargoes onto that truck together with him.
3. During the cargoes loading process, it was Mr Lee who was operating the tailgate of the truck to assist him and the others to upload the cargoes using the pallet trucks. Mr Lee was standing within the truck compartment using the inside control to operate the tailgate.
4. Mr Siu was the one who loaded the last batch of the cargoes onto the truck compartment. By that time the compartment was almost full with the cargoes, and so when he offloaded this batch of cargo into the compartment, he was already standing close to the edge of the compartment facing inside.
5. After unloading the cargoes, he had to leave the pallet trolley in the compartment. As he could not see the ropes (which were usually found in the truck compartment) that were to be used to tie and secure the pallet truck, he started to turn around to look for them.
6. By then, the tailgate was already lowered by Mr Lee to the level of the loading bay platform. Since he was not aware of that, and Mr Lee had not informed him of the same, he stepped into the gap between the lowered tailgate and the edge of the truck compartment. He lost his balance and fell onto the surface of the tailgate, which was about 2 feet below.
7. He landed onto the tailgate with his left leg. His left leg shin was thus injured with a wound. He shouted out for help.
8. After sitting on the tailgate for about 1 minute or so, the other pick up operators came to his assistance.
9. Right after his fall, Mr Lee had not come to his assistance or talked to him.
10. Later, the police came and asked him what had happened. He told the police as to how the accident occurred and that it was Mr Lee who had caused the accident. He also told the police that there were other colleagues working with him who should have seen what happened, although he did not tell the police the names of these colleagues, as he was not asked.
11. He was then sent to the hospital.

*C1.2 The Defendants’ case and evidence*

1. The Defendants have called three witnesses to give evidence at trial. They were Mr Lee, Mr Yu Mei Yi *(余美意)* and Mr Ng Kar Lun *(吳嘉倫)*. Mr Yu is a director of Multi Express and Mr Ng is presently employed by Multi Express as a controller. Mr Ng was a pick up operator working for Multi Express before being promoted to become a controller.

*C1.2.1 Mr Lee’s evidence*

1. Mr Lee’s relevant evidence in support of his case can be summarized as follows.
2. On the date of the accident, he drove the cargo truck to the loading bay area of the warehouse at ST1. After parking the truck there, he (in line with his usual practice) used the outside control to open and lower the tailgate for the uploading of the cargoes onto the truck by the operators.
3. After that, he went to report to the controller, who told him to take a rest. He therefore walked outside the warehouse area (which prohibited smoking) to take a rest and have a smoke.
4. After about 30 to 35 minutes, he returned to the loading bay area, and noticed that there was a crowd of people surrounding the rear area of his truck.
5. He went closer to the crowd to find out what happened. He then saw Mr Siu sitting on the tailgate of his truck, with his left leg injured.
6. It is Mr Lee’s evidence that as far as he was aware of, there was usually only one pick up operator assigned to upload cargoes onto the cargo truck, and this pick up operator himself would control the operation of the tailgate using the inside control. The other pick up operators would usually be assigned with other tasks such as packing or unpacking the cargoes. He accepted that from time to time the controller might assign more than one pick up operator to upload goods onto the truck.
7. He also accepted that the controller might sometimes assign the driver to operate the up and down of the tailgate for the pick operators to upload cargoes onto truck. However, he said the controller would only so assign a driver to operate the tailgate during the uploading process if the cargoes managed by the pick up operators were too big blocking most of the space of the tailgate, which made it difficult for the cargo uploading pick up operator to control the tailgate using the inside control at the same time.
8. Under cross-examination, Mr Lee said whenever he was assigned by the controller to control the tailgate, he had only done so outside the compartment by using the outside control, but never with the inside control.
9. He confirmed that in relation to subject matter cargo loading incident at ST1, he was *not* asked by the controller to control the tailgate for the pick up operators.

