DCPI 357/2001

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 357 OF 2001

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BETWEEN

NAM CHEUK YIN Plaintiff

and

NG YIM HING trading as

BEST CHOICE BEAUTY CENTRE Defendant

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Coram : Her Honour Judge H.C. Wong in Court

Parties : Mr. Steven Lau instructed by Messrs. Richard Tai & Co. for Plaintiff.

Miss Anita Yip instructed by Messrs. Michael Cheuk, Wong & Kee assigned by DLA for Defendant

Dates of Hearing : 24th to 27th February 2003

Date of Handing Down Judgment : 11th April 2003

# JUDGMENT

1. The Plaintiff claims against the Defendant under common law damages for injuries sustained during a beauty treatment performed by the Defendant on 5 August 2000.

2. On the day in question, the Plaintiff attended the Defendant’s beauty shop (hereinafter referred to as “the Defendant’s shop”) at about 8 p.m. where she received a slimming treatment and a facial treatment. In the course of the facial treatment, she claimed the cream applied by the Defendant on her face escaped into her eyes and the Defendant while massaging her face had negligently rubbed one of her eyes causing injuries to her eyes.

3. The Plaintiff’s claim is brought under tort, contract and S.5 of the Supply of Services (Implied Terms) Ordinance Cap. 457.

4. The Defendant denies the Plaintiff’s condition was caused by the Defendant or that she was negligent in supplying her services to the Plaintiff or that she is in any way liable to the Plaintiff.

The Plaintiff’s Case

5. The Plaintiff, Miss Nam, was born on 9th September 1977, she was aged 22 years at the time of the incident on 5 August 2000. Prior to 5 August 2000, she had undergone a course of 5 slimming treatments, eyelash perm and upper lip waxing treatment at the Defendant’s shop. On 5 August 2000, the Plaintiff claims that she was persuaded by the Defendant Ng Yim Hing Shelly to sign up for a course of 10 facial treatments at $3,988 and a further course of 10 slimming treatments at $2,400.

6. It is the Plaintiff Miss Nam’s evidence that after the slimming treatment, the Defendant Miss Ng began the facial treatment on her. It was during the facial treatment that Miss Ng had negligently applied the facial cream on her face causing it to escape into her eyes. Miss Ng then massaged her face and in the course of so doing negligently rubbed on the Plaintiff’s right eyelid causing pain to the Plaintiff’s right eye. It is Miss Nam’s evidence that Miss Ng was talking on the phone at the time of the facial massage.

7. Miss Nam alleged that she felt so painful that she gestured with her hands indicating her discomfort at the time, but it was ignored by Miss Ng because she was talking on the phone. After the facial treatment was completed, Miss Nam complained of pain and blurred vision in both her eyes and she was told by Miss Ng to rinse her eyes with tap water. She did so but the discomfort persisted.

8. The next morning, Miss Nam woke up and found her eyes painful, red and her vision blurred. She attended the Accident and Emergency Department of the Pamela Youde Nethersole Eastern Hospital (hereinafter referred to as “the PYNEH”) where she received irrigation by normal saline on both eyes.

9. According to the clinical notes of the Accident and Emergency Department of the PYNEH of 6 August 2000, Miss Nam attended PYNEH at 7:10 a.m. on that day, she was diagnosed to have sustained corneal abrasion and infected conjunctiva (page 188-190 of the agreed bundle).

10. On 10 August 2000, she attended the opthalmology clinic where the opthalmologist Dr. Edwin Chan found she had “a few epithelial erosion” and further diagnosed that she had a healed corneal abrasion. No permanent visual deficit was found (see page 166 of the agreed bundle).

11. The Plaintiff adduced evidence from Dr. Chan Po Chun Pauline (PW1), a practising opthalmologist. Dr. Chan produced her report dated 13 August 2002 (page 169-170 of the agreed bundle) prepared after examining Miss Nam on 18 May 2002. Dr Chan found Miss Nam suffers from dry eye syndrome leading to corneal epithelial defect. It is Dr. Chan’s opinion that “since chemical injury to eyes can cause damage to conjunctival tissue resulting in poor tear secretion, the ocular abnormality described can be due to the reported injury”.

