DCPI624/2003

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 624 OF 2003

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

LAM WA LAI Plaintiff

and

STARTLONG DEVELOPMENT LIMITED Defendant

trading as LAI YING HAIR SALON

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Her Honour District Judge Marlene Ng in Court

Dates of Hearing: 8th, 9th, 10th and 11th November, 2004

Date of Handing Down Judgment: 14th April, 2005

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

JUDGMENT

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

###### Introduction

1. The Defendant (“D”) carried on business of hair salon/beauty centre at Nathan Road, Kowloon (“Salon”) and employed the Plaintiff (“P”) as a hairstylist.
2. At about 4:00 pm to 5:00 pm on 18th December 2000 (“Date”), P was walking down the internal staircase (“Staircase”) of Salon from the loft (“Loft”) to the ground floor (“G/F”) when she slipped, tumbled down and smashed against the wall facing the bottom of Staircase (“End Wall”) (“Accident”).
3. P’s claim is based on breach of the employer’s duty of care, breach of duty of care as an occupier under the Occupiers’ Liability Ordinance Cap.314 (“OLO”) as well as breach of statutory duties under the Occupational Safety and Health Ordinance Cap.509 (“OSHO”). P no longer relied on the doctrine of *res ipsa loquitur* or criticised the lighting of Salon or the design of Staircase.
4. D claimed Accident was solely caused/contributed to by P’s own negligence, particularly by wearing a pair of 3-4 inches high platform shoes (“Platform Shoes”). D further claimed it had duly cautioned P on wearing Platform Shoes and by warning signs (“Signs”) posted at Salon, but P willingly accepted the risk of damage.
5. P herself gave evidence. D called Ms Li Po Yin (“Li” – D’s former shampoo junior (“junior”) and/or receptionist at Salon), Mr Au Tak Ming Sammy (“Au” – D’s assistant branch manager at Salon) and Mr Lam Ka Fung Johnny (“Lam” – D’s director/shareholder) as witnesses.
6. In December 2000, D had 15 salons which operated a 11-hour day (from about 9:00 am to 8:00 pm). In November 2000, D (through Salon’s branch manager, Mr Chow Yam Han (“Chow”, also known as “Ah Dick”)) employed P as a hairstylist. P was on probation for the first 3 months and was entitled to receive guaranteed income if it exceeded her earned commission. But for Accident, P’s commission earnings after the first 3 months would have depended on her performance.
7. On Date Li only acted as receptionist at Salon. She left D shortly before trial. Au started to work at Salon in October 2000 and was still working there at the time of trial. Au/Chow were responsible for Salon’s daily management. If Li were busy, Au would also have to perform receptionist duties. Lam visited D’s salons regularly and helped in general management if necessary. He saw P 2-3 times during her employment with D.

*Layout of Salon*

1. Salon was divided into G/F and Loft with Staircase for internal circulation. Loft had a glass timber balustrade (“Balustrade”). According to Mr Gary Chung, a registered architect, Staircase was a mild steel structure finished with timber and mild steel chequered plate. It had a glass timber handrail on one side and a wall on the other (“Side Wall”) with 10 risers and 9 treads. Mr Chung opined that the finishing material did not render Staircase unsafe but it could be rendered unsafe if slippery substance such as shampoo, oil or soap water was dropped onto the surface. He suggested that Staircase could be improved by providing additional non-slip carborundum strip at the nosing of each step. Au said the yellow/black striped tape at the top edge of Staircase, which existed before October 2000, was to remind users of the beginning of Staircase.
2. Salon’s main entrance had a “小心梯級” Sign (“Entrance Sign”) which cautioned users of a small step/platform both immediately inside/outside the main entrance. The inside platform was a step higher than the main floor and had yellow/black striped tapes at the edges. The reception desk faced the main entrance, but the cupboard behind it blocked the receptionist’s view of the interior of Salon.
3. G/F had about 20 (according to P) or 23 seats (according to Au/Lam) for customers and each hairstylist had a designated seat (“Seat”) for his/her own customers. There were several pillars in the centre of G/F, 1 of which was close to the bottom landing of Staircase (“Pillar”). Loft had seating for about 12-14 customers. There was a shampoo area at both G/F and Loft with recliners and wash basins (“Shampoo Area”). G/F Shampoo Area was behind Staircase next to a towel rack, which in turn was next to the toilet (“Toilet”).
4. Steam machines (“Machines”) were required for oil treatment. P claimed they were also used for hair perm and colour treatment but Li said it was up to the hairstylist. There were 3 mobile Machines on G/F and 3 (according to P) or 5 (according to Au/Lam) Machines affixed to the countertop at Loft.
5. There was an open staff resting area (“Resting Area”) near to Balustrade and the head of Staircase, which consisted of a glass table and some chairs. A hairstylist could rest/read at Resting Area if he/she had no customer or was waiting for a procedure (eg hair perm) to finish before serving the customer.

*Customer service*

1. Li would arrange for a newly arrived customer to be seated and wrapped with towel/plastic sheet (“Wrap”). She would ask the customer for the services required and whether she had her own hairstylist. Li then issued an invoice (“Invoice”) to clip onto the customer’s Wrap to facilitate juniors in their work. Au/Li said Invoices were issued in the order as the customers arrived at Salon and would not be changed after issue.

*D’s business records*

1. P said the services rendered for each customer were entered in a record book kept at the reception desk and each morning she would check the services she rendered to customers the day before. Li made daily written records of *inter alia* Invoices issued for the day with corresponding receipts (“Daily Written Record”). Li also prepared daily computer records listing *inter alia* Invoices issued for the day (with breakdown of receipts into a deducted sum and the balance amount) with corresponding services rendered to customers (“Daily Computer Record”). These records were prepared for accounting purpose and keeping track of inventory stock. Au claimed all business done or services rendered at Salon on Date were recorded in Daily Computer Record.

*P’s case on liability issue*

1. 4:00 pm to 5:00 pm was generally not a busy hour. There were 6-7 customers on G/F and all 3 Machines on G/F were in use. A female customer with long hair (“Customer”) was at Loft using Machine for oil treatment. P believed that, as was the usual practice, oil would have been applied to Customer’s hair on G/F. A hair clip on Customer’s hair fell down and she asked for help. P, who was sitting close to Customer at Resting Area, redid the hair clip on Customer’s hair.
2. P was then paged to serve a customer and she immediately rose and walked to the head of Staircase. She had a quick glance of Staircase but could not see any slippery substance. She held the handrail with her right hand. As she stepped on the first tread at a normal pace, she suddenly slipped, lost balance, fell onto Staircase on her waist, tumbled down onto the bottom landing and hit her head against End Wall. P suspected there was slippery substance on Staircase, namely, oil/water that dripped from Customer’s hair.

