DCPI361/2003

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 361 OF 2003

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BETWEEN

WONG CHEUK LAM Plaintiff

and

LAM WING SHAN trading as

NATURAL HAIR TREATMENT CENTRE 1st Defendant

(discontinued)

NATURAL HAIR TREATMENT CENTRE

CO. LIMITED 2nd Defendant

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Before : His Honour Judge Muttrie in Court

Date of Trial : 16th – 17th June 2004

Date of Judgment : 30th June 2004

# Judgment

1. The plaintiff claims against the 2nd defendant (the case against the 1st defendant having been discontinued) for damages for personal injury. The 2nd defendant at the material time operated a business of providing hair products, and the dyeing of hair, at a shop in Nathan Road, Kowloon. The plaintiff claims that he was a customer and that on 19 November 2002 his hair was dyed at the 2nd defendant’s shop by an employee named Barbie. As a result he suffered chemical burns to his scalp. He alleges negligence and breach of contract as particularised in the Statement of Claim and also relies on the doctrine of res ipsa loquitur. The particulars state that Barbie applied an inappropriate bleach solution or an incorrectly diluted bleach solution to the plaintiff’s head; when he complained she applied a further such solution, increasing the burns; she failed to heed the risk of chemical burns and failed to take precautions against them; she failed to test the solution on a small area of skin first; and she failed to take adequate precautions when the plaintiff complained of pain.

2. The 2nd defendant admits that it operated the shop and employed a person named Barbie, but specifically denies that the plaintiff visited the shop for hair dyeing on 19 November 2002, and says that no one in the shop had ever heard of any complaint of pain or scalp burns at the relevant time. If, which is denied, the accident happened, the 2nd defendant denies res ipsa loquitur and says that the accident was caused or contributed to by the plaintiff who failed to inform its employee that he was allergic or sensitive to bleach; failed to heed the employee’s advice to test the solution on a small area of skin before applying it to the hair; and failed to inform the employee immediately of pain or discomfort.

3. The plaintiff replies that he was unaware that he had any allergy or sensitivity and received no advice to test the solution before applying it. He told Barbie immediately when he noticed skin redness and she put on ointment. She suggested a further bleaching which caused more discomfort. In total he made three complaints to her but she simply told him that it would be over soon.

4. It is not in dispute that at the relevant time, the 2nd defendant’s shop was open 24 hours a day, and was offering a service whereby, if a customer bought products including dye products, they could be applied free of charge by the shop staff. This was a promotional offer.

5. Evidence for the plaintiff comes from the plaintiff himself and from his colleague, Miss Ho. They both work in the cosmetics industry, he as a make-up designer and she as a make-up consultant, and they work irregular hours. On 19 November 2002 in the small hours, after a meeting at their company office, they were walking together on Nathan Road towards Jordan where they were to take transport to their respective homes. They passed the 2nd defendant’s shop which is open 24 hours. The plaintiff decided to have his hair dyed; Miss Ho was with him while he chose the colours and until he started to have his hair washed, and then she left and went home.

6. According to the plaintiff he had had his hair dyed brown in the same shop a couple of days before. This was his first time to have his hair dyed. He had seen a notice at the shop door offering a free dyeing service. He had bought the products and a staff member had applied them for him free of charge; after that he had taken away what was left of the products, in a bottle and a tube like a tube of toothpaste. He had paid about $200.00.

7. The plaintiff wanted his hair colour changed so he and Miss Ho went into the shop in the early hours of 19 November 2002. They saw the employee, Barbie and she suggested a deep blue colour from a colour book, which the plaintiff accepted. A price of $100.00 was agreed. Barbie told him that she had to remove the existing dye by bleaching, because if she did so the result of the new dyeing would be much better. He had not had his hair bleached, before the previous dyeing.

8. Barbie washed his hair and before bleaching told him that he would feel a few pinpricks on his head from the bleaching. She put some white mixture on and the plaintiff did indeed feel discomfort and a pricking sensation. But he thought he could endure it. From experience he knew that some skin products could cause redness and irritation but that would go away within a couple of hours. The discomfort got worse but Barbie said that she had gone through it herself before and told him to endure it.

