## DCPI 1567/2012

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1567 OF 2012

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##### BETWEEN

XIE QIUYUN Plaintiff

### and

ARCHE BEAUTY THERAPY LIMITED Defendant

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Before: His Honour Judge Tam in Court

Dates of Hearing: 13, 16 June, 24-25 July, 14-15, 21 August 2014

Date of Judgment: 18 December 2015

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JUDGMENT

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1. This is a case of personal injury started by Writ of Summons issued on 31 July 2012.

*Introduction*

*Plaintiff’s case*

1. On 22 June 2009, the plaintiff went to the shop of the defendant, a beauty salon, and sought help in relation to the brownish pigmentation problem on her face. She was greeted by Amy Lam (a non-witness) who introduced her to laser treatment available at the shop. The plaintiff told Amy that she had gone through a chemical peel treatment in the Mainland about 3 months prior and had suffered pigment problem on her face. Amy sold the plaintiff some beauty products and also asked her to pay a deposit of $1,000 for some future laser treatments the first of which was to be performed on 1 August 2009.
2. The plaintiff left and consulted a doctor (dermatologist) by the name of Dr Lee Cho Kay on 24 July 2009 who prescribed her with some cream. However, the plaintiff did not ask Dr Lee for advice on laser treatment as she did not think it concerned him. The plaintiff returned to the shop on 1 August. On this occasion, she was greeted by DW1 Renee Li together with Amy. Both went through the formalities with her and DW1 started to perform laser treatment on her without warning her of the risks involved.
3. The plaintiff went through a series of 10 laser treatments between 1 August and 24 October 2009. Some days after the last treatment of 24 October, she discovered her face had mottled hypopigmentation and therefore lodged the first complaint to the shop on 12 November 2009. She then on the same day started a second type of treatment called the AHA (Alpha Hydroxy(l) acid) chemical peel treatment[[1]](#footnote-1). Her condition had not improved and she made a second complaint on 30 December 2009.
4. The plaintiff finished her last (the 9th) AHA chemical peel treatment on 6 January 2010.
5. There then followed a series of 9 free-of-charge laser treatments between 23 January and 10 April 2010.
6. After that, the plaintiff paid for another series of 10 laser treatments (she actually received 11 and three/four of which were done on her body instead of her face, at her own request). The 11 treatments were done between 8 May and 22 July 2010.
7. The plaintiff made the 3rd complaint on 29 July 2010 at which point the defendant referred her to a dermatologist Dr Chan Kin Yip. On 31 July Dr Chan examined the plaintiff and found clinical signs of post-inflammatory hyperpigmentation and hypopigmentation. The plaintiff ceased to have any further treatment at the defendant’s shop. The plaintiff alleged the defendant was *negligent* in performing its services and had *caused* the plaintiff injury.

*Defence case*

1. The plaintiff did visit the defendant’s shop on 22 June 2009 and had consulted the defendant for beauty therapy. The plaintiff told the defendant she had sustained brownish pigmentation on her face as a result of the chemical peel treatment she had received in the Mainland. The plaintiff would like to have laser treatments at the defendant’s shop to improve her facial condition. However, in view of the plaintiff’s then facial condition, the defendant deemed and explained to the plaintiff that she was unsuitable for laser treatment that day. The plaintiff paid a deposit of $1,000 for 10 laser treatments (costing $10,000) returnable on 1 August 2009 to see if she was suitable then. Between 1 August 2009 and 22 July 2010, the plaintiff had received some beauty therapies including laser treatments and AHA chemical peel treatments at the defendant’s shop. Before providing any beauty therapy to the plaintiff, the defendant had made a comprehensive enquiry and assessment of the plaintiff’s skin conditions. The defendant had also explained to the plaintiff various options of beauty therapies which the plaintiff could consider. The nature, effects and possible side effects of the laser treatment were also explained to the plaintiff. In the end, the plaintiff chose to receive the QX laser treatment therapy. The plaintiff fully understood and signed the Intense Pulsed Light & Laser Treatment Enquiry Form to acknowledge the same to verify her consent to undertake the QX laser treatment. Not only did the plaintiff have (undisputed) pre-existing hyperpigmentation and melasma, she also had (disputed by the plaintiff) pre-existing hypopigmentation involving both cheeks. The defendant denied it was negligent and denied it had caused the plaintiff the injury as alleged.

*Issues on liability*

1. Taking into account the lists of issues drawn up respectively by the plaintiff and the defendant, I consider the following as the issues I have to resolve in order to determine liability in this case :-
2. What was the duty and standard of care owed by the defendant to the plaintiff?
3. In the factual evidence in dispute between the plaintiff and DW1 (the laser therapist), whose evidence, if any, would the Court accept?
4. What weight should be given to Amy Lam’s notes, and the miscellaneous photographs?
5. What weight should be given to DW1’s comments given in the trial?
6. In the medical evidence in dispute between the plaintiff’s expert Dr Yeung and the Defence expert Dr King, whose evidence, if any, would the Court prefer?
7. Has the defendant breached its duty/standard of care owed to the plaintiff?
8. Did the defendant cause the plaintiff’s injury?
9. Before proceeding further, it is useful to have an overview of what it is that the plaintiff alleges are the respective particulars of negligence, causation and injury.

*Particulars of negligence*

1. The particulars of negligence are as follows:-
2. Failing to warn the plaintiff of the potential side effects of the laser treatment in the cosmetic treatment, particularly the development of the injury.
3. Failing to conduct a proper diagnosis and cosmetic treatment on to the plaintiff’s brownish pigmentation on both cheeks.
4. Failing to advise the nature and the risk of laser treatment involved in the said cosmetic treatment at the plaintiff’s brownish pigmentation on both cheeks.
5. Failing to stop to use the laser treatment in the said cosmetic treatment once there was evidence of the development of whitish spotty depigmentation in December 2009.
6. Failing to act reasonably to continue to give laser treatment in the said cosmetic treatment to the plaintiff when the plaintiff has complained of new hypopigmentation and hyperpigmentation irregularly.
7. Failing to refer the plaintiff to dermatologist when the plaintiff has complained of new hypopigmentation and hyperpigmentation irregularly.
8. In all the circumstances failing to provide a safe system for the provision of health care.
9. In the premises failing to provide the plaintiff with appropriate and skillful treatment and exposing her to an unnecessary risk of injury and disfigurement.

*Particulars of causation*

1. The particulars of causation are:-
2. Had the plaintiff been advised about the nature of her facial pigmentation, the natural course of the condition and the potential complications of the laser treatment, particularly the development of the injury, the plaintiff would not have consented to the laser treatment in the said cosmetic treatment.
3. Had the laser treatment in the said cosmetic treatment been stopped once there was evidence of development of whitish spotty depigmentation in December 2008 (2009?) and there were complaints from the plaintiff, the plaintiff would not have consented to the laser treatment in the said cosmetic treatment.
4. But for the laser treatment in the said cosmetic treatment, the plaintiff would not develop the injury.

*Particulars of Injury*

1. The particulars of injury are:-
2. On 31 July 2010, Dr Chan Kin Yip examined the plaintiff and found clinical signs of post-inflammatory hyperpigmentation and hypopigmentation.
3. On 30 August 2012, physical examination by Dr Yeung Chi Keung showed that there were background symmetrical brownish flat patches on cheeks forehead and temples. There was overlying punctuate facial depigmentation with white spots of various sizes and shades on the face. It demonstrates round milky white patches corresponding to the focal loss of skin pigment. The individual white spot measured 2 mm to 6 mm in diameter.

*Duty and Standard of Care*

1. In the Statement of Claim, the plaintiff pleads that the defendant (in carrying on business of beauty salon) owed a duty of reasonable skill and care to the plaintiff, including all matters arising out of or incidental thereto; and that without limiting the generality of its duty, the duty of care comprised the following:-
2. a direct, non-delegable duty of care to ensure that reasonable care was at all times taken in relation to the medical, nursing and other care with which the plaintiff was provided by or on behalf of the defendant; and
3. a duty at all times to take reasonable care to ensure that there was a safe system of health care provided at the defendant.
4. In the first instance case of *Nam Cheuk Yin v Ng Yim Hing trading as Best Choice Beauty Centre*, DCPI 357/2001, on the question of standard of care to be taken by a professional beautician, the Court held that it is incumbent on the defendant as a professional beautician operating a beauty centre as a business to make sure the products used on her customers should be safe and fit for the customer’s use e.g. prior to treatment a test for allergic reaction on the customer. It is further her duty that she should exercise reasonable care and skill in performing her services to customers and in doing so, she should take such precaution and remedial measures to minimize any harm or injuries to her customers.
5. The defendant does not dispute that it owes the plaintiff a duty to act reasonably when performing services to the plaintiff, but only as a beauty salon and no greater duty than a beauty salon; and in any event, the duty of care is not comparable to any health care provider or any medical professional.
6. Even the plaintiff’s own expert Dr Yeung acknowledged that at present there is no government regulation to regulate the use of laser devices and such practice is not considered unlawful (para 3g at C7).
7. Hence, whilst I agree that the defendant owed a duty of care to the plaintiff, the services provided by the defendant are not in the nature or sphere of medical, nursing or health care. Consequently, I do not accept that the defendant owed a duty of care in relation to medical nursing or health care to the plaintiff. Indeed, no authority relied by the plaintiff suggests otherwise. Furthermore, the plaintiff has not spelt out what the “other care” was as alleged in para 3(a) of the Statement of Claim.
8. So, has the plaintiff’s case completely crumbled because of this failure? Well, no. The plaintiff has, fortunately for her, prefaced the foregoing pleaded item with “The defendant owed a duty of reasonable skill and care to the plaintiff, including all matters arising out of or incidental thereto. *Without limiting the generality of* his (sic) duty, the duty of care comprised …” (emphasis added)
9. Hence, I am prepared to consider the plaintiff’s case further on the basis that she has pleaded generally that the defendant owed a duty of reasonable skill and care to the plaintiff, including all matters arising out of or incidental thereto.
10. Relying on the case of *Nam Cheuk Yin (supra)*, in the circumstances of the present case, I would say that the standard of care here is that *the defendant should exercise reasonable care and skill in performing beauty salon services to its customers and in doing so, should take such precaution and remedial measures to minimize any harm or injuries to the customers.* Incidentally, this accords well with section 5 of the Supply of Services (Implied Terms) Ordinance, Cap 457 which states :-

“In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill”.