12. The Plaintiff claims that owing to the injury to her eyes, she suffers from poor tear syndrome, as a result, she has to give up wearing contact lenses. She further claims that after the injury she would lose her temper easily, feel depressed and frustrated, in addition to having lost 20 lbs since the incident. Her mother Madam Lam (PW3) supported Miss Nam’s evidence and confirmed she had prepared nourishing food and soups in the hope of improving Miss Nam’s condition since the injury.

13. The Plaintiff claims damages for the pain, suffering and loss of amenities in the sum of $50,000; loss of earning for 5 days at $1,923.07; loss of future earnings and earning capacity of $42,319.88 and special damages of $8,945 including medical and travelling expenses, return of the two courses of beauty treatments paid of $6,388 and tonic food at $2,000.

The Defence’s Case

14. The Defendant, Miss Ng, operated two beauty shops at the time of the incident in August 2000. She has since ceased the operation of her shops. She was trained as a beautician in 1994, and received further beauty and massage treatment training between 1994 and 2000.

15. Miss Ng claimed that she had conducted both the slimming and the facial treatment on Miss Nam at the same time on 5 August 2000 between 8:45 p.m. and 10:00 p.m. That after the treatments, Miss Nam did not complain of any discomfort. She further paid for 10 facial and 10 slimming treatments after the completion of the treatments that night.

16. Miss Ng denied she was talking on the phone during the facial treatment or that she had negligently spilt cream into the eyes of the Plaintiff or rubbed her eyes with force causing injuries to the Plaintiff’s eyes. It is her evidence that Miss Nam could not have gestured with her hands at the time because she was undergoing the slimming treatment inside a machine She further denied Miss Nam’s condition was caused by the facial treatment.

17. The Defendant called Dr. Tsui Chung Wan, an opthalmologist, to give evidence. Dr. Tsui produced his report on the Plaintiff’s condition (see page 172-175 of the agreed bundle). Dr. Tsui examined Miss Nam on 28 September 2002. He found no clinical evidence of corneal abrasion or erosion. His only positive finding was decreased tear film and abnormal Schiermer’s test. It was his opinion that Miss Nam’s dry eye syndrome could not have been caused by creams used in facial treatment when Miss Nam had her eyes closed. He believed it was caused by prolonged wearing of contact lenses.

1. Further, Dr. Tsui suggested that the dry eye condition of Miss Nam could have been caused by prolonged used of normal saline irrigation at the PYNEH on 6 August 2000 which had damaged Miss Nam’s eyes. He claimed that chemical injury caused to the eye damaging the tear gland usually leave a scar in the conjunctiva and damage to the cornea. It is his evidence that the PH value of the eyes of Miss Nam before and after irrigation showed her eyes were alkalinic rather than acidic indicating there was no facial cream in her eyes. He considered that it is possible Miss Nam had suffered corneal abrasion, and the irrigation had made it worse.

## Liability

Findings on Medical evidence

1. The burden of proving causation rests with the Plaintiff.

“The claimant must adduce evidence that it is more likely than not that the wrongful conduct of the Defendant in fact resulted in the damage of which he complains”.

“On the other hand, there are occasions when the court is permitted to draw an inference that there must have been a casual link, taking a common sense and pragmatic approach to the evidence, in circumstances where the evidence is somewhat equivocal.” (paragraph 2-05 Clerk & Lindsell on Torts 18th ed.)

1. Even if according to Miss Ng’s version the Plaintiff’s hands were kept under wraps during the slimming treatment and the Plaintiff could not have raised her hands in protest upon experiencing pain in her eyes, the Plaintiff’s condition was made known to the Defendant at the time for the Plaintiff had complained to the Defendant about the blurriness of her eyes immediately after the facial treatment. The Defendant did not do anything to help her other than offering her some cotton wool. The evidence of Miss Nam, the Plaintiff, and her mother on the Plaintiff’s eye condition the next morning were consistent and confirmed by the PYNEH’s Dr. Law’s medical report and notes. Had Miss Nam not felt any discomfort in her eyes that morning, it is unlikely that she would have gone to the PYNEH for treatment.
2. The evidence of Dr. Chan (PW1) and Dr. Edwin Chan’s reports showed that the Plaintiff suffers from dry eye syndrome which leads to corneal epithelial defect (page 169-170, page 166 and 168 of the bundles).