9. When Barbie finished bleaching, the plaintiff noticed redness round his hairline. Barbie put on some ointment, which she said was anti-allergic and the plaintiff felt some relief. Barbie then told him that the roots were not fully bleached so she would have to repeat the bleaching. She said there would be a little pain but it would be very quick.

10. At this point the plaintiff’s hair was white; he said in cross-examination that it was “like the defence counsel’s wig”. So he believed what Barbie said and he decided to let her carry on. He asked if the mixture was the same as before; she said that the first mixture was a 12-degree hydrogen peroxide milk but that the second one would be an eighteen-degree peroxide milk. She put it on but the plaintiff felt even more pain and discomfort. He told her so but she said that he should just endure it. In all he complained to her three times.

11. After the second bleaching Barbie put the dye on the plaintiff’s hair. Again he felt pain and discomfort but he just endured it. He felt more pain when she rubbed his head, and blew the hair dry. At this time it was 5.30 a.m. so the plaintiff went home. He did not get any receipt for the $100.00 he paid.

12. The plaintiff says that the next day he got up and washed his hair five times to get rid of the dye marks on his skin. He found that they were burn wounds stained with dye. He had to go to work, but on his way there he went to the 2nd defendant’s shop where he met Mr Alex Chan. He told Mr Chan about the treatment given by Barbie; he asked about it, but does not seem to have complained. Mr Chan said that the bleach concentration did not need to be so strong. The plaintiff went to work, where a colleague took pictures of his burns and went back with him to the shop to see the manager. He was told that he would be called, but he was not; so that evening at about 9.45 p.m. he went back again and this time the Mr Chan and Ms Sharon Lam of the 2nd defendant took him to the Sky One Clinic where he saw a doctor. At the clinic he complained about Barbie’s service but Sharon Lam said that Barbie had had problems with her boy-friend, and her emotions were not stable.

13. The doctor at the clinic referred the plaintiff to a dermatologist, Dr Peter Cheung and an appointment was made to see the latter at 12 noon on 20 November; the plaintiff was to go there with Mr Chan and Ms Lam. But as the plaintiff was on his way there, Ms Lam telephoned him and asked if he had kept an invoice for the treatment. He said he did not. She hung up the telephone and he did not find her at the clinic. So he went to the shop to look for her; and when he could not find her, he called the police. He was taken to the Queen Elizabeth Hospital, treated and discharged.

14. Later, according to the plaintiff, he had further contact with Ms Lam. They had a meeting and she asked what he wanted. He said he wanted to see a specialist. She agreed to join him at Dr Cheung’s clinic at 6.15 p.m. He went there, but she never turned up.

15. The plaintiff relies on a medical report from a Dr Chan of the Queen Elizabeth Hospital who confirmed that the plaintiff attended the Accident and Emergency Department there on the afternoon of 20 November 2002 and gave a history of skin redness and burning sensation around the hairline after hair dye on 19 November. He diagnosed dermatitis after hair dye. The plaintiff was seen again on 22 November.

16. The plaintiff also relies on a report from a dermatologist, Dr. Peter Cheung who saw him on 20 November 2002 at about 7 p.m. Dr Cheung found marked redness of the skin on the whole scalp with extension onto the forehead, sideburns and the back of the neck. There was extensive scab formation along the hairline from front to back. He diagnosed severe contact dermatitis, most probably caused by strong irritants applied locally. He prescribed medicated shampoo, oral medications and topical cream and advised the plaintiff to return after a week; but the plaintiff did not return.

17. The plaintiff has also produced the photographs taken by his colleague which show the redness and scab formation.

18. Evidence for the defendant came first from Ms Lam Wing Shan, formerly the 1st defendant. She was the proprietor of the Natural Hair Treatment Centre and also regional manager of the 2nd defendant. She had no first-hand knowledge of what if anything happened in the early hours of 19 November 2002. She had first heard of the matter when she got a call from the shop manager, Mr. Alex Chan Ching Fung on the evening of 19 November. She referred the matter to her superior, a Mr Leung, who told her to advise the plaintiff to see a doctor; and so she and Mr Fung accompanied the plaintiff to the Sky One Clinic, and also, it appears, paid his fees there. But this was not because of any admission of liability on the part of the 2nd defendant.

