## DCPI 470/2014

[2018] HKDC 615

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 470 OF 2014

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##### BETWEEN

### CHANG LOK KUAN ROCKY (鄭樂群) Plaintiff

### and

### GERMAN POOL KITCHEN EQUIPMENT

### LIMITED (德國寶廚房設備有限公司) Defendant

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Before: Her Honour Judge Winnie Tsui in Court

Dates of Hearing: 1, 2, 5 and 6 February 2018

Date of Judgment: 6 June 2018

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JUDGMENT

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*INTRODUCTION*

1. On 6 October 2011, the plaintiff purchased a set of made-to-measure kitchen cabinets from the defendant. The set was installed at the plaintiff’s home in South Horizons, Ap Lei Chau on about 19 December 2011.
2. About five months later, an accident happened. The plaintiff claims that on 13 May 2012, when he was cooking a late night meal in the kitchen, a glass pane which was fitted onto one of the overhead cabinet doors fell off, just when he was closing it. The glass shattered and he was injured by the glass fragments. He received treatment at the Accident & Emergency Department of Queen Mary Hospital and was discharged that night.
3. The plaintiff immediately made a complaint to the defendant on the following day. Having received no satisfactory response, he reported the accident to the Apple Daily Newspaper in late May. He also lodged a complaint with the Consumer Council in August 2012, alleging defects in the design and workmanship of the cabinet set.
4. In this action, the plaintiff claims damages for negligence in the sum of $85,274. The defendant denies liability and further counterclaims for defamation alleging that in his complaints lodged with the defendant, Apple Daily and the Consumer Council, the plaintiff published words which were defamatory of the defendant. To that, the plaintiff raises the defence of justification or qualified privilege. Mr Douglas Clark, counsel for the defendant, confirmed at the trial that it would only seek $1,000 as nominal damages for the counterclaim. The reason for taking out the counterclaim is merely to vindicate the defendant’s reputation. If awarded, it will donate the money to charity.
5. At the trial, the plaintiff gave evidence. The defendant called Mr Hui Siu Chun as its witness. Hui joined the defendant in 2006 and has been a project manager since April 2012. He was involved in handling the plaintiff’s complaint about the cabinet set in question.
6. Leave was granted to adduce expert evidence on a number of issues including the possible causes of the detachment of the glass pane. Dr Lim Chaw Hyon Eric and Professor Cheah Kok Wai, experts for the plaintiff and the defendant respectively, jointly inspected the cabinet set at the plaintiff’s home on 13 October 2015, almost three and a half years after the accident. A joint expert report was filed with the court. The experts were tendered for cross-examination. Their opinions are divided. In gist, Dr Lim opined that the glass pane fell off because the silicone gel which had been used as an adhesive to attach the pane to the door frame was not able to hold the weight of the glass. On the other hand, Professor Cheah suggested that the most likely cause was the application of external impact or force to the glass pane causing it to detach from the frame.

*THE PLAINTIFF’S CASE*

1. In May 2011, the plaintiff visited the defendant’s showroom in Wanchai. He placed an order for a kitchen cabinet set. The defendant’s staff took measurements of the kitchen in the plaintiff’s flat. The details of the cabinet set were finalised in about November 2011. The cabinet set cost $59,600. The price was inclusive of installation.
2. It is necessary to describe the cabinet set in detail.
3. It comprised a kitchen cabinetry, a solid material sink and countertop, a built-in microwave and a built-in glass-top burner gas cooking range. The defendant prepared a drawing of the cabinet set as it would appear in the plaintiff’s kitchen when the order was placed. The drawing is appended to this judgment.
4. Materially for this action, and as can be seen in the middle of the drawing, there was a two-level kitchen cabinet affixed on the wall at about two metres above the sink. Each cabinet was fitted with a door, which opened upwards. There was a handgrip fitted to the lower part of the door to facilitate lifting up and closing.
5. The two cabinet doors were identical in design and size. Each comprised a wooden door frame and a glass pane. The door frame measured about 99 cm in width and 34 cm in height. It was coated with red paint on the outer face and white paint on the inner face. The glass pane measured about 85 cm in width and 23 cm in height. There was a groove or rabbet of about 1 cm wide and 5 mm deep running all the way along the edge of the inner door frame on the back side. The glass pane was fixed on to the groove using silicone gel as an adhesive. There was no mechanical means, such as a clamp or a slot, to retain the glass in place or to stop it from falling off should the adhesive fail. (In this judgment, I shall refer to the side of the cabinet doors which is nearer the microwave oven as the left hand side and the side nearer the stove the right hand side.)
6. Each door was fitted with hydraulic hinges on the two sides of the frame so that if one let go of the door after opening, its downward fall would be slowed down by the in-built hydraulic springs. There were also two small circular “stoppers” affixed to the inner face of the door frame near the bottom edge (not seen in the drawing) to reduce the impact between the door frame and the cabinet frame when the door was closed.
7. It is common ground that the cabinet set was installed by the defendant on about 19 December 2011. There is however a dispute on whether shortly after the installation, on 28 December, the defendant arranged for its staff to visit the plaintiff’s flat to check if the installation was properly done. Hui claims that it was he who conducted an inspection of the installation on that day and that the plaintiff was not there but the decoration workers were. Disclosed in these proceedings is a report dated the same date which he filled out after he returned to the office the next day. The report appeared to be in a standard format in which he confirmed, amongst other things, that the installation was properly done. The plaintiff denies Hui’s account and says that no such inspection ever took place.
8. The plaintiff and his wife, then newly-wed, moved into the flat in January 2012. The flat was under renovation before then. He or his wife did not cook much. They usually ate out. After the installation of the cabinet set and before the accident, he had cooked for only about 20 times.

