DCPI 1777/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1777 OF 2005

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BETWEEN

PRISCILLA LAU

(Formerly known as PRISCILLA K M HO) Plaintiff

and

CHAN YIN HONG (陳燕航) 1st Defendant

ELITE INT’L (HK) t/a

JENNY BEAUTY COLLEGE 2nd Defendant

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

Coram: His Hon Judge Leung in chambers (open to public)

Date of hearing: 24 November 2009

Date of decision: 24 November 2009

Date of handing down reasons: 25 November 2009

**D E C I S I O N**

1. In 2005, Lau (the Plaintiff) and Chan (the 1st Defendant) attended a beauty course held by the College (the 2nd Defendant). During a manicure practice session on the first day of the course, Chan caused a cut on the skin of the nail base of Lau’s left thumb. Lau commenced legal proceedings against Chan and the College for damages as a result.
2. On 31 July 2009, I handed down judgment whereby I dismissed Lau’s claim with costs to Chan and the College.
3. By her summons dated 28 August 2009, Lau now applies for
   1. leave to appeal;
   2. alternatively, leave for retrial;
   3. leave to adduce medical evidence.
4. At the end of the hearing, I dismissed the application with costs. While the hearing was conducted in Chinese for the benefit of Lau, the summons and her written submissions were all in English. As indicated, I now give my reasons in English.

**The proposed points of law**

1. Attached to Lau’ summons is a list of “points of law” on which she bases for her application:
   1. whether *volenti non fit injuria* is applicable;
   2. whether medical evidence is omitted because she was not aware of her “trauma of amnesia after series of incidents until the trial ended”; and
   3. whether there should be a retrial “under Order 14A, rule 1 and Order 33 rules 3 & 4(2A) of RDC”.
2. In her submission, Lau questioned whether she should be taken to have consented to injury during the course, hence *volenti non fit injuria*. No such issue ever arose for determination in the present case, whether during the trial or now.
3. Lau cited what was said to be a New Zealand Health and Safety in Employment Act 1992. She submitted that the College was under the duty towards her as employee during the course by virtue of this foreign legislation. No sense could be made out of this contention.
4. Lau intended to adduce medical evidence. It was Lau’s burden to prove her claim and to adduce the necessary and relevant medical evidence in support during the trial. She has failed to discharge the burden out of no one’s fault: see discussion in paras.57-66 of the judgment. No point of law for appeal is involved in this respect.
5. There is no basis for the application for leave for a retrial. O.14A and O.33 referred to by Lau are completely irrelevant.

**The proposed grounds of appeal**

1. Under section 63A(2) of the District Court Ordinance, leave to appeal shall not be granted unless the intended appeal has a reasonable prospect of success or in the interest of justice the matter should be heard by the appellate court.
2. Lau listed the following grounds of appeal:

“4. The learned judge had disregarded the most crucial issues in relation to the 2nd incident on 7 April 2005 of the action.

1. Liabilities of the 2nd Defendant in cause of action:
   1. Fiduciary duties – violation (deliberate violation) of the Appellant’s trust (reasonable expectation) under teacher-student relationship.
   2. Trespass – violation (deliberate violation) of the Appellant’s right to enjoy the course in question in safety condition and desirable environment.
   3. School’s duty of care, including a duty of care to take positive steps to protect student’s well-being and to exercise the skill and care of a reasonable head-teacher and/or teacher, applying the Bolam test.
   4. Common law negligence, common law duty, common law damages and vicarious liability.
2. In determining the question whether the 1st Defendant breached general duty of care in the 1st incident, the learned judge had erred in principle and had failed to take proper consideration and wrongly concluded that he did not find the 1st Defendant in breach of such duty. (para 40-41 of judgment)
3. There is fundamental error in the learned judge’s approacj to the evidence inevitably constituting a material irregularity.
4. By reason that the Appellant did not aware that she, very probable, suffered from trauma of amnesia after series of incidents until the trial ended, such omitted material evidence (medical evidence) causing substantial and grave injustice to the Appellant.

Evidence can be seen from Statement of Claims in 2 different stages and direct evidence (audio record) at the scene. The Appellant lost of great of memory shortly after series of incidents.