22. I find Dr. Chan (PW1) an experienced opthalmologist. She has been a medical practitioner for 25 years, 20 years as a qualified opthalmologist. She has been in private practice for 12 years after spending 13 years with the then Medical and Health Department. She found the Plaintiff’s condition compatible with a history of corneal abrasion and she agreed that corneal abrasion can be caused by chemical injury or by rubbing of the eyes. While infected conjunctiva is a reaction to indirect chemical injury or direct injury caused by abrasion, she found that the Plaintiff’s dry eye condition could have been caused by corneal abrasion due to chemical injury. That mild chemical can cause damage if applied over prolonged period even though no scarring was found on the cornea. It is her opinion that irrigation with normal saline is unlikely to cause corneal abrasion unless the force of irrigation was very strong and fast for a prolonged period. It is her opinion that if the corneal epithelia had prior injuries, rubbing the cornea may cause abrasion. She further believed the eye irrigation would have removed any chemical left in the eyes.

23. Dr. Tsui (DW1) has similar medical qualifications as Dr. Chan (PW1). He has been a medical practitioner for 16 years. He qualified as an opthalmologist in 1991. He has been in private practice for 11 years.

24. Dr. Tsui believed prolonged irrigation with normal saline would damage the eye. He considered the ‘balance source solution’ used in eye surgery should be used to irrigate the eyes. On the other hand, he admitted that in the public hospitals, the Accident and Emergency Department would apply normal saline not balance source solution to irrigate patients’ eyes, because it is less expensive.

1. The medical reports of Dr. Edwin Chan of the Department of Opthalmology at PYNEH and Dr. Law Chi Yin of the Accident & Emergency Department of PYNEH who saw the Plaintiff in the morning of 6 August 2000 confirmed the Plaintiff’s complaint and her medical condition. Dr. Law further confirmed in his letter dated 19 October 2002 that the eye irrigation performed on the Plaintiff was by slow flow of normal saline (page 176 of the agreed bundle).

26. I accept the medical reports of Dr. Law and I am satisfied that the Plaintiff’s eyes were irrigated by slow flow of normal saline. The clinical notes on page 188 showed that the Plaintiff was admitted at 7:10 a.m. on 6 August 2000 and she was seen by the triage nurses at 7:11 a.m., that at 8:30 a.m. the eye irrigation had completed and at 8:35 a.m. the P.H. value of her eyes were examined. Taking into consideration that the eye irrigation equipment had to be set up before irrigation can be performed and that the triage nurses had spent sometime taking her blood pressure, pulse count and history of injury, the eye irrigation could not have lasted longer than 1 hour to 1 hour 10 minutes. This would give 30-35 minutes to irrigate each eye with 500 c.c. of normal saline, and the irrigation was slow flowing. According to the evidence of Dr. Tsui, prolonged strong flow of normal saline could cause damage to the eye. While Dr. Chan considered slow flow irrigation unlikely to cause any damage to the eye. As Dr. Tsui agreed that eye irrigation with normal saline is a standard procedure in the public hospitals’ Accident & Emergency Department, it is highly unlikely that public hospitals would adopt as standard procedure something which may cause damage to the patient’s eyes. I am satisfied on a balance of probability that the eye irrigation at PYNEH Accident & Emergency Department is unlikely to be the cause of the Plaintiff’s dry eye syndrome.

27. The record shows Dr. Chan to be more experienced than Dr. Tsui with the public hospital system where she spent 8 years as a qualified opthalmologist. Dr. Tsui, on the other hand, had spent a much shorter time in public hospitals after he qualified as an opthalmologist.

28. I further accept Dr. Chan’s opinion on the cause of the Plaintiff’s dry eye syndrome. I find Dr. Chan’s evidence to be positive and persuasive, her reasoning logical and non-speculative. She showed a thorough understanding of the Plaintiff’s complaint and her condition at the time of the incident. While Dr. Tsui has a different impression of the Plaintiff’s condition. His interpretation of the use of the Cantonese term 「澀」 seemed to be very different from the normal understanding of the term as a ‘dry’ and ‘gritty’ kind of discomfort complained of by the Plaintiff which Dr. Chan had understood it to be. This probably explains Dr. Tsui’s different opinion.

