## DCPI 65/2012

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 65 OF 2012

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BETWEEN

HUNG MUN YING Plaintiff

and

AMBERWING COMPANY LIMITED trading as

AMBER SLIM & BEAUTY CARE Defendant

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Before: Deputy District Judge J Chow in Court

Dates of Hearing: 10 and 11 November 2014

Date of Judgment: 24 November 2014

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JUDGMENT

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*Introduction*

1. The defendant carries on business as a beauty parlour, the plaintiff is its customer. The plaintiff claims damages arising from personal injuries sustained after an intense pulsed light facial treatment (“the IPL treatment”) done by a beautician of the defendant on 17 May 2011 (“the Accident”).
2. The quantum of the plaintiff’s claim is agreed at $100,000 inclusive of interest. This is a trial on liability only.

*Issues*

1. The defendant agrees the plaintiff’s injury was a result of an IPL treatment. The defendant did not dispute the beautician was negligent if she had caused the plaintiff’s injury. The defendant says the plaintiff did not have an IPL treatment on 17 May 2011, she had an aroma facial instead. The issue at trial is purely factual dispute, whether the plaintiff had attended the defendant for an IPL treatment on 17 May 2011.

*Evidence*

1. The plaintiff and Madam Ho Yin Fong (“Madam Ho”), the director of the defendant are the only witnesses.
2. The plaintiff elected not to call Madam Jia Yueqing (“Madam Jia”) as her witness. Madam Jia was a colleaque of the plaintiff who had undergone an IPL treatment with the defendant on 18 May 2011. She sustained injuries and had filed a complaint with the Consumer Council. Madam Jia filed a claim against the defendant in the Small Claims Tribunal, the case was heard and concluded. Notwithstanding Madam Jia’s witness statement has been expunged, parties agreed the transcript of the Small Claims Tribunal claim be included as evidence of the trial. Mr Hoe, counsel for the defendant submitted, the relevance of the transcript was limited to the evidence that Madam Ho testified she did not perform an IPL treatment on the plaintiff on the day of Accident[[1]](#footnote-1).

*The plaintiff’s evidence*

1. The plaintiff was a regular customer of the defendant since 2007. On 2 December 2010, she spent $5,000 for an IPL treatment package, in that she could enjoy unlimited sessions of IPL treatments within a 12-month period from the date of purchase. She was aware IPL treatments can only be done no less than 21 days intervals. The plaintiff further upgraded her services with the defendant by purchasing another facial package at a price of $4,400.
2. On 17 May 2011, the plaintiff went to the defendant for an IPL treatment. At that time, the plaintiff has already undergone 4 sessions of IPL treatments. After the IPL treatment was done, she felt pain over her face. She complained to a staff of the defendant and was told it was normal skin reaction. By evening of the same day, some parts of her face started to blister and were swollen in the next morning.
3. On 18 May 2011, she was further reassured by a staff of the defendant that it was normal skin reaction.
4. In or about noon time of 19 May 2011, she could not have tolerated pain over her face and went to Dr K Leung of Wellness Medical Centre. She was diagnosed to have suffered from multiple blisters with yellow discharge; inflammatory change with swelling and erythema (abnormal redness to the skin due to skin congestion). She suffered from further complication of right eye conjunctivitis redness and pain. By late evening of the same day, the plaintiff went to the A&E Department of Yan Chai Hospital. She was diagnosed with “about 1 cm diameter blister with discharge and mild underlying swelling over left orbital region. Mild swelling and erythema over both sides of the face”. She was administered with oral antibiotic and the wounds were dressed (“the Injuries”)
5. On 19 May 2011, the plaintiff filed a complaint with the Consumer Council. She complained the Injuries suffered as a result of the IPL treatment, she demanded refund of all the fees paid to the defendant.