*The accident*

1. On the day of the accident, the plaintiff was cooking in the kitchen late at night. He opened the lower cabinet door to get a bowl. While he was closing the door, the glass pane suddenly detached from the wooden frame and dropped to the sink. It smashed. According to his witness statement, the glass fragments struck his right thigh, right foot and right hand. I shall have to return to his injuries in more detail below as his account of where he was injured is challenged by the defendant as not being consistent in these proceedings.
2. The plaintiff was asked to elaborate on how the accident unfolded in cross-examination. He said that when he closed the door, he reached for the handgrip, then pushed and let go of the handgrip when the door was just a little more than half way down. He did not see how the glass fell off as the whole thing happened very fast. Also, when he let go of the handgrip, he did not pay attention to the door as he was about to put down the bowl.
3. The plaintiff’s wife was also in the kitchen at that time. She was opening the fridge. According to the plaintiff, the wife did not see how the accident happened and how the glass fell down but she saw him bleeding. She was not called to testify.
4. The plaintiff was taken to the A&E by ambulance that night. He received two stitches for the wound in his right thigh. He was prescribed with analgesics and was discharged after treatment.

*His complaints about the accident*

1. On 14 May, the plaintiff called the defendant’s hotline to make a complaint. He left a voice message. His call was returned on the following day.
2. On 16 May, Hui and another person from the defendant visited the plaintiff’s flat and inspected the kitchen cabinets and the glass fragments which were kept by the plaintiff. They took a few photographs.
3. On that occasion, the plaintiff made a number of demands.
   1. First, the defendant should tender a written apology.
   2. Second, the defendant should look into the design of their kitchen cabinets and make sure that no similar accident would happen.
   3. Third, the defendant should as soon as possible notify those customers who had purchased cabinet sets of the same model that there was an inherent danger in the design.
   4. Fourth, the defendant should make compensation.
4. Being concerned that some other people might get hurt by cabinets of the same design, the plaintiff warned the staff that if the defendant did not properly look into the matter, he would make known the matter for public discussion. In that conversation, the defendant’s staff did not mention anything about the issue of responsibility and compensation. They only said that they would arrange for the repair of the cabinet.
5. In his written statements, the plaintiff says that over the next two months or so, he tried to follow up with the defendant but to no avail.
6. Not having received any satisfactory response, he reported the accident to Apple Daily at the end of May. In cross-examination, he said that he sent some photographs to the newspaper and spoke to them on the phone but he had no recollection of sending them an email. He did not know what Apple Daily did to follow up on the complaint. Nor did he pay attention to whether there was a story printed about it. Then, in August 2012, the plaintiff lodged a complaint with the Consumer Council.
7. The plaintiff contacted the Consumer Council initially by phone. He was told by the staff there that he should lodge his complaint by email and that he should specify a claim amount, and that without an amount, the Consumer Council could not process the claim. He therefore emailed a complaint letter on 16 August as told, in which he specified a claim amount of $1,000,000. In his supplemental witness statement, he explained that it was a random number. At that time, he felt that the defendant was ignoring his complaint and not returning his call. It was as if the accident had not happened. He thought that if he wanted to get the attention of the defendant’s senior management, he would need to specify a high amount. Hence the figure of $1,000,000. The plaintiff however stresses that when he commenced the present action, the claim was reduced to about $120,000 only.
8. Some time after his complaint to the Consumer Council, Hui called him to let him know that replacement doors for his cabinets were ready. But he refused the replacement offer.