1. There is no dispute that it is the plaintiff that bears the burden of proof.

*EVIDENCE*

*PW1 the plaintiff XIE Qiu Yun*

*Examination-in-chief of PW1*

1. PW1 adopted her witness statement dated 31 October 2013 as her evidence-in-chief. Basically, PW1 alleged that on 22 June 2009, she went up to the defendant’s shop and sought help in relation to the brownish pigmentation problem on her face which resulted from chemical peel therapy she received in the Mainland 3 months prior. Amy and other employees greeted her. The defendant’s staff introduced to her laser treatment and chemical peel therapy. Between August 2009 and July 2010, she underwent laser treatment there resulting in large area of hyperpigmentation and a large number of whitish circular confetti-like spots on her face. Before conducting laser treatment on her, the defendant had never given her any advice or analysis. The defendant never told her of any potential side effects of laser treatment. If the defendant had done all those things, she would not have taken the risk of starting the laser treatment. During December 2009, her face had already developed partial injury i.e. white circular confetti-like spots; and later her face had developed large area of hyperpigmentation but the defendant still continued non-stop to conduct laser treatment on her and failed to re-assess if she was suitable for further laser treatment. If the defendant had stopped the treatment and re-assessed her suitability, her injury would not have resulted.
2. *Under additional examination-in-chief*, she agreed she signed the “Intense Pulsed Light & Laser Treatment Enquiry Form” (D3-5) [identical to D76-78] on 1 August 2009. That time she still had brown pigmentation. She had not read D5 [identical to D78] of the form and no one explained it to her before she signed. She signed D6 [identical to D79] the accepting agreement on 1 August 2009. She had not read the page before she signed. No one explained to her what system was to be used except that she was to be treated by laser.

*Cross-examination of PW1*

1. Under cross-examination, after wavering a bit about the date of the first complaint, she finally settled on 12 November 2010. She was more certain about the dates of the second and third complaints – 30 December 2009 and 29 July 2010 respectively.
2. PW1 said she believed the staff of the defendant because they said they were professionals and could help her. They told her there was no need to worry and to believe them. They told her to laser on until the black substance would not appear. They said that after AHA chemical peel treatments and laser treatments, the pigment would not appear. She saw hope and therefore believed.
3. PW1 accepted that the pigments were not now visible and she could see clients but she was not ready for the nightclub job. She had suffered from depression for 3 years.
4. She saw many doctors (Hong Kong, Mainland and Taiwan) in the three years from July 2010 to just before October 2013 but she *did not let them treat her* because she had become more careful in choosing treatments.
5. She told Dr Yeung the number of treatments she had received and she was truthful in what she told Dr Yeung. When queried about Dr Yeung’s reporting that she had done 30 odd laser treatments, she said that in the middle of the treatments, several were gifted to her.
6. When the tables in D72-73 were shown to her, PW1 confirmed that they constituted a complete record of her treatments.
7. When put that according to D72-73 there were altogether only 28 laser treatments 4 of which were done on the body rather than the face, PW1 said that only 3 were done on the body. PW1 also added at this stage that there were some laser treatments not recorded in D72-73. PW1 now disagreed that D72-73 reflect the whole record accurately.
8. PW1 also said that during the previous weekend, she had re-read her witness statement (without obtaining leave from the Court). She said that now she was clearer about the incidents.
9. PW1 said when her statement was made on 31 October 2013, she was still in depression. However, on 30 August 2012, when she saw Dr Yeung, she could say so much more to him because she was prepared, and she was hurt and injured which made her remember. She could tell Dr Yeung what happened but as regards dates she could not be sure. She could now give the dates of the complaints because the photos assisted her.
10. She said that between 26 June and 22 July 2010, a few laser treatments were gifted to her. Hence, in total, there were 30-31 laser treatments.
11. When pointed out that she told Dr Yeung (as per his report) that the first time she discovered her face problem was in December 2009, PW1 said she was weak about dates.
12. PW1 disagreed that she made up the three dates of complaints. She did not think the three dates important enough to be worthy of mention in her statement.
13. She could not remember she told Dr Yeung that the first time she had white spots was in December 2009. However, she acknowledged that she mentioned in her witness statement at para 9 first sentence the time of December 2009.
14. On 1 August 2009, they said her skin had improved and it did seem to have improved.
15. PW1 had some cosmetic surgery performed on her nose and mouth at least 2-3 years before 22 June 2009 by injection of some kind of acid. It was said that the acid would be absorbed. The risks were explained to her beforehand and she consented to the treatment(s). The performing doctor (in Mainland) was a very good friend and it was done free of charge.
16. In October/November/December 2009, when the problems with her face arose, the doctor friend told her not to laser; but the shop told her to do it. She felt that the doctor was not professional in this aspect therefore she did not believe the advice.
17. When asked about whether she still did not believe her doctor friend at the later stage, post the AHA chemical peel treatments, PW1 simply said that by that time, she had already paid.
18. PW1 insisted that she had not read the “possible side effects” list on D78 although she could read Chinese. Nor did the staff remind her of the items on the list.
19. She said that after her Mainland experience, she would be cautious and that was why she chose a HK shop because she thought the latter would be professional and had sense of responsibility.
20. It was put and denied that before she signed, she had read the side effects and the declaration (as per declaration no 2 on D78), and the treatment schedule. It was put and denied that she knew the risks involved but she nonetheless chose laser treatment because she knew it was a faster treatment. It was put and denied that she was also aware of the content of D79 especially the side effects (said to be very rare) in para 1 thereof when she signed that page.
21. PW1 said that at the time she was told to sign quickly before the laser treatment. She pointed to what she described as a rushed signature on D79. She repeated that she had faith in the professionalism and sense of responsibility of HK shops.
22. She said that they did not give her the time to read the forms and no one reminded her of the contents. She did not know their importance. She disagreed that she had the ability to read the contents and to understand them.
23. When put that the pigment re-appeared only because she did not live her life according to the instructions i.e. she failed to use sun-block and recovery gel, PW1 said that she used NuSkin skin-care products before and after treatments and she told Renee (DW1) so who said it was fine. PW1 said if Renee was professional and had sense of responsibility, she should have asked for more details.
24. She agreed that after treatment(s), the defendant told her she should take care of her face; and she did. When put that they told her after treatment that the effect depended on her life style and how she cared for her face, PW1 agreed. She further said she believed it and she followed it.
25. When asked about her claimed travelling expenses of $5,000, she said the flight from her home town to Hong Kong took 4-5 hours; and she also flew to Taiwan once but since the chances of claiming reimbursement was very little, she had not produced receipts.
26. As regards the $10,000 claimed for nourishing food, PW1 disagreed that she would drink the soups in any event. PW1 further said that she had asked people, and they replied that she would benefit from drinking soups such as fish maw in chicken soup etc. As regards receipts, no one had told her to keep them.
27. Regarding the claim of refund of cosmetic treatment in the sum of $30,130, when it was suggested that she could not produce receipts to that amount, she said she still insisted to recover that sum which included payments for laser treatments, AHA chemical peel treatments and other products.
28. When it was pointed out to her that AHA chemical peel treatment was not the basis of her claim, she replied that AHA chemical peel treatment aggravated her skin injury; and as regards the other products, the defendant said that she had to buy them.
29. She agreed that Dr Lee’s medical expenses were only $280. Regarding Dr Chan who examined her on 31 July 2010, she agreed that she had said the medical expenses were $1,100-$1,200 but she had also said the medicine cost $1,500.
30. She agreed that Dr Chan had only produced a single medical report about her. When it was suggested that Dr Chan’s report did not mention he had prescribed any medicine, PW1 said that Dr Chan had given her cream.
31. When asked for the basis of PSLA claim of $300,000, she said she could not go to work, she dared not see friends and could not work for Nuskin and on top of that, she loved beauty and therefore was hard hit.
32. She reiterated that she did not take treatments because the people she consulted told her that she had to wait until her face was to become healthy again after so much as 30 times of laser treatment. She took soups and Chinese medicine in the interim. However, she agreed that when in October 2013 her face condition became better (but not to the extent of requiring no further treatment), she went to Taiwan to seek treatment. She said also that from 4 to 5 months before July 2010 till the time of the trial proceedings, she had gone to Shenzhen on and off for taking Chinese medicine.
33. The reason she had not mentioned in her witness statement about taking Chinese medicine was, she said, they were useless and cheap.
34. It was put to PW1 that on 22 June 2009, during her first visit to the defendant shop, she already understood what services could be provided which included not only laser treatment. PW1 replied that she could not remember.
35. It was put that the staff introduced many types of services to her. Again, she said she could not remember.
36. It was specifically put to her that the staff introduced AHA chemical peel treatment to her. She denied.
37. It was put that after a lot of services were introduced to her, she chose to undergo laser treatment. She denied. It was further put that she chose it because it was the fastest method. She again denied. She said she underwent laser because she felt it was safe and effective.
38. She agreed she would not jump to a decision but disagreed she would understand the matter clearly first. She said she relied on the claim that the defendant was a pigment removal authority.
39. She also agreed the staff had said whether she could undergo laser treatment would depend on her skin condition on the next appointment. So, she only gave $1,000 initial deposit for the laser treatment.
40. When put that Renee and a colleague had explained to her the condition after treatment, PW1 said they did not explain the side effects but did explain the effect after treatment i.e. peeling and scab.
41. PW1 agreed that they did explain about what she needed to do i.e. sun-block and re-wetting. PW1 also agreed that they explained not everybody’s reaction to the treatment would be the same but she could not remember if they explained that the effect of treatment would depend on individual factors. However, when prompted about the factor of sufficient sleep, PW1 remembered that they did explain that the effect would depend on this factor.
42. It was put to but denied by PW1 she signed on forms at D78-79 only after she understood the contents, and that was before Renee started the laser treatment on her.
43. PW1 agreed to the suggestion that the staff reminded her to use appropriate products or the effects would be opposite.
44. PW1 agreed that AHA chemical peel treatments improved her skin but the effect was not as fast as laser.
45. PW1 could not remember if she had said to the staff on 23 January 2010 that she thought the effect was slow and wanted a faster effect and PW1 wanted to go back to laser treatment.
46. When put that the staff saw her condition on 23 January 2010 and explained to her that she still had pigment and said to her that if she wanted to do laser treatment, they would concentrate on the pigments, PW1 said staff did say so but as to the date she could not remember.
47. PW1 could not remember if the staff had reminded her to take care of her skin, otherwise the black and white pigments would come out.
48. Nor could PW1 remember if the staff had reminded her that having sun-tan would give her black and white pigments on her face as a result of the laser effect.
49. However, PW1 categorically denied that the staff had told her the laser’s risks and side effects.
50. PW1 could not remember if the staff had assessed her suitable for the second round of laser on 23 January 2010 but she disagreed that the second round had positive effect on her face.
51. However, PW1 agreed that between 16 March and 10 April 2010, she had gone to the Mainland. She also agreed that during the same period the pigments appeared again.
52. She agreed that before 16 March, the staff had already reminded her to take care of her skin but she insisted that she had followed the instructions.
53. It was further suggested to her that she was satisfied with the service and she even asked the staff to do body laser treatments to which PW1 disagreed. However, PW1 agreed that she had received body laser treatments.
54. PW1 said that there was discussion between DW1 and her about the use of laser on other parts of her body. She added that DW1 distracted her attention and sold her more products.
55. When questioned why she would allow her body to undergo laser treatment when by then she must have known that the laser would not work, PW1 said that her face was different from her body. She added that DW1 said that her (PW1’s) body had mosquito bite marks.
56. When questioned whether she still went ahead to try even when her earlier laser treatments were unsuccessful, PW1 said yes.

