DCPI 1777/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1777 OF 2005

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

BETWEEN

PRISCILLA LAU

(Formerly known as PRISCILLA K M HO) Plaintiff

and

CHAN YIN HONG (陳燕航) 1st Defendant

ELITE INT’L (HK) t/a

JENNY BEAUTY COLLEGE 2nd Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 18-20 May 2009

Date of judgment: 31 July 2009

**JUDGMENT**

1. In 2005, Lau (the Plaintiff) and Chan (the 1st Defendant) attended a beauty course held by the College (the 2nd Defendant). During a manicure practice session on the first day of the course, Chan caused a cut on the skin of the nail base of Lau’s left thumb. Lau commenced legal proceedings against Chan and the College for damages as a result.
2. Lau first commenced proceedings in the Small Claims Tribunal (Case No.SCTC 18993/2005). The case was transferred to the civil jurisdiction of this Court (DCCJ 2797/2005). In December 2005, it became the present personal injuries action.
3. According to her pleading, Lau claims against Chan for the unlawful acts/injuries due to persistent obvious malicious or outrageous conduct allegedly done to her. These allegedly resulted in her bodily injury and nervous shock.
4. Chan is said to be in breach of the following alleged duties:
   1. *common* duty of care under the neighbour principle; and
   2. *implied term of the course* that Chan and Lau were under a duty of mutual respect and confidence that Chan would not commit any unlawful act against Lau.
5. The pleaded case against the College is:
   1. negligence and/or breach of duty of care to Lau; and
   2. breach of duty as occupier to Lau as a visitor.
6. Both liability and quantum are in dispute. Apart from denying liability, Chan also raises the defence of contributory negligence on the part of Lau.

**The incident**

1. The course was called “European Manicure and Hand Foot Treatment” course. This was one of the courses organised by the College under the Government’s Industry Skills Upgrading Scheme. The course lasted for 3 days: 31 March; 7 April and 14 April 2005. The last day was the examination day. The course was conducted by the instructors of the College.
2. In the morning of 31 March 2005, Chan entered and took her seat in the classroom. Lau entered later and took the seat next to Chan. They did not know each other at all previously.
3. At 4:30 pm of that day was the manicure practice session. The learners had to work in pairs and to take turn in practising manicure on the other. Lau and Chan, who were sitting as neighbours, became a pair in the practice. Chan took the first turn to practise manicure on Lau. Chan started working on Lau’s left hand.
4. In the course of the session, Chan, with the manicure clipper she was using, caused a cut on the thumbnail base of Lau’s left hand. The cut was about 0.5 cm long and there was a little bleeding. After the class instructor had treated Lau’s wound by applying some tea tree oil on it, the practice continued and Chan worked on Lau’s other hand. The first day of the course ended later that day.
5. On 7 April 2005, which was the second day of the course, Chan again entered and took her seat in the classroom before Lau did. What happened when Lau entered the classroom and afterwards are in dispute. The fact was that on 2 April 2005, Lau already filed her claim against Chan and the College in the Small Claims Tribunal.

**Lau’s case**

1. By her statement and in court, Lau gave evidence that Chan somehow behaved in a weird and hostile manner towards her on the first day of the course. When Lau sought to talk to Chan, Chan would fall back, open her eyes wide and stare at Lau. Instead of talking to Lau, Chan would also turn around to chat with the other learners sitting behind her and she would cover her mouth while doing that. Lau felt ignored by Chan.
2. During the manicure practice session, Lau rested her left hand on the towel roll on the table. She complained that despite her advice, Chan wilfully carried on talking and chatting with the instructor. Suddenly and without warning, Chan cut the left thumbnail base with the manicure clipper that Chan was using. The sharp pain caused Lau to scream.
3. According to Lau, Chan did not explain or apologise to Lau for what she did. The instructor also did not ask Chan to explain what Lau described as unlawful injury to Lau. The instructor asked Lau to render her right hand for Chan to continue the practice, after having treated her wound with the tea tree oil. Chan was said to have scolded Lau afterwards. At the end of the day, Chan even picked up the piece of cut-out flesh from the table and said that it was a just little cut. Chan then threw the piece away together with other waste.
4. On the second day of the course on 7 April 2005, Chan allegedly persisted in scolding and accusing Lau in the classroom, when Lau sought to ask her why she wounded her on 31 March. Chan was said to be furious.
5. Lau then complained to the staff of the College. Subsequently the secretary of the College by the name of Mabel Chan escorted Chan to come to apologise to Lau. The staff discouraged Lau to call for the police. Mabel Chan also spoke for Chan, saying that the incident was not intentional.
6. Later that day, while Lau came out of the toilet, Chan stood right in front of her with a fierce look and stared at her. Lau was scared and hurried to leave. But Chan followed behind Lau until another learner stopped Chan. Lau claimed that she was intimidated by Chan’s threatening behaviour during the rest of the course. She described this as bullying by Chan.

