## DCPI 1062/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1062 OF 2013

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##### BETWEEN

|  |  |
| --- | --- |
| YAU YUK LAN | Plaintiff |
|  |  |
| and |  |
| INTERNATIONAL NATURAL THERAPY RESEARCH CENTRE LIMITED | Defendant |
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Coram : His Honour Judge Ko in Court

Date of Hearing : 1 & 2 June 2015

Date of Judgment : 12 June 2015

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JUDGMENT

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1. This is a personal injury action involving cosmetic injury.

*Background*

1. The defendant is a provider of healthcare treatments (保健理療). It operates a shop at G/F of No 2A, Tak Shing Street in Jordon (“the shop”). The plaintiff was one of its customers.
2. In the afternoon of 20 July 2010, the plaintiff attended the shop for treatment.[[1]](#footnote-1) The treatment involved positioning a lamp fitted with heated filaments above her abdomen while she was lying flat on a bed. In the course of the treatment, the lamp dropped onto the plaintiff causing burnt injury to her abdomen.
3. In this action, the plaintiff claims damages from the defendant arising from the accident.
4. The defendant denies liability. Its main defence is that the plaintiff’s lamp was knocked over by another customer whose negligence was not foreseeable. The defendant further alleges that the plaintiff has contributed to her own injury by delaying medical treatment and challenges the quantum of the plaintiff’s claim.
5. The broad issues are therefore:
6. Is the defendant liable?
7. Is the plaintiff liable for contributory negligence?
8. If the defendant is liable, what are the damages to be awarded to the plaintiff?

*The trial*

1. Before the trial commenced, the defendant applied to call an additional witness – Madam Lam (林琼芳). According to the defendant’s counsel, Madam Lam was the manager in charge of the shop at the time of the accident. She left the employment of the defendant in 2012 and only came back to work for the defendant on a part-time basis at the beginning of this month. A copy of her draft witness statement was provided to the plaintiff about 2 weeks ago. The plaintiff’s counsel was able to take full instruction and raised no real objection to the new evidence. In those circumstances, I allowed the application.
2. The plaintiff testified at the trial and the defendant called its director Madam Liu (廖建軍) and Madam Lam to give evidence. They all adopted their respective witness statements as evidence and were subjected to cross-examination. I shall set out their evidence in detail when I come to discuss the issues.
3. The parties have no dispute over the documentary evidence in the trial bundle including the following expert evidence:
4. the medical report dated 12 May 2011 of Dr Au Tak-Shing (“Dr TS Au”), a specialist in dermatology; and
5. the medical report dated 21 May 2014 and an addendum dated 19 December 2014 by Dr Otto Au, a plastic surgeon.
6. Dr TS Au treated the plaintiff’s injury between September 2010 and February 2011. Although his medical report was not issued by a government hospital, the parties are content to have it admitted as evidence in pursuance of the order dated 23 December 2013.
7. The plaintiff consulted Dr Otto Au for the purpose of these proceedings. Pursuant to the order dated 19 January 2015, his medical reports are admitted without oral evidence.