*Re-examination of PW1*

1. Under re-examination, on the question of future medical expense at the tune of RMB25,000 (for Taiwan clinic), PW1 said she would require a quantum for 1-2 years amounting to HK$50,000-60,000.

*DW1 LI Kwai-ha*

*Examination-in-chief of DW1*

1. DW1 adopted her witness statement dated 31 October 2013 as her evidence-in-chief. DW1 had many years of experience in the beauty services industry and possessed laser and beauty certificates. She was the executive director and beauty consultant of the defendant and was responsible for day to day operation as well as personnel matters. She also gave pre-job training to newly recruited colleagues. On 22 June 2009, the plaintiff first went to the Jordan branch of the defendant and was received by a fellow beauty consultant who after learning of the plaintiff’s facial pigmentation problem and becoming aware of her weak facial skin, deemed her not suitable for any immediate treatment (including laser treatment) until the condition got better. Meanwhile the plaintiff left after buying some skin repair products.
2. The plaintiff returned on 1 August 2009 and asked for laser treatment. DW1 together with Amy greeted her. DW1 saw that the plaintiff’s skin condition had improved and was suitable for laser treatment. DW1 and Amy together explained to the plaintiff in detail the matters incidental to laser treatment, including making enquiry on the plaintiff’s body condition and explaining the details of treatment, points to note, and risks of treatment and possible side effects etc. Upon hearing the information, the plaintiff decided to accept the treatment and signed the “Accept laser treatment agreement” before the first laser treatment was conducted on her. Throughout the course of treatment, DW1 and other beauty consultants would assess the plaintiff’s condition and advise or explain to her treatments suitable for her and their side effects. The company would also take photographs for the plaintiff. They kept reminding the plaintiff from time to time to put on sun block ointment to prevent burn by the sun and to conduct periodical facial skin care which was appropriate and adequate.
3. On 31 October 2009, the plaintiff attended the company again. That time her facial skin was very dry and began to blacken and displayed pan-reddish condition, and was unsuitable for laser treatment. So the company advised the plaintiff to stop laser and introduced her to AHA chemical peel treatment.
4. On 23 January 2010, that day was originally scheduled for the 10th AHA chemical peel treatment for the plaintiff. However, she suddenly indicated to DW1 that the effect of AHA chemical peel treatment was relatively slow, and she hoped to lighten the facial pigments as soon as possible and requested to continue to receive laser treatment. DW1 explained to the plaintiff that they could concentrate the laser treatment on the facial pigmentation part in order to maintain average skin colouring; but if there was lack of adequate care, the face could display blacken and whiten effects. DW1 noticed that the plaintiff’s black elements were beginning to turn pale and there was no pan-reddish situation, making it suitable for care treatment. And conducting laser treatment would also be a possible option. So eventually, acceding to the plaintiff’s request, starting 23 January 2010, laser treatment restarted on her.
5. Under additional examination-in-chief, DW1 confirmed that she prepared the plaintiff’s chronological table of visits and treatments at B20-22; the table was prepared based on the company’s records and photos taken of the plaintiff.
6. DW1 conducted training for staff; she herself received certain training and passed the exams specified in para 2 of her statement. The reason is that the company wanted her and her colleagues to have a certain level of skills. If a staff member failed to reach a certain professional level, she would not be retained.
7. DW1 emphasized that they were not medical doctors but they would tell clients the advantages and risks of laser treatment.
8. Regarding D76-79 i.e. the 3-paged Intense Pulsed Light & Laser Treatment Enquiry Form and the 1-paged corresponding consent form, the shop explained the contents to the plaintiff before the latter signed.
9. DW1 read the plaintiff’s file and knew that she had no long- standing diseases nor pregnancy. DW1 saw her skin and thought that she could undergo laser treatments. She explained to the plaintiff the possibility of pain and redness and heat and side effects if skin was not cared for afterwards (e.g. whitened and blackened). Care meant keeping wet and sun-proof; if insufficient or done wrongly the treatment effect would be affected. The plaintiff nodded.
10. D79 (consent form) contained what was explained to her about laser treatment that day.
11. On 31 October 2009, her face had turned bad and therefore no treatment was done.
12. As there were still two outstanding laser treatments, the shop asked her not to do them; instead the shop recommended her to do AHA chemical peel treatments, but not before using some products first (these were listed on D74).
13. In June, the plaintiff was happy about the effect of laser treatment on her face (see photos on D90 taken on 12 June 2010). She therefore asked for body laser treatments intending to lighten the appearance of scar.

*Cross-examination of DW1*

1. Under cross-examination, DW1 said she had received laser and other certificates (3 certificates) issued by VTC, ITEC, and HK Beauty Chambers.
2. For VTC cert, one has to have 2 years’ experience before the examination (no training provided); for ITEC cert, one has to have 2 years laser treatment experience (12-20 classes over 3 months); for HK Beauty Chambers cert, one has to have 1,000 treatments or above before direct examination (no training provided).
3. Apart from laser, Amy Lam also introduced re-wet (hydrating) treatment and repair and care products to the plaintiff.
4. D78: apart from the side effects listed there, DW1 also said to plaintiff that she had to re-wet. DW1 also mentioned to plaintiff that if she didn’t take care, then the colour would be uneven. DW1 reiterated to the plaintiff the topic of dryness of skin and the need for re-wetting.
5. Questions were asked of DW1 on energy level of laser machine. DW1 explained that energy level is on a scale of 1 to 10 with 1 being the lowest. Energy was measured in joules.
6. When it was suggested that there was no record in the company to say 5 or lesser level, DW1 disagreed and said that they were recorded on D72-73. DW1 added that when it was lower than 3, it was not written down.
7. DW1 used as example the entry on 8 August 2009 on D72: she explained that the 5 in circle meant that the aperture size was 5 (on a scale of 2 to 8). She explained that the higher the energy level used, the smaller would be the aperture.
8. DW1 said that the relevant brochure should speak to the relationship between energy levels and joules.
9. When asked to what level of energy the plaintiff can withstand, DW1 said lower than 5 (energy level). When asked what did that mean in terms of joules, DW1 said she didn’t know.
10. She agreed that Amy Lam compiled the records at D58-70 as a result of this action; the records were made in August 2012.
11. Amy Lam left the company in May 2013.
12. As regards the change from QX01 on 12 September to QX06 on 19 September 2009 (as documented in D64-65), DW1 said the change was in accordance with her determination as to the plaintiff’s need: it was not necessary to do the full range (QX01) all the time.
13. As regards the performance of QX06 on 26 September and QX01 on 8 October 2010 (as documented in D66-67), DW1 said there was no particular reason for the change.
14. When questioned about the QX entries (without specifying 01 or 06) on D72 for 23 January 2010 onwards, DW1 said that they were QX06 because they were gifts from the shop: the shop would not gift QX01. DW1 continued to say that from 23 January to 10 April 2010, there were 7 gifts of QX06; the reason was that the shop was a small and medium enterprise and gift was a means to maintain relationship with customers.
15. When put that the gifts were a result of the plaintiff’s complaints, DW1 denied.
16. DW1 insisted that prior to 23 January 2010, there were no complaints; she said that the plaintiff claimed that she had no money, and the shop wished to keep a good relationship with her, hence the gifts. DW1 further said that the plaintiff did pay for the two CO2 masks done on 27 February and 10 April 2010.
17. DW1 was asked why she did not refer the plaintiff to a dermatologist before further treatment. DW1 replied that the staff would not casually refer clients to dermatologists unless clients requested so.
18. When asked whether she would not so refer even when she did not know how to solve a problem, DW1 answered that she would not unless she was suspicious of cancer or where she found unknown black spots or infectious diseases. On the present case, she would not.
19. When asked why the side effect of sun-tan (as described in para 12 of her statement) was not mentioned in list of side effects on D78, DW1 said she did mention it orally to the plaintiff the importance of re-wet and sun avoidance : that if anti-sun was not done, there could be reverse whitening, and blackening.
20. DW1 said there was no particular reason why she did not mention about the free treatments in her statement.
21. Before the AHA chemical peel treatment, she did not find the plaintiff’s condition strange. After 23 January 2010, DW1 found the plaintiff’s case strange and difficult.
22. DW1 maintained that from January to July (prior to 29 July) 2010, the plaintiff had not made complaints against the company.
23. When suggested that from January to July 2010, it was the case that DW1 did not think if she should stop the laser treatment, DW1 asserted that she was assessing the plaintiff’s condition on a continuous basis to decide when to stop.
24. DW1 agreed that she had knowledge of bad effects of use of laser treatment. She said that white spots were normal side effects; whereas wrong use would cause bleeding.
25. DW1 said that on 23 January 2010, she also suggested something other than AHA chemical peel treatment and laser to the plaintiff.
26. It was put to but denied by DW1 that she did not suggest to the plaintiff that she should stop everything.
27. It was put to but denied by DW1 that the free treatments that started on 23 January 2010 came about not because the plaintiff thought the effects of AHA chemical peel treatment were slow but because DW1 persuaded the plaintiff that her problem would be solved by more laser.

*Re-examination of DW1*

1. DW1 was asked about the subject of deposit that the plaintiff had paid on 22 June 2009. DW1 said that if on 1 August 2009, the plaintiff decided not to go ahead with laser treatments, she could change to other treatments or products or even had her money back.
2. DW1 added that in plaintiff’s case, this had actually happened. She then referred to the fact that the plaintiff had paid up for laser treatments (in advance) until the end of October 2009 but it seems that she had not taken up all the treatments but changed them into products as evidenced by D72-74.
3. DW1 was shown the photos on D91 (taken on 29 July 2010) again. She commented that the black-white effect on the face was side effect.
4. DW1 said that it was at the end of October that the plaintiff began to tell her about the blackened pigment problem. The plaintiff also told her after the treatment on 16 March 2010 that she was going to return to the Mainland. In April, there was relapse of black pigments.