19. Ms Lam said that it was the 2nd defendant’s invariable practice that if a customer bought products, a receipt should be issued for them. The plaintiff could not produce any receipt. Staff were given instructions as to what to do when a customer wanted to have the products applied; there was an instruction sheet, to be signed by the staff members. The customer had to be told to take a skin test before any bleach or dye was applied; and if the customer would not take the test, a release form had to be signed. The same applied if the customer wanted to have bleach or dye applied close to the hair line. No such form, signed by the staff member Barbie, was produced. A sheaf of customer release forms was produced. None of them had been signed by the plaintiff. Ms Lam said that the dye products, consisting of dye and hydrogen peroxide milk would normally cost $58.00.

20. So far as the events of the evening of 19 November and subsequently were concerned Ms Lam said that on the way to the Sky One Clinic the plaintiff said something to the effect that he did not want to pursue the matter but his company was making him do so. There was no mention of Barbie and she never said anything about Barbie’s trouble with her boy-friend or her emotional state.

21. Ms Lam said that after receiving the complaint she asked staff members if they had seen the plaintiff; but the staff members said that they had not. She did not come across anyone called Barbie and she never heard the name of Barbie until she knew that she had to attend court.

22. Mr Lam, the shop manager, also gave evidence. He said that the plaintiff had complained to him at the shop some time after 8 p.m. on 19 November 2002. But the plaintiff did not say how the accident had happened or who had dyed his hair for him. Later he and Ms Lam had taken the plaintiff to the clinic. On the way the plaintiff said that he did not want the matter to end up as a large matter; it was his company who wanted this. Nothing was said about Barbie or her boy-friend and indeed Mr Chan had never heard anything about Barbie, until he received the summons.

23. Mr Chan said that he himself had been on duty on the night in question from 11 p.m. to 9 a.m. along with two other persons. Very few customers would come in, so he would have some recollection of any who did. He was sure that the plaintiff had not come into his shop that night.

24. He also gave evidence about the dyeing process and how long it took. The 2nd defendant had salespersons and technicians and only technicians were allowed to dye the customers’ hair. He was himself a technician as well as a manager, and could do this; and he had previous experience in hairdressing. He said that the plaintiff would not have had to have his hair washed; it was better not to wash hair before dyeing. It was not necessary to bleach the brown-dyed hair before dyeing it deep blue. If bleaching had been done, to get the brown hair to the colour of counsel’s wig would have taken four hours; or at least 2-3 hours; it would be impossible to bleach it in under two hours.

25. Curiously enough, the matter of Mr Chan’s having been on duty in the shop that night only came out in oral evidence; in the statement which he adopted, although he said that to the best of his memory he had never seen the defendant before the complaint was made, nothing was said about his presence in the shop through the night. I asked him why this was and he said that it was because he had never been told clearly what time the accident had happened. I had earlier asked him whether he had asked the plaintiff to say what time he had been in the shop, so that he could have told the plaintiff that he had been there all the time and had never seen him. His answer was that he could not be sure what time the plaintiff was talking about, and if it was after 9 a.m. he would not have been there. He also said that the plaintiff was very fierce. So he had been unable to find out, and had simply told the plaintiff to leave his number and that he would call him back.

26. As to who was on duty on the night in question Mr Chan said that he could not tell the court their full names, or even their nicknames or given names after so long. However he had made inquiries and had been told that the plaintiff had not come in. As to Barbie, he knew that she had only worked for less than a week; she had not been dismissed; one day she had simply not turned up for work.

27. There can be no doubt that the plaintiff suffered severe contact dermatitis as a result of the application of some strong irritant to his scalp. There is nothing to gainsay the opinion of Dr Cheung on this and I accept it.