*The upper cabinet door*

1. When the plaintiff returned home from the A&E, he checked the upper cabinet door to see if it was safe. He found that there were signs of the glass pane starting to detach from the door frame. Attached to his witness statement are two photographs. One shows that a $5 coin could be partly inserted between the door frame and the glass pane (on the outer face). The other shows that part of a $2 coin could be inserted into that space at the corner. He therefore applied adhesive tapes to secure the glass pane to the door frame. One of the photographs disclosed by him shows that five strips of adhesive tapes were applied vertically across the upper cabinet door and two more strips stuck diagonally on it. He tried not to use the upper cabinet and has opened it less than ten times since the accident.
2. It is convenient to note at this juncture that during the visit by Hui to the plaintiff’s flat on 16 May 2012, Hui also took some photographs of the cabinets. One of them similarly shows that one was able to partly insert a $2 coin between the glass pane and the door frame of the upper cabinet door on its outer face.
3. In December 2017, just about a month before the trial, the plaintiff took down the upper cabinet door. He produced it as an exhibit at the trial. He also produced by way of evidence a box containing the glass fragments broken off from the lower cabinet door and the lower door frame.
4. A demonstration was done in examination-in-chief using a $5 coin in an attempt to show a gap existed between the door frame and the glass pane. The coin was placed flat on the outer face of the glass pane and pressed against the edge of the inner frame. It was run alongside the entire inner frame border. The result was that on the right hand side of the frame, there was indeed a gap in which part of the coin could go in whereas no such gap existed on any other part.
5. The plaintiff was challenged why he did not take down the upper cabinet door earlier if he felt that it was at risk of falling down and would pose a danger to his wife, his young daughter and a maid. The plaintiff’s reply was that he had already secured the glass pane in place by adhesive tapes and also that as he was in the course of court proceedings, he decided not to have the cabinet doors fixed.