*How should the Court deal with the evidence of the plaintiff and DW1?*

1. On reliability of evidence, there is no match between the plaintiff and DW1. I am even surprised the plaintiff brought this action with the scant recollection of events that was recorded in her statement. The events in this case spanned from June 2009 to July 2010 with one series of 10 laser treatments followed by a series of 9 AHA chemical peel treatments before a second series of 7 free laser treatments followed by another series of 7 half-priced laser treatments (on face) (total 24 laser treatments on face).
2. In her statement, she has only described the events by three pages of double-spaced lines of Chinese characters, mentioning only two specific time periods, one 22 June 2009 and the other December 2009. There was simply no time framework on which to hang her other complaints. In her statement, she has not mentioned the AHA chemical peel treatments she received at the centre at all, or the number of times her face had undergone laser treatments. One is simply left to wonder how she was going to pursue her claim without either the material (especially the schedule of visits at B20-22) supplied by the Defence or the viva voce evidence she was to give at the hearing. Also, the plaintiff had made one blatant mistake in her statement by saying that the person who had been performing laser treatments on her i.e. DW1 was present in the centre on 22 June 2009.
3. The plaintiff was not being more reliable when giving evidence in Court. She said that in December 2009, after 10 laser treatments, she complained; she then received 10 times AHA chemical peel treatments. However, according to the schedule of visits at B20-22, supported by both the defendant’s documentary records at D72 and the invoices at D24-33, she should be in the middle of receiving AHA treatments in December 2009. She had mixed memories about when she made her first complaint: was it 12 November 2009 or one odd month before 12 November. She had difficulty remembering when she received the “10 AHA chemical peel treatments” (in fact the documentary records only show 9 AHA chemical peel treatments). She could not remember if she had laser or AHA chemical peel treatment on 30 December 2009, the day when she made a complaint.
4. When the tables at D72-73 were first shown to her, she confirmed that they constituted a complete record of her treatments. However, almost immediately afterwards, she said that there were some laser treatments not recorded in D72-73 seemingly to cover for the fact that she had told Dr Yeung she had received a few more than was recorded in D72-73. At one stage, she had re-read her statement out-of-court whilst still in the middle of giving evidence without seeking prior approval from the Court. But as I had said, her statement did not contain much anyway so I doubt the value of it for the purpose of refreshing memory. Later, she reversed her position by saying that D72-73 did not reflect the whole record accurately.
5. She admitted she was weak on dates. She said she did not think it important to mention the three dates on which she complained in the statement. In her statement, she said she had received numerous treatments after the event. However, in her evidence in Court, she said that she had not taken any because the people she consulted told her that she had to wait until her face was to become healthy again. But then she also said in Court that when her condition became better in October 2013, she went to Taiwan to seek treatment costing her RMB25,000 odd (but she was only claiming $5,000 medical expenses); she also said starting from 4-5 months before July 2010 till the time of the trial proceedings, she had gone to Shenzhen on and off for taking Chinese medicine. However, she admitted she had not mentioned anything about taking Chinese medicine in her statement.
6. In general, there were far too many instances of “cannot remember” in the evidence of the plaintiff under cross-examination especially when the subject matters of the questions were against her interests. In fact, she was one of the worst witnesses I have come across in my professional career as far as reliability is concerned.
7. On credibility, the plaintiff was a poor witness. I was particularly “impressed” by her attitude when it was found that the residential address she stated in her statement was not her true address. After she was reminded of the statement of truth which she signed, her attitude was just so callous and she simply said “I thought I had to fill in a Hong Kong address” or words to that effect when she was actually living in the Mainland at the time, or so she claimed.
8. She stated in her statement that she had gone to government hospital to receive treatment but in Court she retracted it. She stated in her statement that she had incurred huge medical expenses but in fact she was only claiming $5,000 medical expenses – this is a tiny sum compared to what she spent at the defendant’s shop. Regarding the forms D78-79 which she signed and which contained the side effects of laser treatment, I do not believe that someone who had suffered the ill-effects of chemical peeling cosmetic treatments months before (in the Mainland) would simply sign the documents without reading through them.
9. She said her claimed medical expenses of $5,000 comprised only expenses spent at Dr Chan Kin Yip’s and Dr Lee Cho Kay’s and yet according to her evidence, she spent only $1,200 to $1,500 at Dr Chan Kin Yip’s and $280 at Dr Lee Cho Kay’s (latter spent even before the first laser treatment at the defendant’s shop so the basis of claim is in some doubt anyway).
10. The plaintiff said she had a very good doctor friend in the Mainland who had actually performed some kind of cosmetic surgery on her some years before 2009, and who advised her in October/November/December 2009 not to continue the laser treatment but she chose not to believe this advice. I found this evidence to be incredible. Plainly a doctor who specialized in cosmetic surgery must surely have been more professional and believable than a beauty salon. For someone who cared so much about her appearance to ignore a doctor’s advice I found totally unacceptable.
11. The next piece of evidence is even more unbelievable. When asked whether she still disbelieved the doctor friend’s advice at a later stage post the AHA chemical peel treatments, the plaintiff simply said that by this time she had already paid! This is extraordinary to say the least but also ignores the fact there were 7 free laser treatments (after the AHA chemical peel treatments) up until 10 April 2010. Further, according to the invoices starting at D34, she started to pay for the last series of laser treatments (half-priced only) on 8 May 2010. She did not pay in one go for the 10 treatments ordered but by instalments. So her testimony that it was too late to stop as she had already paid does not have a ring of truth in it.
12. It should be noted that the Dr Lee Cho Kay from whom the plaintiff sought advice for her face in July 2009 (before the first ever laser treatment) was a specialist in Dermatology; yet she preferred the advice of another beauty shop (not the defendant) that laser was better than the cream provided by Dr Lee. According to her evidence, she thought laser had better effect; she agreed that she wanted a faster and efficient method. Incidentally, this fits in well with DW1’s evidence that it was the plaintiff who wanted to discontinue the AHA chemical peel treatments at the defendant’s centre and move back to laser because she thought it was a faster method.
13. Another aspect which was unbelievable was that the plaintiff maintained that she had not asked Dr Lee about laser treatment; the reason given was that she did not think it concerned Dr Lee. One has to examine this evidence in the context of someone who was concerned about her face and who was about to embark on laser treatment for the first time. Is it even possible that in front of a Dermatologist, she would not at least raise the matter of laser effectiveness or its side effects with him?
14. When it was suggested she would have asked the defendant whether the (original) pigments would recur, a very natural suggestion I might add, her answer was she could/did not remember. I found this among the many examples within cross-examination when the likely answer would be against her, she would choose not to remember.
15. Even the medical expenses were an exaggeration: she could only account to the figure of less than $3,000 when the claimed figure was $5,000. At one time, the plaintiff said that the AHA chemical peel treatments at the shop aggravated her injury but at another, she agreed that the treatments improved her skin. When being challenged why she would allow her body (as opposed to face) to undergo laser treatment when by that time she must have known that laser would not work, I found it astonishing that the plaintiff would say something like “her face was different from her body”.
16. Regardless of credibility at this stage (but see below on assessment of her credibility), DW1 was by far a much more reliable witness. Her witness statement was detailed and organized and covered most of the important events (it is noted that her statement did not mention the fact that some laser treatments were provided to the plaintiff free of charge). She was able to prepare a table of the plaintiff’s visits to the shop (at B20-22) based on the company’s records and photos taken of the plaintiff. In chief, she was able to explain the various terms peculiar to the beauty business and laser treatments. DW1 was quite clear as to when it was that she first met with the plaintiff. DW1 was apparently quite able to explain the various forms that had to be filled in by or on behalf of a client. I found that on the whole, DW1 had a good memory on the events in question.
17. On the topic of credibility, I found that on the whole, DW1 was an impressive witness. She was forthcoming, ready to provide as much information as she could in order to assist the Court. In particular, I was confident that what she said about the possibility of transmuting a laser treatment deposit into other products would be the truth because it was actually borne out by the evidence of what happened in October when part of the money pre-paid for laser treatment was converted into paying for other products (see D22, 72 & 74).
18. If there was any aspect of her evidence which could be said to be less satisfactory, then it would be the reason she proffered for the 7 free QX06 laser treatments. I do not think she told the Court the whole truth there. I found that the fact of the 7 free laser treatments together with the 10 subsequent half-priced laser treatments (as well as one free laser treatment on the body on 22 July 2010) was quite suspicious and might throw light on what went on between the parties between January and July 2010 (note that the plaintiff was also silent in her statement on the fact of some free and half-priced laser treatments). However, I must emphasize that this unsatisfactory aspect of her evidence did not detract from her overall positive credibility that I have found.
19. As things stand, there being only two live witnesses of fact, where there was factual dispute in the evidence of these two witnesses, I will accept the evidence of DW1 to the civil standard of proof and reject the evidence of the plaintiff.
20. Having said that, and because of the utter unreliability of the plaintiff’s evidence (beside her lack of credibility as a witness), I found that I am unable to give her evidence any weight.
21. I would also add that during the time when the plaintiff was in the witness box, there were occasions when she had displayed outburst of emotions. I did not find these useful in determining where the truth lay. Instead, I would rather and did focus on the contents of her evidence for resolution on the issue of credibility.
22. As a result of this assessment exercise, I find the following facts:-
23. At the latest, on 1 August 2009, prior to receiving the first laser treatment from the DW1, the plaintiff was advised and explained the nature, risks and possible side effects of laser treatment by DW1 and/or Amy Lam generally and as per D78-79 i.e. including the side effects of discomfort or pain during treatment; temporary erythema, edema, swelling, and redness in treatment area; superficial crusting, scabbing, blistering in treatment area; temporary “darkening” of pigmented lesions before becoming lighter; temporary changes in skin tone; temporary or permanent (very rare) discoloration or textual changes in skin; traumatic scar, and permanent discoloration which are said to be very rare; and some other temporary interferences such as reddish skin, swelling, inflammation, transient injury mark and discoloration;
24. On 1 August 2009, DW1 and/or Amy Lam had conducted diagnosis and DW1 had conducted cosmetic treatment on to the plaintiff’s brownish pigmentation on both cheeks and there was no evidence to suggest that the diagnosis and cosmetic treatment was anything other than proper;
25. There is clear evidence from DW1 that by December 2009, the first series of laser treatment had stopped and the plaintiff was in the middle of 9 AHA chemical peel treatments;
26. It was at the plaintiff’s request that a second series of laser treatments started on 23 January 2010 in place of AHA chemical peel treatments;
27. The defendant through mainly DW1 gave continuous assessment of and running advice to the plaintiff about her facial condition throughout the course of her treatments at the defendant’s shop;
28. When the plaintiff lodged her first complaint to the defendant about her facial skin problem on 29 July 2010, DW1 did refer her to dermatologist Dr Chan Kin Yip;
29. The defendant was a beauty salon and not a health care centre; and
30. There is no evidence to suggest that the defendant has failed to provide the plaintiff with appropriate and skilful treatment and exposed her to unnecessary risk of injury and disfigurement.