*Discussion*

*Issue (1): Is the defendant liable?*

1. On the pleadings, the plaintiff is relying on two causes of action for her claim, namely, negligence and breach of statutory duty imposed by section 3 of the Occupiers Liability Ordinance, Cap 314. The plaintiff has also invoked *res ipsa loquitur*.
2. The defendant, as I have recounted, is asserting that the accident was caused by the intervention of a third party.
3. In their closing submissions, both counsel have submitted on the basis that the lamp was indeed knocked down by a third party. The defendant’s counsel argues that the negligence of the third party constituted *novus actus interveniens[[2]](#footnote-2)* and the chain of causation was broken. The plaintiff’s counsel argues that the defendant should still be liable under the Occupiers Liability Ordinance as there was insufficient space between the treatment beds. I do not agree with their approach.
4. I do not think there is sufficient evidence to establish that the plaintiff’s lamp was knocked down by a customer.
5. According to the plaintiff, she was told to lie down on a bed to receive the treatment. The area where she received the treatment was cordoned off by means of drawn curtains as she was required to expose her abdomen. The defendant’s staff applied some traditional Chinese medicine on her abdomen and used the lamp to “shine” on it. The lamp was mounted on an overarching arm extended from a moveable stand which was placed beside the plaintiff’s bed. The staff also massaged the plaintiff’s head as part of the treatment. After the massage, the staff left the area while the treatment associated with the lamp continued. The plaintiff closed her eyes and was dosing off when she suddenly felt pain over her abdomen. It was then that she discovered that the lamp had dropped and the hot filaments of the lamp had come into contact with her skin. She screamed and the defendant’s staff rushed in to lift up the lamp. The staff then removed the traditional Chinese medicine and applied something to the affected area that the staff claimed to have anti-inflammatory and soothing effect. After a while, the pain had subsided to an extent that she was able to go to work without seeking medical treatment. She only consulted a dermatologist (ie Dr TS Au) about two months after the accident when her injury showed no sign of improvement.
6. So, the plaintiff is not able to say how and why the lamp fell.
7. The allegation that the lamp was knocked down by a customer came from the defendant’s witnesses. They claim that the customer receiving treatment at the adjacent bed had accidentally knocked down the plaintiff’s lamp on his way to the toilet. However, Madam Liu (the director who is generally responsible for the operation and management of the defendant) was not inside the shop at the material time. Although Madam Lam was there, she apparently became aware of the accident after it had happened. Importantly, neither of them professes to have witnessed how the lamp was knocked down.
8. The defendant’s counsel explains in his closing submission that the defendant was unable to locate the staff who served the plaintiff on that day or any eyewitness of the accident due to the passage of time. Be that as it may, there is really no direct evidence on how the accident happened.
9. It is not known how the defendant’s witnesses came to their knowledge. Their witness statements are dated April 2014 and May 2015 respectively. There appears to be no contemporaneous statement. The fact of the matter is that their evidence may involve multiple hearsay. I do not think I should attach any weight to their evidence.
10. In my view, this is a classic case for the application of *res ipsa loquitur[[3]](#footnote-3)*. That is a rule regarding the proper approach to the evidence where the claimant is unable to say exactly how his injury was caused. In *Yu Yu Kai*, Ribeiro PJ of the Court of Final Appeal adopted the following explanation from the judgment of Megaw LJ in *Lloyde v West Midlands Gas Board*:

“I doubt whether it is right to describe *res ipsa loquitur* as a ‘doctrine’. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited to technical rules, as the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. I have used the words ‘evidence as it stands at the relevant time’. I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on the balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur*. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The *res*, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted.” [[4]](#footnote-4)