*D’s case on liability issue*

1. Date (Monday) was not busy. At around 12:00 noon there were about 9-10 customers and P’s last customer arrived at about 2:00 pm. From 9:00 am until 2:00 pm on Date 4 customers used Machines. At about 4:00 pm to 5:00 pm, there were no customers at Loft and no Machine on G/F was in use.
2. Au glanced at the CCTV about 2 minutes before Accident, so he knew there was no customer at Loft. Then he walked towards Toilet and noticed on the way there were 4-5 customers (which Li also confirmed). He casually glanced up at Loft and only saw P seated near to the pillar side of the glass table away from Balustrade resting and doing some reading. There was no reason for the surface of Staircase to be slippery.
3. Li paged P to serve a new customer, but P did not come down from Loft immediately. Li wanted to go to Toilet, so (as was her usual practice) she locked the cash drawer of the reception desk. As Au came out of Toilet, Li walked over intending to give the key to him. Since P had not come down from Loft, when Li reached Pillar she looked up and casually said “Lisa, there is a job”. Li then saw P come down Staircase with her hands inside her jacket pockets. After P took 1-2 steps, she made a false step and tumbled down to the bottom of Staircase. Li/Au rushed over and noted P wore Platform Shoes. Li/Au believed Accident happened because Platform Shoes were too high and P failed to hold onto the handrail whilst descending Staircase.

*Issues and findings on the liability issue*

1. The relevant issues are as follows :
   1. whether P slipped and fell down Staircase because it was slippery;
   2. if so, whether the condition of Staircase was caused by D’s negligence or breach of duties;
   3. whether P was wearing Platform Shoes or Sports Shoes (see below) at the time of Accident;
   4. if P wore Platform Shoes at the time of Accident, whether wearing such shoes amounted to contributory negligence and whether D had cautioned P on wearing such shoes;
   5. whether P was holding onto the handrail when she descended Staircase at the time of Accident;
   6. whether there were Signs at the time of Accident and if so, whether P failed to heed them.
2. P gave evidence in a straightforward and candid manner. I find her evidence honest and reliable. Although D called 3 witnesses, I am not persuaded by their version of events. Whilst they elaborated into details over the core factual disputes, they were vague in respect of the surrounding circumstances or even about more recent events (see analysis below). They were also reluctant in their evidence under cross-examination. For example, whilst it is plain (and Au knew as he eventually admitted in evidence) that D’s accounts department was dependent on Daily Written and Computer Records (which Au checked against Invoices and signed off each morning) submitted by Salon for calculating commission payable to hairstylists, Au insisted he did not know how D’s accounts department calculated such commission and even tried to say D’s accounts department would check staff time-cards (which contained no information on invoices and receipts) for such purpose. I do not find the evidence of D’s witnesses reliable.
3. Based on the analysis below I make the following findings of fact :
   1. At the time of Accident, P wore tee-shirt, jeans and flat-soled rubber sports shoes (“Sports Shoes”). Her tee-shirt did not have pockets.
   2. Just prior to Accident, Customer was at Loft having oil treatment and using Machine. Customer had oil applied to her hair on G/F and then walked up to Loft to use Machine.
   3. P descended Staircase at a normal pace with her right hand holding on the handrail.
   4. At the time of Accident, there was oily substance on Staircase which caused P to slip and fall down Staircase. P did not make a false step.
   5. Most if not all Signs (apart from Entrance Sign) were posted at Salon after Accident.

*P’s apparel on Date*

*(a) Shoes*

1. It is undisputed that D had no dress code against platform shoes. It is P’s case that on Date she wore (as she normally did) jeans, tee-shirt and Sports Shoes and in fact she had not worn Platform Shoes during her employment with D. She gave 2 reasons. First, it was her practice to stand whilst serving about 20 customers a day, so it was more comfortable to wear low flat-soled shoes. Secondly, since her pregnancy (she gave birth to her daughter shortly before she started to work for D) her mother-in-law had reminded her not to wear high-heeled shoes, so she did not. She also had to pick up her young daughter from her mother-in-law every Monday (including Date) before her rest day on Tuesday, so she would not wear high-heeled shoes on Mondays.
2. Ms Tan, counsel for D, criticised P’s wavering evidence for not wearing high-heeled shoes. I do not see any real conflict in P’s mother-in-law cautioning her against high-heeled shoes (a) during her pregnancy and (b) during Mondays when P picked up her daughter. Cautions by P’s mother-in-law arose out of reasonable familial concern over the well-being of P and her daughter. There is no sufficient basis to draw the inference Ms Tan suggested that (b) above implied P still wore high-heeled shoes after the birth of her daughter. P frankly accepted she had (but rarely) worn high-heeled shoes in the past but the situation changed when her daughter came along. Even if such inference can be drawn, there is still no sufficient basis to further infer that P wore Platform Shoes to work on Date.
3. I further find P’s other reason that she wore low flat-soled shoes for comfort in her daily work highly probable and indeed, this is supported by D’s evidence. Li was unable to say whether P previously wore platform shoes to work. She even went further to say that although it was her habit to pay attention to her colleagues’ hairstyle/clothing, she generally did not pay much attention to P since she usually wore casual clothes and flat-soled or low-heeled (ie heels of 1 odd inch) or sports/canvas shoes. This is echoed by Au’s evidence that P sometimes wore leather shoes but he had no idea whether they were flat-soled or not. His idea of high-heeled shoes included those with heels of only 1 odd inch. Clearly P did not have a habit of wearing platform or high-heeled shoes to work.
4. Although Li/Au suggested that platform shoes were quite fashionable at some stage and were worn by Salon’s female staff, there is an aura of vagueness about such evidence. Au said he kept on giving verbal cautions to female staff who wore platform shoes to work. Yet he was unable to say when they became fashionable or how frequently female staff wore platform shoes. He was also vague about the details and frequency of his verbal cautions (but he surprisingly remembered the exact words of his verbal cautions to P on Date). I am doubtful of the claimed fashionable practice of wearing platform shoes by Salon’s female staff at the material time or that Au gave out verbal cautions.
5. Even if I were wrong, there is no convincing reason why Li/Au would prior to Accident on Date notice P wore Platform Shoes. First, if such shoes were fashionable around that time, P’s wearing Platform Shoes should not excite special notice. Secondly, there is no real suggestion that P dressed differently from usual on Date. Although Li said P wore a calf-length black skirt on Date which was rare for P, Au said P often wore black clothes and long denim skirt. There was nothing special about P’s clothes that should excite attention to her shoes.
6. Although Li/Au claimed P’s Platform Shoes made loud noises when she walked on the wooden floor or ascended/descended Staircase and they noted P’s Platform Shoes after Accident, they only had a very vague recollection that Platform Shoes were black but were unable to give any information on their material/style/pattern. Au was at pains to explain he could not give any details because he had not touched P’s Platform Shoes, yet in his witness statement he said he noticed P was “wearing a pair of black leather platform shoes ……”. I find Au’s explanation (namely, he thought he had to choose between leather and plastic, so he chose leather even though he was unsure) strained and unreliable. I find Au’s evidence as to P’s footwear on Date doubtful.
7. Although Au felt it would be easy to slip and fall with platform shoes, he was unable to give any plausible reason why he refrained from raising this safety concern with Chow or D during weekly meetings on management matters (see below) or at all, particularly as he was the assistant branch manager responsible for the general management of Salon. His explanation that it was a matter for D and not for him does not sit well with his evidence that he was generally lively to the safety and well-being of staff/customers. More importantly, in contrast to Au’s evidence, Li and apparently other female colleagues had no safety concerns when they wore platform shoes to work and walked up and down Staircase. For the reasons set out above, I do not accept that on Date Au verbally warned P that “你著住呢對鞋上落樓梯小心啲，因住仆親呀” and by again saying “你上落樓梯真係要睇住呀”.
8. Ms Leong submitted that Li’s/Au’s evidence in this respect were *post*-event fabrication and that Li discussed what happened with Au and the juniors to conform her evidence with Au’s. There is no need to draw such conclusion about their discussions as I have already found their evidence to be unreliable on the above analysis.
9. In any event, it is D’s case that P fell down Staircase because she made a false step, ie P missing a step by stepping on empty air instead of a tread. There is no explanation how Platform Shoes (as distinct from flat-soled or low-heeled shoes) will cause/facilitate a false step, particularly in light of Li’s evidence that platform shoes were not dangerous or unsafe and that Salon’s female staff wearing platform shoes had no difficulty in using Staircase. Au also accepted he did not know if platform shoes were actually unsafe or dangerous but only that he felt so. I am not convinced, even if P had worn Platform Shoes on Date (which I do not accept), that it is inherently unsafe or that it caused Accident.