*What weight should be given to Amy Lam’s handwritten notes and the miscellaneous photographs?*

1. The plaintiff asked the Court to afford no weight to the handwritten notes compiled by Amy Lam at D58-70. The plaintiff reminded the Court that those notes formed part of the bundle of documents on which no admissibility issue is taken by either party. Hence, section 47 of the Evidence Ordinance, Cap 8, prevents the Court from excluding them on the ground of hearsay. However, so says the plaintiff, the Court can still give whatever weight it deems appropriate having regard to the circumstances in particular those listed in section 49(2) of the same ordinance. Noting that Amy Lam’s handwritten notes were compiled by her after these proceedings had begun, I looked at them not without with some circumspection.
2. However, bearing in mind there were actually no dispute between the parties on the contents of the first two pages (D58-59), I give them full weight. As for the other pages, I noted that the contents were challenged if only in part on some of the pages. Taking all relevant factors into consideration, I gave them no weight save and except that insofar as the dates of the plaintiff’s visits as recorded thereon might have contributed to the drafting or confirmation of DW1’s table of those visits (B20-22), I gave weight to the evidence of those dates.
3. As for the photographs, I note that the plaintiff’s concern was not with the plaintiff’s photos but with the photos of unknown customers at D93-106. I defer to the plaintiff’s submission that they are irrelevant and I gave them no weight.

*What weight to be given to the comments given by DW1*

1. The plaintiff takes issues with the expression of opinion by DW1 who put herself out only as a witness of fact. These opinions included the effect of sunlight and the daily living habits on the effectiveness of laser treatments and the necessity of skin care during laser treatments.
2. There are two aspects to the question. First, whether she was able to give expert evidence on the matter. Secondly, whether she was able to give admissible evidence on what she had said to the plaintiff as advice (whether correct or not) that she would give to a customer in circumstances similar to that obtained in the case of the plaintiff.
3. On the first issue, a resounding no. DW1 was never portrayed as an expert witness; there was no application to treat her as one nor was there a finding as such.
4. On the second issue, I would hold that it was open to her to give evidence (hence the evidence was admissible) on what advice she had given to the plaintiff, not to prove the correctness of the advice, but to show that the giving of advice (no doubt advice in line with her own training) to customers was part of customer-care reflective of the defendant’s standard of services.
5. Besides, the advice to avoid the sun and live healthily and engage in skin-care while undergoing laser treatment is just common sense. Here, I note that even Dr Lee Cho Kay as early as July 2009, before the plaintiff had undergone any laser treatments, had advised the plaintiff to avoid excessive sun exposure: C2, para 1(a).
6. Hence, subject to my observations above, I gave the relevant evidence the same weight as I would regarding the other parts of DW1’s evidence.

*Expert evidence*

1. The expert evidence came mainly in the form of a Joint Medical Legal Report on the plaintiff dated 7 June 2013 produced by the plaintiff’s expert Dr Yeung Chi Keung and the defendant’s expert Dr Walter King, though the individual expert reports of Dr Yeung dated 25 September 2012 and of Dr King dated 23 April 2013 have also been filed. They can be located from Bundle C. I had perused them all.

*Discussion on experts’ evidence*

1. The joint expert report is conspicuously divided into three parts. Part 1 comprises “Common opinions reached by the two experts”; part 2 comprises “Different Opinions reached by Dr King”; and part 3 comprises “Different opinions expressed by Dr Yeung”.
2. Although each part is entitled “opinions”, one may be able to see that the parts all contain both opinions and assertions of facts (the latter necessarily hearsay).
3. Insofar as the part “Common opinions reached by the two experts” is concerned, I do not think either party here disputes any portions of it. Hence, I accept this part as undisputed evidence and give it full weight.
4. As far as the plaintiff is concerned, she accepts the following opinions (more in the nature of observations) of Dr King which I have no difficulty in accepting because the defendant should not be disagreeing with their own expert either :-
5. From the photo dated 12 November 2009, facial pigmentation appeared to have increased in colour;
6. From the photo dated 30 December 2009, there is mottled discoloration with alternating scattered spots of hypopigmentation and reticular pattern of hyperpigmentation involving the mid face;
7. From the photo dated 10 April 2010, recurrence of some mottled pigmentation was shown;
8. From the photo dated 29 July 2010, mild recurrence of pigmentation was shown; and
9. From the photo dated 14 October 2010, recurrence of mottled discoloration/ pigmentation to a lesser extent than that seen in photo dated 30 December 2009 was shown.
10. Neither expert gave live evidence. Insofar as there are differences of opinions between them, the Court could not resolve them by the usual method of assessing their performance under cross-examination.
11. The plaintiff suggested other methods. The plaintiff relies on para 12-005 of *“Expert Evidence : Law and Practice”* 3rd edition :-

“2. Conflicting expert evidence

Save that the court is usually in the former case dealing with opinions as facts, there is no difference in substance between the assessment of expert and other evidence. The credit of the witness, as revealed by the content of his evidence, his demeanour in court and his manner of answering questions are all relevant, though with experts the court is seldom concerned with the telling of specific deliberate untruths, but more often with either a predisposition towards the case of the party calling him, or towards a professional position which he has adopted and is reluctant to be shifted from, despite evidence to the contrary. The courts pay particular attention to whether or not the expert understands his duties to the court to give unbiased and objective evidence and not to become an advocate for the party calling them. The substance of the evidence, likewise, must be weighed and accorded value. Although the impressiveness of an expert’s qualifications and experience are always relevant, they must not be employed as a substitute for the need to analyse the content of conflicting evidence by reference to the facts in the case. The true rule was stated by Jacob L.J. in *Technip France SA’s Patent*:

“But just because the opinion is admissible, it by no means follows that the court must follow it. On its own (unless uncontested) it would be ‘a mere bit of empty rhetoric’ *Wigmore, Evidence (Chadbourn rev)* para. 1920. What really matters in most cases is the reasons given for the opinion. As a practical matter a well constructed expert’s report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.””

1. I note in 12-006 of the same works, there is this passage :-

“While the court may, therefore, decide between the views of conflicting experts, either by preferring one opinion to another (for reasons set out in the judgment), or by reference to the facts found in the case, it may not adopt a specialist position or theory which has not been posited before the court by any expert:

“If the medical evidence is equivocal, the court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the court may elect between the two or reject them both; it cannot adopt a third theory of its own, no matter how plausible such might be to the court.””

1. The plaintiff also relies on *Jackson & Powell on Professional Liability* 7th edition at 13-021 and 13-022:-

“13-021. In the context of medical negligence, as elsewhere, the expert witness has two principal functions. First, the expert witness has an explanatory or didactic function involving an explanation of the patient’s condition, treatment, and its consequences. Where there is dispute upon an issue of medical fact, the court may prefer the evidence of one party’s experts over that of the other’s experts: the *Bolam* test does not apply to opinion evidence on matters of fact. The second function of the expert witness is to assist the court in deciding whether the acts or omissions of the defendant constituted negligence. Ultimately, however, it is for the court to decide, on the totality of the evidence and applying the *Bolam* test, and the necessary logical analysis, whether, the defendant exercised the requisite degree of skill and care.

13-022. The evidence of a particular expert witness may be rejected on grounds that the expert has become partial or on grounds that his evidence lacks internal consistency or logic.”

1. Funny enough, the plaintiff also cites a short passage from *Halsbury’s Laws of Hong Kong* 2nd edition Volume 27 on Evidence at [175.085] of which, under the general heading of “Medical evidence in actions for personal injuries”:-

“Where there is a conflict of medical opinion, the judge should not treat one report as true and others as incorrect if the witnesses have not been called.”

1. It is not clear from this short passage what the plaintiff wants the Court to do where there is a conflict between the evidence of Dr Yeung and Dr King, neither of whom had been called.
2. Lastly, the plaintiff relies on yet another passage of *Jackson & Powell (supra)* at 6-008 to 6-010 under the general heading of “Cases where Expert Evidence is Not Required”:-

“6-008. In two categories of cases, supportive expert evidence is not necessary for a finding of negligence. The first category is solicitors’ negligence cases……

6-009. The second category of cases where a finding of negligence may be made notwithstanding expert evidence in support of the defendant’s conduct or the lack of evidence critical of it are those cases in which the issue of breach of duty is not decided on the application of the *Bolam* test in its ordinary form. Three types of case make up this category.

1. Cases in which the court considers that there is no logical basis for the body of opinion in accordance with which the defendant acted……

1. Cases in which the defendant’s conduct is subject to criticism and the expert evidence called by the defendant is in reality no more than the personal opinion of an expert witness as to what he would have done in the position of the defendant……
2. Cases in which it is not necessary to apply any particular professional expertise in order to decide whether the defendant has failed to exercise the skill and care expected of an ordinary member of his profession. For example, in the architect’s negligence case of *Worboys v Acme Investments Ltd* Sachs L.J. recognized that there were cases where an omission on a plan was so glaring as to require no evidence of general practice and instanced a house without provision for a staircase. In the architect’s negligence case of *Royal Brompton Hospital NHS Trust v Hammond (No.7)*, Judge Seymour QC put it this way:

“…if I am satisfied on the evidence that an obvious mistake was made which would not have been made by any careful person of whatever profession, or, indeed, of none, then I can find that the person who made that mistake was negligent. What I cannot do, as it seems to me, is to substitute my own view for that of a professional person of the appropriate discipline on any matter in respect of which any special skill, training or expertise is required to make an informed assessment.””

1. Strangely, in this case, neither party has referred me to the *Bolam* test. Is it the case that both parties are of the view that *Bolam* test should not apply here? In any event, I am reminded of the *Bolam* test in a case cited by the defendant viz *Ng Yuk Ha v Yip Siu Keung*, HCPI 1167/2002, that case being a medical negligence case thus explaining the particular tone of the language used, at para 87:-

“the proper criteria and applicable standard of care for medical negligence is as set out in the words of McNair J in the case of *Bolam v Friern Hospital Management Committee*. In order to satisfy the duty in tort, the standard of care and skill to be attained is that of the ordinary competent medical practitioner, exercising an ordinary degree of professional skill. Although the standard is a high one, a medical practitioner charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. A medical practitioner:

“…is not guilty of negligence if he has acted in accordance with practice accepted as proper by a reasonable body of medical men skilled in that particular art… merely because there was a body of opinion who would take a contrary view.””

