TV Media Pte Ltd v De Cruz Andrea Heidi and Another Appeal
[2004] SGCA 29

Case Number : CA 119/2003, 122/2003

Decision Date : 08 July 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J; Yong Pung How CJ

Counsel Name(s) : N B Rao and Fazal Mohamed Bin Abdul Karim (B Rao and K S Rajah) for first appellant; Simon Tan Hiang Teck (Attorneys Inc. LLC) for second appellant; Raj Singam, Wendell Wong and Tan Siu-Lin (Drew and Napier LLC) for respondent

Parties : TV Media Pte Ltd — De Cruz Andrea Heidi

Civil Procedure – Costs – Principles – Whether appellants entitled to full costs if appeal not wholly successful

Companies – Directors – Liabilities – Whether director of company personally liable for authorising, directing, procuring torts committed by company – Whether exceptional circumstances existing to justify lifting of corporate veil to make director personally liable

Damages – Apportionment – Joint tortfeasors

Damages – Quantum – General damages for pain and suffering and loss of amenities – Whether award of $250,000 too high

Damages – Quantum – Whether multiplier of 34 years for future medical expenses too high

Tort – Negligence – Causation – Whether circumstantial evidence proved on balance of probabilities that relevant slimming pills caused liver failure – Whether chain of causation broken by respondent's failure to buy pills from authorised retailer – Whether chain of causation broken when respondent continued consuming slimming pills after experiencing unusual physical symptoms

Tort – Negligence – Duty of care – Whether distributor of slimming pills owing duty to consumers to exercise reasonable care in promotion, endorsement and advertisement of pills – Whether distributor's reliance on importer's director's assertions regarding slimming pills adequate defence to negligence – Whether distributor's advertisement of slimming pills as safe justified because pills approved by Health Sciences Authority

Words and Phrases – "Authorised, directed and/or procured" – Whether phrase limited to single positive act – Whether phrase includes omissions forming negligent course of conduct

8 July 2004 *Judgment reserved.*

Yong Pung How CJ (delivering the judgment of the court):

1 The appellants in these two appeals disputed the decision of the court below, which held them liable in negligence for the respondent's liver failure. We heard the appeals on 26 May 2004 and reserved judgment.

The parties

2 The respondent, Andrea Heidi de Cruz ("Andrea"), was a 27-year-old artiste with MediaCorp Studios ("MediaCorp") when she suffered liver failure. She instituted an action against five defendants in the court below for the liver damage, allegedly caused by her consumption of a slimming drug, "Slim 10". The first defendant, a company incorporated in China, was the manufacturer of Slim 10

(the "Chinese manufacturer"). As the Chinese manufacturer could not be located for the purpose of service of the writ of summons, the trial could not proceed against it. The second defendant, Health Biz Pte Ltd ("Health Biz"), was a Singapore company which imported and sold Slim 10. The third defendant, Semon Liu ("Semon"), was the director and principal shareholder of Health Biz. He was also the appellant in the second of the two appeals before us. TV Media Pte Ltd ("TV Media"), the fourth defendant, was the sole distributor of Slim 10 in Singapore. It appealed in the first of the two appeals before us. The fifth defendant, Rayson Tan ("Rayson"), was Andrea's colleague who supplied her with Slim 10. Andrea claimed in negligence against Health Biz, Semon and TV Media, and sued Rayson for breach of contract.

Andrea's case

3 For conciseness, this judgment will only set out Andrea's version of events in full. The material facts disputed by the appellants will be dealt with in conjunction with the appellants' arguments.

4 Andrea came to know Rayson and his wife, Chen Liping ("Liping"), in December 2001 when they were cast together in the Chinese drama series *No Problem*. They spent a lot of time together during filming. During this period, Andrea saw TV Media's television commercials on Slim 10 that featured Liping, who was known to be having problems with her weight. The commercials showed "before" and "after" pictures of Liping, and Andrea was very impressed by the difference. The commercials were "infomercials", which were longer and more informative than ordinary commercials. They represented that Liping had tried the pills which were "100% herbal". They featured TV Media's name and stressed that TV Media was the distributor of Slim 10.

5 Andrea saw life-sized cardboard cutouts and large posters of Liping advertising Slim 10 at TV Media's retail outlet in Beach Road. She viewed the advertisements aired over various television channels in Singapore until late March 2002 when she went to Bangkok. She knew that TV Media was a large and reputable company as her family had bought products from it before, and she had seen its advertisements in the United States. Hence, she believed that TV Media would have made the necessary tests to ensure that Slim 10 was safe for consumption before endorsing and marketing the product so aggressively. Andrea testified that the reputation, reliability and credibility of health supplements were very important to her. She would not have bought Slim 10 from Rayson had it been marketed by Health Biz or the Chinese manufacturer as she knew nothing about them and they had no reputation in Singapore.

6 In December 2001, Andrea told Rayson that she had seen the Slim 10 advertisements and commended him on how much weight his wife had lost. Rayson replied that the pills really worked and that Andrea should take Slim 10 if she was concerned about her weight. A few days later, Rayson asked Andrea whether she wanted the Slim 10 pills as he had some in his car. He offered them to her at $130 per bottle of 120 capsules, which was cheaper than each bottle's retail price of $149.90. Andrea decided to buy two bottles and was given two clear, unmarked test tubes containing the capsules. Rayson told her that side effects might include insomnia, chills and pain in her calves. Other than that, the pills were definitely safe as they were all natural. Andrea paid him for the pills, not doubting that they were the Slim 10 pills advertised by TV Media, since Rayson's wife was after all the poster girl for the product. The transparent test tubes and the white or off-white colour of the capsules also resembled those shown in TV Media's advertisements.

7 As she was still filming at the time, Andrea did not start taking the pills immediately, as she did not want her performance to be affected by insomnia. She only started consuming Slim 10 when filming for *No Problem* was coming to an end, around late January or early February 2002. She had to

take four capsules three times a day. As Andrea experienced some of the side effects mentioned by Rayson, as well as palpitations, she reduced her intake of the pills to four-four-two pills per day so as to minimise disruption to her sleep.

8 On 15 February, she sent a text message to Rayson telling him that she had "run out of skinny pills". Some time on 18 February, Rayson handed her a second batch of 240 pills. These were packed in aluminium foil, and Rayson explained that he had asked the Slim 10 boss to pack them in this manner as Rayson always kept the pills in his car and did not want them to be affected by the heat. Again, Andrea did not doubt that these were Slim 10 pills. She started consuming this second batch sometime in early to mid-March 2002 after finishing the first batch of pills.

9 On 29 March, Andrea flew to Bangkok where she finished the second batch of Slim 10. On 11 April, she returned to Singapore and sent another text message to Rayson asking him to order more pills. On 14 April, Andrea's sister observed that Andrea's eyes looked very yellow and jaundiced. Andrea saw her doctor the next day, whereupon the doctor told her that her liver was inflamed and her eyes very jaundiced. Andrea went to Changi General Hospital where it was confirmed that her liver was inflamed and she had to be hospitalised. She was referred to Mount Alvernia Hospital. Sometime in the second week of her hospitalisation, Andrea underwent a liver biopsy, with inconclusive results.

10 On 3 May, Dr Dede Selamat Sutedja of the National University Hospital ("NUH") liver team visited Andrea. He prescribed some drugs for her but she threw them up. On 4 May, she was moved to NUH. On 5 May, she was encephalopathic. She was unable to recognise anyone and was muttering incoherently. She was taken to the intensive care unit for immediate liver dialysis, which allowed her to recover her lucidity temporarily. As Andrea's fiancé was the only suitable liver donor who could be found, the Ministry of Health granted special permission for an unrelated living donor transplant to be carried out. On 7 May, Andrea was transferred to Gleneagles Hospital because the NUH liver team had never carried out a living donor transplant. Dr Tan Kai Chah of Gleneagles Hospital successfully carried out the transplant.

11 In the meantime, the Singapore Health Sciences Authority ("HSA") had convened an urgent meeting with Health Biz on 2 April 2002 because people who had consumed Slim 10 were complaining of medical problems. The following day, Semon and Peter Boo, the Vice President of Health Biz, wrote in to HSA appealing against the recall of Slim 10, as it would have devastating consequences for Health Biz. On 15 April, HSA ordered Health Biz to suspend all sales of Slim 10 immediately and to withdraw the product from the market by 29 April 2002.

12 Later tests found that Slim 10 contained the undeclared substances of nicotinamide, fenfluramine, thyroid gland extract and N-nitrosofenfluramine. Fenfluramine is an appetite suppressant which can damage heart valves but does not normally cause liver damage. It is banned in various countries, including the USA, Japan, Korea, Hong Kong, China and Singapore. N-nitrosofenfluramine is an adulterated version of fenfluramine, suspected of causing Andrea's liver damage.

13 Andrea sued TV Media for negligently advertising and promoting Slim 10 as being 100% herbal and safe. She also sought to hold Semon personally liable for authorising, directing and/or procuring Health Biz's negligent acts of importing and selling Slim 10.

The issues on appeal

14 We have categorised the issues before us in the following manner:

(a) TV Media's appeal on liability.

(i) Whether Andrea consumed Slim 10.

(ii) When Andrea consumed Slim 10.

(iii) Whether TV Media owed Andrea a duty of care.

(iv) Whether TV Media breached this duty of care.

(v) Whether TV Media's breach caused Andrea's liver failure.

(vi) Whether Slim 10 caused Andrea's liver failure.

(b) Semon's appeal on liability.

(i) Whether Semon authorised, directed or procured Health Biz's negligence.

(ii) Whether Health Biz's corporate veil should be lifted.

(iii) Causation.

(c) The appellants' appeal on quantum.

(i) Apportionment of blame.

(ii) Quantum of damages awarded.

TV Media's appeal on liability

Whether Andrea consumed Slim 10

15 The judge found that the pills taken by Andrea "came through an unbroken chain from [Health Biz] to [Rayson] to [Andrea] … no one was in any doubt that the only slimming pills imported by [Health Biz] were those meant to be marketed as Slim 10": See *De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co Ltd* [2003] 4 SLR 682 at [162].

16 TV Media disputed this finding on several grounds. We now deal with them in turn.

Different packaging of the pills

17 TV Media first contended that the judge had no basis for ruling that what Andrea consumed were Slim 10 capsules since they were packaged differently from the Slim 10 pills advertised and sold by TV Media.

18 The first batch of pills bought by Andrea came packaged in two clear test-tubes. The second batch was contained in two aluminium foil packets. Both the test-tubes and aluminium foil packets were unmarked. In this aspect, they differed from the Slim 10 pills packaged for TV Media by DAC Pharmalab ("DAC") into marked, clear test tubes for retail and distribution. TV Media disclaimed any knowledge that these unmarked and untested capsules were being sold by Health Biz, Semon or Rayson, arguing that it should not be liable to Andrea if she had bought them.

19 In reply, Andrea adduced Semon's testimony that although the pills came in a variety of unmarked packages, Health Biz had imported only one product from one manufacturer, which product

was Slim 10. As all the packages contained Slim 10, he had never tried to distinguish the various packages or to mark them as containing Slim 10.