1. Earlier in *Sanfield*,[[5]](#footnote-5) Bokhary PJ explained that it matters not that the immediate cause of an accident (eg brake failure or a burst tyre) is known. So long as the cause on which the issue of liability actually turns (eg why the brakes failed or the tyre burst) is unknown, the accident is still regarded as one of unknown causeand *res ipsa loquitur* applies.
2. In the present case, there is no dispute that the plaintiff’s injury was caused by the heated filaments of the lamp coming into contact with her skin. According to Dr TS Au, “the hot part of the device burned [the plaintiff’s] abdomen.” Dr Otto Au similarly concluded that: “… as the result of the treatment [the plaintiff] suffered first degree burn on her abdomen and left some scarring over the skin of the treated area measured 90 x 100 mm.”
3. Although the immediate cause of the accident may be known (ie the fall of the lamp), the plaintiff is unable to say how and why the lamp fell.
4. At the material time, the plaintiff was served inside a private area. The plaintiff and the defendant’s staff who served her were the only persons inside. The plaintiff was asked to lie flat on a bed to receive the treatment. Leaving aside whether any real benefit can be derived from the treatment,[[6]](#footnote-6) the plaintiff relied on the defendant’s staff to properly calibrate and suitably position the lamp for the treatment. According to Madam Liu, the lamp was set at a maximum of 45 degrees Celsius and fitted with a timer to ensure that it would not become too hot. She says that the lamp should be positioned at about 8-10 inches above the plaintiff’s abdomen. Given the heated filaments, the plaintiff might suffer injury if the lamp became too hot or was positioned too close to the skin. Injury might also ensue if the stand was not rigid enough to support the lamp during the course of the treatment. Both the lamp and the stand were equipments supplied by the defendant and used in the plaintiff’s treatment.
5. That was not the first time the plaintiff received that kind of treatment from the defendant. Previous treatments had been uneventful. Madam Liu also testifies that the defendant did not have such kind of accident before. So, the accident should not have happened in the ordinary course of things.
6. As the evidence stood at the close of the plaintiff’s case, it is more likely than not in my view that the effective cause of the fall of the lamp was some act or omission of the defendant’s staff for whom the defendant is responsible (eg in calibrating and positioning the lamp) or some defect on the equipment (eg the lamp and the stand) for which the defendant is also responsible. All these suggest a failure on the part of the defendant to take proper care for the plaintiff’s safety.
7. The defendant has attempted to assert a positive case at trial to rebut the inference. Its witnesses testify that the customer occupying the adjacent bed had accidentally knocked down the plaintiff’s lamp on his way to the toilet. They claim that there was a safe distance of about 24 inches between the beds and the negligence of the customer was not foreseeable.
8. According to Madam Liu, the stand holding the plaintiff’s lamp was weighed down by a heavy base that extended underneath the plaintiff’s bed. Bearing in mind that there was a curtain drawn between the beds, it is not known where the base was placed with respect to the curtain. It remains a mystery as to how the customer knocked over the plaintiff’s lamp. Did the customer venture beyond the curtain and into the plaintiff’s area and knocked down the lamp? Or was he tripped over by the stand or its base which was placed too close to the curtain? Was he warned of the use of the lamp on the adjacent bed and that he should get off his bed from the other side? Thus, the bare assertion that a customer had knocked over the lamp does not begin to explain the mechanism of the accident or bespeak the innocence (or lack of negligence) of the defendant.
9. For the reasons I set out above, I do not think the defendant has succeeded in rebutting the inference. To adopt the words of Megaw LJ, the *res* which previously spoke for itself remains loud and clear at the end of the trial.
10. By the operation of *res ipsa loquitur*, I am satisfied that the plaintiff has overcome the threshold of proving negligence on the part of the defendant. The defendant should be liable for her injury.

*Issue (2): Is the plaintiff liable for contributory negligence?*

1. In his closing submission, the defendant’s counsel complains that the plaintiff had delayed in seeking medical attention for about two months. He finds support in Dr Otto Au’s addendum that: “It is reasonably assumed that the degree of deformities be less if the plaintiff received treatment immediately within the date of the alleged accident.”
2. It is true that the plaintiff did not seek medical attention immediately after the accident. When she consulted Dr TS Au about 2 months later, she was found to have “an area of 8 cm x 8 cm consisting of multiple parallel lines of post-inflammatory hyperpigmentation and scarring”. She was treated with moisturizer and a bleaching medicated cream. She attended follow up treatments until, according to the plaintiff, the doctor told her that her condition would not improve.
3. When the plaintiff was examined by Dr Otto Au in May 2014 for the purpose of these proceedings, the doctor found “many vertical fine linear pigmentation adjacent and lateral to the level of the umbilicus, [measuring] 90 x 100 mm. They are flat and smooth, no pain on palpation.” The doctor did not mention any scarring and presumably there was none. What is left in terms of injury is just “mild to moderate pigmentation”.
4. Whilst expressing the opinion that earlier treatment might lessen the degree of deformities, Dr Otto Au did not elaborate on what deformities he was referring to and the basis of his opinion. He merely recommended that the plaintiff’s injury should initially be treated with “frequent proper wound dressings and changed daily.” If the suggested course is meant to prevent inflammation, Dr TS Au did not observe any inflammation when he first examined the plaintiff in September 2010. If Dr Otto Au was referring to hyperpigmentation, the defendant has failed to adduce medical evidence to explain how frequent and daily change of dressing can help lessen the pigmentation and to what extent. This is not something that is within the general experience of the court.
5. The defendant’s contention is therefore not supported by proper medical evidence.
6. In any event, the defendant’s criticism appears to be too harsh. Both the plaintiff and Madam Lam say that the defendant’s staff rushed in immediately to lift up the lamp. I accept the plaintiff’s evidence that the defendant’s staff had applied some soothing and anti-inflammatory agent on the affected area and, after a while, the pain had subsided to an extent that she was able to go to work. Madam Lam even claims that the plaintiff had indicated that she was all right (冇事). Thus, the evidence does not suggest that the plaintiff required medical attention immediately after the accident. Dr TS Au has confirmed that there was no inflammation when he examined the plaintiff about two months later. Dr Otto Au has no adverse comment on the subsequent management of the plaintiff’s injury. There is nothing to suggest that the plaintiff has mismanaged her injury.
7. I reject the defendant’s contention that the plaintiff should be held partly liable for her injury.