## Finding of Facts

29. There were disputes between the evidence of Miss Nam and Miss Ng on the timing of the procedure of the slimming and facial treatments performed on 5 August 2000. The Plaintiff alleged that the slimming treatment was performed before the facial treatment while the Defendant, Miss Ng, alleged that both treatments were conducted at the same time. A further dispute was the time of payment by credit card of $6,388. Miss Nam said in court that she paid after the slimming treatment but before the facial treatment. This was different from what she stated in her witness statement that she had made payment after both treatments had completed or that she paid before either treatment that night as claimed in her letter to the credit card company on page 219 of the bundle. Miss Ng, on the other hand, insisted that payment was made at the end of both treatments.

30. Miss Yip, counsel for the Defendant, criticised the quality of Miss Nam’s evidence and submitted that her evidence is unreliable.

31. I find Miss Nam, on the whole, to be a credible witness. Though at times she was proned to generalise, at other times emotional and careless in answering questions put to her both in chief and in cross examination, I do not find her calculated or dishonest. It is possible that after a lapse of over two years, her recollection of the incident had paled. If she had been a more careful witness and had rehearsed her evidence she would have dealt with the discrepancies as to the time of payment in her evidence in court. It is possible as suggested by Miss Yip that in order to exaggerate her discomfort, she had insisted the payment was made before the facial treatment. On the other hand, looking at the documentary evidence, the letter on page 219 was written on 24 August 2000, less than 20 days after the incident, her recollection of the order of the events that took place on 5 August 2000 should be more reliable.

32. Miss Ng admitted that Miss Nam did complain of discomfort in her eyes due to blurred vision after the facial treatment. Miss Ng further admitted that she had offered to use cotton wool to clean Miss Nam’s eye lashes which might have caught some of the facial cream applied on Miss Nam and Miss Nam had turned the offer down preferring to use a tissue paper.

33. Miss Ng further claimed that the Plaintiff had been given free samples of the brand of “Canvee” creams used on 5 August 2000 on a previous occasion, a fact which the Plaintiff denied. Presumably, this evidence was introduced by Miss Ng to show that Miss Nam had used the same brand of cosmetics before and there should be no harmful or allergic effect of this product on the Plaintiff. Miss Nam may or may not have been given samples of the ‘Canvee’ product, even if she was given them, it does not necessarily mean that she had used any of the samples on herself before 5 August 2000. Neither does it follow that if the creams had escaped on to her eye lashes or into her eyes it would not have caused any damage to her eyes, there was no evidence on the ingredients or components of the cream used on the Plaintiff by the Defendant. Miss Yip referring to Dr. Tsui’s evidence submitted that facial creams are usually acidic not alkalinic, and Dr. Law’s clinical notes showed the PH value of the eyes were alkalinic. As there was no evidence on the ingredients of the ‘Canvee’ cream used, the evidence is not conclusive.

34. Upon considering all the evidence before me, the medical notes and reports produced by the Plaintiff, I am satisfied on a balance of probability that the Plaintiff did experience discomfort and pain in her eyes at the time when the Defendant’s Miss Ng performed the facial treatment on her. That her discomfort and pain had persisted the next morning; as a result, she went to PYNEH in the early morning of 6 August 2000 for treatment.

35. 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 minimise any harm or injuries to her customers. S.5 of the Supply of Services (Implied Terms) Ordinance Cap. 457 provides that :

“Implied term as to care and skill

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.”

36. On the Plaintiff’s various letters of complaint to the Consumer Council on 10 August 2000 (page 205-207 of bundle) and the credit card company (page 219 of bundle and page 237-245) written before the writ was issued, she had repeatedly referred to the callousness and negligence of the Defendant when performing the facial treatment and her talking on the phone during the facial treatment etc. In her complaint to Dah Sing Bank on page 244 of the bundle, she again referred to the Defendant’s talking on the phone and pressing hard on her eyes while performing the facial massage. These are consistent with her evidence in Court at the trial.