20 TV Media knew that Slim 10 came in a variety of unmarked packages. It also knew that Health Biz was conducting product testing with various MediaCorp artistes by providing them with samples of Slim 10 in its original unmarked packaging. Moreover, a TV Media representative, Wilfred Wong ("Wilfred"), testified that he and another staff member had tried Slim 10 products that had come in various forms of packaging and in different colours. Despite the fact that the pills were neither uniformly packaged nor properly marked, Wilfred trusted that he was consuming Slim 10 because the pills came "direct from Semon Liu". In our view, this was a reasonable assumption to make. It also belies TV Media's attempt to portray Andrea as unreasonable for trusting that the pills she bought from Rayson were also Slim 10. Rayson's wife was, after all, the poster girl of Slim 10, and he knew the Slim 10 boss, Semon. There was every reason for Andrea to trust that the pills Rayson gave her were really Slim 10.

21 As such, we are of the view that TV Media has no leeway to disclaim knowledge that Slim 10 was being distributed in unmarked packages of various types. The fact that Andrea had consumed capsules that were not packaged in properly marked test tubes in no way precluded the judge from ruling that she had nevertheless consumed Slim 10.

Different formulations of Slim 10

22 TV Media then asserted that different variants of Slim 10 were being imported. As it was under the impression that it was only advertising and retailing a product approved by HSA, it should not be held liable if Health Biz, Semon and Rayson were importing and selling "pirated pills" of different formulations.

23 We are not persuaded by this argument. We accept Semon's testimony that each batch of pills that arrived would be given to DAC for repackaging. DAC would take a round number of pills for repackaging and give the surplus pills from each batch to Rayson for distribution to his friends, relatives and colleagues. This means that the pills distributed by TV Media, Health Biz and Rayson all came from the same batches and that TV Media is equally implicated in the sale of different batches of Slim 10.

24 Moreover, it is clear that none of the pills being distributed was approved by HSA, save for the initial sample of Slim 10 submitted to HSA in June 2001 when Health Biz was applying for product listing approval. In fact, the judge found that although Health Biz gave a written undertaking to HSA to conduct tests for poisons and synthetic substances on each consignment of Slim 10, it failed to do so. Rather, "due to the hopelessly haphazard way in which [Semon] permitted the importation to be done, there was no definable 'batch or consignment' to even speak of": [15] *supra* at [183]. In turn, TV Media neglected to follow up on Health Biz's undertaking and blindly trusted Semon to keep his word. It therefore appears that subsequent batches of Slim 10 were not even tested, let alone HSA-approved. In our view, this sounds the death knell for TV Media's argument that it had only distributed HSA-approved pills whilst Health Biz and Rayson sold "pirated" pills.

Ignorance that Rayson was selling Slim 10

25 TV Media claimed ignorance that Rayson was selling Slim 10 on a large scale. It admitted knowing that samples were being given to Rayson to distribute amongst friends, relatives and other MediaCorp employees, but not that he was selling them for a profit. It submitted that since Andrea failed to purchase her pills through proper sales channels, imposing a duty on it would be akin to

making a legitimate retailer, selling original products, responsible for damage caused by Rayson who was selling counterfeit goods.

26 Again, we are wholly unmoved by this argument. TV Media, Health Biz and Rayson were clearly selling pills from the same source, which means that the "pirated pills" argument cannot stand. Whether Rayson was giving out the pills for free or selling them for a profit is irrelevant to the issue of TV Media's liability. Rather, having approved of the fact that Rayson would help to promote the pills amongst his circle of friends and colleagues, TV Media cannot now seek to disassociate itself from Rayson's actions.

Constituents of the pills

27 TV Media alleged that Andrea failed to adduce test results which showed that the ingredients of the pills she took were the same as those in Slim 10. However, as we find no compelling reason to overturn the judge's finding of fact that the pills taken by Andrea and those distributed by TV Media came from the same source, we do not see any necessity for Andrea to have adduced test results as to the constituents of the pills.

28 In the final analysis, we are of the view that TV Media has not provided sufficient reason for us to overturn the judge's finding that Andrea had indeed consumed Slim 10 pills, and that this ground of appeal must fail.

When Andrea consumed Slim 10

29 Having established that Andrea had indeed consumed Slim 10, we turn next to the issue of when she consumed Slim 10. There are three possible sets of dates on which Andrea could have consumed Slim 10 based on the evidence before the court.

30 The first range of dates falls between December 2001 and January 2002. Andrea gave these dates to the doctors at Mount Alvernia Hospital in the second week of her hospitalisation. The relevant clinical notes observed that Andrea was clinically well and alert. She was able to mention two other health supplements, Spirulina and Pcynogenol, which she had been taking, and to give a fairly accurate estimation of how long she had been consuming the products.

31 The second range of dates is between November 2001 and February 2002. Andrea gave these dates to the NUH doctors when she was first moved to NUH on 4 May 2002. At this time, Andrea was already encephalopathic and the credibility of this evidence is doubtful.

32 The third set of dates, which the judge accepted as correct, is between late January and early February 2002, and late March and early April 2002. Andrea gave these dates in her affidavit dated 6 March 2003, and confirmed them in her affidavit of evidence-in-chief and her testimony in court.

33 TV Media challenged the judge's acceptance of the third set of dates, arguing that the contradictory versions of Andrea's evidence in relation to the commencement and cessation times of her ingestion of Slim 10 showed that her evidence was neither truthful nor reliable. Instead, TV Media asserted that the first set of dates was the most accurate. Naturally, this set of dates was also in its favour since three months would have elapsed from the time Andrea stopped consumption of Slim 10 in January 2002 to her falling ill, thus ruling out any link between Slim 10 and her liver failure.

34 When analysing TV Media's arguments, we bore in mind that the litmus test for overturning

any finding of fact by a trial judge requires the appellant to show that the finding of fact is plainly wrong or unjustified on the totality of the evidence before the trial judge: *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305. After considering the totality of the evidence, we find that TV Media has failed to surmount this high threshold.

The third set of dates – Rayson's evidence

35 We note that although the judge was aware of the discrepancies in the dates given by Andrea, he found that Rayson's evidence "rescued" Andrea from these discrepancies. Rayson testified that he had only come to know Andrea well during the filming of "No Problem" in December 2001 and that she had asked him about the pills in late December 2001. He handed her the first two sets of pills on 11 January 2002. He adduced evidence of a text message sent to him by Andrea on 15 February, saying that she had run out of "skinny pills" and needed more of them, as well as a copy of a cheque for $260 (the cost of two sets of pills) from Andrea dated 18 February 2002. We agree with the judge that the cheque and text message are objective evidence consistent with Andrea's testimony that she received the second batch of pills on 18 February. As two sets of pills would have lasted Andrea 20 days if taken in the recommended dosage of 12 pills a day, the first batch of pills would at least have lasted Andrea until the middle of February if she began consuming them in late January or early February. Thus, the fact that Andrea sent Rayson the text message on 15 February supports Andrea's testimony that she only began consuming the pills when the filming for *No Problem* was coming to an end in late January or early February 2002, that she had reduced her dosage to ten pills a day and that she may have missed some doses due to erratic filming hours.

36 The second batch of pills would have lasted Andrea roughly 24 days if she consumed ten pills daily. On the premise that she began consuming the second batch after receiving them on 18 February, they would have lasted her until the middle of March. In fact, the second batch of pills may have lasted her longer than that, given her testimony that she had reduced her intake of the pills to ten pills daily, and since she may well have missed some doses along the way. This corresponds with the judge's finding that Andrea would have finished the second batch of pills around 20 March 2002 and no later than 29 March 2002. It also accords with Rayson's testimony that Andrea had sent him a text message around 21 March, asking him to help her buy more pills as she was going for a holiday in Bangkok and needed the pills for "maintenance", as well as with Andrea's own testimony that she finished the second batch of pills in Bangkok. As it is agreed that Andrea never consumed the third set of pills, she would have stopped taking Slim 10 after 29 March 2002. Hence, it is evident to us that the dates provided by Rayson are largely consistent with Andrea's testimony.

37 To get around this, TV Media sought to cast aspersions on Rayson's credibility, contrasting his insistence that he had paid $130 for each set of pills with the documentary evidence that he had only paid $100 for each set. We find this argument fallacious. Rather, we agree with the judge's finding that Rayson's evidence was all the more compelling because he had "no reason to state the dates falsely and would certainly gain nothing by assisting [Andrea] in advancing her case". We fail to see how it could be in Rayson's interests to lie about the dates on which he had sold the pills to Andrea. If he could prove that he had sold her the pills earlier, that would make it more difficult for her to establish that the pills had caused her liver failure, which would in turn weaken her case against him. Moreover, TV Media's arguments disregarded the existence of objective evidence that bears out Rayson's testimony about the dates.

The first and second set of dates

38 What weight should be accorded to the first set of dates given by Andrea to her Mount Alvernia doctors? The clinical notes documented that Andrea was alert and well when she gave her

answers. This was in contrast with Andrea's condition when she gave a second set of dates to the NUH doctors, since she was encephalopathic by then. Dr Julia Alexis Wendon, an expert witness for TV Media, testified that, in her experience, patients who have had acute liver failure have little or no recollection of the chronology of events pre-transplantation. We accept that this casts doubt on the accuracy of Andrea's affidavit evidence, supporting TV Media's case that the first set of dates is more likely to be accurate.

39 The judge explained his choice of the third set of dates by suggesting that Andrea may have been "nonchalant" in her answers during the taking of her medical history by the Mount Alvernia doctors, or distraught and confused at the discovery that her liver might be damaged: [15] *supra* at [163]. More importantly, we note that Rayson's evidence and the objective evidence of the text message and cheque, both dated after Andrea had supposedly finished the first batch of pills, support the third set of dates. In contrast, there is nothing to corroborate the first and second sets of dates.

Credibility of Andrea's evidence

40 Andrea asserted in court that she had overlooked one tube from the first batch of pills in her refrigerator. The judge did not accept this evidence, noting that it had surfaced very late in her testimony and appeared to have been "conjured up to match a starting date of consumption closer to Chinese New Year": [15] *supra* at [166]. TV Media submitted that Andrea's utter dishonesty on this aspect of evidence should render her entire evidence incredible. We disagree. Reprehensible as her lie may have been, we cannot reject her entire evidence as incredible, given Rayson's testimony and the objective evidence before us.

41 We are also not convinced by TV Media's other argument on this point, that the judge failed to take into account Andrea's evasiveness in not wanting to provide an answer on the precise or approximate time gap between the date she ordered the pills and the date they were delivered. We think that TV Media is clutching at straws here. Andrea's inability to recollect the timeframe of events that took place over one and a half years ago in any detail is perfectly understandable in the circumstances.

42 After careful consideration of the totality of the evidence, we find that TV Media has failed to prove that the judge's finding of fact was plainly wrong or unjustified by the evidence. This ground of appeal must fail. To this end, all issues canvassed by TV Media which turn on the dates of Andrea's consumption also fail.

Whether TV Media owed Andrea a duty of care

43 Apart from being the exclusive wholesale distributor of Slim 10, TV Media also advertised and sold the pills. The judge found that Andrea bought Slim 10 after being convinced by TV Media's advertisements that Slim 10 was effective and safe. He held that it was TV Media's corporate backing of the pills which assured Andrea of their safety, as she would not have relied on the names of Health Biz, the Chinese manufacturer, or any assurances given by Rayson to purchase herbal medicines which had no established reputation in Singapore. TV Media challenged this finding.