C1.2.2 Mr Yu’s evidence

1. Mr Yu was not involved in the day-to-day operation at the warehouse including ST1. He was not at ST1 when the accident occurred and obviously did not witness it.
2. His material evidence can be summarized as follows.
3. The organizational staffing of the company at the time of the accident was that there was one officer overlooking the operation of ST1. Working under the officer was the post of controller, who took care of the day-to-day operation at ST1. There was one controller for each shift working at ST1. The controller was in charge of assigning the works to the pick up operators and the drivers. However, the controller might sometimes work in the office which was located at the higher floor of ST1 and was therefore not always stationed at the loading bay.
4. At the regular operation meetings held between the directors (including Mr Yu) and the warehouse officers, they would discuss from time to time the operation procedures for the workers. They would also discuss any issues concerning safety in such operations. The warehouse officers would pass on any decisions or guidelines reached in these meetings to the controllers to implement them.
5. It is Mr Yu’s evidence that insofar as the control of the tailgate was concerned, the management had issued oral guidelines that unless the controller so assigned, the drivers were not to control the tailgates of the trucks when cargoes were being uploaded onto or offloaded from the trucks. Further, it was their instructions that the controller should only so assign the drivers to control the tailgate for the pick up operators on two situations. One was when the cargoes were too big or too heavy which thus required the continuous full attention of the pick up operator to look after them throughout the uploading or offloading process. The other was when the controller thought it was necessary to do so, and what amounted to such necessity would be left to the controller to decide, depending on the on the site situations.
6. It was also Mr Yu’s evidence that Multi Express’ customers and ST1’s operator would from time to time send people to check and inspect Multi Express’s operation to see if it complied with their own work safety requirements. Mr Yu was not asked of, and did not give details as to, what these safety requirements were.
7. Further, when they employed pick up operators, they would test them to see if they knew how to operate the tailgates by asking them to demonstrate the operation.
8. After he was informed of the accident, Mr Yu said he had in fact approached and talked to the controller on duty at ST1 (a Mr Tsang) at the time of the accident. By then, Mr Tsang had already left the employment of Multi Express. According Mr Yu, Mr Tsang said he did not witness the accident as he was not there, and thus did not know whether Mr Lee was controlling the tailgate at the time of the accident.
9. Mr Yu had asked Mr Tsang whether he would give evidence for Multi Express but Mr Tsang showed unwillingness. As he was no longer working for Multi Express and given that he did not see anything, Mr Yu therefore did not insist Mr Tsang to become a witness for Multi Express.
10. Mr Yu did not ask the other pick up operators working at ST1 on the day of the accident as to what happened. He accepted under cross-examination that perhaps it was his oversight in not asking the other workers about the accident.

*C1.2.3 Mr Ng’s evidence*

1. Mr Ng was a pick up operator at the time of the accident posted at ST1. He was not present at the loading bay of ST1 when the accident occurred as he was posted to another cargo site at the airport then. He therefore also did not witness the accident.
2. The gist of Mr Ng’s relevant evidence is as follows.
3. At ST1, there was only one customer, which was DHL, and thus the cargoes involved at ST1 by Multi Express were mostly export ones. Therefore, the works at ST1 were largely cargo uploading.
4. Mr Ng said that subject to the controller’s otherwise instructions:
5. The usual work pattern at ST1 was that, for each cargo truck, the controller would assign one pick up operator to upload cargoes, while the other pick up workers (if not already assigned to upload cargoes with other trucks) would be responsible for unpacking and categorizing the cargoes for uploading purposes.
6. The pick up operator responsible for uploading the cargoes to the truck would also be controlling the tailgate levels himself.
7. Mr Ng’s evidence is that the truck drivers were not required to control the tailgate for the pick up operators. However, there were times when the controller so directed and assigned, the drivers would help to control the tailgate for the pick up operators. As far as he could see, the controller would ask the drivers to assist when the cargoes were too heavy or too big.
8. He had previously seen Mr Lee controlling the tailgate for the pick up operators from time to time, although it was not very frequent. He also confirmed that at times he saw Mr Lee controlling the tailgate from *inside* the truck cargoes compartment using the insidecontrol.