*The defendant’s evidence*

1. Madam Ho testified for the defendant. She was a director and also a beautician of the defendant. She has been working in the profession for more than 20 years.
2. Madam Ho agreed, the plaintiff was one of her regular customer since 2007. The plaintiff had a trial IPL treatment in 22 December 2009, not until 2 December 2010, she purchased a course of IPL treatments at $5,000, with unlimited sessions within a 12-month period from the date of purchase. She agreed, prior to the Accident, the plaintiff upgraded her services with the defendant for an extra $4,400. Madam Ho explained the plaintiff could benefit from enjoying all kinds of beauty treatments with the upgraded package.
3. The plaintiff attempted 4 IPL treatments before the Accident. Madam Ho has made known to the plaintiff of two conditions in deciding whether an IPL treatment was suitable for a customer on a particular visit: (i) a resting time of at least 21 days is required after each IPL treatment; and (ii) her skin condition.
4. Madam Ho emphasized, she has performed an aroma facial instead an IPL treatment on the defendant on the day of Accident, the treatment was well recorded in the customer record and was countersigned by the plaintiff. Madam Ho explained, the reason no IPL treatment was performed because she found some redness on the plaintiff’s skin.
5. In Madam Ho’s supplementary witness statement filed on 10 April 2014 (which is 5 months after her witness statement), she explained further in respect of (i) Madam Jia’s Small Claims Tribunal claim; (ii) the plaintiff’s complaint of the Accident to the Consumer Council and (iii) the interpretation of the plaintiff’s customer record.

*Discussion*

1. This case is on credibility of witnesses. The dispute is purely factual and the evidence shall be assessed on a balance of probabilities.
2. In assessing the credibility of witnesses, both Mr Hoe and Mr Wong, counsel for the plaintiff agreed, the tests as laid down in *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at 524, paragraph 53 per Deputy High Court Judge Au (as he then was) as follows:-

“53. In assessing the credibility of a party’s case on a particular issue, I accept the submissions of Ms Lisa Wong (leading counsel for the Plaintiffs) that the Court should take into considerations the following:

1. Whether the party’s case is inherently plausible or implausible.
2. Whether the party’s case is, in a material way, contradicted by other evidence (documentary or otherwise) which is undisputed or indisputable.
3. Where it is shown that a witness has been discredited over one or more matters to which he has given evidence using the above tests. This is relevant to the assessment of his overall credibility.
4. The demeanour of the witnesses.

See: *R v Ng Wing Ming*[[2]](#footnote-2), *per* Litton JA at 465, 467; *Four Seas Fish Balls Co Ltd v Yeung Hung Sin*[[3]](#footnote-3), *per* Chung J at para 20; *Profit Boat Development Ltd v Craft Projects (HK) Co Ltd*[[4]](#footnote-4), *per* Recorder R Yuen SC at para 16.”