44 The three criteria for the imposition of a duty of care have been ably summarised by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. They are:

(a) foreseeability of damage;

(b) proximity of relationship between the parties; and

(c) that it is fair, just and reasonable to impose such a duty.

45 We will now consider each criterion in turn.

Foreseeability of damage

46 TV Media protested that it could not have foreseen that Andrea would take pills from unmarked containers without written precautions or dosage instructions, or that Health Biz and Semon would provide these unmarked, undeclared and untested pills to Rayson. This was essentially a rehash of the arguments which we have dealt with earlier in this judgment. TV Media knew that Health Biz was conducting product testing by getting Rayson to distribute Slim 10 to MediaCorp artistes in unmarked packaging. If so, TV Media must have foreseen that these artistes would then take the pills without the benefit of written precautions or dosage instructions. We are satisfied that the test of foreseeability of damage is met.

Proximity

47 The notion of proximity has been described in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 498 as including "reliance by one party upon such care being taken where the other party ought to have known of such reliance". TV Media averred that it should not owe a duty to Andrea, since she was not in the class of people who relied on TV Media's advertisements and bought pills from an authorised retailer. Rather, she was part of an "unknown and unlimited" class of people who may have acted on TV Media's statements. It sought to rely on a portion of Lord Reid's judgment in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 483 where he said:

> It would be one thing to say that the speaker owes a duty to a limited class, but it would be going very far to say that he owes a duty to every ultimate "consumer" who acts on those words to his detriment.

48 We do not agree that TV Media can rely on this statement to eschew its duty to the consumers of Slim 10 pills. *Hedley Byrne* dealt specifically with a situation where the only damage suffered was pure economic loss. The statement quoted above was made in the context of a discussion on the duty of care owed to a person who suffers pure economic loss through reliance on a negligent misstatement. It is worth noting that the courts have repeatedly distinguished economic loss claims from most physical damage claims, so as to take a more restrictive approach to the imposition of a duty of care in economic loss cases.

49 The case before us is patently a case of physical damage. Contrary to TV Media's claims, tortious liability to the world at large for physical damage due to defectively manufactured articles can be traced back to the seminal case of *Donoghue v Stevenson* [1932] AC 562. Although the *ratio decidendi* of *Donoghue v Stevenson* was confined to the liability of a manufacturer of goods towards ultimate consumers, the principle it laid down has since been extended to apply to negligent distributors of goods. Thus, it is established law that a distributor or wholesaler may be in a proximate enough relationship to the consumer so as to owe him a duty of care to check the safety of what he distributes: *Watson v Buckley, Osborne, Garrett & Co, Ltd* [1940] 1 All ER 174. That the distributor or wholesaler is also under a duty to take reasonable steps to deal with reputable suppliers is implicit in *Watson v Buckley*, where the court stressed the incautiousness of the distributor in buying its product from an unknown supplier.

50 In our judgment, TV Media was in a sufficiently proximate relationship to Andrea. Andrea would not have relied on assurances of safety from Semon, Health Biz or the Chinese manufacturer

because she did not know them or have any inkling as to their reliability or credibility. Similarly, it was unlikely that she would have relied solely on Rayson's word since he had no knowledge of Chinese medicine. She bought the pills because they had the backing of a reputable company, and merely chose to purchase them through Rayson for reasons of convenience and in order to secure a discount. We are of the view that the judge's finding of fact was eminently reasonable and should be upheld.

Fair, just and reasonable

51 In our view, it is fair, just and reasonable to impose a duty of care on TV Media. We cannot agree with TV Media's argument that to do so will open the floodgates of litigation to anyone who might have bought the pills from an illegitimate source, since we fail to see how Rayson could be termed an "illegitimate source" of Slim 10 for reasons given earlier in this judgment.

Andrea's failure to mention the advertisements to Rayson and Liping

52 Having examined the three *Caparo* criteria, it remains for us to deal with a peripheral issue raised by TV Media. Rayson testified that, contrary to Andrea's evidence, she never mentioned the Slim 10 advertisements when she asked him to obtain the pills for her, but only asked what the secret of Liping's weight loss was. TV Media asserted that Rayson's testimony was clear indication that Andrea had not seen the advertisements at the time she approached Rayson. If she had, its argument ran, she would surely have mentioned them to Rayson and Liping.

53 We disagree. A perusal of the relevant notes of evidence reflects that counsel for TV Media only asked Rayson whether he agreed that he and Liping had not mentioned anywhere *in their affidavits* that Andrea had asked about Slim 10 because she had viewed the TV Media advertisements. Rayson agreed that "there was no mention". Counsel for TV Media never asked Rayson whether Andrea had *actually* mentioned the advertisements to him. Andrea testified that she had done so, and the judge, who had the advantage of observing her demeanour, accepted her testimony. This quibble over semantics hardly provides us with strong enough cause to overturn the judge's finding of fact that Andrea was induced by TV Media's advertisements to buy the Slim 10 pills.

54 Having determined that all three *Caparo* criteria are satisfied, we endorse the judge's finding that TV Media did owe Andrea a duty of care in its promotion, endorsement and advertisement of Slim 10.

Whether TV Media breached its duty of care to Andrea

55 A defendant is in breach of his duty of care if his conduct falls below the standard of a reasonable and prudent man. In *Watson v Buckley*, distributors were held liable to a customer who was injured after applying their hair dye. The distributors did not ascertain the type of supervision under which the manufacture of the dye was carried out and never tested the solution supplied. Nevertheless, they advertised that the hair dye was "absolutely safe and harmless". The court ruled that their conduct was careless and adjudged them liable to the customer for his injury.

56 There are striking parallels between *Watson v Buckley* and the present case. TV Media did not ascertain the conditions under which the manufacture of Slim 10 was carried out and never took steps to test the pills. Nonetheless, it proceeded to hold them out as "100% natural" and "safe for consumption". As the judge commented ([15] *supra* at [186]):

> … [TV Media] was negligent in placing blind faith in everything [Semon] said. [Health Biz] had no

track record of any sort. [Semon] had no experience at all in the importation of Chinese medicines. Without verification, [TV Media] began accepting Slim 10 packs for sale. Again, without verification, it began to proclaim to the consumer world that Slim 10 was 100% herbal and was safe for consumption. It could not excuse its lack of diligence and care by plaintively pleading that the wording of its advertisements was vetted and approved by the HSA. It was the responsibility of the distributor to make sure that what it represented to the public was true and plainly, it was not.

The process of importing and testing Slim 10

57 TV Media contested this finding on several grounds. Before dealing with them, it is necessary to lay out the process by which Slim 10 was imported and tested in some detail. The original formulation which Semon intended to import through Health Biz was "yue zhi tang qing zhi shu". Semon sent samples of this product to Setsco Services Pte Ltd ("Setsco"), an accredited test laboratory, for testing. Health Biz then applied to HSA for import and wholesale dealer licences, as well as for conversion of the name "yue zhi tang qing zhi shu" to "Slim 10". In its application, Health Biz submitted two test reports from Setsco, as well as a sample for analysis. The licence for Slim 10 was granted on 27 June 2001.

58 In July 2001, the Chinese manufacturer launched a new version of Slim 10, "yue zhi tang jian fei jiao nang", which it described in a letter to Health Biz as being "our improved version of the slimming pill". However, the same letter pointed out that "both types of slimming pills [have] exactly the same ingredients and quantity". Health Biz later confirmed with HSA that it was seeking approval for the second name, not the first.

59 In August 2001, HSA asked Health Biz why the powder in the new version of Slim 10 and the original version of Slim 10 differed in colour and smell. The content of the new "yue zhi tang jian fei jiao nang" pills was brown, coarse and fragrant, whereas the original Slim 10 pills contained a smooth pale yellow powder. Health Biz assured HSA that from then onwards, Slim 10 capsules would only contain the yellow powder. On 1 November 2001, Health Biz sent HSA a letter of undertaking stating that it would ensure that all subsequent consignments of Slim 10 would be free from poisons and synthetic adulterants. We would highlight that it was *in exchange* for this letter that HSA granted Health Biz product listing approval on 2 November 2001.

60 It was not disputed that Health Biz eventually breached its undertakings to HSA. It did not test the next few consignments of Slim 10 for poison, but supplied these consignments to TV Media and Rayson without declaring that the pills were free of poisons, as required by the Medicines (Licensing, Standard Provisions and Fees) Regulations (Cap 176, Reg 6, 2000 Rev Ed). Keith Norman, a Scientific Officer in the Australian Federal Police Force who analysed samples of Slim 10 in July and August 2002, testified that all three samples of Slim 10 given to him for analysis contained brown powder, which indicated that Health Biz had breached its undertaking to HSA to import and sell only capsules which contained yellow powder. In turn, TV Media accepted the consignments for sale without checking that Health Biz had complied with its undertakings.

TV Media's misplaced faith in Semon

61 TV Media protested that it had no reason to disbelieve Semon when he indicated that each batch of pills would be tested prior to packing in Singapore to ensure the safety and quality of Slim 10. TV Media's litany of reasons for trusting Semon ran as follows: Semon was a successful businessman who ran an archery and chinchilla business, he had invested his own money in the manufacturing process, he had a famous grandfather and uncle, he had taken Slim 10 himself and lost

a lot of weight, he had agreed to take up insurance cover and he had kept TV Media constantly informed as to the status of the planning approval for the product and appeared to know what needed to be done.

62 We fail to appreciate the relevance of most of these factors to the matter before us. In our opinion, the points germane to the issue are those that follow. TV Media knew that Semon had no experience in the medical or pharmaceutical industry and that this was his first foray into Chinese proprietary medicine. TV Media did not conduct any independent checks on Semon or on Health Biz apart from checking the company's paid-up capital. It failed to check on Health Biz's system of business practices. TV Media omitted to conduct any independent checks on the Chinese manufacturer before signing the agreement to distribute Slim 10. Before distributing Slim 10 in Singapore, TV Media did not consult any expert herbalists or any legal experts about the distribution of Slim 10 but merely depended on the research that Wilfred carried out on the Internet, even though he acknowledged that he was not an expert herbalist. TV Media relied on the representation of Peter Boo ("Peter"), the Vice President of Health Biz, that as Health Biz already had a wholesale dealer's licence, TV Media did not need to apply for one as well. In the event, TV Media had to plead guilty to 20 charges of conducting wholesale distribution of Slim 10 without a wholesale dealer's licence.

63 We do not think that a reasonable distributor would have been so slipshod in its approach to marketing a new drug that would be ingested by consumers. On the contrary, a reasonable distributor would at least have taken steps to deal with a reputable supplier and, if it knew that the importer had no experience with such products, would have done more to ensure the safety of the product. As in *Watson v Buckley*, we cannot accept that it is a tenable defence for TV Media to assert that it had placed reliance on another party in the chain of distribution if it had neglected its own duties.

64 After enumerating the reasons for its trust in Semon, TV Media then denied placing blind faith in everything Semon had said. It offered as proof of this its insistence that the effective date of the contract between Health Biz and TV Media should be 1 December 2001, after product approval was granted by HSA. We are not satisfied with this explanation. A careful examination of the events leading up to the contract led us to conclude that the effective date of the contract was a mere formality since the actual distributorship agreement was originally dated 1 March 2001 and signed by both parties in July 2001, months before HSA granted product listing approval for Slim 10 in November 2001. In fact, it was only in mid-November 2001 that TV Media wrote to Health Biz proposing that the distributorship agreement be re-dated to commence from 1 December 2001. These were hardly the actions of a distributor which was truly anxious for product listing approval to be granted before entering into a distributorship agreement for the product. In the meantime, Semon had been supplying Slim 10 to Rayson for distribution to MediaCorp artistes with TV Media's approval, and this continued after 1 December 2001. It is therefore clear to us that TV Media supported the distribution of Slim 10 to consumers at all material times, even though none of these consignments of Slim 10 was tested for safety.