**Chan’s case**

1. According to Chan, the atmosphere of the class in the morning of the first day of the course was relaxed and friendly. Besides Lau, she did talk to other learners sitting behind her. But she denied that she ever behaved in the strange manner towards Lau as alleged by Lau. When it came to the manicure practice session in the afternoon, Chan asked whether she or Lau should practise the manicure first. It was Lau who suggested that Chan took the first turn.
2. According to Chan, it was Lau who took the initiative in conversing with her. Chan answered Lau’s questions occasionally and tried to focus on the manicure practice. However Lau kept talking and sometimes failed to keep her hand steady while talking. When Chan was trimming the skin at the base of the Lau’s thumbnail, Lau suddenly moved her hand and thus causing the cut. The cut caused a little bit of bleeding.
3. Upon that, Chan apologised and asked the instructor to come over. After examining the wound, the instructor commented that it was only a trivial wound. The instructor then brought some tea tree oil and applied it to the wound. After the simple treatment, Lau indicated that Chan could continue with the manicure practice. Lau rendered her right hand for the practice accordingly.
4. At the end of the session, Chan asked Lau again whether the wound hurt and Lau indicated that there was no problem. Chan also observed that there was no more bleeding from the wound.
5. In the morning of 7 April 2005, Chan again arrived at the classroom before Lau did. But when Lau arrived, Lau started to demand explanation from Chan of what she did to her on the first day of the course. Lau’s complaint was brought to the attention of the staff of the College and eventually Mabel Chan. This developed into a conversation among these persons at the reception area.
6. Somehow Lau recorded this conversation at the reception area. According to the recording, Lau first asked to see the Principal of the College that morning. Conversation between the staff of the College and Lau then began. Lau complained about what happened on 31 March 2005 and that Chan had not apologised to her. The staff of the College apparently tried to mediate and also proposed to change the seating arrangement for Lau in the class for the rest of the course.
7. The matter came to the attention of Mabel Chan. According to Chan, Mabel Chan came to the classroom to inform her of Lau’s complaint. Chan told Mabel Chan that she did apologise upon the accident but nevertheless agreed to come out to the reception area to apologise to Lau again.
8. According to the recording, Chan did follow Mabel Chan to the reception area and apologise to Lau as suggested by Mabel Chan. However Lau repeated that it was too late for Chan to apologise. Before returning to the classroom, Chan reiterated that she had apologised to Lau after the accident.
9. Lau followed by asking Mabel Chan to acknowledge receipt of her letter to the College. That transpired to be Lau’s letter of that date referring to her claim in the Small Claim Tribunal. By that letter, Lau requested the College to provide the personal particulars of Chan by 6:15 pm that day. The fact was that Lau already filed her claim against Chan and the College in the Small Claims Tribunal on 2 April 2005 and Lau needed the personal particulars of Chan apparently for service of the legal proceedings.
10. The second part of the audio recording captured Lau’s request to see Mabel Chan indeed at about 6:00 pm that day. In reply to Lau’s written request mentioned above, Mabel Chan explained to Lau that the College was not in a position to disclose the personal data of the learners. This marked the end of the conversation and the recording.