1. By bringing all these authorities to my attention, no doubt, the plaintiff is bringing this action in the name of breach of professional negligence without actually using the term.
2. As was made clear earlier in this judgment, I am not satisfied the subject matter of this case can be classified as being related to the medical, nursing or the health fields.
3. The defendant was carrying on business of a beauty salon and as part of that business, it provided laser treatment and AHA chemical peel treatment to customers. Cosmetic effect was no doubt the aim of these treatments. It is not known what effect on the general “health” of the customers these treatments would have. In any event, there is no government regulation to control the conduct and standard of service of this branch of business activity.
4. Even if I am satisfied this is a case of alleged breach of professional negligence, I found myself unable to apply the *Bolam* test. The reason is simple. Neither side has adduced evidence of what a reasonable/responsible/ respectable body of laser therapists/technicians working in a beauty salon would do in circumstances similar to those in the present case.
5. Noting the fact that the plaintiff’s expert, Dr Yeung, is a specialist in Dermatology, that the defendant’s expert, Dr King, is a specialist in Plastic Surgery, and DW1, the laser therapist who served the plaintiff, is neither, I have grave doubts as to whether I could use the experts in their second function as espoused in *Jackson and Powell* 13-021 reproduced above i.e. in my task of deciding whether the acts or omissions of the defendant constituted negligence.
6. I am afraid that in deciding the question of whether the defendant had breached its *duty of exercising reasonable care and skill in performing beauty salon services to the plaintiff and in doing so, taking such precaution and remedial measures to minimize any harm or injuries to the plaintiff*, I am reduced to having to treat, as far as I am able, this case as the third type of case where a finding of negligence may be made notwithstanding the lack of evidence critical of the defendant’s conduct (see *Jackson and Powell* 6-009 reproduced above). Hence, I will be looking for, in the defendant’s acts and omissions, any glaring and obvious mistake(s) which would not have been made by any careful person of whatever profession, or, indeed, of none. If I am able to so find, the defendant is negligent, if not, not.
7. With the above legal literature and observations in mind, I now look at the differences in opinions between Dr King and Dr Yeung which matter to the plaintiff.

*Ruling on Material differences in opinions between Dr King and Dr Yeung*

1. Material differences in opinions between Dr King and Dr Yeung are as follows.
2. It is common ground that (a) facial punctate hypopigmentation and depigmentation with uneven combination of hyperpigmentation and hypopigmenation is a possible side effect of laser treatment and (b) the plaintiff suffered from pre-existing melasma and mild PIH on cheeks and temporal region. Dr King opined that, based on his observation of the photos dated 22 June 2009, there was pre-existing mottled hypopigmentation before laser treatment. Dr Yeung disagreed the said photos show any spots of hypopigmentation and his reason was that punctate hypopigmentation spots in the face are not part of the features of melasma or PIH induced by chemical peels. Also DW1 said that she had not seen any white spots on the plaintiff’s face on 1 August 2009; and according to DW1, Amy Lam had not told her anything about the existence on 22 June 2009 of white spots on the face of the plaintiff (which if present, it would be reasonable to expect Amy to tell DW1). I have seen all the photos taken on 22 June 2009, and I do not see any white spots either. All things considered, I prefer the evidence of Dr Yeung in this aspect of his evidence.
3. Whilst it may be said that one of the side effects as listed on D78 viz “temporary or permanent (very rare) discoloration or textual changes in skin” may be said to cover the injury in this case (which is the view held by Dr King), Dr Yeung opined that such statement was misleading because the symptom of temporary or permanent discoloration or textual changes in skin was not rare and the percentage to have such side effect ranged from 8 to 13.6% (C144 para 3.2). As interpretation of documents is my responsibility, I find that there was a misreading by Dr Yeung of the warning of that side effect: it was *permanent* discoloration or textual changes in skin which was meant to be very rare, not temporary ones. Besides, it is not clear from Dr Yeung’s report as to which category (temporary or permanent or both) of discoloration the rate of mottled depigmentation of 8 to 13.6% was meant to apply. In the premises, I prefer the view of Dr King in this aspect of his evidence.
4. Dr Yeung opined that the staff involved has acted below the reasonable standard, for the following reasons:-

(a) The staff of the defendant needs to safeguard the clients as the laser operator performing a procedure that may bring damage to the skin as evidenced by the episode of major skin reaction after laser in October 2009 as documented. It is not appropriate for the laser operator to continue treatment with the same laser for 16 more treatments in following 6 months that made the complication of mottled facial depigmentation even worse. Melasma and PIH are difficult to treat by laser therapy and good results are not guaranteed and deterioration is possible. However when a laser intervention results in deterioration of the facial pigmentation problem rather than the intended improvement of appearance, the staff should have sensibly stopped the laser treatment when the patient complained of distressing facial appearance resulted from worsening of original pigmentation and mottled discolouration after series of laser in December 2009. Instead of reviewing the treatment plan and referral to appropriate specialist for further care, the centre staff subjected the [plaintiff] to undergo the same series of laser treatment again from January 2010, leading to further psychological trauma as well as skin damage in the form of worsening mottled discolouration.

(b) When laser toning is performed for melasma, all patients should be closely monitored for the earliest evidence of depigmentation with photographic images taken. Laser toning treatment should be terminated once there is evidence of the development of such complication.

(c) As the [plaintiff]’s pre-existing pigmentation have become darker and extensive after a series of multiple treatments with 1,064 nm QS Nd: YAG laser, Dr Yeung disagrees with the further use of such laser for her pigmentary condition as it can perpetuate the damage to the skin in the form of mottled depigmentation and subject the [plaintiff] to the same psychological trauma of receiving the same treatment associated with complication in this [plaintiff]. There is no laser device that has been proved to be consistently effective to induce lasting improvement for her background melasma.

(d) It is difficult to treat both hyperpigmentation and hypopigmentation at the same time with opposite therapeutic effects. There is a published paper in the literature supporting the use of NB-UVB to treat this pattern of laser-induced facial depigmentation with clinical improvement.

(e) Although one would not expect the staff to make accurate clinical diagnosis, the treatment with laser in the initial course of the care is not inappropriate for either melasma or PIH, the operator should use common sense to review the outcome and decide on the subsequent treatment including alternative treatment options or refer the patients to other experts for care when the staff was informed by the [plaintiff] about the worsening of pigmentation and appearance of white spots on face in December 2009. It is inappropriate to continue on the same treatment that already caused complications of facial spotted depigmentation.

(f) Although the [plaintiff] has signed the consent form, it does not mean that the operator is not responsible for the side effects of the treatment if the operator acts recklessly in the course of the treatment intervention such as continuation of the same treatment that is already doing damage to the [plaintiff].

(g) The [plaintiff] sought second opinion from Dr Chan Kin Yip for her facial pigmentation problems and subsequently stopped receiving laser treatment in July 2010 because she sensed that the laser treatments were inducing deleterious effects to her pigmentary condition.

1. Dr King on the other hand opined that the beautician has acted correctly and to the best of her ability. Dr King’s supporting reasons were:-
2. The use of laser therapy plus chemical peel was an effective approach to improving either PIH or Melasma;
3. We could not expect a beautician to make accurate clinical diagnosis to differentiate between PIH and Melasma;

(c) When laser should be temporary or completely stopped as a treatment for Melasma or its associated post laser development of mottled hypopigmentation is controversial and have to be individualized. Dr King said he would not entirely rule out the further use of such similar lasers in further improving the pigment condition of this patient;

(d) The fact that the [plaintiff] willingly elected to receive approximately 27 times of laser treatment over a 12 months period is because she sense that the laser treatments indeed are most likely to be able to help her pigment disorder and it is not known whether the patient has received excessive sun exposure (which may aggravate her pigment disorder) during this time period.