65 In *Leitz v The Saskatoon Drug and Stationery Co Ltd* [1980] 5 WWR 673; 112 DLR (3d) 106, the court found the distributor liable for falsely advertising that the sunglasses it distributed were impact resistant. The distributor had never conducted any tests on the sunglasses to determine if they were really impact resistant, and worsened this by devising a tag containing untrue information to entice consumers to buy the sunglasses. Similarly, TV Media failed to ensure that tests were conducted on the pills to determine their safety and instead advertised blithely that the pills were safe for consumption.

HSA's approval and testing

66 The linchpin of TV Media's assertion that it did not breach its duty of care was that it had placed its faith in HSA and only prepared the advertisements after HSA had given product approval for Slim 10 and approved the use of the phrase "100% herbal" in TV Media's advertisements. It argued that, as an approved body with scientific resources, HSA would have been able to provide a clear view on whether or not the pills were safe for consumption. HSA failed to detect the presence of fenfluramine in Slim 10 even though it was set out in the Setsco reports presented to HSA. Instead, HSA carried out its own tests and approved Slim 10. TV Media could not be blamed for relying on HSA's approval, as it was too onerous to expect TV Media to have insisted on seeing batch test reports and seeking professional advice about them. TV Media's role was confined solely to applying for the advertising permit.

67 In this respect, Dr Bosco Chen Bloodworth ("Dr Bloodworth"), Head of the Pharmaceutical Laboratory and of the Poisons Information Centre, HSA, explained that HSA did not usually rely on reports submitted by vendors, since vendors would not submit flawed reports damaging to their own interests. Rather, HSA would base its decision to grant the import licence on its own test results. It thus ignored the Setsco report, which set out the presence of fenfluramine, and conducted its own tests which screened for fenfluramine but did not detect it. Dr Bloodworth explained that fenfluramine was not stated as "fenfluramine" in the Setsco report but by its chemical name, which no one except a structural chemist would be familiar with as it was subject to numerous permutations. He insisted that HSA's role was only to ensure that the minimum level of testing had been satisfied. Importers were ultimately responsible for the safety of the product they were importing, as it was virtually impossible for HSA to test for every possible contaminant in Chinese medicine.

68 We agree with TV Media's submissions in so far as it asserted that HSA should bear some degree of responsibility when granting approval for a product. HSA is a government regulatory body whereas distributors clearly have a vested interest in promoting their products. We consider that laymen in Singapore wanting to buy drugs will indubitably place more confidence in HSA's stamp of approval on the product than in the distributor's platitudes about it. For HSA to insist that products are not necessarily safe even though it has given them its stamp of approval begs the question of what its role in the approval process is. We think that if HSA does not intend its approval process to signal a guarantee of the safety and quality of the approved product, it should make this clear to both importers and the public.

69 Nevertheless, we cannot condone TV Media's attempt to shirk its responsibility for ensuring product safety. The letter of undertaking, which Health Biz gave to HSA in exchange for product listing approval of Slim 10, reflected Health Biz's awareness of its responsibility to ensure that the pills did not contain poison or synthetic substances. It stated:

> To the best of [Health Biz]'s ability, [Health Biz] shall ensure that Slim 10 slimming capsules shall not contain any poison or synthetic substances or drugs in Slim 10.
>
> [Health Biz] shall comply to [*sic*] HSA's requirements to submit the Test Results for Toxic Heavy Metal and Microbial Contamination within two months of the import of the consignment of Slim 10 capsules from China.

70 Further, s 3(2)(d) of the Medicines (Licensing, Standard Provisions and Fees) Regulations required Health Biz to submit a declaration stating that Slim 10 was free from poisons and synthetic substances *before* selling *each* consignment of the pills. In our view, legislation would not require importers to submit such declarations and test results if HSA had indeed undertaken all responsibility to warrant the safety of the products it tests. Similarly, Health Biz's undertaking would not have made any sense in such a context. We also recognise that, as a matter of public policy, it might not be

reasonable to expect a government agency to carry out in-depth testing of each of the thousands of products submitted to it. Equally, it might not be economically efficient to place the costs of such testing on the government. Rather, given the large profits TV Media hoped to rake in from sales of Slim 10, we do not deem it too onerous for TV Media to have sought professional advice on the Setsco report.

71 In any event, we consider the issue of HSA's liability to be academic as it was not party to the proceedings below and none of the defendants made any attempt to join it as a third party to proceedings. As a joint tortfeasor, TV Media is still liable to Andrea for the whole damage she suffered. In our judgment, TV Media was not entitled to place such unquestioning reliance on HSA's approval of the product, and was accordingly in breach of its duty of care to ensure the safety of Slim 10.

TV Media's doubts about the safety of Slim 10

72 Our finding that TV Media had breached its duty of care to Andrea is fortified by the contents of several of its internal e-mails which were adduced in evidence. We will not detail the contents of these e-mails. Suffice it to say that the e-mails were telling evidence that TV Media had strong doubts about the safety of Slim 10, and knew or suspected that Semon was not taking adequate steps to ensure its safety.

73 It is painfully apparent to us that TV Media was manifestly more concerned about any "fallout" on the company than about taking steps to ensure the safety of Slim 10. This attitude evinces a callous disregard for consumer safety that we cannot condone, and we have no difficulty in finding that TV Media was in breach of its duty of care to Andrea.

Whether TV Media's breach caused Andrea's liver failure

74 The judge observed that if TV Media had taken care to insist on seeing the batch test reports and to seek professional advice on them, it would not have made its claims about the safety of Slim 10 on television. In consequence, Andrea would not have been lured to her "devastating debacle": [15] *supra* at [186].

75 TV Media appealed on the grounds of *novus actus interveniens* and contributory negligence. It adduced Andrea's testimony that whilst she was taking the pills, she had experienced chills, slight pains in her feet and calves, insomnia and palpitations. TV Media argued that Andrea was contributorily negligent in that she ought to have stopped taking Slim 10 or seen a doctor when she experienced these symptoms.

76 We do not agree that Andrea's omission to seek medical aid was so "wholly unreasonable" as to constitute a *novus actus interveniens* which would obliterate TV Media's wrongdoing. It is only where the act or omission of a party is of such a nature as to constitute a wholly independent cause of the damage that the intervening conduct may be termed a *novus actus interveniens*: *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507. Thus, in *McFarlane v Tayside Health Board* [2000] 2 AC 59, the House of Lords emphatically confirmed that the failure to undergo a termination of pregnancy or to give the child up for abortion did not break the chain of causation between a negligently performed sterilisation operation and an unwanted birth. Similarly, we fail to see how Andrea's failure to seek medical aid could be anything more than part of the sequence of events. It was certainly not a wholly independent cause of her damage.

77 TV Media did not plead the defence of contributory negligence below. We ruled in *Rajendran*

a/l Palany v Dril-Quip Asia Pacific Pte Ltd [2001] 3 SLR 274 at [19]–[20] that if the defence of contributory negligence was not pleaded below, or if the facts pleaded below were not sufficiently clear that the defendant was alleging the plaintiff's partial responsibility for the injuries giving rise to the action, then the court below would not be entitled to make a finding of contributory negligence. This seems enough for us to dispose of this ground of appeal.

Whether Slim 10 caused Andrea's liver failure

78 Analysing the issue of causation required us to consider the expert evidence presented before the court below. In so doing, we bore in mind that the approach to be taken in evaluating conflicting expert evidence is to examine the scientific grounds and bases on which the experts rely and to determine the soundness of their opinions in the light of the facts: *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd* [1984–1985] SLR 381 and *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260.

Andrea's expert witnesses

79 Andrea adduced the testimony of two expert witnesses. The first witness was Dr Dede Selemat Sutedja ("Dr Sutedja"), a consultant in the Division of Gastroenterology and a member of NUH's Liver Transplant Programme. A liver specialist for the past eight years, Dr Sutedja was involved in Andrea's diagnosis and treatment at NUH. He took her period of ingestion of Slim 10 as being between December 2001 and January 2002 and said that the onset of her liver injury was "certainly" somewhere in early March 2002, or even late February 2002. He eliminated non-drug related causes and opined that the temporal relationship between the last ingestion of Slim 10 and the onset of liver failure was compatible with a possible drug hepatotoxicity. Hepatotoxicity is the medical term for liver damage caused by drugs and other chemicals. Dr Sutedja considered a histopathology report by Dr Jean Ho ("Dr Ho"), a consultant pathologist, and concluded that Andrea's liver failure was drug-induced.

80 Dr Sutedja evaluated the other two health products taken by Andrea before her illness, Spirulina and Pycnogenol. He observed that only Slim 10 contained hepatotoxic substances, whilst the other two supplements had no known adverse effects. Slim 10 was found to contain nicotinamide, fenfluramine, thyroid gland extract and N-nitrosofenfluramine. Nicotinamide can cause hepatotoxicity when taken in excessive amounts. N-nitrosofenfluramine is a nitrosamine, which is an N-nitroso compound, and such compounds are generally thought to be hepatotoxic. Moreover, Andrea had consumed Spirulina and Pycnogenol for two and a half years without problems. As such, he was "very satisfied" that Slim 10 was the likely cause of Andrea's liver failure.

81 Andrea's second witness was Dr Tan Kai Chah ("Dr Tan"). Director of the Liver Transplant Programme in NUH since 1995, Dr Tan performed Andrea's liver transplant. Upon consideration of Dr Ho's histopathology report and the fact that Andrea's liver had been severely damaged, he concluded that there was strong indication that Andrea's liver failure was drug-induced. He followed the same diagnosis of exclusion as Dr Sutedja to conclude that Slim 10 was the only possible causative drug.

82 Dr Tan also referred to a report from the Japanese Ministry of Health entitled "Results of Investigation into Chinese Diet Health Food Products". Detailing the results of laboratory tests on animals with N-nitrosofenfluramine, the report said:

> Although weight gain was suppressed, an increase in the absolute liver weight was also observed, and the results of biochemical testing … *showed liver cell damage* and that the biliary system

was affected.

From these results, it has been inferred that *N-nitrosofenfluramine not only damages liver cells, but also caused hepatic toxicity in the broadest possible sense* including possible damage to the biliary system. [our emphasis]

TV Media's expert witnesses

83 TV Media likewise adduced testimony from two expert witnesses. The first was Dr David Joyce ("Dr Joyce"), a physician of clinical pharmocology and toxicology and an associate professor of medicine and pharmacology in the School of Medicine and Pharmacology of the University of Western Australia. He applied a test suggested and partly validated by Naranjo and others in 1981, and estimated that the attribution of Andrea's liver failure to Slim 10 could be scored at 2 or 3, which meant that association between Slim 10 and her liver failure was in the "possible" zone. We note that Dr Joyce was unable to apply some of the criteria in the Naranjo test, as they required the re-taking of Slim 10, which was impossible in the circumstances.