*Dr Lim’s opinion*

1. The plaintiff says that the accident was caused by the negligence of the defendant. The main complaints revolve around the design and workmanship of the kitchen cabinets. The plaintiff contends that the defendant failed to take adequate care in the design of the kitchen cabinets and that it failed to affix the glass pane on to the back of the door frame with sufficient silicone gel or other adhesive materials to ensure that the glass pane would not fall off.
2. Dr Lim, the plaintiff’s expert, is in the field of materials and mechanical engineering. He studies all kinds of materials except concrete.
3. In the joint report, the experts agreed that there are two possible reasons for the detachment of the glass pane:-
   1. The silicone gel adhesive deteriorated and could not hold the glass pane in place.
   2. The door or the glass pane had been subject to excess force either by way of an impact or excessive force being applied, or repeated impact force. This might have caused the glass to break which would cause it to fall out.
4. It would also appear from their oral testimony that both experts accepted that the glass pane might have detached because insufficient silicone gel had been applied.
5. Amongst the possible causes, Dr Lim was of the view that the cause set out in para 34(a) above is the most probable cause.
6. It is first of all necessary to set out his observations of the kitchen cabinets, both on the date of the joint inspection and at the trial.
   1. In the joint report, from his examination of the glass fragments which had been broken off from the lower cabinet door, he observed that the silicone gel sealant “remained attached completely to the edge of the broken glass” and that “no signs of sealant could be found along the edge of the frame”. But he went on to state that he found patches of opaque material “that were most likely silicone gel adhesive that were applied to the corners of the door frame were found on the right side of the door”.
   2. In his oral testimony, having had another chance to examine the glass fragments, he added that there are traces of silicone gel still attached to the top right hand corner of the lower door frame.
   3. His examination of the upper cabinet door revealed a gap between the door frame and the glass pane on the right hand side.
7. The above observations are generally shared by Professor Cheah save that he found traces of silicone gel on the *bottom* right hand corner of the lower door instead.
8. Dr Lim’s findings and opinions were that:-
   1. Paint does not adhere well to silicone gel sealants. For this proposition, he relies on a reference in a practitioner’s book: *Handbook of Adhesives and Sealants* by Edward M Petrie (2000).
   2. The use of silicone gel as adhesive for glass furniture is “very rare”. For this, he relies on a survey which he conducted by visiting a number of large furniture chain stores such as Ikea, Pricerite and Jade@Home. In the survey, he found that all the glass panes were fixed by mechanical means.
   3. For the cabinets in question, based on his observations of the lower cabinet door and the glass fragments, there was “adhesive failure” all along the edges of the door frame except for the top right hand corner which suffered from a combination of “adhesive failure” and “cohesive failure”. “Adhesive failure” denotes the failure of the adhesive to bond itself to the surface, in this case the paint which coated the wooden door frame, whereas “cohesive failure” refers to the adhesive being torn between the two bonded surface.
   4. Dr Lim opined that the adhesive failure observed along the edges of the lower door frame (save for the top right hand corner) demonstrates that the silicone gel did not in fact provide sufficient adhesion to the paint surface. In other words, the silicone gel only bonded well to the glass surface but not the paint surface. As a result, the gel sealant remained attached “completely” to the glass and no sealant could be found along the door frame edges (again, save for the top right hand corner).
   5. Here, the silicone gel sealant on the right hand side of the lower door had deteriorated in a rapid manner due to exposure to the heat and steam emanating from the stove (which was closer to the right hand side). Due to the poor adhesion between the silicone gel sealant and the paint surface, the silicone gel sealant gradually failed from the right hand side to the left hand side. The glass pane fell when the remaining silicone gel sealant was no longer able to hold the weight of the glass.
   6. Dr Lim was of the view that if more silicone gel sealant had been applied, the retaining force on the glass pane would have been stronger. However, regardless of the quantity of the adhesive applied, given that the silicone gel does not adhere well to the paint surface, the same failure could still occur later.
   7. Lastly, Dr Lim opined that it is not likely that the glass fell off because of excessive force being applied to it. It is because the in-built hydraulic springs, if functioning properly, would make it hard for one to exert excessive force to the door unless one slams it really hard. However, in that case, there would likely be signs of damage to the stoppers or the frame itself. None was observed here.
9. In sum, Dr Lim’s opinion was that silicone gel provides poor adhesion for paint surface in the first place and that such poor adhesion rapidly deteriorated in this case because of exposure to heat and steam. The adhesion eventually failed to hold the weight of the glass pane and it fell off.

*His injuries*

1. In his statement of claim filed on 3 March 2014, the plaintiff pleads that he suffered from “right thigh and right foot injuries”. In his revised statement of damages filed on 19 September 2014, he pleads that he suffered from “right hand, right thigh and right foot injuries” and that there was bleeding from his right thigh wound. In his witness statement filed on 2 December 2014, he claims that his right thigh, right hand and right foot were cut by the glass fragments and the wounds were bleeding profusely.
2. According to the report of the treating doctor at the A&E, the plaintiff claimed at that time that his right thigh was hit by broken glass falling from height. There was bleeding from the right thigh wound. The doctor further reported that on examination, there was laceration over his right inner thigh. Suturing was performed on the wound and the plaintiff was discharged with analgesics. Although not mentioned in that medical report, the medical notes taken at the time of the consultation did note that there was right hand abrasion.
3. No sick leave was granted. At the trial, the plaintiff explained he did not request any sick leave because he worked in his family business and could take time off if needed.
4. The plaintiff was not advised to attend any follow-up consultation. The plaintiff attended a government outpatient clinic for anti-tetanus toxoid injection in June 2012 and April 2013.
5. Then, in January 2014, some 20 months after the accident, the plaintiff sought treatment at a private medical centre. According to the physiotherapy report provided by the centre, the plaintiff presented with numbness on his right big toe and there was dullness sensation on his right big toe on palpation. There was also pain on his right forefoot, especially when walking on stairs. It showed tenderness on his right forefoot on palpation. The plaintiff underwent eight sessions of physiotherapy treatment in that month.
6. In examination-in-chief, he explained why he sought physiotherapy treatment only in 2014. He said that all along he felt pain in his thigh and foot but during that period, he felt particularly painful.
7. In cross-examination, he revealed *for the first time* that the underside of his right big toe was also cut by the glass fragments when the accident happened. He referred to a photograph in which some blood can be seen inside his right slipper although the wound underneath could not be seen. Neither the A&E medical notes nor the subsequent medical report made any mention of the cut to the toe. The plaintiff said that he did not mention it to the doctor at that time as his main focus was his right thigh wound which was bleeding profusely. He also added that the scar on the toe is not obvious.
8. The cut to the underside of his right toe does not seem to have been expressly referred to in his pleadings, witness statements or documents disclosed by him in these proceedings. Naturally the point was taken up and explored at some length by Mr Clark in cross-examination. He was asked why he only mentioned his right thigh injury in his complaint email to the Consumer Council. His answer was broadly that he was mainly focussing on his right thigh injury which was the most important one. He was also asked to clarify his description of his injury in the witness statement in which he said the fragments cut into his right thigh and right foot. He said in oral testimony that the reference to “right foot” was a reference to his “right toe”.
9. According to the photographs disclosed, there is now a 1 cm scar on his right inner thigh where he was cut by the glass fragment.
10. In the revised statement of damages and his witness statement, the plaintiff complains of occasional pins and needles sensation of pain over the injured area of his right thigh and that the pain is worse after long hours of walking or standing and the pain also affects his sleep. He feels tenderness on his right forefoot on palpation and when walking on stairs.
11. Prior to his accident, the plaintiff enjoyed jogging in the park. After the accident, he seldom goes jogging due to pain on his right thigh and right forefoot.