28. The main issue is whether the plaintiff went to the 2nd defendant’s shop and there received the treatment from the employee, Barbie, as he claims. His own evidence was straightforward and credible. So was that of his witness. There is no evidence from Barbie. The evidence of the defendant’s witnesses tends to show that the incident should not have happened, rather than it did not happen; and that the plaintiff should have been advised to test his skin with the products before they were applied, and so on; but there is no evidence actually to contradict what he says happened in fact.

29. The 2nd defendant’s main point seems to be that there is no invoice or receipt for the products sold to and used on the plaintiff. There is also the evidence of Mr Chan that he was on duty throughout the night and never saw the plaintiff; but as I have indicated that never came out before the oral evidence was heard.

30. So far as the lack of receipt is concerned it is of course common experience that whatever a shop’s policy about receipts may be, it is not necessarily always followed by the shop assistants. Usually when one buys something, a receipt is issued, but sometimes one is asked if one wants a receipt and sometimes no receipt is offered at all. So the lack of a receipt is neutral.

31. There is also the fact that Ms Lam and Mr Chan took the plaintiff to the Sky One Clinic and paid for his treatment there. The defence case is that this was not to be taken an admission and indeed it did not matter who paid; but it is difficult to see why they did not simply tell the plaintiff to see his own doctor. There was of course a complete change of stance when Ms Lam found out that the plaintiff had no receipt; further co-operation, as far as medical treatment went, stopped at once. This does rather suggest that the 2nd defendant’s representatives thought that the plaintiff had a claim but took a different stance as soon as they had a peg on which to hang their defence.

32. As to Mr Chan’s story of being on duty throughout the night, as I have indicated that came out only in oral evidence and looks suspiciously like an afterthought. It is difficult to reconcile his evidence that the plaintiff was fierce when he first came in, with his evidence that the plaintiff later said that it was not he, but his company, that wanted him to make a big matter out of the complaint. Nor is there any reason why Mr Chan could not have said that he was there all night, and at any rate while he was there, he had never seen the plaintiff. It would seem logical enough for the shop manager, if he was there for ten hours at a stretch and had seen nothing, to make this point at the outset. Overall I have considerable doubts as to the reliability of Mr Chan’s evidence.

33. There can be no doubt that the plaintiff had his hair treated with bleach and dye and this – probably primarily the bleach - caused his dermatitis. If he did not have his hair treated at the 2nd defendant’s shop on 19 November 2002 in the small hours, it can only mean that it was done elsewhere. Either he dyed it himself, so he and his witness are lying, and it was not done in a shop at all, and they have decided to bring a false claim against the 2nd defendant. Why anyone would do that is not clear; it would be easy enough to claim against the seller of the bleach or dye in any event. Alternatively, the bleaching and dyeing was done in another shop and the plaintiff and his witness are totally confused about the identity of the shop where it was done. For the latter to apply there would have to be another similar shop, also with an assistant called Barbie, open in the area at the relevant time. Further, if the name of Barbie was never mentioned to Ms Lam or Mr Chan, or indeed never came up before the proceedings were issued it would mean that the plaintiff (or someone) has gone to the shop and found out the name at a later stage, to add verisimilitude to the story. This is again most unlikely if Barbie only worked there for a week.

34. Having seen and heard the plaintiff and his witness I have no doubt that they are telling the truth as they remember it. I have heard nothing to suggest that they may be mistaken about the identity of the shop. Indeed I asked Ms Ho if there were any similar shops nearby and she said that there were not; and I have not heard any evidence from the defence witnesses to suggest that there were. So I have no doubt that the plaintiff had his hair treated by Barbie in the 2nd defendant’s shop.

35. The particulars of negligence pleaded against the 2nd defendant are obviously made out, in that Barbie was negligent as pleaded and she was the 2nd defendant’s employee, for whom the 2nd defendant was vicariously liable. To the extent that Barbie did not follow procedures laid down by the 2nd defendant, of course, there would be an added element of lack of supervision to be laid directly at the 2nd defendant’s door.

36. The defendant pleads contributory negligence. Since, on the plaintiff’s evidence there was never any question of his being advised to take a skin test or any other precautions before proceeding, the only possible factor on which the 2nd defendant could rely would be his failure to stop the treatment as soon as he felt discomfort.