*Issue (3): If the defendant is liable, what are the damages to be awarded to the plaintiff?*

1. The parties have narrowed down their dispute over quantum. According to their closing submissions:

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| --- | --- | --- |
|  | *Plaintiff’s revised claim* | *Defendant’s suggestion* |
| PSLA | $70,000 | No more than $40,000 |
| Medical expenses | $2,130[[7]](#footnote-7) | $2,130 |
| Tonic food | $1,000[[8]](#footnote-8) | $1,000 |
| Future medical expenses | $45,000 + $4,000 | Nil |
| Total | $122,130 | $43,130 |

So, the remaining dispute is on PSLA and future medical expenses.

1. I have recited the pertinent parts of the medical evidence above. For the parallel pigmentation striate appearing on the plaintiff’s abdomen, Dr Otto Au has assessed the permanent cosmetic impairment of the plaintiff to be 1% of the whole person making reference to the 5th edition of AMA’s Guide to Permanent Impairment.
2. I accept that it must have been painful initially, as the plaintiff was awakened from her trance and her reaction had attracted the attention of the defendant’s staff. The pain should not have lasted long as the plaintiff was able to attend work afterwards. Neither Dr TS Au nor Dr Otto Au noted any pain or itchiness in the affected area when they examined the plaintiff.
3. The plaintiff was 57 years old at the time of the accident and is now almost 62. All along, she works as an assistant in a mahjong parlor. Her work requires her to reach above her head to place the commission into the basket above the mahjong table and occasionally revealing her abdomen. She has been wearing longer clothing since the accident to avoid revealing her “scars” (to use her words).
4. The present complaint of the plaintiff appears to be emotional. She says that she used to enjoy swimming and playing badminton but is now deterred from engaging in such activities for fear that others might see her “scars”. She also complains of disharmonious relationship with her boyfriend since the accident. In fact, Dr Otto Au has advised her to consult a psychologist for her emotional disturbance.
5. The plaintiff’s counsel referred me to *Shabbina Khokhar[[9]](#footnote-9)* and *Leung Ka-yee[[10]](#footnote-10)* and suggested an award of $70,000 for the pain, suffering and loss of amenities suffered by the plaintiff. I agree with the defendant’s counsel that those authorities involve much more serious injuries.
6. Taking into account *Tsang Chi Cheong[[11]](#footnote-11)* and *Chan Tsz Sing[[12]](#footnote-12)* cited by the defendant, I assess PSLA to be $40,000.
7. Turning to the claim for future medical expenses, the plaintiff mainly relies on the opinion of Dr Otto Au that: “Her pigmentations over her right abdomen may be treated with laser, about 10 treatments are recommended at 3-4 weeks intervals at $4500 x 10 = $45000. Day of absence – 10 days.” She is also claiming $4,000 loss of wages for her to attend the laser treatment.
8. At first glance, the advisability of laser treatment seems to be equivocal as the plaintiff has suggested in her evidence that Dr TS Au had told her that the hyperpigmentation and scarring would be permanent. However, I do not attach much weight to her recollection as Dr TS Au has suggested in his report that the pigmentation may go away after a few years.
9. In any event, Dr TS Au treated the plaintiff at a relatively early stage of her recovery. The fact that he did not discuss laser treatment in his report does not mean that such course of treatment is not advisable. Dr Otto Au now suggests that the injury may be treated with laser with an “[e]xpected recovery [of] 60% approximately”. Whether the doctor meant 60% chance of ridding the pigmentation altogether or bleaching the presently “mild to moderate pigmentation” by 60%, that is improvement in the plaintiff’s injury supported by medical opinion. The general object of an award of damages is to compensate the claimant for the losses sustained as a result of the defendant’s tort. In the oft-quoted words of Lord Blackburn, the court should award “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”.[[13]](#footnote-13) Despite the rather inconspicuous location of the injury and notwithstanding her age, it is only fair that the plaintiff be put as far as possible in the same position as she would have been if she had not met with the accident.
10. The defendant does not challenge the cost of the laser treatment quoted by Dr Otto Au (at $45,000).
11. The defendant does not challenge the monthly salary of the plaintiff either (at $11,000). The claim of $4,000 for loss of wages associated with the 10 days treatment appears to be reasonable.