*Quantum*

1. The plaintiff was 41 years old when the accident happened. He has been working as a marketing and sales manager in his family business.
2. He claims the sum of $80,000 for pain, suffering and loss of amenities. This amount is revised downwards from the sum of $120,000 as sought in the revised statement of damages. He also claims special damages of $5,274, comprising medical charges at the A&E ($100), injection charges ($34), medical charges for his private physiotherapy treatment ($2,950), travelling expenses ($190), tonic food ($1,000) and plastic strap and scar remover ($1,000).

*THE DEFENDANT’S CASE*

1. The defendant denies liability and disputes quantum.
2. The defendant is a subsidiary of a well-known local group engaging in the retail sale of kitchen equipment and furniture, including kitchen cabinets. Disclosed in these proceedings are certificates received by the German Pool brand, including certifications under the Hong Kong Q-Mark Service Scheme, the Hong Kong Top Brand Awards and the Hong Kong Quality Board.
3. The defendant commenced selling cabinet sets since 2002. Between 2011 to early 2014, there were about 20 transactions. The plaintiff’s complaint was the first and only one complaint which Hui knows of since he joined the defendant in 2006.
4. The cabinet doors in question were manufactured by a renowned cabinet manufacturer called Shenzhen Wanjia Kitchen Cabinet Ltd, a mainland company. It specialises in the manufacturing of cabinets or components of cabinet and had over 10 years of experience in this field. Wanjia has stringent quality control systems and will perform quality checks before products are shipped. Over the years, Wanjia has received various accreditations and awards, both local and international.
5. Between 2008 and 2014, Wanjia supplied kitchen cabinets to the defendant. From 2011 onwards, Hui visits Wanjia’s factory in Shenzhen every year and is impressed by its high quality in manufacturing. The defendant would also carry out its own quality checks after receiving products from Wanjia.

*The defendant’s plea regarding the cause of the accident*

1. The defendant’s position is that the plaintiff’s account of the accident is not a truthful one because it does not make logical or scientific sense. It contends that there must have been some event in the kitchen that night to cause the glass to break.
2. In its defence, the defendant pleads that the accident arose as a result of contributory negligence on the part of the plaintiff, with particulars as follows:-
   1. He had improperly handled the cabinet door.
   2. He had repeatedly or persistently closed or opened the cabinet door with excessive force.
   3. He failed to close or open the cabinet door in a proper manner.
   4. He failed to heed the condition of the cabinet door.
3. The defendant’s case is that the plaintiff had misused the cabinet and intentionally shifted the blame on the defendant. Either the door or the glass pane was subjected to excess force. In gist, the door was broken by some impact. And the accident arose through no fault of the defendant.