C1.3 Discussion

1. Ms To, counsel for Mr Siu, in her closing submissions has not sought to challenge the evidence of Mr Ng and Mr Yu. I also find them to be honest and reliable witnesses. I therefore accept their evidence in full.
2. On the other hand, I reject Mr Siu’s material evidence as to how the accident occurred. I do not find him a reliable witness. My reasons are as follows.
3. First, Mr Siu’s essential evidence changed as he went along and was shown to be inconsistent or incredible:
4. At trial, he revealed for the first time that there were in fact other workers who had been assigned to upload the cargoes onto Mr Lee’s truck and who had witnessed that it was Mr Lee who was in control of the tailgate. He even provided the nicknames of two workers who should have seen Mr Lee controlling the tailgate.
5. When asked why he did not put this in his witness statement, he initially said he did not think it was important and in any event he had tried to contact those workers subsequently but failed to find them as they had left the company.
6. However, when asked further under cross-examination and by the court, he said he had in fact informed his solicitors about that, but they had decided not to put it in the witness statement as he did not *think* he could find these workers as they must have left the employment of Multi Express (in contrast to his earlier evidence that he did try to locate them but failed).
7. I find this part of the evidence and explanation unreliable and bears the sign of an afterthought to embellish the evidence:
   1. It is inherently incredible and contrary to common sense that this important part of the evidence (there being at least two other named witnesses who saw Mr Lee in control of the tailgate), if it were true and had in fact been conveyed to his solicitors, would not have been contained in Mr Siu’s witness statement[[1]](#footnote-1). It must be remembered that after the Defence was filed on 23 August 2008, it was already clear that the fundamental and crucial debate between the parties was whether Mr Lee was in control of the tailgate when the accident occurred.
   2. It is clearly inconsistent in Mr Siu’s own evidence as to why this was not stated in his witness statement. As pointed out above, he initially said he looked but failed to locate these two other workers, while later he changed and said when asked by his solicitors, he thought these workers could no longer be located and thus there was no point in seeking.
8. Similarly, when Mr Siu was recalled to answer further questions raised by me, he again said for the first time that he had also informed the police who came to investigate the accident that it was Mr Lee who had caused the accident. He also told the police that there were other workers who had seen what happened, although he did not give their names to the police as he believed the police could carry out the investigations himself.
9. To support what he said, Mr Siu further confirmed that he had informed his solicitors about this and had asked his solicitors to request for the records from the police.
10. This evidence was again shown to be unreliable:
    1. Under cross-examination, he accepted that he had not signed anything to authorize his solicitors to approach the police to request for any such records. This simply could not be right if he had in fact asked (and thus instructed) his solicitors to obtain such records as he would have to sign an authorization to be produced to the police.
    2. Mr To, counsel for Mr Siu, fairly informed the court in closing that it was her instructions that the solicitors had not received any such written authorization from Mr Siu.
11. Secondly, an essential part of Mr Siu’s evidence is inherently incredible and defies common sense:
12. Mr Siu said after he fell and while waiting for help sitting on the tailgate for some one minute, and before he was sent to the hospital, Mr Lee had not come forward to help him or talk to him.
13. To me it was only a natural reaction of a reasonable person, if he was standing in the cargo compartment seeing Mr Siu fell, to have promptly come forward to at least help Mr Siu after his fall and to ask whether Mr Siu was hurt. Ms To fairly accepted this when I asked her the same during closing submissions.
14. In the premises, I find this incredible that, if Mr Lee were in fact standing in the cargo compartment at that time when Mr Siu fell, he would have only stood there doing nothing and without even trying to help or inquire with Mr Siu in relation to the accident.
15. In my judgment, the fact that Mr Lee did not come to Mr Siu’s assistance or talk to him after his fall is inherently consistent with the fact that Mr Lee was *not* there when the accident occurred. It is thus also more consistent with the fact that Mr Lee was not controlling the tailgate when the accident occurred.
16. Finally, Mr Siu was not straightforward and frank in answering questions. He was evasive in answering even simple questions. For example, when he was asked about his employment history under cross-examination, he started off by saying that he had only worked as a pick up worker. But when pressed further, he eventually and gradually came up with a long history of employment since leaving school, where had had worked for a number of different positions, including carrying on for 2 years or so a partnership business in transportation.
17. For the above, reasons, I find Mr Siu not a reliable witness and reject his evidence that Mr Lee was in control of the tailgate when the accident occurred.
18. On the other hand, I also find Mr Lee an unreliable witness.
19. Under cross-examination, Mr Lee accepted that the evidence set out in paragraphs 5, 6 and 8 of his witness statement was incorrect and wrong. The relevant parts of these paragraphs (as translated) are as follows:

“5. During the loading or unloading, the *pick-up operator is wholly responsible for the control of the ‘Tailgate of Cargo Truck’ and I would not control the same. I am only responsible for driving.* Generally, when the Cargo Truck reaches the loading and unloading place, I would make use of this opportunity for rest away from the working place so that I can refresh myself or having smoking. *The pick-up operator is wholly responsible for the loading and unloading including the control of the ‘Tailgate of Cargo Truck’ and ‘Pallet Truck’.*

6. At the date of the accident when I checked the Cargo Truck in the morning as usual I used the key to open the said box. When (the Cargo Truck) reached the place of accident, I stopped there and got off the Cargo Truck. I then went to the nearby place for rest and smoking. During the period, the Plaintiff dealt with the goods by operating the ‘Tailgate of the Cargo Truck’ and ‘pallet truck’. After smoking, I returned to Cargo Truck and saw the Plaintiff sit on a place near the ‘Tailgate of Cargo Truck’, his shank was slightly swollen, red and injured. There were one or two workers around the Plaintiff. *I asked them what had happened. The Plaintiff replied that he did not notice the tailgate that he had lowered down. He lost his balance while working, causing his left leg inserting into the gap between the Cargo Truck and the tailgate and injured his calf.*

…

8. I confirmed that before the accident I had not operated the tailgate of the Cargo Truck. *Apart from the Plaintiff, I had not seen anyone operating the tailgate.* I did not witness the accident.” (emphasis added)

1. The gist of these paragraphs of his witness statement is to the effect that:
2. A driver was *never* asked to control the tailgate for the pick up operators (paragraph 5).
3. After the accident, upon his enquiry, Mr Siu answered that he advertently fell onto the tailgate which he himself had lowered before the fall (paragraph 6).
4. Mr Lee himself saw Mr Siu controlling the tailgate at the material time (paragraph 8).
5. Mr Lee accepted these are incorrect. He now said:
6. A driver would sometimes be assigned to control the tailgate by the controller and he himself had in fact been so assigned before.
7. It was *not* Mr Siu who answered him when he made the enquiry, but it was one of the crowds gathered around Mr Siu after the accident. That person also did not say Mr Siu had lowered the tailgate.
8. He never in fact saw Mr Siu in control of the tailgate at the material time, as he was not there. It was only his own deduction that it was Mr Siu who was in control of the tailgate as he was told that it was Mr Siu who was the uploading pick up operator on that day.
9. When asked as to why he would have made all these mistakes in his witness statement, he said he only looked at the witness statement briefly before he signed, and thus he had overlooked them. After studying the witness statement more closely shortly before the trial, he recalled the incident and found out that these parts of the witness statement were incorrect.
10. I do not accept Mr Lee’s explanations as to how these mistakes were made:
11. The evidence coming from these three paragraphs is in my judgment the most relevant and crucial part of his evidence in relation to the central dispute of this case. It is difficult to see how he could have overlooked them before he signed.
12. Further, the explanation could not have explained why he would have given these instructions to the solicitors in preparing the witness statements. There is no question (and it is also not Mr Lee’s evidence) that he had also been similarly careless in giving the instructions to the solicitors to draft the witness statements.
13. Finally, I could not see how Mr Lee would have made a mistake that it was Mr Siu who said that he had himself lowered the tailgate before the fall (paragraph 6 of Mr Lee’s statement), when *no one* whatsoever had ever said this to Mr Lee (as now corrected by him).
14. Furthermore, although Mr Lee said under cross-examination that he had never operated the tailgate with the inside control from within the cargo compartment, this is flatly contradicted by Mr Ng’s evidence (which I accept) that he had seen Mr Lee controlling the tailgate using the inside control from time to time.
15. For the above reasons, I find Mr Lee an unreliable witness who is prepared to change his evidence (even though such evidence is obvious to him to be incorrect) to embellish his case. I therefore also do not accept Mr Lee’s evidence.

C1.2.4 Finding

1. I have rejected the evidence of both Mr Siu and Mr Lee.
2. However, given that the burden is on Mr Siu (as the Plaintiff) to prove his case and that the accident occurred in the manner as he alleged, I find that Mr Siu has failed to prove that Mr Lee was in control of the tailgate when the accident occurred.
3. Insofar as necessary, in accepting Mr Ng’s and Mr Yu’s evidence, and the uncontroversial parts of the evidence of Mr Siu and Mr Lee, I find that:
4. Upon the assignments of the controller, Mr Lee had in the past before the accident assisted in operating the tailgate of the truck. He had done that on occasions by using the inside control and from within the cargo compartment of the truck.
5. Generally, under the oral guidelines given by the management, the controller would assign the drivers to control the tailgate when the cargoes managed by the pick up operators were too big or too heavy, which required the constant attention and control of the uploading pick up operators.