84 Dr Joyce postulated that as Andrea had eaten seafood in Bangkok, her liver failure might be due to a seafood source. The amount of fenfluramine and nicotinamide in Slim 10 was much too low to have caused her liver failure. He felt that the link between N-nitrosofenfluramine and hepatotoxicity is not sufficiently established. Although N-nitrosofenfluramine is a nitrosamine and some nitrosamines are known to be hepatotoxic, the most toxic of nitrosamines is N-nitrosodimethylamine ("NDMA"), which is associated with cirrhosis rather than acute liver failure. If N-nitrosofenfluramine works in the same way as NDMA, it should be rapidly metabolised, so that Andrea would have had to take 480 Slim 10 pills at one go in order to suffer liver failure.

85 TV Media's second expert witness was Dr Julia Alexis Wendon ("Dr Wendon"). A senior lecture and honorary consultant physician at the Institute of Liver Studies in London, Dr Wendon is responsible for running the Institute's Liver Intensive Care Unit, which sees about 120 to 180 cases of acute liver failure annually.

86 Dr Wendon posited that toxic insult to Andrea's liver had been delivered fairly recently. Fenfluramine is unlikely to be hepatotoxic. N-nitrosofenfluramine and nitrosamines are very rarely associated with liver toxicity and are related more to chronic cirrhosis and carcinogens than to acute hepatic necrosis. However, nitrosamines may render an individual at greater risk from hepatotoxicity. As such, although the compounds in Slim 10 do not appear to have any direct hepatotoxic effects, they may render the risk of hepatotoxicity greater should an individual be exposed to an unrelated source of hepatotoxin. Applying the Maria and Victorino clinical scale, a clinical scale for the diagnosis of drug-induced hepatitis, Dr Wendon arrived at a score of 3 to 7 based on Andrea's consumption of Slim 10 between February to early April 2002, which meant that Slim 10 was an "excluded" or "unlikely" cause of her liver failure.

87 Dr Wendon further testified that Spirulina may become contaminated with toxins, which may in turn affect the liver resulting in necrosis (the death of living cells). The risk of such toxicity increases with the duration of ingestion. She cited a case where doctors in Japan had surmised that Spirulina might be associated with the liver injury of a 52-year-old Japanese man who had taken Spirulina for five weeks before admission to hospital. She concluded that she did not believe that a definitive cause of acute liver failure could be determined. Andrea might have suffered from sero-negative hepatitis, which would effectively exclude other causes of liver failure. As such, she ascribed Andrea's liver failure to an unknown viral cause.

The judge's findings

88 The judge first examined the temporal relationship between Slim 10 and Andrea's liver failure. Hyman J Zimmerman's *Hepatotoxicity: The Adverse Effects of Drugs and Other Chemicals on the Liver* (2nd Ed, 1999) states that most instances of drug-induced hepatic injury occur five to 90 days after taking the drug. Where the interval from stoppage of drug intake to onset of injury is 15 days or less, the injury is likely to have been caused by the drug. If the interval is more than 35 days, it is unlikely to have been caused by the drug.

89 Based on the dates of consumption which we discussed earlier in this judgment, Andrea began consumption of Slim 10 in late January or early February 2002 and completed consumption of the second batch of pills around 20 March 2002 and no later than 29 March 2002. Dr Wendon placed Andrea's probable date of liver injury at 11 April. If so, the interval between the date when Andrea began consumption of Slim 10 and the onset of her liver injury would fall well within Zimmerman's buffer period of 5 to 90 days. The interval from stoppage of intake to appearance of injury would have been 12 to 21 days, which would be around the 15-day range required to establish that the injury was likely to have been caused by Slim 10, and well within the 35-day range mentioned by Zimmerman.

90 The judge also considered the "worst-case scenario" for Andrea. This entailed her starting her course of Slim 10 in the last five days of January 2002 and consuming both batches of Slim 10 in the recommended dosage of 12 pills a day. She would have finished both batches of pills by 7 March 2002. The gap of 34 days between 7 March and 11 April was still within Zimmerman's 35-day range.

91 Since Andrea had been taking Spirulina regularly for two and a half years, the judge concluded that it would "fail spectacularly" the Zimmerman test. Moreover, apart from the case of the 52-year-old Japanese man who also had a host of other medical conditions, there was no known case of Spirulina being hepatotoxic. On the other hand, N-nitrosofenfluramine belongs to the nitrosamine family, which is generally accepted as hepatotoxic. Animal tests conducted by the Japanese Ministry of Health have also confirmed its harmful effects on the liver.

92 The judge also considered the case of another Singaporean lady who had suffered liver failure after consuming Slim 10 and died. The coroner in that case accepted the expert's opinion that the deceased's liver failure was related to the N-nitrosofenfluramine present in Slim 10. Dr Tan opined that the fact that there were only two cases of liver failure from Slim 10 among the many who consumed the pill indicated that the damage caused was not dose-related, but that Andrea had probably suffered an idiosyncratic drug reaction.

93 Based on the evidence before him, the judge made the following finding ([15] *supra* at [180]):

> On the evidence placed before me, I am convinced on a balance of probabilities that Slim 10 did cause the liver failure in this case. The totality of the circumstantial evidence points quite ineluctably to Slim 10 as having been the causative agent of [Andrea's] massive hepatocellular necrosis. … I do not … think that one theory of causation is extremely improbable and the other virtually impossible. I do think that Slim 10 is the highly probable cause and all the other possibilities highly improbable.

94 It now remains for us to examine the various arguments canvassed by TV Media on appeal.

Whether Slim 10 induced liver failure

95 TV Media took issue with the judge's finding that the totality of evidence showed that Slim 10 had caused Andrea's liver failure on a balance of probabilities. First, the experts agreed that Andrea had suffered from fulminant liver failure, that is, a sudden and severe attack on the liver. This was contrary to the behavioural pattern of NDMA, which causes cirrhosis of the liver (scarring of the liver through regular insults to the liver). Andrea's liver did not exhibit any signs of cirrhosis – in other words, there was no clinical picture of repeated poisoning in small dosages, which should have been the case given that Andrea consumed Slim 10 over a period of three months.

96 Second, even assuming that N-nitrosofenfluramine is as toxic as NDMA, which is the most potent hepatotoxic nitrosamine known, Dr Joyce's opinion was that Andrea's daily dose of Slim 10 was around 40 times lower than the estimated dose necessary to produce acute liver damage in a human. Moreover, nitrosamines are generally very quickly metabolised and removed from the body.

97 Both contentions were premised upon the assumption that N-nitrosofenfluramine functions in the same way as NDMA. As the judge below noted, there is no medical literature as yet on this subject. Dr Tan also cautioned that the effect of N-nitrosofenfluramine in this case might have been different as it was combined with a cocktail of other substances present in Slim 10. These conjectures aside, the only established evidence before us is first, that N-nitrosofenfluramine is a nitrosamine, and nitrosamines are generally accepted to be hepatotoxic; and second, that animal studies conducted by the Japanese Ministry of Health have confirmed N-nitrosofenfluramine's harmful effects on the liver.

98 As established by the Privy Council in *Grant v Australian Knitting Mills, Ltd* [1936] AC 85, circumstantial evidence may be sufficient to connect a product to damage or injury in the absence of any other explanations. In *Grant*, the appellant claimed against the retailers and manufacturers of his woollen garments after he had contracted dermatitis, allegedly from the presence of free sulphite in the garments. Lord Wright noted at 96 that "pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion." As such, "the coincidences of time and place, and the absence of any other explanation" than the presence of free sulphite in the garments pointed strongly in the appellant's favour.

99 Similarly, after considering the temporal relationship between Slim 10 and Andrea's liver failure as well as a host of other factors, the judge ruled out any other explanations for Andrea's liver failure. We have heard nothing in TV Media's submissions which persuade us that the decision by the judge was wrong and ought to be revisited.

Whether Andrea's liver failure was drug-related or caused by a viral infection

100 Dr Ho agreed that her earlier histopathology report of 2 May 2003 had leant towards a diagnosis of drug-induced liver failure. However, after further tests and research she was unable to come to a conclusion, based on the biopsy specimen alone, whether the cause was a toxic substance or a viral infection. TV Media contended that as Dr Sutedja had relied on Dr Ho's initial report to conclude that Andrea's liver failure was drug-induced, his clinical finding ought to have been re-evaluated in light of Dr Ho's change in testimony.

101 We find this argument unmeritorious. Dr Sutedja's conclusion that Andrea's liver failure was drug-induced was not based solely on Dr Ho's report but on a consideration of all the evidence before him as well as the medical literature. Moreover, Dr Ho did not rule out drug-induced hepatotoxicity altogether. She merely said that a viral cause was also a possibility.

Whether Andrea suffered an idiosyncratic drug reaction

102 Similarly, we are not persuaded by TV Media's argument that since Dr Ho dispelled the notion of Andrea suffering from a drug reaction, there was no reason for the judge to conclude that Andrea had suffered from an idiosyncratic drug reaction. It is apparent from the notes of evidence that Dr Ho made no such statement. She merely testified that Andrea's liver failure might have been caused by a drug reaction *or* a viral infection.

103 In similar vein, TV Media's assertion that Dr Sutedja and Dr Tan had only brought up the possibility of an idiosyncratic drug reaction on the witness stand does not stand up to scrutiny. Dr Sutedja's clinical notes referred to Andrea's condition as a "drug induced immuno-allergic toxic hepatitis". In our understanding, an immuno-allergic reaction is a type of idiosyncratic reaction.

Maria and Victorino clinical scale

104 TV Media further charged that the judge had failed to take the Maria and Victorino clinical scale into account when reaching his decision. To the contrary, the judge accepted that the Maria and Victorino scale test militated against Andrea's case. Nevertheless, he noted the limitations to the test since it was impossible to perform certain components of the test in this case, such as the re-challenging or re-introduction of the suspect drug.

105 We find more merit in TV Media's next argument, that the judge could not have held that the probable cause of Andrea's liver failure was drug-related given Dr Wendon's score of 3 to 7 when she applied the scale, since this placed Slim 10 in the "excluded" or "unlikely" range. However, it is worth noting that all the experts, including Dr Wendon, agreed that clinical scales are merely "crude guides" which are difficult to apply to new drugs. Dr Sutedja testified that there are drugs which have been considered "unlikely" by these scales but which have been found to cause liver hepatotoxicity. In deciding the question of causation, the totality of the clinical picture still has to be considered. The Maria and Victorino scale was only one of the many factors which the judge considered. We do not see how the judge can be faulted for concluding that Slim 10 had caused Andrea's liver failure on a balance of probabilities.

Shortcomings in expert reports

106 TV Media cast various aspersions on the credibility of Andrea's expert witnesses. Most of these have already been dealt with in the preceding paragraphs. A brief overview of the remaining criticisms follows.

107 TV Media levelled various criticisms at Dr Sutedja. First, it alleged that he failed to consider the diagnosis of sero-negative hepatitis in his affidavit. This criticism is unmeritorious. Dr Wendon defined sero-negative hepatitis as "a diagnosis of effective exclusion of other causes of acute liver failure". It is apparent from this definition that doctors will only make a diagnosis of sero-negative hepatitis if they are unable to find a cause of liver failure. Since Dr Sutedja had already concluded that Andrea's liver failure was drug-induced, there was no reason for him to even consider the diagnosis of sero-negative hepatitis.