37. Based on the evidence before me, I am satisfied on a balance of probability that the Defendant has failed to exercise due care when performing services on the Plaintiff. She failed to make sure the facial creams used on the Plaintiff was suitable, safe, and that the Plaintiff was not allergic to them. She also failed to prevent the cream used from escaping, spilling or running into the Plaintiff’s eyes; and lastly, she was negligent in the performance of her work when she rubbed or pressed her hand onto one of the Plaintiff’s eyes. She further failed to heed the Plaintiff’s complaint or to assist the Plaintiff and ascertain if the cream had run into the Plaintiff’s eyes at the time or immediately after the facial treatment. The Defendant is negligent and failed to carry the service with care and skill and is therefore liable.

Quantum

Pain, Suffering and Lose of Amenities

38. Dr. Pauline Chan, Dr. Edwin Chan and Dr. Tsui all found the Plaintiff suffered no permanent visual deficit. According to Dr. Pauline Chan, the poor tear secretion can cause the Plaintiff discomfort in dry and windy environment, she agreed that no permanent visual function impairment was resulted.

39. I do not find the Plaintiff’s condition can be compared to a victim who suffered fractures to a toe or a finger. The only case referred to me by Mr. Lau comparable to the Plaintiff’s condition is the case of Fong Wai Mui v. Cheung Fung Lan DCCJ No. 24639 of 1998 (date of judgment 18 December 2000). The victim received 4 stitches to her cut lip as a result of being punched on the face and chest. H.H. Judge Carlson awarded $13,000 under PSLA.

40. The Plaintiff’s dry eye condition in no way affected her work or enjoyment of life in general. Furthermore, there was no suggestion that it will not improve given her young age. She may have been inconvenienced by having to wear glasses instead of a contact lens on her myopic eye, she therefore has been deprived of the option. On the other hand, glasses would give her the protection she requires against strong and dry wind. She will be required to rely on eye drops to lubricate her eyes until her condition improves. For the aforesaid reasons, I shall award her under this head the sum of $8,000.

## Pre-trial earnings

41. The evidence of the employer’s returns for the year ending 31 March 2000 and 31 March 2001 supported the Plaintiff claim of a salary of $10,000 per month. The Plaintiff took sick leave up to and including 10 August 2000. As 6 August 2000 was a Sunday, the actual days the Plaintiff had taken leave was 4 days. I shall award her for the loss of those 4 days :

$10,000 x 4/30 = $1,333.00

42. As to the claim of loss of earning capacity, Miss Nam has been engaged in full employment since the injury. Her having to wear glasses instead of contact lens has not in any way affected her employment prospects nor should her need to use eye drops be an obstacle to future employment. For this reason, I do not find she suffered any loss or will suffer any loss in her future employment prospects.

1. Special Damages

The Plaintiff claims the following :

Medical expenses – 4 sessions at PYNEH @$44 $176.00

Travelling expenses $425.00

Costs of facial and slimming treatment $6,388.00

Tonic food $2,000.00

$8,989.00

44. The medical expenses are clearly documented, and they are agreed by the Defence, I allow these expenses.

45. The travelling expenses consisted of travelling by taxi to PYNEH and back to her home by the Plaintiff on 6th to 10th August 2000 and her mother on 6 August 2000, at $25-45 per trip (see page 288-289 of bundle). I consider the expenses reasonable. I allow them in full.

1. As to the cost of the 10 facial and slimming treatments, the incident had left the Plaintiff with a dry eye syndrome. The services performed on her on 5 August 2000 was a total disaster so far as the Plaintiff is concerned. It is reasonable for the Plaintiff who has completely lost her trust in the Defendant to recover the payment she paid for 10 facial and 10 slimming treatments. I award her full repayment.

47. As to the tonic food, I accept that Madam Lam, the Plaintiff’s mother had made nourishing soups for the Plaintiff. In addition, she bought her daughter bottled birds nest drinks. This was not made under the advice of a doctor, though it is an acceptable Chinese custom to take nourishing tonic food for the nursing of an ailment. However, it has not been shown if the bird’s nest drink is purely to nourish the Plaintiff’s eyes or for her general health. For this reason, I shall allow tonic food in the sum of $1,000 and not the sum of $2,000 claimed.

## Conclusion

48. The damages awarded are :

PSLA $8,000.00

Loss of earnings $1,333.00

Special damages $176.00

$425.00

$6,388.00

$1,000.00

$17,322.00

## Interests

49. Interest on special damages is awarded at 2%.

## Costs

50. I order costs nisi to the Plaintiff with certificate for counsel.

(H.C. Wong)

District Judge