*(b) Clothes*

1. Ms Tan argued P had her hands in her jacket pockets because if P held onto the handrail, common sense and logic dictated that she would not have fallen all the way down to the bottom of Staircase.
2. P’s evidence is that her tee-shirt had no pockets and she was not wearing a jacket at the time of Accident. I find P’s evidence credible. Although it was winter at that time, Au accepted warm air ventilation would render the temperature inside Salon warmer than outdoors. There was also a wardrobe near the reception desk for staff/ customers to place their jackets/overcoats. Although Au said customers had priority in using such wardrobe, the existence of the wardrobe suggests that customers/staff (albeit it is their choice) do take off their jackets/overcoats.
3. In the course of cross-examination, Au volunteered the information that P often wore a jacket (which she kept at Salon) in the afternoon but later denied it. In my view, Au tailored his evidence to suit the fact that Accident took place in the afternoon on Date, but had to retract his evidence when no plausible explanation could be offered for P wearing a jacket only in the afternoon. Au’s evidence in this respect is unreliable. Further, even if I were wrong and P had kept a jacket at Salon to wear during the day, it is inexplicable why Li, who was interested in her colleagues’ clothes, could not describe its colour, style, collar or pattern but remembered it had top-opening pockets. I find her evidence unreliable. Although Li said few hairstylists wore tee-shirts as they were concerned with their image and dressed to impress their customers, Li agreed P generally wore casual clothes. I find on balance that P wore a tee-shirt without pockets at the time of Accident.

*Slippery substance*

1. It is not disputed that customers would usually be seated on G/F. Shampoo and other services would be done on G/F. I have no reason to doubt Lam’s claim that it would look better to have customers sitting on G/F. I also accept that at 4:00 pm to 5:00 pm on Date, no matter whether there were 4-5 (according to D) or 6-7 (according to P) customers, they would initially have been seated on G/F. The questions here are whether there was any Customer at Loft just prior to Accident and whether slippery substance has been dropped onto Staircase from Customer or otherwise.

*(a) Daily Computer Record*

1. In my view, Daily Computer Record does not exclude the existence of Customer nor does it support an inference that Machines at Loft were not in use at the time of Accident. Daily Computer Record does not tell us when Accident happened or when customers arrived at/left Salon. It tells us that P served 8 customers that day (excluding the customer for whom she was paged since such customer was eventually not hers).
2. Daily Computer Record also shows that by the time P’s last customer came to Salon on Date, 4 customers have used Machines that day. According to Au, P’s last customer came in at about 2:00 pm. But there is nothing to show how many customers came to Salon between 2:00 pm and 5:00 pm. Customers who came in earlier might leave Salon later than the customers who came in after them. Daily Computer Record shows that on Date 7 other customers used Machines after P’s last customer came in but does not show when they came to Salon. However, amongst the 17 customers who came to Salon after P’s last customer on Date, 6 used Machines. I am unable to infer from Daily Computer Record, as Ms Tan suggested, that 3 Machines on G/F were sufficient in the afternoon on Date without the need to bring any customer to Loft to use Machines there. In fact Daily Computer Record shows it is possible that 3 Machines on G/F were insufficient at the time of Accident. I bear in mind that Daily Computer Record was introduced whilst P was giving evidence, so P was not in a position to anticipate such evidence. Yet Daily Computer Record does not in any way refute P’s evidence in respect of Customer.

*(b) Usual practice*

1. I now turn to the usual practice adopted at Salon. It is not disputed that if there were too many customers on G/F, they would have been seated at Loft. There is no evidence to refute D’s claim that this would happen when G/F was 70% full (ie about 15 customers). It is also common ground that even though customers were seated on G/F, if all 3 Machines on G/F were in use or had broken down, then a customer requiring use of Machine would be brought to Loft to use a Machine affixed to the countertop there. But P and D differ in their evidence as to whether the whole of the service to the customer was done at Loft or partially at both Loft and G/F.
2. In my view, where (as on Date) there were not enough customers on G/F, they would be seated on G/F and only brought to Loft to use Machine if necessary. The initial task was usually a shampoo and I accept P’s evidence that it was usually done by a junior at Shampoo Area on G/F. Once a customer was seated on G/F, I believe that it would be unlikely for a junior to take the initiative to remove the customer to Loft when the shampoo could well be done on G/F. Then if the customer required oil/colour treatment, the application of oil/colour to the customer’s hair would be done on G/F. After all, such products were kept near the reception desk on G/F and there was none at Loft. If none of Machines on G/F were available, the customer would then have to walk up Staircase to Loft to use a Machine there. After the customer finished using Machine, a junior would bring the customer to the relevant hairstylist’s Seat on G/F for hair cut and blow dry. Quite clearly, most of the services would be done at G/F even if use of Machine at Loft was required and I accept P’s evidence in this respect.
3. P fairly accepted that if the customer was already seated at Loft to have a hair perm to be followed by oil treatment, a junior might go to G/F to fetch a dish of oil to apply to the customer’s hair at Loft. But such special circumstances do not detract from the usual practice referred to above. I reject D’s contention that where a customer was seated at Loft or brought to use Machine at Loft, the junior would apply oil to the customer’s hair at Loft. I find such evidence to be a tailored attempt to avoid having a situation where a customer with oil on her hair has to walk up Staircase.
4. I find that under the usual practice described above there is a real risk of oil/colour being dropped on the surface of the floor or Staircase. It is not disputed that for oil treatment, the customer’s hair is fixed in place by hair clips after shampoo and a towel was used to encircle the head at the hairline. Oil/colour is then applied to the hair. The hair is therefore exposed and D elicited no evidence that hair will be covered. If the customer is to walk to Loft for using Machine, dripping of oil/colour is quite possible. I agree with P that if the customer’s hair is not dried thoroughly, it will be easy for water/oil/colour to drip to the floor. Even if the hair is dried thoroughly, oil/colour by reason of their consistency may still drip when the customer has to move and walk up to Loft to use Machine.