1. As previously indicated, through a lack of evidence of what a reasonable/responsible/respectable body of laser therapists/technicians working in a beauty salon would do in circumstances similar to those in the present case, I simply cannot rely on either Dr Yeung or Dr King to say that the defendant has acted below the required standard (which is what the plaintiff needs to prove). Indeed, what is that standard? Other than being certain that the standard of care here is that *the defendant should exercise reasonable care and skill in performing beauty salon services to its customers and in doing so, should take such precaution and remedial measures to minimize any harm or injuries to the customers*, there is nothing else to guide me.
2. Of course I have unchallenged evidence from DW1 saying that she possessed laser and other certificates issued by such bodies as VTC, ITEC and HK Beauty Chambers. For the ITEC cert alone, she would have had 2 years laser treatment experience and attended 12-20 classes over 3 months. In a way, DW1 was acting as a professional laser technician. Unfortunately, there is no evidence as to how that professional standard compared with the standard of the medical profession insofar as the use of cosmetic laser technology is concerned. Neither expert called by the parties testified or professed himself qualified to testify as to the former standard. Nothing is known about the syllabuses related to the certificates. There is just no fair benchmark against which to measure DW1’s (hence the defendant’s) performance and professional judgement in the treatment of the plaintiff.
3. DW1 is not a doctor (and nor Dr King or Dr Yeung a laser technician working in a beauty salon) and it would be quite wrong to measure her performance and professional judgement against the standard presumed by either expert that a person in the position of DW1 should possess. Consequently, I am thrown back to looking for, in the defendant’s acts and omissions, any glaring and obvious mistake(s) which would not have been made by any careful person of whatever profession, or, indeed, of none.
4. However, if I am wrong in the preceding analysis, and that I should take into account the expert evidence in determining whether the defendant was negligent, then in the current analysis of the conflicting evidence between the two experts, as outlined by the plaintiff in her submissions and repeated above, I would prefer the evidence of Dr King whenever it conflicts with that of Dr Yeung (save in one aspect particularly specified above). Dr King’s opinion that “when laser should be temporary or completely stopped as a treatment for Melasma or its post laser development of mottled hypopigmentation is controversial and have to be individualized” is borne out by the obvious improvements of the plaintiff’s condition in March and June 2010 (D88 & 90) as compared with her condition in November and December 2009 (D85 & 86). Dr King’s comment that he would not rule out the further use of such similar lasers in further improving the pigment condition of this patient is borne out by the same photos and by his actual experience of using a Q-switched Ruby laser on a patient of his successfully.
5. The fact that “the exact energy parameters/level of each laser treatment were not entirely/well recorded” does not detract from Dr King’s above opinion and comment. In this respect, it is a red herring. Besides, though not entire/well recorded, there are limited records of the parameters on D72 (beside 8/8/09 QX01) and D73 (beside 1/6/10, 12/6/10, 26/6/10).
6. However, insofar as there was an attempt by Dr King to attribute to the plaintiff a reason why she willingly elected to receive approximately 27 times of laser treatment over a 12 months period, I will not receive this evidence as it goes beyond the expert’s professed expertise. In addition, Dr King’s comment that “it is not known whether she received excessive sun exposure during this period” is neither here nor there; I exclude it from my consideration. His opinion that excessive sun exposure may aggravate the plaintiff’s pigment disorder is something which is almost common knowledge and was implied by Dr Lee Cho Kay’s advice to the plaintiff made on 24 July 2009 (C2, para 1a) and which was repeatedly emphasized by DW1 in her evidence.
7. When looking at the expert evidence, it is as well to be reminded that according to the unchallenged evidence of DW1, the progress of the treatments started off as 10 sessions of laser treatment ending on 24 October 2009. Then, according to both experts, there was an episode of major skin reaction with pain, redness and scab *after* one particular laser treatment session in the defendant’s centre in late October 2009. This session that the experts talked about must be the session on 24 October because there was no other session later than this one in October. The date of the *episode* is uncertain: it could be 24 October or it could be the plaintiff’s next visit to the defendant’s centre on 31 October 2009. The plaintiff’s statement gave no clue. DW1’s statement however gave some clue: according to DW1, when the plaintiff re-visited the centre on 31 October, apparently for the next laser treatment, it was observed that her facial skin was very dry and was displaying the beginnings of relapsed hyperpigmentation, and pan-redness features. DW1 deemed her unsuitable for laser and recommended her to stop the laser and to use AHA chemical peel treatment instead. There was then a series of nine AHA treatments between 12 November 2009 and 6 January 2010.
8. The second series of 7 laser treatments started on 23 January 2010 and ended on 10 April 2010: apparently the unchallenged evidence is that these were provided free of charge to the plaintiff.
9. There then followed a last series of 7 half-priced laser treatments on face and 3 half-priced laser treatments on body, together with a final laser session on body (which was free) which took place on 22 July 2010.
10. Periodically from the first visit on 22 June 2009 till 29 July 2010, photographs were taken of the plaintiff’s face were taken to monitor progress. The last set of photographs available to the court was taken on 14 October 2010.
11. The picture thus emerged is that there was continuous assessment and monitoring of the plaintiff’s condition; that there was a clear change of course in October/November when treatment method was changed from laser to AHA and then a reverse change in January 2010. Laser treatments on the face lasted until 22 July 2010.
12. An examination of the photographs shows there was an improvement in September 2009 followed by a deterioration in November (12th) and December (30th). There was an apparent improvement in February (6th) 2010 and a clear improvement in March (16th) followed by another deterioration in April. But then there was again a marked improvement in June (12th) followed by a third deterioration in July (29th) which worsened in October 2010 (laser stopped since 22 July 2010).
13. So, it seems the results of laser treatment fluctuate; it’s neither a case of continuous improvement nor a case of continuous deterioration when laser treatments were in progress. Incidentally, this actually fits in with one or more of the side effects listed on D78 : temporary “darkening” of pigmented lesions before becoming lighter; temporary changes in skin tone; and temporary discoloration in skin.

*Has the defendant breached the duty/standard of care owed to the plaintiff?*

1. The standard of care as found by the Court was that *the defendant should exercise reasonable care and skill in performing beauty salon services to its customers and in doing so, should take such precaution and remedial measures to minimize any harm or injuries to the customers*.
2. As said earlier, here, I am reduced to having to treat, as far as I am able, this case as a type of case where a finding of negligence may be made notwithstanding the lack of evidence critical of the defendant’s conduct (see *Jackson and Powell* 6-009 reproduced above). Hence, I will be looking for, in the defendant’s acts and omissions, any glaring and obvious mistake(s) which would not have been made by any careful person of whatever profession, or, indeed, of none. If I am able to so find, the defendant is negligent, if not, not. Looking at the conduct of the staff of the defendant, in particular DW1 who was chiefly responsible for conducting laser treatments on the plaintiff, I am unable to find any such glaring and obvious mistakes.
3. I rule that the defendant had not breached the standard of care.
4. In particular, and dealing specifically with the plaintiff’s particulars of negligence in this respect, I find the following facts:-
5. The staff of the defendant has warned the plaintiff of the potential side effects of the laser treatment as per D78-79 which covered the injury suffered by the defendant;
6. The staff of the defendant has conducted a diagnosis and cosmetic treatment on the plaintiff’s brownish pigmentation on both cheeks and there was no evidence to suggest that there was anything glaringly wrong with the diagnosis or cosmetic treatment;
7. The staff of the defendant has advised the plaintiff the nature and risk of the laser treatment involved in the cosmetic treatment of the plaintiff’s brownish pigmentation on both cheeks;
8. The staff of the defendant has stopped to use the laser treatment from 24 October 2009 till 23 January 2010 when it was the plaintiff who wanted to re-start the laser treatment;
9. There is nothing to suggest that the staff of the defendant has acted unreasonably to continue to give laser treatment between January and July 2010;
10. The first time when the plaintiff complained (in the true sense of the word) to the defendant about her skin condition was 29 July 2010 whereupon the defendant referred her to Dr Chan Kin Yip;
11. The defendant need not provide a safe system for the provision of health care; and
12. There is no evidence to suggest that the defendant has breached its duty/standard of care owed to the plaintiff.

*Did the defendant cause the plaintiff’s injury?*

1. The plaintiff clearly faces difficulty here once I have accepted the evidence of DW1 and rejected the evidence of the plaintiff. In particular, I find as a fact that the defendant had through its staff (Amy Lam and DW1) explained the range of services available to the plaintiff, the nature of the plaintiff’s facial condition in general terms and what the laser treatment could do to help alleviate the problem and most importantly the possible side effects of laser treatments. All of these had taken place prior to the first laser treatment received by the plaintiff. I also hold that the injury sustained by the plaintiff came within the scope of the possible side effects listed on the relevant company forms.
2. It is of course not in dispute that the plaintiff had consented to undergo the laser treatments: the only dispute in this respect was whether it was an informed consent. Along with the findings in the previous paragraph, it would almost be inescapable that I would hold and I do hold that the consent given by the plaintiff was an informed consent. I found that the consent was a continuous one throughout the period of the laser treatments. Indeed, it would seem from the evidence of DW1 that the giving of advice by the defendant to the plaintiff not only took place at the initial stage, but throughout as and when necessary and the advice suitably modified to suit the circumstances. The advice resulted in the change to AHA chemical peel treatments in November 2009. Continual advice emphasized on the need to avoid the sun and to work on re-wetting the skin.
3. I have already accepted the evidence of DW1 that there was no complaint from the plaintiff until July 2010. The fact that the day originally scheduled for the 10th (chargeable) AHA chemical peel treatment was commuted into performing the first of 7 free laser treatments shows it could not have been at the instigation of the defendant (from a business point of view). The plaintiff certainly had a large part to play in being successful in obtaining such a benefit. Needless to say, it was with her full (informed) consent that the laser treatments were re-started and this is despite what had transpired up to that time i.e. January 2010.
4. When the photos taken since (and including) 30 December 2010 were examined, it could be seen there were clear improvements on 16 March, but some deterioration on 10 April and back to some improvements again on 12 June 2010. The condition of the plaintiff’s skin fluctuated between good and bad. Other than to attribute it to being a possible side effect of laser treatments[[2]](#footnote-2), the cause of that fluctuation is not apparent.
5. As a result of my findings on the lack of negligence and the presence of informed consent, I rule that the plaintiff’s injury was not caused by the defendant’s negligence.

*Finding as to injury*

1. For completeness, I should make a finding on the injury suffered by the plaintiff. With reference to the particulars of injury pleaded by the plaintiff, there appears to be no contrary evidence to say otherwise. I therefore make a finding that the injury suffered by the plaintiff is as pleaded by her in the particulars of injury.

*Conclusion on liability*

1. I therefore rule that the plaintiff has failed to prove its case against the defendant under the law of negligence.
2. The defendant is therefore not liable to the plaintiff for the injury suffered.

*Quantum*

1. The following calculations are worked on the assumption that I was wrong on my holding as to liability for reasons unrelated to the assessment of the credibility and reliability of witnesses.
2. For the purpose of working out the quantum, as a result of my above finding on the plaintiff’s credibility and reliability as a witness, I shall only take into account those parts of the her evidence, so far as relevant, which are non-contentious.
3. The plaintiff was born on 14 July 1974. She was aged 36 on 31 July 2010, said to be the time of the incident and was aged 40 at the time of trial. She was educated to Middle 3 in the Mainland. She is single and is living with her family in the Mainland.
4. Before injury, she was working as a Public Relations lady in (a) nightclub(s) and she had a reasonable social life.

*Medical evidence*

1. The most material medical evidence in this respect is the injury suffered which is spelt out in the section on “Particulars of Injury” hereinabove.

*PSLA*

1. I should start by saying that at the time of trial, there was no apparent injury on the plaintiff’s face that I could see. In her evidence, the plaintiff admitted *against interest* (hence despite the view I held about her evidence, I am prepared to consider this part of her evidence) that one could not now see the pigment, that she could do her job and see clients now.
2. Her claim for PSLA was restricted to the period between 31 July 2010 and October 2013.
3. The plaintiff claimed PSLA in the tune of $300,000 as per the Revised Statement of Damages which was reduced to $250,000 in the plaintiff’s Opening Submissions.
4. The claim is based on the following alleged pain and sufferings (sourced mainly from Dr Yeung’s opinions):-
5. Great discomfort and difficulties given to the plaintiff on her work and a lot of inconvenience;
6. The long term damage to the disfigurement of facial skin colours with confetti-like pattern;
7. 40% of the distortion of the facial appearance with change to “Dalmatian” look on cheeks;
8. Disfigurement as a result of the “Dalmatian” look on cheeks and the confetti-like appearance being guarded as the mottled depigmentation persists for more than 2 years after cessation of laser therapy in July 2010. It has difficulty to cover up the flaw with cosmetic camouflage; and
9. There is profound negative psychological effect with impairment of quality of life and the impact on appearance is even worse as the depigmentation occurs in the background of melasma that enhances the contrast of the discolouration.