C2. Was Mr Lee negligent in causing the accident

1. As Mr Siu has failed to prove that Mr Lee was in control of the tailgate when the accident occurred, I conclude that Mr Siu has also failed to prove that Mr Lee was negligent in causing the accident.
2. It follows that Mr Siu also fails to show that Multi Express was vicariously liable for the accident.

C3. Was Multi Express negligent in causing the accident in failing to provide adequate supervision or training

1. In my judgment, Mr Siu also fails to prove that Multi Express was independently negligent in causing the accident as alleged.
2. This is so because, other than a general allegation, Mr Siu has failed to say (and thus prove) what training or supervision should have been provided by Multi Express that would have prevented the accident from occurring.
3. In the premises, it is not open to me to make any findings as to what Multi Express had failed to do in terms of training or supervision which could have avoided the accident.
4. Mr Siu therefore also fails under this issue.
5. Insofar as necessary, as I have indicated above, I accept Mr Yu’s evidence and find it as proved the operational and safety procedures and system put in place by Multi Express at the material times.

C4. Was Mr Siu contributorily negligent if Mr Lee and/or Multi Express were liable

1. Had I found that Mr Lee and/or Multi Express had been negligent in causing the accident as alleged by Mr Siu, I would *not* have found any contributory negligence on the part of Mr Siu. There is no evidence to suggest what Mr Siu ought to have done himself to prevent the accident from occurring if he had proved his case against Mr Lee and/or Multi Express.

C5. Quantum

1. If I had found in favour of Mr Siu for liability, I would have determined quantum as follows.

C5.1 PSLA

1. Mr Siu asks for an award of HK$100,000 for damages under PSLA.
2. Pursuant to the government medical reports:
3. On admission to the A&E department on the date of the injury, Mr Siu was found to have tenderness, soft tissue swelling and minor skin abrasion over his left lower leg. He was discharged with wound dressing and analgesic medication.
4. His condition was later complicated by infection and a minor operation of open drainage of the pus was done on 22 October 2005. This resulted in suturing of the wound, and a week or so follow-up on wound care.
5. Since then, he has been complaining of persistent pain, cramps and difficulty in his left leg’s mobility.
6. He had been referred to and attending occupational therapy and physiotherapy for the period between 3 September 2005 and 23 July 2006.
7. Under the Employee Compensation regime, he was assessed by the board to have suffered a 1.5% loss of earning capacity and awarded compensation the sum of HK$54,853.33.
8. At trial, the alleged residual problems resulting from the accident are occasional pain and cramping of the left leg, scar with patch of tender discoloration, discomfort and limitation in squatting, climbing and walking fast.
9. I find that Mr Siu has exaggerated his residual problems.
10. In the joint medical report dated 13 November 2008, it was recorded that Mr Siu walked, stood and sat normally, he could support himself on any one leg, on his toes and heels, and that he squatted up and down normally. This is quite different from his present complaints that he had limitation in squatting and walking fast. There is no reason why I should not accept the assessments in the joint medical report.
11. Mr Siu said he believed the joint medical report was incorrect as he had made some similar complaints to the specialists, and in any event his conditions had changed after the joint medical examination. I rejected his explanations as I find this inherently improbable that (a) both specialists would have ignored his complaints and recorded something different, and (b) his conditions for no good reasons have turned worse since November 2008.
12. I therefore find that Mr Siu’s existing problems are minor in nature and are as those recorded in the joint medical report.
13. In light of the joint expert report and the minor nature[[2]](#footnote-2) of his initial injury as recorded in the government medical reports, after taking into account of the complications of the wound suffered by Mr Siu, I am of the view that an award of H$50,000 under PSLA is appropriate in the circumstances. In coming into this conclusion, I have taken into consideration of the authorities cited to me by Ms To for Mr Siu[[3]](#footnote-3).