*(c) Date*

1. I prefer P’s evidence as to what happened on Date. Ms Tan’s main criticism was that P failed to mention a male colleague at Resting Area in her witness statement or in her evidence on the first day of trial and that she did not even mention the male colleague’s name. I am not troubled by this since apart from being there at Resting Area the male colleague was entirely uninvolved in this matter. He played no part with Customer or with the new customer for whom P was paged. He did not go downstairs with P but remained at Resting Area. His presence would not excite special description. However, P did mention Customer in her witness statement and in her evidence as Customer played a role in her account of events. I accept P’s evidence, which had an air of naturalness, about her male colleague.
2. On the other hand, I find Li’s/Au’s evidence on crucial matters unconvincing. Ms Leong queried the accuracy of their recollection. Whilst it is plausible they might remember Accident, she doubted the fine detail of their evidence on what happened on Date as they had no particular reason to remember the events. Both Li/Au were unaware of P’s claim prior to the present proceedings which were commenced almost 3 years after Accident and Li’s/Au’s witness statements were given in April 2004. Ms Leong further submitted that on other matters which were not crucial to D’s defence, eg when Au first became aware that P sued D, whether police came to the scene after Accident, whether Au made a statement to the police or the number of hairstylists with no work at the time of Accident, Li/Au had no recollection. Ms Leong suggested Li’s/Au’s evidence exhibited hallmarks of recent fabrication. As seen from the analysis below, I accept there is a degree of embellishment in Li’s/Au’s evidence which I reject.
3. First, I am not convinced Au could clearly remember there were 9-10 customers at about 12:00 noon on Date without any refreshment of memory by documentary record and without special reason to remember this fact. He was adamant that there were 9-10 customers at about 12:00 noon and 4-5 customers at 4:00 pm to 5:00 pm on Date and yet did not remember how many customers there were at 6:00 pm to 8:00 pm. If, as Au claimed, he were alert enough to note the number of customers at lunch (when nothing special happened) and in the afternoon, I doubt whether the occurrence of Accident will put him off from recalling the number of customers in the evening. I find that he is trying to embellish his evidence on matters affecting Accident.
4. Secondly, I do not accept on balance that Au looked at the CCTV shortly before Accident. There is no reason for him to remember such a casual observation. I further doubt that whilst going to Toilet he would make detailed observation of the number of customers on G/F and the position of P at Loft. He even said he noticed a junior was about to finish washing a customer’s hair on G/F. At that time Salon was not busy, Au had no work and he was on the way to Toilet. There is little reason for him to be so attentive to the details. More importantly, he made no mention of these observations in his witness statement at all.
5. Thirdly, I do not accept Li’s evidence that P did not immediately come down Staircase after being paged. P was doing casual reading and had nothing to do. Resting Area was very close to the head of Staircase. There is no plausible reason why P would refrain from immediately responding to the call. Au said it was D’s policy not to keep customers waiting and, according to his observations, P generally complied with D’s corporate policies. I find on balance that P responded to the paging call promptly. In such circumstances, given that Resting Area was near to the top of Staircase, Li would not have time, as she claimed, to lock her drawer, leave for Toilet with her key and walk to Pillar to observe Accident. These matters were not described in Li’s witness statement and I find her evidence a poor attempt to justify the time lapse for her to reach Pillar to claim that she observed P coming down Staircase.
6. Fourthly, I reject Li’s evidence that whilst walking to Toilet, she looked up towards Loft and said “Lisa, there is a job”. Although Li described her observation of Accident in her witness statement, she made no mention that she called out to P. It is also doubtful that Li saw, as she claimed, P making a false step. Li said she was looking at P above the handrail and saw her hands were inside her jacket pockets (which evidence I have rejected). I do not accept that at the same time Li was able to pay such careful attention to P’s lower body through the tinted glass of handrail to actually see P making a false step. Despite the details she gave about Accident, Li did not say P made the false step with which foot.
7. Fifthly, Li said she did not walk up Staircase to inspect it after Accident. Au said he went up Staircase with Li who explained to him how Accident happened. Such discrepancy in their evidence has not been satisfactorily explained.
8. I find that it is highly probable that Staircase was slippery due to the presence of slippery substance on its surface at the time of Accident :
   1. I refer to the analysis of the evidence above as well as on D’s system of work below.
   2. I accept P’s evidence that she slipped and lost balance. But for the presence of slippery substance on Staircase, I see no plausible reason for her to slip and fall. Even Li said P came down Staircase leisurely. I have found that P wore Sports Shoes and held onto the handrail. I also note Mr Chung’s unchallenged expert opinion that the surface of Staircase was not unsafe but slippery substance such as shampoo, oil or soap water could render it so.
   3. Li was not in a position to refute this as she did not inspect Staircase. Au went up Staircase about 10 minutes after Accident with the express purpose of checking it. Au said he did not know if P slipped/fell down Staircase because there was oil/colour material on Staircase.
   4. Ms Tan suggested that since P had glanced at Staircase before descending, oily substance on the surface would have reflected light and P would have seen it. I do not accept this contention. P frankly accepted that oil did reflect light but said whether it could be observed depended on the angle of vision. I agree that the fact P did not notice anything reflective does not mean there was no oily substance on the surface of Staircase. I find P’s quick glance to be a natural reaction since she was about descend Staircase, but that does not mean she was on the lookout for oily or reflective substance on Staircase.
   5. I find that just prior to Accident, Customer was using Machine at Loft. Daily Computer Record for Date supports the possibility that 3 Machines on G/F were in use at the time of Accident. I find that because of her involvement in helping Customer to fix her hair clip, P had good reason to remember Customer at Loft. In accordance with the usual practice, I find it probable that oil was applied to Customer’s hair on G/F before she was brought to Loft to use Machine. Customer’s exposed long hair posed a real probability that oil would drip onto the surface of Staircase when she walked upstairs.

*Liability*

1. Employers owe their employees a non-delegable duty of care to devise a safe system of work and to see that system is operated. Such duty is to exercise reasonable care in all the circumstances. I find on balance that D fell short of its duty.

*(a) System of work*

1. It is common ground that (a) juniors’ main duties included washing customers’ hair, performing hair perm and oil/colour treatment under the hairstylists’ supervision and cleaning up, (b) most juniors were skilled workers, (c) D did not employ any cleaning staff and (d) no junior(s) were designated as cleaning workers. In short, cleaning duties fell on juniors generally at Salon.
2. Au/Lam gave evidence that candidates for the position of junior had to demonstrate their knowledge of basic skills before they would be employed as skilled juniors. Chow/Au would instruct newly employed juniors on D’s work procedures and service standards on *inter alia* the proper way to shampoo and dry customers’ hair, namely, (a) water must not be allowed to drip onto the customer’s clothes or the floor, (b) before a using dry towel to wrap the customer’s hair after shampoo, the tips of long hair must be wrung dry and (c) the dry towel used for wrapping the customer’s hair after shampoo must be tucked in properly. If the juniors failed to meet D’s service standards, they would be orally warned and/or dismissed. Au further said that he would give cleaning instructions to newly employed juniors as follows : (a) the floor had to be swept after finishing each hair cut, (b) if the floor was wet for whatever reason, it had to wiped immediately with a dry towel and (c) Salon had to be thoroughly cleaned after close of business each day.
3. On the other hand, P said that unless employed as apprentices, the juniors were skilled workers who did not require induction training. I am not convinced of D’s claim of a detailed induction programme for juniors (see below). But even if Au’s/Lam’s above evidence were correct, the need for the aforesaid induction training clearly shows that (a) there is a real risk of water dripping onto the customer or the floor in the course of performing services for the customer, (b) the employment of skilled juniors do not necessarily remove the risk of water/oil/colour dripping from the customers’ hair and (c) a wet floor needs prompt cleaning/wiping for the safety of customers/staff.
4. Yet there is paucity of evidence on the initial training or on the general inspection regime or management system to ensure the initial instructions were implemented and operated. No particular junior was designated to carry out cleaning work at any designated time. It was generally left to the initiative of the juniors to clean the floor whenever they had some spare time. There was no formal division of labour and Au only gave *ad hoc* instructions to clean the floor if he noticed a specific need. This coincides with P’s evidence that Au would sometimes ask a junior to sweep the floor when there was too much hair. There were no particular instructions to address the real risk of dripping water/oil/colour when a customer had to walk up Staircase after having oil/colour applied to her hair.
5. I note that apart from cleaning, juniors have other duties to perform. They are also apprentices in that they have to learn how to perform the hair services offered by Salon so that they can in due course pass D’s internal examination for promotion to become hairstylists. In the circumstances, it is unreasonable to simply rely on their initiative.
6. In my view, the absence of a safe system of cleaning is due to the fact that D was contemptuous of the risk of water/oil/colour dripping from customers’ hair. Au said he did not regard there was such risk even at Shampoo Area, the area in Salon that was most likely to be wet or slippery, unless it was a deliberate act. Given such a cavalier attitude, it is hardly likely that Au would have reminded the juniors to check for wet/slippery floor and to clean up if necessary. By reason of such attitude, it is impossible that D organised such a detailed induction programme on *inter alia* cleaning procedure for newly employed staff as claimed.
7. Whilst I accept Au would explain the special features and/or methods of use of D’s products, I reject his evidence that he trained newly employed hairstylists on D’s service standards for washing and drying hair. I also reject his hearsay evidence that Chow had given such training to P at the time of her recruitment, which evidence was flatly rejected by P. P is a skilled hairstylist and it was not within her general scope of duties to shampoo customers’ hair. Au was unable to give any particulars of the meeting at which he learned that Chow had given such training to P.
8. I also reject D’s suggestion that there were weekly meetings attended by hairstylists, juniors, Au and Chow to discuss work procedures, distribution of work and management matters. Had there been such regular meetings, there is no reason why a safe system for cleaning up during the course of the day has not been devised and put in place prior to Accident. I find on balance that there has been no adequate system of work in place to meet the risk of slip and fall posed by D’s work procedures.