**Claim against Chan**

1. Lau made no secret of her allegation that Chan wounded her intentionally and that Chan targeted to bully her. Lau explained that this was her inference from the circumstances.
2. I have tremendous difficulty in accepting the suggestion that Chan targeted Lau. Lau and Chan did not know each other prior to the first day of the course. There was no circumstance then that might explain why Chan would set out to cause harm to her fellow-learners in the class, not to mention to target Lau. It was also Lau who chose to sit next to Chan who was already in her seat that morning.
3. The behaviour of Chan that morning as described by Lau was indeed too odd to be reconcilable with the fact that they continued to sit as neighbours uneventfully until what happened during the manicure practice session at about 4.30 pm that afternoon.
4. Equally, there was no circumstance then that might suggest that Chan would deliberately wound Lau during the manicure practice. Lau agreed to Chan taking the first turn to practise manicure on her. According to Chan, she had also performed other procedures on Lau’s hand. Lau had no complaint about them. The manner in which Lau was injured did not per se suggest intentional harm. The extent of the 0.5 cm cut of the skin at the base of the nail of the thumb is by any standard trivial.
5. Lau emphasized that in the audio recording of the conversation on 7 April 2005, Chan uttered words to the effect that had she been intentional, she would have stabbed Lau (with the clipper). But as part of the entire conversation then, these words could not possibly be taken more seriously than simply said by Chan to attempt to reason with Lau who persisted in accusing her.
6. Lau subsequently reported the matter to the police. But no result of the police investigation is available that might point to Chan’s culpability in this incident. Apparently Lau was dissatisfied with the police investigation. In January 2008, she wrote to the police, alleging “misfeasance” on the part of the police for failing to investigate. Lau also accused the police officers concerned of perverting the course of justice.
7. Seeing Lau and Chan testify and considering their evidence, I prefer the evidence of Chan to that of Lau. I have no difficulty in rejecting Lau’s assertion that this was a case of unlawful and deliberate wounding. This was clearly an accident in the manicure practice session.
8. In her closing submission, I asked and Lau confirmed that her cause of action in respect of her injury on 31 March 2005 is that it was not an accident. Nevertheless, for completeness, I proceed to consider whether Chan should be liable for her injury as an accident.
9. Of the causes of action pleaded against Chan, the claim on the basis of the “implied term of the course” that Chan owed Lau a duty of mutual respect and confidence not to commit any unlawful act against Lau is devoid of any sound legal and factual basis. The reference to the “neighbour principle” suggests that Lau is claiming in negligence. The pleading of a “common duty of care” was a misnomer.
10. Lau suggested that Chan must have possessed knowledge about manicure by the time of the course and that Chan was an expert in beauty industry. Chan never denied her previous training in aesthetics and aromatherapy prior to the course. She admitted having worked as a beautician providing facial treatment. She also admitted working as a consultant in a body slimming establishment. But she denied that she had been trained or was knowledgeable about the manicure that she now paid to learn from the course.
11. I accept Chan’s evidence. The evidence shows that the course was primarily designed for current practitioners in the beauty industry. The syllabus specified that the course was to provide *basic* manicure and hand foot care skills training. The level was *elementary*. Like Chan, Lau too applied for registration with the course as a practising beautician then. For such purpose, her then employer also certified her as having had 3 years’ experience in the industry.
12. In my view, both Chan and Lau enrolled themselves as learners in the course. It would not be reasonable to impose on Chan the duty towards another learner to exercise the care as that expected of an expert as alleged by Lau. Such standard of care could not be expected of Lau or other learners either.
13. Under the general duty to exercise reasonable care expected of a learner in the course, was Chan in breach of such duty? Upon my preference of Chan’s evidence to that of Lau, the answer to the question is in the negative. I do not find that the injury to Lau was caused by Chan’s failure to handle the manicure clipper properly or to pay attention to the practice. In the circumstances of this case, I find no room or need to consider the issue of contributory negligence.

1. I am also not satisfied that there was any bullying by Chan of Lau. Even assuming that Chan was far from being gentle towards Lau or that Chan expressly showed her dislike of Lau, I am not satisfied that such attitude affords Lau with any actionable cause of action in tort against Chan.