C5.2 Loss of pre-trial earnings

1. There is no dispute that for the purpose of calculating quantum under this head, the average monthly earning of Mr Siu should be taken as HK$6,800.
2. The only contention made by the Defendants is that the sick leave period should have been only 3 months (as opined by the joint medical experts) instead of 262 days as claimed by Mr Siu.
3. In relation to this, I accept the submissions of Ms To (for Mr Siu) that the joint medical experts’ view must be looked at against the fact that they were assessing Mr Siu without actually examining the complications suffered by Mr Siu over the wound. Thus, there was no justified basis to challenge the sick leaves granted by the government doctors who had actually examined Mr Siu as at the time when the sick leaves were granted.
4. I therefore conclude that it has not been shown that the 262 days of sick leave granted by the government doctors to Mr Siu were unreasonable or unjustified.
5. In the premises, I would have awarded a sum of HK$58,573.00 (HK$6,800 x 12 x 262/365) as Mr Siu’s loss of pre-trial earning.

C5.3 Loss of MPF benefit

1. Given my above ruling, I would have also awarded Mr Siu HK$2,929.00 (HK$58,573.00 x 5%) as his loss of MPF benefit.

C5.4 Special damages

1. Mr Siu claims HK$3,000.00 as travelling expenses (taxi fares) for *some* of his 41 visits to the hospital for follow-ups. He says each round trip taxi fare between his home and the hospital was about HK$120.00, and he confirms that he started to take public transportation to go to the hospital after his conditions had become better.
2. He also claims HK$5,000 for tonic foods expenses. He says this account for herbal and medical ingredients his wife and his wife’s family had bought to make nourishing soups for him to help him to recover. He however does not have any of the receipts in relation to the purchase of these ingredients and he also does not know the particulars of these ingredients.
3. Notwithstanding that there is no documentary support of these sums, I find them to be of reasonable sum and it is inherently credible that they had been so incurred. I therefore accept Mr Siu’s evidence and would have awarded him special damages HK$8,000.00 under this head.

C5.5 Summary of quantum

1. In light of my above findings, the total damages I would have awarded Mr Siu had he been successful in liability is HK$64,648.67 calculated as follows:

|  |  |
| --- | --- |
| PSLA | HK$ 50,000.00 |
| Pre-trial loss of earning | HK$ 58,573.00 |
| Pre-trial loss of MPF | HK$ 2,929.00 |
| Special damages | HK$ 8,000.00 |
|  | ------------------ |
|  | HK$119,502.00 |
| Less: EEC compensation award | HK$ 54,853.33 |
| Total: | HK$ 64,648.67 |

D. Conclusion

1. For the reasons given above, I find that Mr Siu has failed to prove liability against Mr Lee and Multi Express. I therefore dismiss his claims against them.
2. There is no reason why costs should follow the events, I further make an order *nisi* that (a) costs of the action be to the Defendants to be taxed if not agreed, with certificate for counsel, and (b) the Plaintiff’s own costs be taxed in accordance with the legal aid regulations. Unless any of the parties applies by Summons to vary it, the costs order *nisi* shall be made absolute 14 days from today.

# (Thomas Au)

District Court Judge

Ms Doris TO, instructed by Messrs Cheung Wong & Associates for Plaintiff.

Mr Kevin C.W. WONG, instructed by Messrs William Sin & So for 1st and 2nd Defendants.

1. Dated 17 December 2008. [↑](#footnote-ref-1)
2. Which to me is consistent with the fact Mr Siu fell only for about 2 feet onto the tailgate. [↑](#footnote-ref-2)
3. They are: ***Khan Hamid v Profit In (HK)Co Ltd*** (unrep., DCPI 1145/2008, H H Judge Mimmie Chan, 19 March 2009); ***Leung Yiu Wing v Wong Lan Fun*** (unrep., HCPI 806/2004, Master de Souza, 26 November 2008); ***Chau Chi Wah v Wong Kwok Ming*** (unrep., DCPI 1059/2007, Deputy District Judge J Ko, 18 April 2008); ***Yip Piu v Chung Kam Fei Catherine*** (unrep., HCPI 1168/1999, Cheung J, 27 November 2000); ***Khan Zubair v Hung Kee Cleaning Environment Recycle Ltd*** (unrep., DCPI 1514/2008, H H Judge Leung, 1 April 2009). [↑](#footnote-ref-3)