1. The plaintiff has the burden of proof, she has to prove, on balance, the defendant performed an IPL treatment on her on the date of Accident.
2. Mr Hoe submitted, the defendant agrees the Injuries is caused by an IPL treatment, he emphasized the court shall give weight to the defendant’s customer record where the plaintiff countersigned. The plaintiff confirmed an aroma facial treatment was done and no IPL treatment was performed.
3. During cross examination of the plaintiff, Mr Hoe placed emphasis on the discrepancy of the plaintiff’s complaints in her medical records/expert reports, more particularly, sleeplessness at night, after the Accident. I must say, the areas of cross examination did not assist the defendant. The discrepancy between the plaintiff’s complaint in her witness statements and medical records are not conducive. The plaintiff gave firm answers her discomfort was not continuing since the Accident, she said, it lessened sometimes. As the medical reports were compiled by different medical practitioners, it is difficult to draw conclusions that the plaintiff’s evidence is not credible only for the difference in the present complaint of her discomfort as recorded.
4. The defendant agreed the plaintiff has paid visit to its beauty parlour on the day of Accident. The plaintiff bought a course of unlimited sessions of IPL treatments, the possibility of having it done with other beauty parlour is low. Likewise, Mr Hoe confirmed the defendant has no positive case put to the plaintiff that an IPL treatment was done in another beauty parlour which has caused the Injury.
5. As there is no evidence that the plaintiff and Madam Ho had an argument on the provision of IPL treatment on the day of Accident, it is unreasonable for the plaintiff to have attended other beauty parlour for IPL treatment on the same day, where she has already entitled to benefit from unlimited sessions of IPL treatments throughout the entire year. It is implausible.
6. Madam Ho testified, for the first time, that she found the plaintiff’s skin condition on the day of Accident was not suitable for an IPL treatment. She placed strong emphasis that she had seen the plaintiff few days before when the plaintiff visited the defendant for other treatments. She remembered there was some redness on the plaintiff’s face and she has suggested an aroma facial rather than an IPL treatment. This is something new in the evidence which the court is reluctant to accept, the material fact was not pleaded in the defence, nor was it mentioned in Madam Ho’s two witness statements.
7. The plaintiff filed a complaint with the Consumer Council on 19 May 2011, two days after the Accident. The brief summary of the case details tallies with the plaintiff’s evidence. The plaintiff has contemporaneous medical reports with both her private doctor and the A&E Department of the Yan Chai Hospital of the Injuries.
8. Madam Ho’s evidence is contradicted by her response to the plaintiff’s complaint to the Consumer Council. In a letter issued by the Consumer Council to the defendant dated 21 June 2011, it recorded the defendant’s response to a staff of the Consumer Council: the plaintiff might have tempered the wounds temporarily caused by the IPL treatment, the defendant said it would not be responsible.
9. Madam Ho explained during cross examination, the said response as recorded in the letter dated 21 June 2011 was meant to be her response to Madam Jia’s complaint, not the plaintiff. Madam Ho has mixed up two complaints. At that time, as she was confident no IPL treatment was done on the plaintiff, she would not have responded in that way. Nonetheless, the Madam Ho admitted during cross examination, in the letter from the Consumer Council dated 25 May 2011, she knew there was a complaint from an anonymous customer. Reading from the enclosures, the defendant’s receipts and recent photos of the injuries, she said she recognized the anonymous customer was the plaintiff. If this is so, the plausibility of mixing up two complaints is relatively low.
10. As submitted by Mr Wong, there was no positive case raised by the defendant as early as the plaintiff filing her complaint with the Consumer Council. Coupled with the contemporaneous records, I find the explanation of Madam Ho was not believable and of which I reject.
11. I also reject the defendant’s customer record is an accurate record of the beauty services provided to the plaintiff on the date of Accident.
12. Afterall, the plaintiff is a long term customer of the defendant. There is no evidence that the plaintiff and the defendant were in a bleak relationship prior to the Accident. I accept the plaintiff is a truthful and credible witness. I accept what the plaintiff testified are the facts.

*Conclusion*

1. I find the plaintiff has attended the defendant’s beauty parlour on 17 May 2011 for an IPL treatment. The plaintiff sustained the Injuries after the IPL treatment, the defendant was negligent in the course of providing the service.
2. I award the damages, agreed at $100,000 inclusive of interest to the plaintiff.
3. I further make a costs order *nisi* that costs of the action be to the plaintiff, with certificate of counsel, to be taxed if not agreed. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations. Unless there be an application to vary the same by summons, the costs order *nisi* shall be made absolute 14 days from today.

( J Chow )

Deputy District Judge

Mr Wong Chi Kwong, instructed by W K To & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Felix CY Hoe, instructed by S Cheng & Yeung, for the defendant

1. At page 216P – R of the transcript [↑](#footnote-ref-1)
2. [1994] 2 HKC 464 (CA) [↑](#footnote-ref-2)
3. Unrep., HCA 4159/2003, 25 August 2006 [↑](#footnote-ref-3)
4. Unrep., HCCT 122/2000, 31 August 2007 [↑](#footnote-ref-4)