108 In answer to TV Media's argument that Dr Sutedja's assessment of the time of onset of Andrea's liver failure was not substantiated by any clinical or scientific studies, we would say that this was irrelevant, since the judge eventually accepted Dr Wendon's suggested date of Andrea's liver failure (11 April 2002) rather than adopting Dr Sutedja's approach.

109 Similarly, we must dismiss TV Media's contention that Dr Sutedja had no basis for his clinical diagnosis since Andrea did not have features of drug-induced toxicity like joint aches, skin rash and

swollen lymph nodes. Zimmerman states clearly that the lack of such features does not exclude the diagnosis of drug-induced liver disease.

110 We reject as preposterous TV Media's criticism of Dr Tan's evidence because he only saw Andrea the day before her operation and did not have any "first hand perception" that her injury was drug-induced. After all, TV Media's own experts, Dr Wendon and Dr Joyce, were flown in from overseas and never talked to Andrea, let alone examined her.

N-nitrosofenfluramine and liver failure

111 TV Media's final attempt to deny that Slim 10 could have caused Andrea's liver failure was to advance the argument that there was no basis for blaming N-nitrosofenfluramine for Andrea's liver failure. First, Andrea did not show any signs of carcinogenic effects after ingesting Slim 10 even though nitrosamines are carcinogenic. Second, no evidence was adduced to show that n-nitroso compounds were found in Andrea's urine or waste samples.

112 In our opinion, both contentions are spurious. First, TV Media's unequivocal statement that nitrosamines are carcinogenic is blatantly untrue. The Australian tribunal in *Re Brown & Repatriation Commission* (1994) 33 ALD [*Administrative Law Decisions*] 211 at [27], the case cited by TV Media in support of this proposition, merely noted that nitrosamines are carcinogenic in animals and *might* be carcinogenic in humans. In any case, whether or not N-nitrosofenfluramine is carcinogenic is hardly relevant to the issue before us, which is whether it is hepatotoxic.

113 Second, the tribunal in *Re Brown* said, at [34], that N-nitroso compounds are *not normally found*, other than in trace amounts, in human urine or faeces. This statement hardly supports TV Media's argument that failure to find these compounds in Andrea's urine or waste samples points ineluctably to the fact that N-nitrosofenfluramine was not responsible for her liver failure.

Conclusion on TV Media's appeal as to liability

114 In our judgment, all the evidence points to Slim 10 as the cause of Andrea's liver failure. As the distributor and advertiser of Slim 10 in Singapore, TV Media patently owed Andrea a duty of care once she purchased and consumed the pills. By representing to the public that Slim 10 was totally natural and absolutely safe for consumption, TV Media was in breach of that duty of care. For the foregoing reasons, we agree with the judge's finding that TV Media was liable for Andrea's liver failure.

Semon's appeal on liability

115 Semon adopted the arguments of TV Media on the issues of medical causation. For the reasons enumerated above, we would dismiss this aspect of the appeal.

Whether Semon authorised, directed or procured Health Biz's negligence

116 The judge held Semon personally liable for authorising, directing and/or procuring Health Biz's negligent acts. Semon appealed. Before turning our attention to the substantive issues on appeal, we will deal briefly with some preliminary points.

Preliminary issues

117 A fundamental tenet of company law is that a company is a separate legal entity from its members or shareholders. As such, the members are not liable to be sued in respect of a breach of

the company's obligations: *Salomon v A Salomon and Co, Ltd* [1897] AC 22. In an extension of this principle, the courts have held that proof of the commission of a tort by a company does not automatically prove that the directors who manage its affairs are also guilty of the tort: *Rainham Chemical Works, Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374.

118 The law has carved out an exception to this principle. Where directors order an act by the company which amounts to a tort by the company, they may be liable as joint tortfeasors on the basis that they have "procured or directed" the wrong to be done: *Performing Right Society, Ltd v Ciryl Theatrical Syndicate, Ltd* [1924] 1 KB 1.

119 At this juncture, we can quickly dispose of Semon's argument that it was improper for the judge to lift Health Biz's corporate veil to find him liable for authorising, directing and/or procuring Health Biz's negligent importation of Slim 10, since Andrea's statement of claim did not plead that the corporate veil should be lifted. In our view, Andrea's claim against Semon for authorising, directing and/or procuring Health Biz's negligence was essentially a claim asking the court to lift Health Biz's corporate veil. After all, a court can only find a director personally liable for authorising, directing or procuring the company's tort if it has first lifted the company's corporate veil which otherwise protects a director from being found liable.

120 Hence, it only remains for us to consider the question of whether Semon authorised, directed and/or procured Health Biz's negligence so that this Court should lift the corporate veil and find him personally liable in negligence.

The definition of "authorised, directed and/or procured"

121 Semon made much of the correct interpretation of the phrase "authorised, directed and/or procured". He argued that the phrase is directed at a situation where the wrong can be isolated as a positive, clear, deliberate act or where there has been an assumption of personal liability by the director. In contrast, both his negligence and that of Health Biz lay in omissions which formed a negligent course of conduct.

122 In support of this, Semon referred us to *Performing Right Society*, where the phrase "authorised, directed and/or procured" was first used. This was a case of copyright infringement, and the words "authorised", "procured" and permitted" were statutorily derived from the English Copyright Act of 1911 (c 46). Semon argued that when read in context, the words were only meant to apply to a director authorising, permitting and/or procuring a positive act such as copyright infringement, as opposed to a wrongful omission to act.

123 This formulation is too narrow and inadequate in three aspects. In the first place, Semon's reliance on *Performing Right Society* as authority for his proposition does not stand up to scrutiny. Bankes LJ held at 9 that:

> I agree … that the Court may infer an authorization or permission from acts which fall short of being direct and positive; I go so far as to say that indifference, exhibited by acts of commission *or omission*, may reach a degree from which authorization or permission may be inferred. [our emphasis]

124 Second, while the common law stops short at imposing liability for "pure omissions" (*Smith v Littlewoods Organisation Ltd* [1987] AC 241), it is clear that there can be tortious liability for both omissions and commissions. The classic definition of negligence, as formulated in *Blyth v The*

Company of Proprietors of the Birmingham Waterworks Co (1856) 11 Exch 781 at 784; 156 ER 1047 at 1049, and cited by the House of Lords in *British Railways Board v Herrington* [1972] AC 877 at 907, is:

> the *omission* to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or *doing* something which a prudent and reasonable man would not do. [emphasis added]

Similarly, Lord Atkin adjudged in *Donoghue v Stevenson*, [49] *supra* at 580, that:

> You must take reasonable care to avoid *acts or omissions* which you can reasonably foresee would be likely to injure your neighbour. [emphasis added]

125 Third, it is not apparent to us that a valid distinction can be drawn between acts of commission and omission. Should it come down to an issue of semantics, a tort of omission can equally well be phrased as a tort of commission. For instance, Health Biz's failure to conduct tests on each batch of Slim 10 can be restated as a positive act of negligently selling untested pills. Its failure to ensure that only yellow-powdered Slim 10 was sold was also a positive act of selling the contaminated brown-powdered Slim 10.

126 Denning LJ said in *Hawkins v Coulsdon and Purley Urban District Council* [1954] 1 QB 319 at 333 that:

> … I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at it.

Even though this *obiter dicta* by Denning LJ was made in the context of a discourse on the duties of occupiers of land towards their licensees, we think that the reasoning employed by him applies with equal force to other acts of negligence such as those complained of in the present case. We do not see why liability should only be imposed on a director for authorising, directing and/or procuring a positive act of negligence, whilst another director's tortious omission to act should escape liability.

127 All this aside, we fail to see the relevance of Semon's contention since Andrea's statement of claim against Health Biz was couched in positive terms:

> The 2nd Defendant by its servants or agents *imported, distributed and/or sold* in Singapore, the Pills which contained poisonous and/or harmful substances. [emphasis added]

128 In sum, we determine that the phrase "direct, procure and/or authorise" is eminently suited to Andrea's claim in negligence against Semon and that it is irrelevant that Semon stands accused of having directed, procured or authorised a negligent course of omissions rather than a single positive act.

Evidence that Semon authorised, directed and/or procured Health Biz's negligence

129 We now turn to Semon's contention that there is no evidence that he authorised, directed and/or procured Health Biz's negligence.

130 The judge identified Health Biz's negligent acts as:

(a) failing to ensure that only the HSA-approved yellow-powdered Slim 10 was imported and

sold;

(b) failing to keep proper records on the consignments of pills being imported so that each consignment could be identified and tested; and

(c) failing to conduct proper batch tests and to ask for professional help in interpreting test reports.

131 Semon sought to downplay his personal involvement with Health Biz by highlighting the role which Peter played in the business. He asserted that Peter was in charge of important aspects of licensing and testing the pills and was instrumental in liasing with DAC and HSA. For instance, it was Peter who signed the letter of undertaking to HSA promising to conduct tests for poisons and synthetic substances on each consignment of Slim 10. TV Media's representatives testified that they had looked to Peter when it came to the licensing and approval aspects of Slim 10. Peter wrote to HSA to ask about the tests required for Slim 10, which Semon highlighted as significant evidence that he had never authorised Peter to cut corners when it came to testing the pills. In light of all this, Semon argued that Peter's involvement with Health Biz went beyond liasing with HSA to acting and making decisions on Health Biz's behalf even in Semon's absence.

132 The judge disagreed. He found that Peter, "despite his directorship and the high-sounding title of Vice President, was nothing more than an employee". Semon, on the other hand, was the founder, director and president of Health Biz, its "one constant director and shareholder from its inception": [15] *supra* at [193]. Semon only employed Peter after he made the decision to import Slim 10 and signed a contract with the Chinese manufacturer. He admitted in court that he invited Peter to join Health Biz "after we discussed that I needed a personal assistant".

133 We cannot help but agree with the judge. While we acknowledge Peter's involvement in all stages of Slim 10's licensing and testing, we see his involvement as consistent with his role as Semon's assistant, which would have required him to handle all administrative matters. To us, what is significant is that Peter had to report to Semon at every stage in the process, and that Semon took all decisions which were of any import. For example, when HSA decided to recall Slim 10, Semon decided to appeal against this recall and instructed Peter to draft the letter of appeal to HSA. Wilfred stated in his affidavit that:

> *Semon Liu decided to appeal* against the voluntary recall. As it was very late at night by then and as Peter Boo was noticeably exhausted, Health Biz requested me to help them type out a letter that very night so that *Semon Liu could approve it* and Peter Boo could submit it to the HSA the next morning. Peter Boo and I drafted the first draft, which was *then faxed to Semon Liu for vetting and editing*. In all I think about 3 drafts were typed up *before Semon Liu agreed to the final copy*. [emphasis added]

134 As such, we think that Peter's role in Health Biz does not dilute the fact that Semon had absolute control of Health Biz, which in turn supports the judge's finding that Semon's involvement in Health Biz's negligence was total. We see no reason to overturn this finding.

135 We turn next to Semon's contention that there is no evidence before the court to show that he directed, authorised and/or procured Health Biz's negligence. We are not so persuaded. The totality of the evidence leads us to the inescapable conclusion that Semon was the only person in the position to direct, authorise and/or procure Health Biz's negligence.