*Professor Cheah’s opinion*

1. Professor Cheah, the defendant’s expert, is the Chair Professor of the Director of Institute of Advanced Materials at the Baptist University.
2. Although he generally shared Dr Lim’s observations about the *physical state* of the upper cabinet door, the lower cabinet door and the glass fragments, he put forward mostly opposite views to Dr Lim’s:-
   1. While silicone gel does adhere to some other substances better than it does to paint, it is not possible to state categorically that silicone gel does not adhere to paint. It depends on the type of paint and the condition of the paint surface.
   2. He disagreed that the use of silicone gel for glass furniture is very rare. On the contrary, it is commonly used in kitchens, bathrooms, glass windows and interior decoration for sealing and fixing panels.
   3. He considered that the overall design of the kitchen cabinets in question is standard. His examination revealed that the silicone gel is found to be “in very good condition and some pieces of glass still adhere to the gel firmly”. As to the gap observed in the upper cabinet door, he said in the joint report that he was not able to comment why the sealant was no longer adhering in places. However, in his oral testimony, his opinion was that he would expect there would be gaps so as to allow for expansion or contraction due to temperature change and tolerance in the manufacturing process.
   4. He disagreed that the adhesiveness of the silicone gel would be affected by the heat and steam in the kitchen in the way Dr Lim claimed. This is because silicone gel is generally resistant to heat and moisture and its property would not be changed unless it is exposed to heat and moisture reaching at least 200oC, which would not be the case in the plaintiff’s kitchen.
   5. Professor Cheah was of the further opinion that a sufficient amount of silicone gel had been applied to the cabinets in question. Based on his visual inspection, it had been applied all around the four edges and reinforced at the four corners.
   6. On the whole, in this case, the silicone gel provided strong adhesion holding the glass pane in place.
   7. The most likely reason the glass fell is due to some external impact or excessive force being exerted on the glass causing it to detach from the door frame. The logic is that if the glass pane was to fall because of the failure of the silicone gel, it should have done so when the door was fully open and when it was horizontal, as in that position there was only the silicone gel and nothing else to hold the glass pane in place against gravity. However, on the plaintiff’s factual case, the glass fell off when it was about half way down.

*The counterclaim for defamation*

1. As pleaded, the defendant’s counterclaim is based on the plaintiff’s publication of the following words to the staff of the defendant, Apple Daily and the Consumer Council by letter on about 18 June 2012:-

“本人綜合所見，德國寶的玻璃櫥櫃門設計有缺陷加上生產裝配也有問題，是一個不安全不可靠的設計，安全不達標準，一片約80cmW x 20cmH的玻璃只用一丁點玻璃膠（見圖），又沒有加固玻璃的設計，掉下來是遲早問題，可以說是一件危險的產品。”

“According to my observations, there are flaws in the design of the German Pool glass kitchen cabinet doors and the manufacturing and assembly has problems; it is an unsafe and unreliable design, not meeting safety standards; only minute amount of glass adhesive was used on a glass with measurement of 80cmW x 20cmH (see diagram), additionally there was no design for reinforcing the glass, its falling off was a matter of time; it can be described as a dangerous product.” (the defendant’s translation)

1. However, at the evidence stage of the trial, Mr Clark confirmed that the defendant would no longer pursue the defamation claim in respect of the alleged publication to the defendant’s staff.
2. In opening, Mr Clark said that of particular concern was the publication to Apple Daily. But he did not exactly explain why. The plaintiff admits in his pleadings that he reported the accident to Apple Daily in late May 2012. Apart from that admission, however, there is no documentary evidence adduced by the defendant to substantiate its plea that the words in question *were in fact published* to Apple Daily. The only document disclosed is an email reply from a staff of the defendant to Apple Daily sent on 18 June 2012 giving answers to a list of questions previously raised by Apple Daily. It cannot be deduced from the list of questions exactly what was said by the plaintiff to Apple Daily and, more importantly, whether he published the words in question to the latter.
3. The words were published to the Consumer Council in the plaintiff’s complaint email dated 16 August 2012 – see para 25 above. The Consumer Council then forwarded the complaint to the defendant on 24 August.

*DISCUSSION*

1. The issue of liability turns ultimately on whether the court accepts the plaintiff’s account of how the accident happened, applying the standard of balance of probabilities. In addition to his own factual evidence, the plaintiff relies on Dr Lim’s opinion that the silicone gel did not provide sufficient adhesion to the paint surface of the door frame and the adhesion eventually failed resulting in the accident. On the other hand, the defendant challenges the plaintiff’s credibility. It also relies on Professor Cheah’s opinion that there must have been some external force or impact being applied to the glass pane causing it to fall off on the night of the accident.
2. I shall first deal with the factual and expert evidence separately and then seek to arrive at an overall view on the most likely cause for the detachment of the glass pane by taking into account all the relevant matters.