*Conclusion*

1. In conclusion, I find the defendant liable for the cosmetic injury suffered by the plaintiff as a result of the accident. I reject the contention that the plaintiff should be partly responsible for her injury and assess the compensation payable by the defendant to be $92,130 as follows:

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| --- | --- |
|  | *Amount awarded* |
| PSLA | $40,000 |
| Medical expenses | $2,130 |
| Tonic food | $1,000 |
| Future medical expenses | $45,000 |
| Future loss of wages | $4,000 |
| Total | $92,130 |

1. I award interest on damages for PSLA at the rate of 2% per annum from the date of service of the writ until the date of judgment. Interest on other pre-trial losses is awarded at 4% per annum from the date of the accident to the date of judgment.
2. I further make a costs order *nisi* that the defendant do pay the plaintiff’s costs of the action to be taxed if not agreed with certificate for counsel.

(Justin Ko)

Acting Chief District Judge

Mr Vincent Chan instructed by Francis Kong & Co, for the plaintiff.

Mr Sunny Chan instructed by Huen & Partners, for the defendant.

1. It is not disputed that on that day the plaintiff received two treatments at the same time, namely, “細胞能量排毒服務” and “首創透皮吸收理療”. [↑](#footnote-ref-1)
2. Meaning, a new act intervening (*Hong Kong English-Chinese Legal Dictionary*). [↑](#footnote-ref-2)
3. Meaning, the thing or matter speaks for itself (*Hong Kong English-Chinese Legal Dictionary*). [↑](#footnote-ref-3)
4. *Yu Yu Kai v Chan Chi Keung* (2009) 12 HKCFAR 705 at §44. [↑](#footnote-ref-4)
5. *Sanfield Building Construction Ltd v Li Kai Cheong*  (2003) 6 HKCFAR 207 at §3. [↑](#footnote-ref-5)
6. According to Dr Otto Au, there is no known scientific basis to prove that the liver will benefit from light treatment from a shining lamp. [↑](#footnote-ref-6)
7. This was reduced from $2,900 claimed in the Revised Statement of Damages. [↑](#footnote-ref-7)
8. This was reduced from $8,000 claimed in the Revised Statement of Damages. [↑](#footnote-ref-8)
9. *Shabbina Khokhar v Europe Beauty International Limited*, unreported, DCPI 579/2007, 4 January 2008. [↑](#footnote-ref-9)
10. *Leung Ka-yee v L & Y Beauty Centre Limited*, unreported, DCPI 196/2003, 22 October 2003. [↑](#footnote-ref-10)
11. *Tsang Chi Cheong v The Incorporated Owners of Mei King Mansion (Stage 1)*, unreported, DCPI 23/2012, 31 March 2015. [↑](#footnote-ref-11)
12. *Chan Tsz Sing v Lo Ching Pong*, unreported, CACV 176/2004, 31 January 2005. [↑](#footnote-ref-12)
13. See *Clerk & Lindsell on Torts*, 21st Edition (2014), §28-07. [↑](#footnote-ref-13)