# DCPI 2002/2019

[2022] HKDC 288

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2002 OF 2019

-----------------------------------------

BETWEEN

IAO, CHOI I Plaintiff

and

INGRID MILLET LIMITED Defendant

-----------------------------------------

Before: Deputy District Judge Calvin Cheuk in Court

Dates of Hearing: 29-30 November, 1 and 3 December 2021

Date of Judgment: 20 April 2022

--------------------------

JUDGMENT

--------------------------

*INTRODUCTION*

1. This is an action commenced by the plaintiff, a masseuse, against the defendant, her employer, for her personal injuries sustained during employment on 1 April 2017. The employment contract between the parties was made on or about 15 November 2016. The plaintiff had 3 years of similar experience before she was employed by the defendant.
2. The plaintiff’s case is that on 1 April 2017 at about 12:50 pm, the plaintiff was performing massage for a customer in Room No 3 (the “**Room**”) of the defendant’s shop. In doing so, she was required to rotate and twist her trunk because the massage room was too small and full of apparatus. Further, the defendant had never instructed her that she was allowed to remove the apparatus. Consequently, she sprained her waist and back and sustained injuries (the “**Accident**”).
3. The plaintiff raises 4 causes of action against the defendant, namely: (1) negligence; (2) breach of the implied terms of the contract of employment; (3) breach of common duty of care under Section 3 of the Occupiers’ Liability Ordinance, Cap 314 (“**OLO**”); and (4) breach of statutory duties under Sections 6(2)(a)-(e) of the Occupational Safety and Health Ordinance, Cap 509 (“**OSHO**”).
4. The following witness statements are filed:-
   1. The Chinese Witness Statement of the plaintiff herself dated 15February 2020;
   2. The Supplemental Chinese Witness Statement of the plaintiff dated 20 September 2021;
   3. The Chinese Witness Statement of Mak Sin Nga (“**Madam Mak**”), an Human Resources Officer of the defendant dated 15 October 2021; and
   4. The Chinese Witness Statement of Lau Chi Ha (“**Madam Lau**”), a beauty consultant of the defendant dated 15 October 2021.
5. The defendant had originally also filed the Chinese Witness Statement of Chung Pik Kan (“**Madam Chung**”) dated 14 April 2020. However, it was expunged by consent of both the plaintiff and the defendant during the course of the trial for reason that Madam Chung had left Hong Kong for good and was no longer available to give evidence at trial on behalf of the defendant.
6. The parties also filed a joint medical report prepared by Dr Lam Chi Keung Johnson (“**Dr Lam**”) on behalf of the plaintiff and Dr Tsoi Chi Wah Danny (“**Dr Tsoi**”) on behalf of the defendant.
7. The plaintiff was represented by Ms Debora Poon and the defendant was represented by Mr Gary Chung (together with Mr Jethro Pak).

*LIABILITY*

1. As submitted by Ms Poon in her closing submissions, issues of the present case are:-
2. Whether and how the Accident occurred;
3. Whether the Accident occurred as a result of any breach of the defendant’s duties;
4. Whether the plaintiff was guilty of contributory negligence; and
5. The quantum that should be awarded if the defendant is found liable.
6. In paragraph 5 of the Statement of Claim, the plaintiff pleads that:-

“The circumstances of the subject accident are as follows:-

1. On 1st April 2017, the plaintiff was in the course of her employment with the defendant and was working at the Shop.
2. At about 12:50 p.m. of the same day, the plaintiff was in the course of her employment with the defendant. The plaintiff was performing massage for a customer of the defendant in Room No. 3 of the Shop.
3. In doing so, she was required to rotate and twist her trunk because the massage room was small and was full of apparatus. The defendant had never instructed her that she was allowed to remove the apparatus. While she was massaging the foot of that customer, she sprained her waist and back. As a result thereof, she sustained injuries.”
4. Further, paragraph 9(b) and (c) of the plaintiff’s witness statement states as follows:-

“9. 涉案意外的詳情：

…

(b) 本人在中午12時50分入3號房幫客人做離子按摩，客人要求本人幫她做腳部的按摩，本人坐在床尾位置，側腰並且用力按離子於客人腳底，其間，把腰扭向左邊，不斷用離子按腳底時，本人換一換身體方向，想把身體轉回中間，但轉身時聽到“啪”一聲，沒有為意是扭傷腰部。