*On alleged discomfort, difficulties and inconvenience*

1. As said, I have grave doubts on the credibility of PW1, hence even on the assessment of PSLA, I take her evidence with a pinch of salt. The plaintiff also relies on the expert evidence of Dr Yeung as follows: “the disfiguring mottled appearance of the depigmentation and hyperpigmentation on the plaintiff’s face makes her very unfavourable to work in public relation service. It is merely the change in the physical appearance after the incident and she is capable of undertaking alternative employment demanding less on appearance. Period of sick leave is not applicable for her pigmentation skin condition”. With respect, it doesn’t take an expert to make such a comment.
2. I take into account that the pigmentations were only temporary (in this respect, I reject the plaintiff’s claim of long term damage) and had by the time of trial dissipated for all intents and purposes. I have examined the facts of the cases cited by the plaintiff, namely (in the order of decreasing award), *Susi Yanti & Lo Ka Ying v Chu Shiu Chuen* HCPI 1176 of 2000, *Aqsa Rana (a minor suing by Mukhtar, Muhammad her next friend and father) v Tsui Luk Pui* DCPI 68/2007, *Leung Yuk-kwan v Maple Professional Beauty Centre Limited* HCPI 274/2002, *Lau Hing Kwan v Lai Chi Kwan and Anor* HCPI 986/2003, *Leung Pui Yiu v Wong Yin Kuen and Ors* HCPI 453 of 2000, *呂賢 對 陳蓮妹* DCPI 44/2000, *Cheung Kam Ian v Hong Kong Printing Company* HCPI 143/1998, *Shabbina Khokhar v Europe Beauty International Limited* DCPI 579/2007, *Chau Fung Yee v Lee Chi Ming* HCPI No 76 of 1999, and *Leung Ka-yee v L & Y Beauty Centre Limited* DCPI 196 of 2003.
3. I also note from the Defence’s reliance on one aspect of Dr King’s expert evidence (disputed by the plaintiff): the plaintiff’s pigmentary disorder is a very superficial skin colour change without any skin texture change or scar formation, i.e. there is no deep alterations or changes in the dermis of the skin, he believes that the skin colour unevenness can be successfully camouflaged by make up by a cosmetician (C143 para 2.12).
4. I tend to agree with Dr King’s opinion here as it accords with common sense and is in line with what I could see from the photos.
5. I note that among the five heads of claim under PSLA, none was for pain or psychiatric sufferings. The claim was more in the realm of discomfort and difficulties associated with the plaintiff’s facial appearance for about 3 years post the last laser treatment. There was a mention of “profound negative psychological effect” which originated from Dr Yeung’s opinion at C146, 4th to 5th last lines of the paragraph. Quite apart from the fact that Dr Yeung is not a psychologist, what he was saying there was not specifically about the plaintiff; he was merely saying that “[a]lthough the white patches may be covered by cosmetic camouflage, the profound negative psychological effects with impairment of quality of life have been well documented in the literature.” To be fair, though, Dr Yeung went on to say that “[t]he impact on appearance is even worse in [the plaintiff] as the depigmentation occurs in the background of melasma that enhances the contrast of the discolouration”.
6. I note that the plaintiff has not sought either psychiatric or psychological assistance from relevant practitioners.
7. The plaintiff’s counsel has categorized the authorities he cited into three categories from the (implied) “high range of compensation” (up to $380,000) to the “low range of compensation” (around $225,000) and lastly to the “minor range of compensation” (around $100,000).
8. The plaintiff asked for an award of $300,000 in the Revised Statement of Damages; this was downgraded voluntarily in the Opening and Final Submissions to $250,000. The Defence also pointed to the undisputed expert evidence that the plaintiff suffered from pre-existing melasma and mild PIH on cheeks and temporal region when she first presented to the defendant’s centre in June 2009. The Defence contended that no more than $50,000 was a reasonable amount under PSLA.
9. Having considered the above factors and the evidence that I accept in this trial, I find that the case of *Leung Ka-yee v L & Y Beauty Centre Limited* DCPI 196 of 2003 came closest to the plaintiff’s situation.
10. In *Leung’s* case, the plaintiff suffered four columns of rectangular hyperpigmented scars on her back covering most of the upper and lower back. The plaintiff felt embarrassment of her condition and she could no longer wear swimsuit or clothes that would show her back. She would not go swimming and she would avoid sun exposure and she would cover her back because of pigmentation. The plaintiff was diagnosed to have post-inflammatory hyperpigmentation and hypopigmentation and scars due to burn. The court accepted the plaintiff’s pain to the back must have been intense, particularly after the wounds became inflamed. The court also found her embarrassment to be real and genuine. The judge had seen in court the plaintiff’s faint scars still remained on the back and found it was not surprising for her as a girl of 27 or 28 years old, not wishing to wear a swimsuit or garments that showed her back. The court awarded a sum of $75,000 as PSLA.
11. Back to our present case, the plaintiff suffered no scar, no burns, no obvious psychological or psychiatric injuries; she underwent no operation hence had not endured the pain and anxiety associated with it. I take into account her age, her gender, and the embarrassment, discomfort and inconvenience she must have gone through in the time duration concerned. I note also that *Leung’s* case is quite dated. I assess a reasonable award to be $50,000 and this is the award that I make.

*Past loss of earnings*

1. In her Statement of Damages filed on 8 December 2012, the plaintiff claimed $480,000 for loss of one year’s earnings. However, the claim had since been dropped from the time of filing of the Revised Statement of Damages on 8 July 2013.

*Special damages*

1. The plaintiff claims four items under the head of special damages: (1) Medical expenses in the sum of $5,000; (2) Travelling expenses in the sum of $5,000; (3) Nourishing food in the sum of $10,000; and (4) Refund of the cosmetic treatment in the sum of $26,950 (amended from $25,610 as per invoices, which was itself amended from $30,130 as per Revised Statement of Damages); the figure of $26,950 came from the evidence of DW1.
2. As regards Medical expenses, the plaintiff has not been able to provide receipts. At one time, the plaintiff had wished to amend the claim at the last minute to RMB20,000 to accord with the plaintiff’s viva voce evidence that she had spent RMB25,000 in October 2013 in a Taiwan clinic/hospital. This was (not surprisingly) strongly objected to by the Defence. In line with the negative view I hold on the plaintiff’s evidence, I simply cannot allow this claim of RMB25,000. However, I rule that she must have expended a reasonable sum on medical expenses. I will award her $5,000 for medical expenses as originally claimed.
3. As for Travelling expenses, again, no receipts have been produced. The Defence objects to any travelling expense. Again, despite my view on the plaintiff’s evidence, I hold that $1,000 would be a reasonable amount and that is the amount I award.
4. As regards nourishing food, again no receipts have been produced. The Defence again objects to any expense here. However, I am prepared to award a reasonable sum of $2,000 here.
5. On the subject of refund of cosmetic treatment, no legal basis has been submitted by the plaintiff as to why this is recoverable. Besides, the products sold and part of the laser treatments (the first series up to 24 October 2009) and to a lesser extent the AHA chemical peel treatments were not really the subjects of complaint: these resulted in the bulk of the expenditure spent at the defendant’s shop. For the above reasons, I disallow any award on the refund claim.

*Total on special damages*

1. Hence, the total amount of special damages is $5,000 plus $1,000 plus $2,000 plus $0 equals $8,000.

*Further medical expenses*

1. The plaintiff claims future medical expenses in the sum of $64,000. Obviously this figure, which rose from $14,460 in the Statement of Damages, and which appeared first in the Revised Statement of Damages and persisted until final submissions time, found its origin from Dr King’s opinion (C64 paras 12.3-4; C143 paras 2.14-15). So, to this extent, the plaintiff seemingly accepts Dr King’s opinion herein on what further treatments she needs. Funny enough, those treatments were more or less the treatments given by the defendant. In brief, and with a view to avoiding repetition, Dr King recommended further treatment with many sessions of either QS Nd:YAG (i.e. the machine used by the defendant) or QS Ruby fractional laser or pulsed dye vascular laser; the cost for 10 sessions is about $46,000. Further, Dr King recommended additional AHA chemical peel sessions; and 6 such sessions cost $18,000. Hence, the total amount comes to $64,000.
2. In her final submissions, the plaintiff justified the sum of $64,000 also on the basis of her viva voce evidence (during re-examination!) to the effect that in addition to the RMB25,000 already spent in the Taiwan clinic/hospital, she expected to spend another $50,000-$60,000 in the next one to two years. I have made known my views on the plaintiff’s evidence and I shall not repeat them. What I can say is that both bases of her claim herein are preposterous. It just paints a picture that she will grab on anything in order to make good her claim under this head.
3. In the Answer to Revised Statement of Damages, the Defence had been kind enough to suggest that any claim for reasonable future medical expenses should not exceed $20,000. They seemed to have retracted their position somewhat by the time of the final submissions. No doubt this is because during her vive voce evidence, the plaintiff gave the peculiar impression she would not attempt further treatments until her skin had somehow “recovered” (to be fair, she used the word “healthy”).
4. To err on the side favouring the plaintiff because (in general) I give no weight to her evidence anyway, I will award her $20,000 as reasonable future medical expenses.

*Summary on damages*

1. The sum awarded under PSLA being $50,000, that awarded under special damages being $8,000, that awarded under future medical expenses being $20,000, the total amount awarded is therefore $78,000.

*Interest*

1. I award interest on general damages (including PSLA) at a rate of 2% per annum from the date of the writ to the date of judgment; and interest on special damages at half the judgment rate from the notional date of injury i.e. 31 July 2010 to the date of judgment. Interest from the date of the judgment shall run at the judgment rate until payment.

*Costs*

1. The general rule is that costs follow the event. I make an order nisi that the plaintiff shall pay the defendant’s costs of this action to be taxed if not agreed with certificate for counsel; that the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations. The order will be made absolute should there be no application within 14 days of this judgment.

(Isaac Tam)

District Judge

Mr Stephen Fong, instructed by Damien Shea & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Catherine Wong, instructed by SK Wong & Co, for the defendant

1. The plaintiff when giving evidence used the term “甘醇酸” to denote AHA chemical peel treatment [↑](#footnote-ref-1)
2. According to the common opinion of the two experts, treatment attempts by laser and chemical peels to lighten the pigment of melasma (a pre-existing condition suffered by the plaintiff) may sometimes cause further darkening; relapse and persistence in patients with melasma are common after treatment – the condition is sometimes improved and sometimes aggravated by laser treatment; rebound hyper- pigmentation with further darkening of melasma occurs in approximately 8% of the patients who received laser; facial punctate hypopigmentation and depigmentation with uneven combination of hyperpigmentation and depigmentation is a possible side effect of laser treatment. [↑](#footnote-ref-2)