37. The plaintiff says that Barbie told him just to put up with the discomfort, and had experienced it herself. He believed what she said. He knew from his own experience that sometimes cosmetic products would cause redness and this would go away in a couple of hours. I do not have any difficulty with the plaintiff’s evidence that he believed Barbie; he may not have seen her before but he had only ever had his hair dyed once before, and not bleached. Naturally if one entrusts one’s hair to someone to bleach or dye it, in the absence of contrary experience one will tend to expect that person to know what he or she is about, and believe what one is told. Further, once the first bleaching had been done, he did not want to go out with his hair discoloured. Now it may be that it had not been bleached long enough to become as white as counsel’s wig, although I am disinclined to accept any blanket opinion from Mr Chan as to what ought to happen, against the plaintiff’s evidence of what did happen. In any event I accept that there would be some discolouration and the plaintiff would want to have that put right. As he said he did not want to go home “like that”. I do not see that he can be said to have been negligent; he was put in an impossible position and if he made the wrong decision it was made in the light of what Barbie told him.

38. I turn to quantum. The extent of the redness and scabbing round the hairline may be seen from the contemporaneous photographs. In his statement the plaintiff says that the redness was gone after three weeks but that his head itched constantly for three months, he has continued sensitivity and his hairline has receded. In oral evidence he said that there was no apparent mark after a month and a half. He was embarrassed, lost sleep, and could not give lectures or meet customers for a while.

39. In fact there is no evidence of medical treatment after the visit to Dr. Cheung; according to the report, the plaintiff failed to follow up. So it seems likely that the recovery period from the redness and scarring was quite short; probably three weeks rather than a month and a half. I accept that the plaintiff had some itching for three months; this is subjective but it is unpleasant, as is well known to any judge or barrister who has to wear a wig and the itch caused by a horsehair wig is probably not as bad as that caused by contact dermatitis. As to the hairline, the plaintiff appears to be a normal young man with no sign of his hairline receding; there may be some recession which he can see, but one could not say that there is any cosmetic defect.

40. The plaintiff in his Statement of Damages seeks $120,000.00 for pain, suffering and loss of amenity. He assesses his loss of earnings, by comparison with other periods at $2,000.00. He also claims doctor’s fees of $600.00, and small sums for taxi fares and a haircut. The 2nd defendant in its Answer says that the figure for PSLA should be $20,000. The cases which counsel have put forward are on different kinds of injury entirely and do not assist.

41. I have been unable, by means of a Lexis search, to find any prior award for contact dermatitis of the scalp, etc. arising from the use of hair bleaches or dyes; which is a little surprising, given the relatively larger numbers of Hong Kong people to be seen with dyed hair in recent years. There are some English awards for contact dermatitis arising from the use of hair cosmetics in **The Quantum of Damages** by **Kemp & Kemp** but they are not of much assistance, because the levels of damages in the two countries are different, and in any event the levels of award for what appear to be similar injuries in two cases are quite disparate.

42. The injury is minor. I think a reasonable figure for PSLA in the circumstances will be $50,000.00. Given the nature of the plaintiff’s work a loss of earnings of $2,000.00 is not unreasonable and I will allow it. There are no receipts for the doctor’s bill but we know that he consulted Dr. Cheung and $600.00 is not out of the ordinary for a specialist consultation. I do not however see that there is any basis for awarding special damages for taxi fares or a haircut.

43. There will accordingly be judgment in favour of the plaintiff for $52,600.00. Interest is awarded at 2% on the figure of $50,000.00 for pain, suffering and loss or amenity from the date of the Writ and on the special damages at half the judgment rate from the date of the accident, until the date of judgment and thereafter at the judgment rate. The plaintiff is awarded the costs of the action (*nisi*) to be taxed if not agreed with certificate for counsel.

G.P. Muttrie

District Judge

Mr. J. Wong by Messrs. Miller Peart for Plaintiff.

Mr. S. Lau by Messrs. Huen & Partners for 2nd Defendant.