*(b) Signs*

1. The photographs reveal a lot of Signs at Salon but P denied the following Signs (except Entrance Sign) existed at the time of Accident :
   1. “小心碰頭” Sign on the ceiling beams of Loft near to the head of Staircase;
   2. “小心梯級” Sign on Side Wall near the head of Staircase;
   3. “小心梯級” Sign on Side Wall near the bottom of Staircase;
   4. “小心地滑” Sign on Side Wall;
   5. “小心地滑” Sign on End Wall;
   6. “小心地滑” Signs near Shampoo Area on G/F;
   7. “小心梯級” Sign on the wall abutting another staircase leading to the beauty centre;
   8. “小心梯級” Sign at the reception desk facing the main entrance.
2. Ms Tan pointed out P at first only mentioned Signs in (a), (b) and (d) of the above paragraph in her evidence-in-chief but later said some or all Signs did not exist at the time of Accident. I do not find P’s evidence incredulous and I accept her explanation that she misunderstood Ms Leong’s question during her evidence-in-chief as asking her about Signs at/near Staircase. It would have been surprising had she remembered every location of a Sign. But her impression was the profusion of Signs shown in the photographs was not reflective of the situation on Date and in that I agree with her. I further find there was no sufficient warning of the risk of slippery Staircase.
3. I find D’s evidence unconvincing. D tried to suggest 2 things at the same time, namely, that there was no risk of wet/slippery floor and that it had given adequate warning of a wet/slippery floor. D’s evidence is unsatisfactory in either respect.
4. D’s evidence that all Signs shown in the photographs existed at the time when Salon opened for business in June 2000 or before October 2000 is not persuasive. Up to that time, there has been no accident at all in all of D’s 15 salons. Au tried to suggest that “小心地滑” Signs posted up at/near Staircase was not indicative of a risk of wet/slippery floor at that location because similar Signs were posted at other locations without risk of a wet floor. He doubted whether there was any risk of a wet floor even at Shampoo Area (yet agreeing that “小心地滑” Sign near Shampoo Area was appropriate as it was a place most likely to have water). He even said a wet and slippery floor could only be due to deliberate acts. If there is no perceived risk of wet/slippery floor at/near Staircase, there is no reason for indiscriminate posting up of “小心地滑” Sign at/near Staircase on the basis that more Signs were better (according to Lam). The probable scenario is that these Signs were posted after Accident.
5. Even if “小心地滑” Signs at/near Staircase were posted before Accident (which I do not accept), it would not have helped D’s case. Lam/Au seemed to accept the common sense observation that one posts up a Sign with appropriate contents to address the potential concern particular to the specific location. In short, the posting up of a Sign serves a purpose. For example, “小心碰頭” Sign was posted at the beams of Loft and not at Side/End Walls and “小心地滑” Sign was posted at Shampoo Area on G/F and Loft and not at the main entrance because the risk of knocking one’s head or slipping were present in the former locations and not at the latter ones. Even if “小心梯級” and “小心地滑” Signs at/near Staircase were posted before Accident, it can only suggest that D knew of the risk of a slippery floor at/near Staircase prior to Accident but had not done anything to sufficiently address such risk.
6. That was probably why Lam/Au tried to shy away from the aforesaid common sense stance in their evidence. Au said he had no idea whether “小心地滑” Signs were for reminding users of Staircase of a slippery floor. Lam denied there was any special danger at Staircase and “小心梯級” and “小心地滑” Signs were just for reminding users to be careful when ascending/descending Staircase. If that were correct, “小心梯級” Sign would have been adequate to address such concern. Au/Lam were unable to sensibly explain why “小心地滑” Signs were posted at/near Staircase.
7. In an attempt to explain this away, Lam suggested that similar Signs were also posted at all of D’s salons as a result of a unanimous resolution by D’s shareholders in meeting to the effect that more signs be posted to ensure safety and to avoid accidents. Such shareholders’ meeting was not referred to in Lam’s witness statement. He was unable to say when such meeting took place. The relevant resolution was also not disclosed. I reject such evidence as unreliable. Even if I were wrong and there is such shareholders’ meeting/resolution, I note that Lam did eventually accept under cross-examination that D’s shareholders unanimously resolved to post “小心地滑” Signs at D’s salons with staircase because they thought there was a potential risk of slippery floor at the staircase. Therefore, even if Signs were posted before Accident, they only go to show that D must have foreseen and recognised there was a risk of slippery floor at Staircase and Au’s/Lam’s denial of such risk is untenable.

*(c) Summary*

1. In the circumstances, I find there was no safe system of work. There is no dispute that D is the occupier within the meaning of OLO and the employer within the meaning of OSHO. Both counsel accepted that P’s claim of breach of the common law duty of care under OLO and of statutory duties under OSHO stand and fall with her claim on negligence. Having found that P slipped and fell due to D’s lack of safe system of work, I find that D is negligent and also in breach of its duties under OLO and sections 6 and 7 of OSHO.
2. The burden of establishing contributory negligence rests on D. However, such plea rests on D’s claim that (a) P wore Platform Shoes and failed to hold onto the handrail when descending Staircase and (b) P should have paid heed to Signs and to Au’s verbal cautions on Date. I have rejected D’s evidence in these respects. In the circumstances, I do not find any contributory negligence on P’s part.

*Background on quantum issue*

1. P was 31 at the time of Accident and enjoyed good health. She was educated up to primary 6 and had worked as a waitress and hairstylist in Mainland China. In 1995 she came to Hong Kong and worked as a hairstylist for various hair salons. After giving birth to her daughter in 2000, she started to work for D with an average monthly commission income of HK$13,514.00. She is now divorced and lives with her daughter.