136 Both before and after Peter's employment, Semon represented Health Biz in all significant

dealings with third parties. For instance, Semon dealt with the Chinese manufacturer on cash terms and in person. Every time an order for Slim 10 was placed, Semon would personally fly to China to make payment in cash. He flew to China to attend the launch of the "new and improved" version of Slim 10, "yue zhi tang jian fei jiao nang", and decided to import the new version of pills instead. When HSA queried Health Biz on the reason for the disparity in colour and texture of the Slim 10 pills, it was Semon who flew to China to ask the manufacturer for a written explanation for this disparity.

137 When HSA expressed dissatisfaction with the explanation given by the Chinese manufacturer, Health Biz assured HSA that from then onwards, Slim 10 capsules would only contain the yellow powder. Since it is not disputed that Semon was the only person who had any form of contact with the Chinese manufacturer, we find ample reason to believe that he was the only one who could and should have ensured that the Chinese manufacturer supplied only the yellow-powdered Slim 10 pills as it had promised. We also find that he was the only person who could have instructed the Chinese manufacturer to adhere to a proper system of batching so that the pills would not have been imported in such a haphazard manner.

138 There are other indications of Semon's overwhelming personal involvement in the importation of Slim 10. For instance, rather than approaching TV Media, Rayson and Liping in his capacity as director of Health Biz to promote the company, Semon presented his personal portfolio and *curriculum vitae* to them when he met them for the first time. Although the other shareholder and director of Health Biz, Tan Eng Kiat was present at this meeting, Rayson testified that Tan Eng Kiat hardly spoke, which indicates to us that it was Semon who was in full control of the situation. Moreover, Wilfred testified that during his meetings with Semon, Semon represented that he had invested his personal savings into the Chinese manufacturer, which was why Semon was able to go to the factory, take photographs and get close to the boss and the boss's son, whom he called his "godfather" and "godbrother" respectively.

139 Semon also raised the well-worn argument that he thought it safe to assume that HSA's granting of product licences confirmed the safety of Slim 10. For the reasons given earlier, we give no credence to this argument.

140 On the totality of the evidence, it is patently clear to us that Semon, and Semon alone, had absolute control of Health Biz. It stands to reason that Semon was the person directing its negligent acts or omissions. We find no reason to overturn the judge's finding that nothing was done without Semon's knowledge, and that Semon's involvement in the negligence of Health Biz was not merely very great, but was total.

Whether Health Biz's corporate veil should be lifted

141 Having established that Semon did direct, authorise and/or procure Health Biz's negligence, we turn to the issue of whether there are exceptional circumstances which warrant the lifting of Health Biz's corporate veil in order to fix Semon with personal liability.

142 Semon contended that that his involvement in the saga was only a "miniscule part of a vast and complex constellation of interacting causative factors". He cited the case of *British Thomson-Houston Co, Ltd v Sterling Accessories, Ltd* [1924] 2 Ch 33 for the proposition that where a director is to be fixed with liability as principal, his agency of the company must be established substantively and cannot be inferred from his holding of director's office and his control of the company shares alone. Additionally, he drew our attention to the case of *Fairline Shipping Corp v Adamson* [1975] QB 180, where the English Court of Appeal held that however small the company, and however powerful the director's control over its affairs, the director should not automatically be identified with

his company for the purpose of the law of tort.

143 The judge was clearly aware, and said as much in his judgment, that Semon's liability could not be inferred from his holding of director's office and his control of Health Biz's shares alone. However, he went beyond Semon's directorship of Health Biz and his 99% shareholding in the company to analyse the level of Semon's involvement in the importation and testing of Slim 10. As we have discussed earlier, the judge took a multitude of other factors into account before arriving at his conclusion that Semon's involvement in Health Biz's negligence was total and that the very exceptional circumstances of the case justified a lifting of Health Biz's corporate veil.

144 We are similarly unmoved by Semon's arguments. We recognise that the issue of a director's personal liability for his company's torts involves the consideration of difficult policy questions. On the one hand, there is the principle that a company is separate and distinct in law from its shareholders and directors, and that there is a commercial interest in allowing companies to enjoy the benefits of limited liability which are offered by incorporation. On the other hand, directors of companies should not be allowed to escape personal liability to third parties for torts that they personally committed merely because they committed the torts in the course of carrying out their duties as directors of the company. Previous courts have weighed these considerations in the balance and arrived at the conclusion that whether or not a director is personally liable for a tort committed by his company depends on the factual situation at hand. The court must look at the level of his involvement in the company in order to determine the extent to which he is the company's alter ego: *Gabriel Peter*, [117] *supra* at [35].

145 In our considered opinion, Semon's level of involvement in Health Biz indicates that he was clearly the controlling mind and spirit of Health Biz. We cannot agree with Semon's attempts to portray Peter as anything more than a mere employee of the company. We accordingly find sufficient reason to lift Health Biz's corporate veil and find Semon personally liable for authorising, directing and/or procuring Health Biz's negligent acts.

Causation

146 This leads us to Semon's next line of argument, which is that even if he had authorised, directed and/or procured Health Biz's negligent acts, these acts did not lead to Andrea's injury. He raised three arguments in support of this.

147 He first took issue with the judge's comment in his judgment, that "only [Semon] could have decided that a general screening for poisons was not necessary": [15] *supra* at [194]. Semon disagreed with this, asserting that Health Biz had sent the pills to Setsco for testing. We think that the judge's comment must be read in context of his entire judgment. He was clearly aware that some screening tests had been commissioned for the pills, since he admonished Health Biz for not getting professional help in interpreting the Setsco test reports. Rather, he was referring to the fact that many batches of pills were not tested, and that this could only be due to Semon's decision that general screening tests for *every batch of pills* were unnecessary.

148 Semon's second and third arguments run along similar lines. He averred that even if Slim 10 had been properly batched and each batch sent for screening, the same test reports would have been generated and Andrea would still have suffered liver failure. Moreover, even if Health Biz had issued declarations of safety for each batch, they would have been inaccurate since N-nitrosofenfluramine was unknown to chemists at the time and would not have been detected.

149 In our opinion, both arguments miss the point. As the judge emphasised, Health Biz's

negligence lay in failing to test the batches of pills and *then* in failing to get professional help in interpreting the test results. As such, even if the same results would have been generated after testing each batch of pills, and even though these results might not have revealed the presence of N-nitrosofenfluramine, they would have revealed the presence of other banned poisonous substances like fenfluramine. If Health Biz had sought professional help in interpreting these test reports, the pills would not have been sold and Andrea would not have consumed them or suffered liver failure. This is the precise line of reasoning followed by the judge and we do not see how it can be faulted.

Policy arguments

150 Semon raised various policy arguments in his final attempt to persuade us to allow his appeal. He argued that making him personally liable will be tantamount to ruling that in virtually all situations, a dominant director will be made liable or impugned by virtue of having been linked to some of the company's acts and omissions. This will result in "open hunting season" on small companies.

151 We are not so persuaded. As the judge stressed, Semon's liability was founded on the very exceptional circumstances of this case. It is unlikely that this particular concatenation of circumstances will arise in many future cases and we do not share Semon's concern that dismissal of his appeal will open the floodgates of litigation.

Conclusion on Semon's liability

152 We accordingly find Semon personally liable for authorising, directing and/or procuring Health Biz's acts of negligence and dismiss this aspect of his appeal.

The appellants' appeal on quantum

153 This leaves us to deal with the appeals of TV Media and Semon as to the quantum of damages awarded to Andrea.

Apportionment of blame

154 The judge decreed that liability between Health Biz, Semon and TV Media should be on a joint and several basis. TV Media challenged this, arguing that Semon's degree of blameworthiness was very much higher than TV Media's blameworthiness. It canvassed the same litany of arguments discussed in an earlier part of this judgment to argue that Semon's act of selling and distributing the "pirated" pills was a direct causative act of Andrea's liver injury, in contrast to TV Media's acts of advertising and retailing the pills.

155 The law as to the apportionment of damages between joint tortfeasors is laid out in *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162, which was adopted by us in *Chuang Uming (Pte) Ltd v Setron Ltd* [2000] 1 SLR 166. The English Court of Appeal held at 188–189:

> Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate *for the whole of it*. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. [emphasis added]

156 We also find it useful to refer to the case of *Wong Jin Fah v L & M Prestressing Pte Ltd* [2001] 4 SLR 529, where the judge held at [92]:

> … [The] defendants were each a proximate cause of the injury inflicted on the plaintiff. Although they were not acting in concert when the accident happened, their contemporaneous acts of omission caused the indivisible damage to the plaintiff. The defendants left it to the others to take the necessary precautions and, cumulatively, they did nothing at all. Each turned a blind eye to safe working practices and relied on the others. Their faults and breaches indisputably overlapped such that each of them must be held liable to the plaintiff for the whole damage.

157 The situation in *Wong Jin Fah* is akin to that presently before us. TV Media left it to others to take the necessary precautions. In the event, proper records of the consignments of pills being imported were not kept, and proper batch tests were never conducted. Given its position of responsibility as the promoter and seller of Slim 10, TV Media cannot now plead ignorance to escape liability. TV Media's actions are clearly a proximate cause of Andrea's damage and it is therefore liable for the whole of that damage.

158 TV Media also contended that Andrea's own failure to stop consuming the pills in spite of side effects was a proximate intervening act, which carried a greater degree of blameworthiness than TV Media's acts. We have dealt with this argument earlier in this judgment and need only repeat that it is wholly unmeritorious.

159 An appellate court is only justified in interfering with a trial judge's apportionment of damages in "very exceptional circumstances": *The Macgregor* [1943] AC 197 at 201; *Ramoo v Gan Soo Swee* [1969–1971] SLR 34 at 41, [15]. We do not find that the circumstances warrant an interference with the judge's decision.

Quantum of damages awarded

160 The judge awarded Andrea $250,000 in general damages and gave her a multiplier of 34 for her medical expenses. Semon aligned himself with TV Media's arguments regarding the quantum of damages awarded to Andrea. Both appellants raised three issues in this respect. We will assess them in turn.

That the judge erred in awarding Andrea $250,000 in general damages for pain and suffering and loss of amenities

161 In reaching his award of $250,000 for Andrea's general damages for pain and suffering and loss of amenities, the judge did not refer to any case law since there is no comparable local precedent for liver transplant cases. Instead, he took into account a range of factors spanning both Andrea's past and present sufferings.

162 With regard to her past sufferings, the judge noted that Andrea had been hospitalised for 36 days; had undergone numerous blood tests, a liver biopsy and a liver transplant; and had suffered from lethargy, jaundice, hallucinations and bouts of vomiting. The judge also considered Andrea's future sufferings as detailed by the expert witnesses. Amongst these are a restriction of her physical activities and food preferences; a nagging fear of liver failure or that her weakened body will succumb to disease; risks to her and her foetus if she becomes pregnant; an increased risk of renal failure and skin cancer so that she will have to cover up when she goes out under the sun, thus affecting her social and working life; the fact that visits to hospital are now a way of life for her and that she must remain on immuno-suppressant medication for the rest of her life; and the fact that she is now

uninsurable. In light of this "horrific list" of injuries, the judge considered an award of $250,000 to be appropriate.

163 Before us, the appellants contended for an award of $35,000 to be made to Andrea for her pain and suffering and loss of amenities, arguing that the award of $250,000 was too high.

164 At the outset, it is pertinent for us to note that an appellate court will only interfere with an award of damages when it is convinced either that the trial judge acted upon some wrong principle of law or that the amount awarded is so manifestly high or low as to have been a wholly erroneous estimate of the damage: *Peh Diana v Tan Miang Lee* [1991] SLR 341 at 345, [17].