(c) 至下午1時5分當整個按摩過程完成時，本人直起腰起身向客人說按摩結束了，才發現腰部隱隱作痛，右邊腰間動不了，站起來感到右邊腰極痛，痛到站也站不直身體，離開房間後，本人按著受傷的右邊腰部，慢慢坎向前枱完成客人的療程及質素紙後，再慢行到員工休息室休息。”

1. When the plaintiff was under cross examination, however, she gave various different versions of how the Accident occurred. In particular:-
2. There are inconsistencies in the various versions as to whether she was facing the customer or facing the wall when the Accident occurred; and
3. There are inconsistencies in the various versions as to whether she was turning her trunk to the left or to the right at the time.
4. While I can understand a witness may not be able to recall the details of an event, the plaintiff’s performance, in my view, was more than that. She was changing her versions of event whenever she found the questions difficult to answer.
5. The credibility of the plaintiff’s case is further undermined by the following contemporaneous evidence. First of all, when the plaintiff attended A&E Department of North Lantau Hospital (“NLH”) on 1 April 2017 in the afternoon, the medical report stated that:-

“Miss Iao complained of sprained back while working on the day of attendance. She complained of right lower back pain worsen with walking. NO lower limbs weakness and numbness nor incontinence was reported. No gastrointestinal or urinary symptoms were complained by patient. She did not report any associated fall/trauma. She was able to walk with no aids.”

1. Further, in the A&E Clinical Documentation Form of NLH of the same day, under Chief complaint, it was recorded that:-

“? Sprained right lower back at 13:00 today.

No limbs numbness ow weakness.”

1. Under the section “History & Clinical Findings”, it was also recorded that:-

“IOD case

?sprained right lower back at 13:00 today,

no trauma/fall

No limbs numbness or weakness

No incontinence

Ablet to walk with no aids”

1. In my view, these contemporaneous documents, in particular the fact that she did not report any associated fall or trauma and the question marks as shown in the medical records, suggest that the plaintiff herself did not know how she was injured.
2. The plaintiff’s own WhatsApp audio messages on 2 April 2017 to Madam Chung, the defendant’s supervisor at the time, also suggest the same. They record the following:-

“又唔係話扭親條腰或者整親啲骨嘅 不過佢係嗰個軟骨移左位佢幫我整返正佢 咁就即係依一個星期佢話要慢慢適應囉 咁唔算話係啲咩大問題嘅 咁佢話因為我後生個底子好 咁好快就會好返㗎啦咁樣囉 只要我乖乖哋喺屋企即係休息多啲 同埋 即係唔好做啲咁粗重嗰啲嘢 等佢慢慢好返咁就OK囉”

“唔係 我唔知點樣扭一扭整到佢 跟住我諗呢啲應該係可能係我以前啲舊患囉 咁佢話而家冇事囉即係幫我整返 咁我咪喺屋企休息吓囉”

1. As to the Form 2 filled in on 11 April 2017 by Madam Mak, the defendant’s Human Resources Officer, there were also no details of how the plaintiff was injured. It only records that the plaintiff sprained her back while she massaged a customer:-

“請敘述意外如何發生，並說明雇員當時正在進行的工作（附註4）替客人進行療程時不慎扭傷腰部”