1. Leave to adduce of medical evidence on whether the Appellant suffers from amnesia after series of incidents.
2. Serious dishonesty and misrepresentation had done by the 1st Defendant and her solicitor team (assigned by Legal Aid) in the proceedings gave rise to jeopardy interest of justice.”
3. Lau’s pleaded case was that Chan caused unlawful acts/injuries by persistent obvious malicious or outrageous conduct to her. During the trial, she confirmed to this court that the injury was deliberate and not an accident: see para.35 of the judgment. She reiterated such stance during this hearing. Lau claimed against the College for negligence and/or breach of duty of care to her as well as breach of duty as the occupier.
4. After analysis, this court preferred the evidence of Chan; rejected the claim that this was a case of unlawful and deliberate wounding; and found as a matter of fact that this was an accident: see paras.28-34 of the judgment. Such finding suffices to put an end to Lau’s case.
5. Nevertheless, for completeness, this court proceeded to consider the issue of Chan’s liability on the basis that this was an accident: see paras.35-36 of the judgment.
6. As far as the now alleged “fiduciary duties” is meant to relate to the “reasonable expectation” argument that Lau advanced during the trial, this court did consider and dismiss it: see paras.53-55 of the judgment.
7. How the now alleged “trespass”, properly understood, is meant to relate to the alleged violation of Lau’s right to attend the course safely is beyond normal understanding. I would have rejected the allegation of “trespass”, had this been raised during the trial.
8. Upon my preference of the evidence of Chan and the witness for the College, I did not find that the injury to Lau was caused by Chan’s negligence in handling the manicure clipper properly or in paying attention to the practice. I was not satisfied that there was any bullying of Lau by Chan or any actionable tort on such basis, short of conduct causing physical harm, in the circumstances of this case: see paras.37-41 of the judgment. I was also not satisfied that the College was in breach of its duty of care towards Lau as a student: see paras.42-56 of the judgment.
9. In her submissions, Lau criticised Chan and the College for allegedly concealing relevant documents. This case came to trial with a long history. Directions had been made on many occasions in relation to discovery of documents. I did not and do not accept that necessary discovery, whether automatic or specific upon application, had not been carried out.
10. Lau also accused them of suppressing the truth from this court and thus having affected this court’s consideration of the issue of credibility of the witnesses. The solicitors for the defendants were accused of misleading this court.
11. All these accusations boil down to be a challenge against this court’s evaluation of the evidence and this court’s conclusion on questions of fact. I am not impressed that such proposed challenge would likely be accepted by the appellate court.
12. Upon finding against Lau on liability, there would have been no need to consider the issue of quantum of damages. This court proceeded to consider the issue only for completeness. It was because of this that this court needed to evaluate the medical evidence.
13. Lau has pleaded her alleged injury and the various symptoms of her alleged nervous shock. As mentioned above, it was her burden to prove and to adduce medical evidence in support. I repeat what is discussed above. New evidence cannot be adduced before the appellate court unless special circumstances are established in accordance with the conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489; Hong Kong Civil Procedure 2010 (Vol.1) at 59/10/8 – 59/10/13. None of them is satisfied here.
14. The intended appeal has no reasonable prospect of success at all and there is no other reason for leave to appeal to be granted.

**Chan and the College**

1. At the beginning of this hearing, Mr Poon for Chan complained that neither his firm nor the solicitors for the College had received the Lau’s summons. Like this court, they received Lau’s written submissions only before this hearing. Mr Lok confirmed that. It was due to the notification of Lau having applied for legal aid for her application and the subsequent notice of the court that they came to realise this application.
2. No affirmation of service of the summons has been filed in support of Lau’s assertion that she has duly served the summons. Nevertheless, both Mr Poon and Mr Lok did not object to the continuation of this hearing, after a short adjournment to allow them time to consider the summons.
3. As to the College, Mr Lok informed the court that he only managed to obtain confirmation from his client that his firm had no instruction to appear today in opposition of the application. Yet, as his firm was still on the record, he was duty bound to be present but made no submission.

**Order**

1. For the above reasons, I dismissed the application.
2. I also made an order that between Lau and Chan, Lau shall pay the costs of Chan occasioned by this application. Costs shall be taxed, if not agreed. Chan’s costs shall be subject to legal aid taxation.
3. In view of how Mr Lok came to be present today, I made no order as to costs of this application between Lau and the College.

Simon Leung

District Judge

The Plaintiff, appearing in person

Mr Anthony K POON of Messrs Ho Tse Wai & Partners for the 1st Defendant upon the assignment by the Director of Legal Aid

Mr LOK Tse Bong of Messrs Huen & Partners for the 2nd Defendant