*P’s injuries and medical treatment*

1. After Accident, P had mild abrasions over the head, neck, waist and left leg and severe pain over her waist. She was sent to Caritas Medical Centre’s (“CMC’s”) accident and emergency department (“AED”). There was a 2cm haematoma on the occiput and abrasion/tenderness at the lumbar spine area. P, not realising the consequences of her injuries, declined to be hospitalised for observation and was discharged with analgesics.
2. The pain over P’s neck/left ankle gradually eased but her waist pain persisted. P was first seen at CMC’s orthopaedic and traumatology outpatient clinic (“Clinic”) on 29th December 2000 when she was hospitalised for headache and left-sided body weakness. There was tenderness over the right lumbar area but no neurological deficit. P was discharged the following day for follow up at Clinic. P was treated by a private othopaedic surgeon regularly between December 2000 and July 2001.
3. P’s back pain was managed by analgesics and physiotherapy during follow up. She received outpatient physiotherapy in February 2001 and by 2nd March 2001 her back pain improved by about 60-70%. She was transferred to Kwong Wah Hospital in March 2001 for further physiotherapy management of her low back pain with limited trunk movement. On 26th April 2001, P had further 70% improvement and was discharged with home exercises.
4. MRI in June 2001 revealed minimal posterior bulge at L3/4 and L4/5 with minimal compression of the anterior thecal sac. Existing nerve roots were not compressed and P declined operation due to the inherent risks. P was referred for medical assessment in July 2001 when her medical condition became static. P fixed an appointment with the Labour Department but was told by the nurse there she could seek follow up treatment if there was continued problem with her waist. P’s waist continued to be painful and she attended CMC’s AED on 29th July 2001. She was discharged with treatment and with advice to follow up at Clinic. P did not attend the medical assessment.
5. P was referred for CMC’s outpatient physiotherapy from August to November 2001 when her condition became static with 70% overall improvement of back pain and residual on/off low back discomfort. P’s spinal range of movement had improved. P agreed there was improvement but the pain recurred when physiotherapy ceased.
6. In October 2001, P was referred to CMC’s occupational therapist for work assessment and training. P attended 43 sessions of strengthening and endurance training with subjective improvement of back pain. P noted the pain returned when the occupational therapy treatment ceased.
7. The functional capacity evaluation by CMC’s physiotherapy department in November 2001 estimated P was able to work at sedentary physical demand level. The minimal symptom exaggeration and equivocal inappropriate illness behaviour gave P equivocal validity profile, which indicated partial submaximal effort during the evaluation or that it “may be caused by her pain or fear of being re-injured”.
8. On 13th March 2002 the occupational therapist suggested P should try to work as there was 70% decrease of back pain and 2 hours’ sitting tolerance. 2 days later, sick leave was discontinued and P was referred for medical assessment. P said the physiotherapist told her she should do more physiotherapy exercises as her waist was still weak. She had exacerbation of back pain for a few days and attended CMC’s AED on 20th and 31st March 2002. P said the doctor told her to rest and not to re-injure herself. P attended Clinic on 12th April 2002 and sick leave was continued. Since she was still on sick leave, she did not attend the medical assessment.
9. P was referred for outpatient physiotherapy from April to June 2002, by which time there was 70-80% subjective improvement and walking/standing tolerance for more than 40 minutes. Objectively the range of movement of P’s lumbar spine was “satisfactory and with mild stretching feeling”. P agreed there was improvement during physiotherapy sessions, but serious waist pain would recur if the weather changed or when the sessions ceased.
10. P was referred to a clinical psychologist in September 2002. No significant adjustment disorder relating to Accident was found on 3rd December 2002, but P was reported “to have adjustment difficulties related to her low back pain which has affected her child caring ability” in January 2003. There was improved life adjustment after treatment and further outpatient follow up service was arranged.
11. In January 2003 P was referred to the occupational therapist for work assessment and training. P reported increase in back pain. There was no significant improvement and the sessions were stopped due to concern over SARS in a hospital setting. In April 2003, the occupational therapist suggested P should try to work. P’s clinical condition was static by April 2003. Her medical assessment appointment was postponed from April to June 2003 due to SARS and the certificate of assessment was issued on 26th June 2003.
12. At P’s last orthopaedic follow up in June 2003, she was encouraged to do more physical exercises/swimming for rehabilitation of her back pain. As at September 2003, P was still on regular medication for her lumbar back pain.

*P’s present condition*

1. P complained of lumbar back pain which was more prominent on the left side. Pain occurred after sitting for 30 minutes or standing/walking for 20-25 (Dr Richard Poon’s and Dr Poon Kai Ming’s reports dated 14th February and 5th September 2003 respectively) or 15 minutes (P’s witness statement) with soreness/paraesthesia radiating down her leg. P could not walk fast due to the tightness at her lower back. The pain was constantly present, worse on rainy days and exacerbated by coughing/sneezing. P told Dr Richard Poon, P’s orthopaedic expert, the pain often woke her up at night but told Dr Poon Kai Ming, D’s orthopaedic expert, that no pain was experienced whilst lying in bed. P claimed there was limitation of movement/sensitivity as well as frequent stiffness/weakness over her waist area. P could use the stairs but needed to walk with her left leg first. There was weakness/numbness with a vague feeling of paraesthesia in her left leg. P’s sister took care of her daughter and P could not do heavy housework or lift/move heavy objects.
2. P also complained of deterioration in memory and sleep disturbance due to waist pain with a need to change sleeping postures frequently. She was worried over the persistent back pain and intermittent headache and insomnia.
3. P’s persistent back pain now prevented her from enjoying pre-accident activities such as going out with friends for karaoke and dancing etc. She is now irritable. P lost interest in sex, causing frequent quarrels with her husband which led to their divorce in 2002.
4. Dr Richard Poon in his report opined that P’s complaints were genuine. P appeared to have been better at the end of 2001 than she was in February 2003. But in 2002 P made attempts to do more physically demanding housework to prepare for a return to work but each time the move resulted in a relapse of the symptoms. As a result she was just 50% better than she was immediately after Accident. Dr Richard Poon was of the view that P suffered 5% impairment of the whole person. There was still room for improvement but eventually P might have to live with some mild residual symptoms in the lower back and left leg. P was expected to be able to return to her job as full-time hairdresser.
5. Dr Poon Kai Ming in his report opined that P’s persistent lumbar back pain was a result of contusion/sprain of the back with diffuse soft tissue injury but no significant structural damage. Maximal medical improvement had been achieved and no surgery was required. Prognosis was fair but the residual pain over P’s lumbar back was expected to be persistent and amounted to about 3.5% impairment of the whole person. P was fit to resume work as a hairstylist but with reduced work efficiency or to take up other jobs of a sedentary and non-manual nature such as clerk or telephone operator.