1. For the reasons above, I do not find the plaintiff’s evidence regarding how the Accident occurred reliable and do not accept it.
2. Ms Poon submits that in the Defence, the defendant pleads that the plaintiff told her supervisor Madam Chung at about 1:15 pm on 1 April 2017 that she sprained her waist as she was clearing and cleaning material and equipment; and she did not mention at the time she sprained her waist as she was performing a massage at all. Ms Poon submits that the defendant’s assertion is not supported by evidence and contradicted by Form 2 completed by Madam Mak.
3. While that may be correct, the burden remains on the plaintiff to prove in what manner the Accident took place. If the plaintiff did not and does not know how she sprained her back and sustained injuries (as I find in the present case), it begs the question how she can prove that the Accident occurred as a result of any breach of the defendant’s duties. For these reasons, I find that the plaintiff’s claim should be dismissed on this ground alone.
4. In any event, I consider that the plaintiff’s claim should be dismissed for the following additional reasons. First of all, according to the plaintiff, the setup and condition of the Room was shown in some photographs adduced by the plaintiff. The source of the plaintiff’s photographs is however dubious.
5. The plaintiff admits that the relevant photographs were not taken by her, but by a former colleague named “Cat”. She did not know the exact date on which those photographs were taken, but it should 8-10 days after the Accident, and it should have been in April 2017. “Cat” was however not called as a witness in these proceedings.
6. Further, the plaintiff’s photographs were attached to an email dated 11 September 2017, with a recipient known as zinarose@netvigator.com. The plaintiff, however, says she cannot remember who that was, and neither can she remember the reason for her to send that email.
7. In my view, I do not find the plaintiff to be a credible witness and she was plainly less than forthcoming.
8. Without knowing the setup and condition of the Room at the time of the Accident, I cannot decide whether the plaintiff’s allegation that the Room was too small and full of apparatus (which led to the Accident) is supported by proper evidence.
9. Secondly, as to whether the plaintiff was permitted to move the apparatus in the Room, I agree with the defendant that there is a notable change of case in the plaintiff’s evidence. In her witness statement made on 15 February 2020, the plaintiff only stated that she had never been instructed by the defendant to move the machines. But in her supplemental witness statement made on 28 October 2021, her evidence changed to aver that the defendant specifically forbid all masseuses from moving beauty apparatus out of the rooms. In the plaintiff’s oral evidence given at the hearing, such instruction was further said to have been conveyed by the manager in a meeting.
10. In contrast, the defendant’s witness Madam Lau confirmed in her evidence that there was never such a meeting in which the defendant prohibited masseuses from moving beauty apparatus. According to Madam Lau, it is a common occurrence for the defendant’s staff to move apparatus. She also said that she had previously seen the plaintiff moving beauty apparatus.
11. The apparatus were fitted with wheels, indicating that they were meant to be moved around. Madam Lau also explained the defendant’s operation that apparatus would be required to be moved and swapped among rooms to fit the services the customers required. Madam Lau, as well as the defendant’s another witness Madam Mak, confirmed that they had experience of moving the apparatus.
12. Regarding movement of the bed, it is the evidence of both Madam Lau and Madam Mak that the bed was not difficult to move. According to the evidence of Madam Lau, it is practical for masseuses and beauticians to move the bed in order to fit the relevant procedure required. As such, the choice is on the plaintiff herself to move the bed if she considered the distances between the rear wall was insufficient for her to perform the foot massage. Madam Lau suggests that the plaintiff could have also asked the customer to change position, namely by placing her head at the end of the bed and the feet at the front of the bed.
13. In overall, I prefer the evidence of Madam Mak and Madam Lau over the plaintiff. I also accept the evidence of Madam Mak and Madam Lau and reject the evidence of the plaintiff whenever they contradict each other. In my view, even if there was some degree of congestion in the Room, a reasonably experienced masseuse (such as the plaintiff) should be able to carry out her job safely without substantial difficulty, whether by moving the beauty apparatus or the bed, or by asking the customer to change position.
14. For the reasons above, I dismiss the plaintiff’s case on liability, whether in relation to negligence, breach of the implied terms of the contract of employment, breach of OLO or breach of OSHO.

*QUANTUM*

1. If I am wrong on the liability issue, I will need to decide on the quantum issue, which I now turn to. There are several preliminary observations that I would like to set out before I go on the individual items.
2. First of all, while Dr Lam and Dr Tsoi agree that the plaintiff suffered from soft tissue injury to her low back, they also agree that the plaintiff exaggerated her conditions. As shown in the surveillance taken in February/March 2018 (ie less than 1 year after the Accident), and agreed by the experts, notwithstanding the plaintiff was carrying a walking stick, she did not need to rely on it.
3. Secondly, from the immigration record of the plaintiff between 1 April 2017 to 2 July 2020, the plaintiff left Hong Kong for Macau and the Mainland China in multiple times starting from 13 October 2017 (ie less than 7 months after the Accident). Under cross-examination, the plaintiff explained that she sought regular treatments from some unlicensed medical practitioners such as acupuncture, Chinese bone-setting and so on. No medical reports or receipts are, however, adduced in these proceedings.
4. Thirdly, the plaintiff went to Australia between 29 May 2019 to December 2020, and then from February 2021 to September 2021. It appears that the plaintiff had no problem taking long haul flights. There is again no evidence showing that she attended any medical treatment in Australia.