**Claim against the College**

1. Of the causes of action pleaded against the College, the alleged breach of duty on the part of the College as the occupier is devoid of any merits. No doubt the College was the occupier of the premises where the course was held and Lau was a lawful visitor there. But there is simply no basis whatsoever for any suggestion that Lau’s complaint was due to the physical condition of the premises or things done or omitted to be done on the premises.
2. The remaining cause of action against the College is really that in negligence. The particulars of negligence of the College as pleaded are as follows:
   1. causing or permitting Lau to attend the course where she could be easily injured or bullied by other learners;
   2. exposing Lau to risk of damage or injury that the College knew or ought to have known;
   3. failing to take any or reasonable care to see that Lau would be reasonably safe in attending the course;
   4. failing to provide and maintain a safe and proper system to the course;
   5. failing to provide any or adequate staff;
   6. failing to control or supervise the course so as to prevent Lau from being injured or bullied while attending the course;
   7. failing to give any or adequate warning to the learners before the practice session to ensure the safety of Lau in the course;
   8. failing to provide any or adequate instruction to Lau before the practice session to ensure her safety in the course;
   9. failing to impose warning and proper punishment to Chan so as to prevent unlawful acts including the bullying and threatening behaviour, while Lau was attending the course;
   10. failing to provide or to execute preventive measure or policy against unlawful acts so as to prevent Lau from being injured and bullied while attending the course;
   11. failing to investigate and to make statement as to the unlawful acts or injuries;
   12. preventing Lau from asking Chan why she wounded Lau;
   13. permitting the unlawful acts or injuries directly or indirectly.
3. As far as this were a case of intentional or unlawful wounding, there was no circumstance prior to the incident suggesting to the College that such kind of intentional or unlawful act might happen. Likewise, there was no circumstance prior to this course suggesting to the College that there might be bullying among the learners in the course.
4. As the College would not have reasonably foreseen such acts, it should not have reasonably been expected to take any step to prevent such acts from taking place or to prevent Lau from being harmed by such acts when she attended the course.
5. There should be no dispute that the College owed a general duty to exercise reasonable care in organising the course and ensuring that the learners would be reasonably safe in attending the course. In view of my finding that the injury to Lau on 31 March 2005 was an accident, was the College in breach of its duty in failing to prevent such accident from happening?
6. The evidence shows that the College was supposed to organise the courses in accordance with the detailed administrative guidelines and information booklet issued by the Skills Upgrading Scheme Secretariat. According to Wong, the director of the College, the course materials used by the College were approved by the Secretariat.
7. The contents of the course materials were meticulous which also contained a section on the suggested professional code for practitioners. The evidence shows that the instructor of the course in question was certified by the College to have successfully completed a professional nail trainer course.
8. According to Chan, the instructor was meticulous in her teaching. This included reminding the learners of the need to handle the sharp equipment such as clipper or scissors with care during the course. In my view, the fact that the sharp equipment should be handled with care was probably too obvious to call for any specific warning to these learners.
9. According to Chan, during the practice, the instructors would walk around the classroom to monitor and if necessary to answer questions and to provide assistance. The instructor had an assistant in the class. According to the syllabus, and as confirmed by Chan, there were within 20 learners in the classroom. If required, the instructor and the assistant were able to attend to the learners fairly quickly.
10. I accept the evidence of Chan and Wong. In my view, there is no question of inadequate staff to manage the class and to assist the learners as alleged by Lau. The fact was that after the accident, Lau allowed Chan to continue the manicure practice on her other hand which Chan also managed to finish uneventfully.
11. Lau alleged that the College had failed to give appropriate warning or to impose appropriate punishment on Chan for what she did to Lau on 31 March 2005. I do not see how the after-event warning or punishment as alleged would have any bearing on preventing the incident from happening in the first place. Insofar as Lau’s allegation related to the alleged bullying by Chan during the rest of the course, I have ruled against that as a matter of fact above.
12. During the trial, Lau put forward an argument that was admittedly not pleaded. This is what she described as “reasonable expectation” of what the College should do after her injury on the first day of the course. This seems to relate to her complaint about the College’s siding with Chan and discouraging her from reporting the matter to the police.
13. How the so-called “reasonable expectation” and the failing of which on the part of the College are said to amount to an actionable tort is not clear. I do not think they do. In any event, judging from the audio recording of the conversation at the reception area on 7 April 2005, I think what the College tried to do then was to mediate and to settle Lau’s complaint. Chan in her evidence shared such an understanding. It is unfair to suggest that by doing that, the College sided with Chan against Lau.
14. Further, nothing said then suggested that the College ever sought to prevent Lau from taking any action. The fact was that Lau sought to speak to the Principal that morning when she had already filed her claim with the Small Claims Tribunal against both Lau and the College. Lau eventually also filed her report with the police.
15. I am not satisfied that the claim against the College is proved.