*Pain, suffering and loss of amenities*

1. The undisputed medical evidence shows that P suffered from persistent residual back pain. I accept that P still suffers from back pain and left leg weakness/numbness at time of the trial. Her condition is aggravated by activities that require back movement or by standing, sitting or walking for a prolonged period. Both medical experts opined that no surgery is required and I accept further medical treatment will not be therapeutic. However, that does not mean that P will not require relief from the residual pain. Even after achieving maximum medical improvement, P is still on pain relief medication. The ebb and flow of P’s pain during/after physiotherapy management illustrates the benefit of pain relief.
2. There has been some suggestion of P’s doubtful motives by reason of her refusal to undergo medical assessment in 2001 and 2002. However, I accept on balance that P genuinely considered she had not sufficiently recovered for proper medical assessment. There is no suggestion that P has been slack in attending physiotherapy or occupational therapy or follow up sessions. She frankly accepted that there was significant improvement during physiotherapy or occupational therapy sessions. It is the painful relapse during the aftermath that troubled her. Dr Richard Poon noted that P tried heavier housework to ready herself for work which resulted in relapse of the symptoms and he accepted that the complaints were genuine. Indeed, following the relapses, the public hospital doctors did grant P sick leave and refer her for further treatment.
3. It was further suggested that P exaggerated her complaints during the functional capacity evaluation in November 2001. A careful reading of the report showed it noted equivocal symptoms, but the examiner was careful to recognise that the equivocal results might be due to fear of pain and re-injury or to deliberate sub-performance. The examiner also recommended re-testing after informing P of the equivocal symptoms (presumably to cross-check the equivocal signs) but there is no evidence of any re-testing before me.
4. I agree with Dr Richard Poon that the fact P felt better by the end of 2001 than in February 2003 did not detract from the genuine nature of P’s complaints. We are after all dealing with P’s subjective pain and discomfort.
5. P’s residual pain is clearly a permanent impairment and it affects both her work as a hairstylist as well as her household chores. P’s work as a hairstylist requires a 11-hour day, most of which is spent standing or twisting/bending the body at different angles. Some hairstylists work sitting down. Whilst it is arguably possible that P may be retrained for such purpose, I note P’s practice of working whilst standing. On the home front, P has a young daughter who understandably requires coddling and carrying at times. P now has to seek her sister’s help in caring for the child. P also cannot do heavy housework.
6. Even so, although the permanent residual impairment will cause P pain and discomfort, P’s injury does not seem severe. There is no neurological impairment. Whilst I accept that keeping a posture (whether walking, sitting or standing) for a prolonged period will aggravate P’s pain, I am not persuaded that her present tolerance is 15 minutes. There is no convincing medical reason why her tolerance regressed so substantially. Further, I am also not convinced that P’s sleep disturbance, if any, is debilitating for she told Dr Poon Kai Ming that no pain was experienced whilst lying in bed. I accept that P has decreased interest in social activities because of the discomfort, but I am not convinced her sex life or matrimonial harmony was affected by her injuries. There is no medical evidence of such complaints. Even the psychologist report dated 8th April 2003 which deals with more personal matters made no mention of such problems although P was divorced in 2002.
7. This falls short of the serious category in **Lee Ting Lam**’s case. Ms Leong submitted that the claim under this head should not be less than HK$250,000.00 (**Yeung Sze v Win Art Design & Decoration Co Ltd** HCPI6/2000, Master M Yuen (unreported, 27th June 2001), **Lung Kwong Ying v So Sai Lo & ors** HCPI206/2001, Seagroatt J (unreported, 9th August 2002), **Ali Shoukat v Hang Seng Bank Limited** HCPI3/2003, Suffiad J (unreported, 23rd June 2004) and **Limbu Man Bahadur v Tsang Chan Fai & anor** HCPI486/2003, Mr Recorder Kwok SC (unreported, 29th July 2004)). Referring to **Shek Kam Ching v Po Kee Construction Engineering Ltd & ors** [2002] 3 HKLRD 795 and **Ho Moh v Tam Yiu Keung trading as Yiu Sun Construction Engineering Company & anor** HCPI1251/1998, Master Lung (unreported, 18th January 2001), Ms Tan suggested HK$120,000.00. I find that the appropriate award should be HK$170,000.00.

*Pre-trial loss of earnings*

1. It is agreed that P is entitled to pre-trial loss of earnings for the whole sick leave period from Date to 12th June 2003 in the sum of HK$13,514.00 x 29 24/30 months = HK$402,717.00. The question is whether P is entitled to loss of earnings for the remaining pre-trial period from 13th June 2003 to 8th November 2004.
2. Ms Tan submitted that P could have returned to her pre-accident work after expiry of the sick leave period. Ms Tan accepted in the course of her oral final submissions that P was not malingering, but pointed out that P was not pro-active in looking for work. She referred to Dr Richard Poon’s opinion that P could return to full time work after a year’s sick leave and there was no psychological problem that prevented P from getting work. Ms Tan did not complain that P mentioned to prospective employers that she had a back problem and reduced efficiency (see Dr Poon Kai Ming’s report), but submitted that P was dilatory in looking for job opportunities. Ms Tam relied on **Chiu Wing Sze v Chan Wing Wai & anor** [2001] 2 HKLRD 92 to say that if the medical evidence supported there being no loss of earnings, none would be awarded.
3. Ms Tan drew my attention to the fact that on several occasions P refused to go back to work upon the recommendation of the occupational therapist and that she declined to be medically assessed. I have dealt with this matter above. In any event, they relate to her condition during sick leave and there is no dispute over her loss of earnings during her sick leave period. In fact, after her sick leave, P did try to return to work.
4. I accept P’s evidence that even before expiry of her sick leave, she has approached Chow for work as part-time hairstylist but was refused. Chow told her there was no part-time job in their trade and pointed out that if she was not at work, another hairstylist would serve her customers and in the long run she would lose her customers. If P just served walk-in customers, it would adversely affect her income and D’s income/image. Au’s denial of P having approached Chow for work after Accident is vague and Chow has not been called as a witness. P’s evidence is supported by Lam’s evidence that as a matter of corporate policy D preferred not to employ part-time hairstylists since it would be difficult for them to generate customer following, a situation commercially detrimental to D. This quite matches P’s evidence as to why Chow refused her request. Further, as early as in December 2002 P had already informed the psychologist of D’s refusal of her request to return to part-time work.
5. I accept that P made reasonable and appropriate attempts to look for jobs like office assistant and home caretaker by registering with the Labour Department, attending the single interview for office assistant referred by the Labour Department (which unfortunately did not result in any response from the prospective employer) and checking out newspapers and making telephone calls to look for part-time hairstylist work. P said she explained her injury and waist pain to her prospective employers and that she might have to take time off if her pain became severe. None gave her even the chance of an interview. In my view, if P properly reflected her physical condition without exaggeration (which I accept she did) to her prospective employers, I do not consider such conduct to be malingering or obstructive conduct. Given the poor response from Labour Department’s job centre, I do not blame P for losing confidence in the referral service and not renewing the registration after expiry in January 2004.
6. Although P has been unemployed and is now on social welfare assistance, I am persuaded that after expiry of her sick leave, P was capable of returning to part-time but not full-time hairstylist work due to reduced efficiency or she could handle other sedentary non-manual work. This is supported by Dr Richard Poon’s report which recognised that she had genuine back pain and Dr Poon Kai Ming’s report which confirmed she had reduced efficiency even if she went back to hairstylist work. I find that D can hardly return to full-time 11-hour day hairstylist work with much of time spent in standing and twisting/turning her body. On a full day P served about 20 customers.
7. But any reduced efficiency resulting in serving fewer customers immediately translates to a lowered income because as a hairstylist P earns her commission by splitting customers’ service charges with her employer. Indeed, Lam confirmed other salons in the hairdressing trade also operated on a commission-based system. I am therefore convinced that after 12th June 2003, P suffered partial pre-trial and post-trial loss of earnings.
8. The next issue is the appropriate multiplicand for partial pre-trial loss of earnings. Ms Leong submitted P properly assumed she could perform half of her pre-accident work, hence the multiplicand is HK$13,514.00 ÷ 2 = HK$6,757.00. Ms Tan submitted that the multiplicand should be HK$3,000.00 per month. She referred to Lam’s evidence that in view of the high unemployment rate and poor economic condition, the monthly income of a hairstylist with P’s years of experience would be about HK$10,000.00 per month. P did not lead any evidence to refute such assertion and did not produce any other evidence of the current earnings of a hairstylist of similar experience as P’s. Lam has continued to remain in the hairdressing trade up to the time of trial and I accept his evidence in this respect. However, such sum of HK$10,000.00 was reflective of the income of a full-time hairstylist. I accept that P was capable of doing half of her pre-accident work. In such circumstances, the monthly multiplicand should be HK$10,000.00 ÷ 2 = HK$5,000.00.
9. The partial pre-trial loss of earnings from 13th June 2003 to 8th November 2004 are HK$5,000.00 x 16 27/30 months = HK$84,500.00. Thus the total pre-trial loss of earnings are HK$402,717.00 + HK$84,500.00 = HK$487,217.00.