165 In passing, we also note that the general purpose of damages in personal injuries cases is to compensate the victim and not to punish the tortfeasor for his actions: *Livingstone v The Raywards Coal Co* (1880) 5 App Cas 25 at 39. We see no reason to depart from this principle in the present case. We now turn to the arguments laid before us by counsel.

166 As a preliminary point, the appellants argued that the judge was wrong in taking Andrea's past sufferings into account when assessing general damages for pain and suffering. This argument is misconceived. Damages in respect of pain and suffering are awarded for both future pain and suffering as well as for what has already been endured: *Birkett v Hayes* [1982] 1 WLR 816.

167 The appellants next asserted that Andrea's pain and suffering were not severe enough to warrant damages of $250,000. First, they argued that, based on Dr Wendon's testimony, Andrea's quality of life is still excellent. Second, they contended that the award of $250,000 was too high because even quadriplegics have not been awarded general damages near that amount. Third, they cited several personal injury cases to buttress their argument that $35,000 is an adequate award of damages for Andrea. We will deal with these three arguments in turn.

168 First, Dr Wendon testified that Andrea can carry out reasonable cardiovascular activities like walking and light jogging. In her experience, Andrea can hope for a "good quality of life". However, she will require long-term follow-up treatment and will not get back her "normal quality of life". Dr Wendon agreed that Andrea will be at higher risk of infection than the general population, but noted that the period carrying the highest risk has already passed without incident. Andrea may give birth so long as her pregnancy is closely monitored, although Dr Wendon acknowledged that there are cases of smaller babies and abnormal foetuses where their mothers have hypertension in later stages of the pregnancy and or on immuno-suppressants, as is Andrea.

169 On the basis of this evidence, the appellants contended that Andrea's disabilities are only a restriction in her food intake, a stipulation against travel to destinations where there is a higher probability of infection, tiredness at times, pregnancy risks, and the possibility of another transplant in future. We think that this understates Andrea's disabilities somewhat. Andrea is not only at risk of infection when she travels but also in Singapore, since her immune system has been weakened by the immuno-suppressants which she has to take. Moreover, she is at higher risk of renal failure and skin cancer, which will affect both her quality of life as well as the scope of work she can undertake as an actress.

170 Second, the appellants cited several cases of awards made to quadriplegics in order to buttress their claim that the award of $250,000 for Andrea was too high. In return, Andrea countered that the comparison with damages awarded to quadriplegics was inaccurate, since the sufferings of quadriplegics differed vastly from what she had suffered and would continue to suffer.

171 We find ourselves in agreement with the appellants on this point. Admittedly, the sufferings of liver transplant patients and quadriplegics cannot be quantified or measured "apple to apple". Nevertheless, this is not to say that a comparison between their sufferings is inappropriate. To our minds, a strong case can be made that the travails of quadriplegics exceed those of liver transplant patients. Whilst the latter can still exercise control over their own bodies, quadriplegics cannot walk on their own and need assistance in the most fundamental tasks of feeding, bathing themselves or using the toilet. They are susceptible to a multitude of illnesses which may strike at any time. Their opportunities of travel or pregnancy are even more limited than those of liver transplant patients. We therefore think it pertinent to compare Andrea's award of damages with those awarded to quadriplegics.

172 We considered a number of cases in this regard but will confine ourselves to mentioning just four in this judgment. In the first, *Toon Chee Meng Eddie v Yeap Chin Hon* [1993] 2 SLR 536, a seven-year-old boy was awarded $160,000 in general damages after a road accident left him with irreparable brain damage, paralysis on the right side and a very slim chance of being able to speak again.

173 In the second case, *Gunapathy Muniandy v Dr James Khoo* [2001] SGHC 165, the judge awarded the plaintiff $100,000 in general damages, describing her condition as follows, at [23.12]:

> The result of the radiation damage done to her brain was immense and intolerable agony for Gunapathy. Now, when she walks she walks with a grotesque gait. So she avoids walking. She uses a wheelchair with the help of a maid. Her own hands cannot even push it. The few words she utters she utters as though she was born with a birth defect like cerebral palsy. She is not even half the lively person that everyone said she was before the radiosurgery. She is crippled by severe dysphasia and right-sided severe hemiparesis … She needs to be permanently cared for because her deficits are permanent. Emotionally she is insecure in the extreme.

174 Although we later overturned this decision on the basis that the defendants had not been negligent and therefore had no cause to decide the issue of quantum of damages (see *Dr Khoo James v Gunapathy d/o Muniandy* [2002] 2 SLR 414), we find the amount awarded by the High Court to be a useful reference point for present purposes.

175 In the third case, *Lim Yee Ming v Ubin Lagoon Resort Pte Ltd* [2003] SGHC 134, the judge awarded the 26-year-old plaintiff $130,000 in damages for pain and suffering. Like Andrea, the plaintiff in that case remained mentally active and alert after the accident. Unlike Andrea, however, she suffered paralysis to her lower limbs, loss of sexual function, bladder and bowel dysfunction.

176 Finally, we noted the case of *Chen Qingrui v Phua Geok Leng* [2001] SGHC 64, where the plaintiff was awarded $206,000 in general damages by the assistant registrar. However, the injuries she sustained were far worse than those suffered by Andrea, as the accident left her blind, bound to a wheelchair and unable to speak.

177 We are of the opinion that the afflictions of the plaintiffs in these cases are at least comparable to, if not far worse, than Andrea's. As such, we find that the award of $250,000 in damages to Andrea is manifestly high and should be adjusted accordingly.

178 This brings us to the appellants' third argument under this heading, that $35,000 is an appropriate award of general damages for Andrea. To buttress this proposal, they referred us to several cases involving injuries such as contusion, lacerations to the liver and loss of one kidney. As we find this argument entirely lacking in merit, we will not attempt to set out a detailed analysis of the cases. We fail to see how the sufferings accompanying lacerations of the liver or colon are on par

with the travails of liver transplant patients. For one, it does not appear that any of the plaintiffs in the cases cited by the appellants suffered any debilitating long-term effects from their injuries, whereas Andrea does face a host of problems, including increased susceptibility to illness and the risk of liver failure. We do not hesitate to find that these cases are not of much assistance to the appellants in this appeal, and that the sum of $35,000 is manifestly too low in the circumstances.

179 Andrea brought our attention to the United Kingdom case of *A v National Blood Authority* [2001] 3 All ER 289; 60 BMLR 1 at [279], where the plaintiff, a 56-year-old lady, suffered from cirrhosis of the liver and underwent a liver transplant operation. She was awarded £45,000, roughly $124,313 at the time of trial. In our view, a plethora of reasons mandate against the comparison of awards given in Singapore and foreign countries in this manner and, indeed, Andrea did not refer us to any local cases which have followed awards given by foreign courts.

180 We found the case of *Tan Hun Hoe v Harte Denis Mathew* [2001] 4 SLR 317 more helpful in assessing what an appropriate quantum of damages was. The plaintiff in this case was already infertile to a fair extent before he underwent surgery, but became totally infertile after a botched operation. He had to undergo hormone replacement therapy which increased his risk of liver cancer. The trial judge awarded him $50,000 in general damages. We increased this award to $120,000 and observed that if Mr Harte had been a "normal fertile man" before the accident, we would have awarded him a higher sum. Like Mr Harte, Andrea has more or less had to give up the prospect of parenthood, but in contrast to him, she was a perfectly healthy individual before she took Slim 10. Whilst Mr Harte was at increased risk of liver cancer, Andrea is now at risk of cancer, osteoporosis, hypertension and diabetes.

181 After a careful evaluation of the case law, we conclude that an appropriate quantum of general damages for Andrea's pain and suffering and loss of amenities is the sum of $150,000.

That the judge erred in providing a multiplier of 34 years

182 The judge provided for a multiplier of 34 years in relation to Andrea's medical expenses. The average life expectancy for females in Singapore is 80 years. Since Andrea was 29 years old at the time of trial, she argued for a multiplier of 51 (that is, 80 minus 29). The judge decided that, bearing in mind the contingencies of life, a fair multiplier would be two-thirds of the expected 51 years of life, that is, 34 years.

183 The appellants challenged this and asked that a multiplier of 18 years be awarded. They referred us to several High Court cases in which similar multipliers were given. The first of these is a case which we have referred to earlier in this judgment, *Lim Yee Ming v Ubin Lagoon Resort Pte Ltd,* [175] *supra.* The judge provided for a multiplier of 15 years for the 26-year-old plaintiff. In the second case, *Ng Song Leng v Soh Kim Seng Engineering & Trading Pte Ltd* [1997] SGHC 289, the judge awarded the 29-year-old plaintiff a multiplier of 17 years. In yet another case, *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR 333, the judge determined that a multiplier of 18 years was appropriate for the plaintiff, who was 28 years old at the time of the accident. We also had regard to the case of *Chen Qingrui v Phua Geok Leng*, [176] *supra*, wherein the female plaintiff aged 18 years was awarded a multiplier of 18 years for nursing care.

184 We have not come across a case where a multiplier as high as 34 has been awarded, and Andrea was not able to cite us even one instance of such a case. She attempted to argue that this present case presents a unique factual matrix, thus justifying the award of a particularly high multiplier. We are not in the least convinced by this argument since the injuries suffered by the plaintiffs in the cases mentioned above are, at the very least, comparable to Andrea's.

185 Considering that Andrea was 27 years old when her liver failed, and that the plaintiffs in the cases we have just detailed were also in the same age range, we think that a multiplier of 17 years is more appropriate and order accordingly.

That the judge failed to deduct the sum of $135,565.87 from Andrea's award

186 We can deal briefly with this point. The judge found that Andrea was entitled to claim the sum of $135,565.87, which was paid by her insurers, NTUC Income, towards her hospitalisation costs and expenses. The appellants contested this. They argued that since NTUC Income paid out the sum voluntarily without any policy liability, they cannot now recover this amount from Andrea. The judge should therefore have deducted this sum from the total expenses incurred by Andrea, so as to avoid her recovering the sum twice.

187 This argument does not take the appellants anywhere. The documentation before us indicates that although NTUC Income paid out the money under Andrea's insurance scheme, Andrea has to reimburse this sum to NTUC Income under the insurance policy co-payment scheme. MediaCorp stated that it had assisted Andrea by giving her an interest-free loan of this amount, but that Andrea would have to repay the loan.

188 As such, this sum of $135,565.87 forms part of Andrea's expenses, which she is entitled to claim for. This ground of appeal is wholly unmeritorious.

Conclusion

189 For the reasons we have canvassed, we deem it fit to dismiss both appeals against liability but to allow the appeals against quantum. Andrea's award of general damages is to be reduced to $150,000 and a multiplier of 17 years shall be given for her medical expenses.

190 It remains for us to deal with the question of costs. We note that while we have allowed the appeals in part, both appellants have only succeeded on the question of quantum and not on the larger issue of liability. We further note that although Semon raised the issue of his personal liability, an argument not advanced by TV Media, TV Media also put forward arguments which were not issues in Semon's appeal. As such, taking into account the appellants' success on quantum, we order that Andrea shall have 60% of the costs of the appeals. The security deposits are to be released to Andrea's solicitors to account of her costs.

Appeals against liability dismissed. Appeals against quantum allowed.