*(1) PSLA*

1. After considering the various authorities submitted by both the plaintiff and the defendant, I agree with the defendant that the plaintiff’s injury was relatively minor. I consider that the award of PSLA should not exceed $150,000.

*(2) Pre-trial Loss of Earnings and MPF*

1. The total salaries received by the plaintiff from 11 November 2016 until 1 April 2017 amount to $74,839.67. There are 142 calendar days and therefore about 4.6 months. I consequently find that the plaintiff’s pre-trial earnings to be $74,839.67/142 x 30 = $15,811.20/month.
2. As to the reasonable sick leave period, I prefer the evidence of Dr Tsoi, who opines that 6 months will be sufficient.
3. In the premises, the plaintiff’s pre-trial loss of earnings and MPF should be: $15,811.20/month x 6 months x 1.05 = $99,610.56.

*(3) Loss of Future Earnings and MPF*

1. The experts agreed that the plaintiff should be able to return to work as a beautician.
2. Dr Tsoi opines that the plaintiff should have no problem in resuming her pre-injury job in almost full capacity, with her future employability to be unlikely affected. Purely for parties’ reference, he opines that the loss of earning capacity is 1%.
3. Dr Lam opines that the plaintiff will be able to return to work as a beautician with more self-exercise to strengthen the low back, and a gradual return-to-work program to improve her endurance. He estimates that the plaintiff’s injury itself should carry 2% loss of earning capacity.
4. Given the minimal impact on the plaintiff’s resumption of work as a beautician, I do not consider that the Accident caused any real loss of future earnings and MPF. I therefore decline to make any award under this head.

*(4) Loss of Earning Capacity*

1. This head of damages was explained by Lord Fraser of Tullybelton in *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176, at 183, as follows:-

“……to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk – see *Moeliker v A*. *Reyrolle & Co. Limited* [1977] 1 WLR 132, 140, where Browne L. J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant’s age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.”

1. The evidence shows that the impact on the plaintiff’s earning capacity by the Accident was minimal. Further, by May 2019 when the plaintiff went to Australia, in my view, the plaintiff had no intention to seek further employment. This is consistent with the fact that she was not in any employment at the time of trial. I therefore will not make any award under this head.

*(5) Special Damages*

1. I agree with the defendant that $15,000 will be sufficient under this head.

*(6) Future Medical Expenses, Tonic and Nourishing Food*

1. The plaintiff no longer claims damages under this head. I also consider that there is no need for further medical expenses. Hence the award under this head is nil.

*(7) Summary on Quantum*

1. Credit should be given to the employees’ compensation received by the plaintiff in the amount of $271,341.34.
2. In summary, the total amount of award is as follows:-

|  |  |
| --- | --- |
| PSLA | $150,000.00 |
| Pre-trial Loss of Earnings and MPF | $99,610.56 |
| Loss of Future Earnings and MPF | Nil |
| Loss of Earning Capacity | Nil |
| Special Damages | $15,000.00 |
| Future Medical Expenses, Tonic Food and Nourishing Food | Nil |
| Sub-total | $264,610.56 |
| Less: EC received | ($271,341.34) |
| Total | Nil |

*CONCLUSION*

1. For the reasons above, I dismiss the plaintiff’s claim.
2. There be a costs order nisi that the plaintiff shall pay the costs of the defendant in these proceedings with certificate for one counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
3. I thank Ms Poon, Mr Chung and Mr Pak for their assistance.

( Calvin Cheuk )

Deputy District Judge

Ms Debora Poon, instructed by Ambrose Ng & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Gary Chung & Mr Jethro Pak, instructed by Winnie Leung & Co, for the respondent