*Future loss of earnings*

1. The agreed monthly multiplicand is HK$3,000.00. P is now 35 years old. Ms Leong submitted that the appropriate multiplier was 14 (**Kwan Wing Sang v Chi Chiu Engineering Co Ltd** [1997] HKLRD H49, **Leung Lai Yin v Yeung Kei Chi (t/a Shun Hing Furniture Decorating Construction) & anor** [2000] HKLRD D14 and **Lee Kim Fung v Lok Lun Keung & anor** [2003] HKLRD C15). The claimants in the first 2 authorities cited by Ms Leong were males who worked as driver/delivery worker and carpenter. The claimant in the last authority was a male police sergeant and the multiplier was affected by his qualification for promotion. Ms Leong submitted that as P’s job as a hairstylist did not require as heavy physical demand as the claimants in the cited authorities, she should have a longer working life.
2. Ms Tan submitted that the appropriate multiplier was 11 (**Mak Yiu Keung v Ho Cheung Kat** [1995] 3 HKC 575 where the claimant was a carpenter).
3. There is no evidence before me of the length of the working life of hairstylists, particularly female hairstylists. P herself had changed jobs as a hairstylist a number of times before joining D and said that mobility in the hairdressing trade was high. Although the job is less demanding than manual work such as carpenter or delivery worker, it is by no means certain that a female hairstylist’s working life will be longer. In the circumstances, I am of the view that the appropriate multiplier is 13.
4. Thus the future loss of earnings is HK$3,000.00 x 12 months x 13 = HK$468,000.00.

*Loss of MPF benefits*

1. Loss under this head should be calculated at 5% of lost earnings. The total loss under this head is (HK$487,217.00 + HK$468,000.00) x 5% = HK$47,760.00.

*Future loss of earning capacity*

1. Ms Tan submitted that there should be no award under this head as there was no real risk that P would be handicapped in the labour market. Dr Richard Poon said P only suffered mild residual symptoms in the lower back and left lower limb. She submitted there was no evidence that if P found a sedentary job she would likely lose her new job or that she would be put to any particular disadvantage. If P resumed work as a hairstylist, she would be able to sit at times when cutting hair for customers. Ms Tan asked me to bear in mind that although P’s job with D was a full-time job, she was at the time of Accident on probation and she previously changed jobs regularly. She cited **Ho Chi Ming v Union Rife Hong Kong Ltd** [1999] HKLRD 357 in support where the claimant was only engaged in temporary casual work.
2. Ms Leong submitted that P would be prejudiced in the labour market in obtaining comparable employment by reason of her injuries, education background and employment history. P claimed the sum of HK$6,757.00 x 6 months = HK$40,542.00 under this head.
3. In my view, apart from P’s limited education and apparent lack of non-hairstylist skills, P will be handicapped in competing in the open labour market due to her disabilities, ie her residual pain and reduced efficiency. She cannot go back to being a waitress given her back condition. P had looked for non-hairstylist work but it is evident that her registration with the Labour Department’s job centre has not been fruitful. She made attempts to look for part-time hairstylist work to no avail. Au’s/Lam’s evidence makes it quite clear that she will find it hard to keep her customers and her job if she cannot be a full-time hairstylist. D is not prepared to employ part-time hairstylists and Lam said others in the trade would have similar concerns against part-time workers. Thus the risk of being thrown onto the labour market is real.
4. I refer to **Christopher Gordon Young v Lee Chiu** CACV131/2003 (unreported, 19th May 2004) where the Court of Appeal discussed the approach to awards of loss of earning capacity. Reyes J held that the judge must be qualitatively satisfied that a person might be forced into the job market and due to his injury would have to exert himself to secure a job similar to the one previously enjoyed. “But once so satisfied, the judge can only award a rough and ready lump sum.” I agree with such approach and award HK$40,000.00 under this head.

*Tonic food*

1. In the hope of a speedy recovery, P consumed tonic food such as tin chai, chicken essence and bird’s nest. She consulted Chinese herbalists who said tin chai was good for internal injury. She believed chicken essence and bird’s nest would help her sleep better. P did not have the relevant receipts but she spent about HK$7,000.00 on tonic food.
2. Ms Tan accepted HK$2,000.00 as reasonable allowance for tonic food. She submitted that P was unable to produce any documentary support or any medical justification for consumption of tonic food. Ms Tan relied on **Chiu Wing Sze**’s case (supra) where it was held that only a reasonable sum would be awarded where there was no evidence as to the advisability or suitability of tonic food. She also referred to **Shek Kam Ching**’s case (supra) where the costs of tonic food were disallowed as they were ineffective for prolapsed disc.
3. In my view, taking into account the injuries and disabilities as well as the convalescence period, I accept that HK$3,000.00 is a reasonable sum under this head.

*Other special damages*

1. Travelling and medical expenses were agreed at HK$925.00 and HK$1,653.00 respectively.

*Conclusion*

1. I summarise the award for P’s loss and damages as follows :

|  |  |
| --- | --- |
| Pain, suffering and loss of amenities | HK$170,000.00 |
| Pre-trial loss of earnings | HK$487,217.00 |
| Post-trial loss of earnings | HK$468,000.00 |
| Loss of MPF benefits | HK$47,760.00 |
| Loss of earning capacity | HK$40,000.00 |
| Tonic food | HK$3,000.00 |
| Other special damages | HK$2,578.00 |
| Less employees’ compensation | (HK$407,265.00) |
| Total | HK$811,290.00 |

1. Interest is payable on the award for pain, suffering and loss of amenities at 2% pa and on pre-trial loss of earnings and special damages but less employees’ compensation from Date to the date of judgment at 4% pa and thereafter at judgment rate until payment.

*Costs*

1. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that D shall pay P costs of the action (with all costs reserved, if any) to be taxed if not agreed with certificate for counsel.

(Marlene Ng)

District Judge

Ms Susanna Leong instructed by Messrs Huen & Partners for the Plaintiff.

Ms Vera Tan instructed by Messrs Au-Yeung, Cheng, Ho & Tin for the Defendant.