**Quantum**

1. For completeness, I proceed to consider the quantum of damages. The starting point is that it is her burden of proof. But this aspect of Lau’s case is equally problematic.
2. In her pleading, Lau alleges that besides the physical finger injury, she sustained nervous shock or more particularly major depressive disorder. She had loss of memory and confidence, impaired concentration, increased fatigue, lack of energy, panic, stress, difficulty in performing mental tasks, nightmares, disturbance of sustaining abuse and bullying as well as phobia about fingernail equipment.
3. Lau claims loss of the chance of becoming a manicure therapist, expenses for future expert treatment for major depressive disorder and phobia as well as occupational therapy. She also claims general damages and other special damages.
4. The evidence shows that Lau had consulted various doctors several times during the period of 2 years since the accident.
5. On the day following the accident, Lau consulted Dr Lam who was resident doctor of St Theresa Hospital. Dr Lam’s subsequent report recorded the 0.5 cm abrasion on her finger with no active bleeding. There was no record of any treatment or medicine needed.
6. In late June and early August 2005, Lau visited the hospital apparently complaining of fear about manicure related equipment, bad dreams and anxiety. The diagnosis was manicure equipment phobia. Vitamins were prescribed to ease her feeling and referral to psychiatrist was given.
7. Lau visited Evangel Hospital in early October 2005 and March 2006. The report from the hospital’s resident psychiatrist recorded the diagnosis of major depressive disorder. However, claiming that she was receiving treatment from a therapist, Lau refused psychiatric treatment offered by that hospital.
8. The only other treatments evidenced by the documents were the couple of visits Lau made to the Chinese medical doctor of the Hong Kong University in 2005.
9. Lau alleges that her psychiatric disability amounts to 4% of her whole person. The basis for her to say that was probably Dr K Singer who had apparently examined her and prepared a medical report. The medical report of Dr Singer was actually filed pursuant to the order of the Master back in September 2006. Lau was ordered to attend examination by the medical expert engaged on behalf of Chan and the College but this had not been successful in the absence of Lau’s co-operation. This caused the Master to order in January 2008 that the parties were not allowed to adduce medical expert evidence, including but not limited to the report by Dr Singer, without leave of the court. Lau had appealed against such order of the Master out of time. Such appeal was dismissed.
10. The position of the parties regarding the medical expert evidence had not changed by the time of the pre-trial review before this court. In the circumstances, it would not be fair to give leave to Lau to adduce the report by Dr Singer without affording the opposite parties the opportunity of countering it properly by medical expert evidence.
11. How far can one rely on the medical evidence in hands? I agree with Mr Poon for Chan that the diagnosis by the doctors inevitably had to rely on the subjective complaint by Lau. In the circumstances of this case, it is doubtful how much of Lau’s complaint could be taken seriously.
12. In court, Lau claimed that she was in a state of shock after the accident so much so that she “acted like a robot”. But the fact was that on the day following the accident, she went to see the doctor who found only the 0.5 cm abrasion that was not bleeding. As mentioned above, there was no record of the need for any treatment or medicine. On the day following that, she went to the Small Claims Tribunal and filed her claim against Chan and the College.
13. On 7 April 2005, Lau went to the College to attend the second day of the course. But as mentioned above, she went prepared with the letter to the College requesting for the personal particulars of Chan. She asked to see the Principal and eventually had the conversation with the staff of the College and Chan. She was prepared and managed to make an audio recording of the conversation both then and after the course that day. The conversation captured in the recording does not appeal to me that Lau acted “like a robot” as she claimed.
14. Not only did Lau finish the second day of the course, but she also attended the examination a week later and managed to pass that. In court, she sought to explain that during the examination, she still could not really handle the equipment but simply put up an appearance of using them.
15. In court, Lau seemed to suggest that had the College shown more concern and met her “reasonable expectation” by reporting the matter to the police, she would not have felt fearful and she would not have suffered phobia or depression.
16. Considering the evidence in hands, I am most sceptical about the complaint about her condition. Even according to her own explanation, it seems that Lau developed the alleged psychiatric condition not as a result of the physical injury suffered on 31 March 2005 but her dissatisfaction with how the College handled the matter. As mentioned above, Lau fails to prove how such complaint about the College constituted an actionable tort.
17. Lau named numerous decided cases in her submissions. But it was Mr Poon for Chan who explained them in court. It suffices for me to say that I agree with him that they are far from being relevant or useful, whether in relation to liability or quantum.

**Conclusion and order**

1. The inevitable conclusion in this case is that the claim must be dismissed. Accordingly I make a nisi order that Lau shall pay the costs of Chan and the College in this action, including any costs reserved. Costs shall be taxed, if not agreed. Chan’s costs shall be subject to legal aid taxation. In the absence of any appointment within 14 days to argue costs, this costs order shall become absolute.

Simon Leung

District Judge

Representation:

The Plaintiff, appearing in person

Mr Anthony K POON of Messrs Ho Tse Wai & Partners for the 1st Defendant upon the assignment by the Director of Legal Aid

Mr LOK Tse Bong of Messrs Huen & Partners for the 2nd Defendant