*Evaluation of the factual evidence*

1. I should evaluate the factual evidence against the backdrop of undisputed, indisputable and objective facts. I am to weigh the inherent probabilities of the parties’ cases. Contemporaneous documents in this case include, most importantly, the photographs taken at the time of the accident and shortly afterwards.
2. I should start by saying that on the face of it, the plaintiff’s account of how the accident happened is fairly straightforward. But the same cannot be said of the allegation he makes in respect of his injuries. The defendant mounts a number of attacks querying his credibility. I now deal with those attacks which I consider are the more important ones.
3. First, in my view, the attack which has most force is the one directed against the plaintiff’s allegation that his right toe was cut by a glass fragment in the accident. This is not supported by any of the photographs taken after the accident or the contemporaneous medical notes. It should be noted that while the A&E doctor did make a note of the right hand abrasion which was clearly a very minor injury, he made no mention at all of any injury to the right toe, which the plaintiff described as a “cut”. It is also quite inexplicable why the plaintiff did not *explicitly* refer to the cut to his right toe in any of his pleadings or written evidence. Instead, he opted to describe his injury as one to his “right foot”. By contrast, the alleged right toe injury featured prominently when the plaintiff was under cross-examination.
4. Another unusual aspect of the plaintiff’s evidence on his injuries is the very late treatment of his alleged right toe injury. The plaintiff sought physiotherapy treatment some 20 months after the accident for numbness to his right big toe. In his written statement, he said that since the accident there was occasional numbness in his right thigh when under pressure (such as getting off a car) and sometimes he also experienced numbness in his right foot and right big toe. In cross-examination, he said that he felt pain in his right thigh and right foot all along after the accident and that he went to see a physiotherapist in January 2014 because he felt particularly painful around that period.
5. His explanation for the unduly long time lapse for seeking treatment for his right foot is hardly convincing, given the very minor nature of his injuries in the first place and the apparent lack of any triggering event justifying the need for treatment so long after the initial injuries.
6. In this regard, I accept Mr Clark’s submission that the timing, coupled with the lack of a good explanation, strongly suggests that the problem with the right big toe is either not genuine or if genuine not related to the accident at all.
7. On the other hand, I accept that the plaintiff was indeed injured in his right thigh and right hand, as this is well supported by the medical notes. However, it is clear to me that the injuries are of a very minor nature. The cut in the thigh required two stitches. In view of that, I find the plaintiff’s allegation that these injuries have affected his sleep and prevented him from jogging up to this date is an exaggeration of his symptoms.
8. This part of the plaintiff’s evidence does cast some doubt on the reliability of his evidence as a whole.
9. Secondly, Mr Clark also took issue with the plaintiff’s failure to call his wife to testify. The plaintiff admitted that his wife was in the kitchen at the time of the accident. Against that admission, Mr Clark invited the court to draw an adverse inference that the wife’s evidence, if adduced, would not support the plaintiff’s case.
10. I do not agree with this submission. Although the wife was in the kitchen (and the kitchen is apparently not a particularly big one), it is not necessarily the case that she actually witnessed how the glass pane fell down. It is in fact the plaintiff’s evidence that his wife did not so witness. That is an entirely plausible explanation why he did not call her to testify as she would have nothing meaningful to add to his evidence on how the accident occurred. Here, there is simply no material before the court to suggest in any way that the wife would likely be in a position to give evidence which would be favourable to the plaintiff. In the circumstances, there is no room to draw any adverse inference against him for failing to call her to come forward as a witness.
11. Thirdly, Mr Clark also queried why the defendant would retain the upper cabinet door in its place for so long after the accident when it was clearly a danger to him and his family members. I do not think there is much force in this argument. I consider that the plaintiff’s explanation is inherently plausible – see para 31 above. The photograph shows that the plaintiff had indeed used a fair amount of adhesive tapes to secure the glass pane from falling off. As such, it does not pose such a danger as suggested by Mr Clark.
12. Fourthly, the defendant’s ultimate factual position is that the plaintiff might have applied excessive force or impact on the glass causing it to fall – see the pleas set out in para 60 above. I need to consider critically the inherent likelihood of the defendant’s case.
13. I have found above that the plaintiff has exaggerated his injuries. However, as accepted by Mr Clark in closing, this does not by itself mean that the plaintiff has lied about how the accident had happened.
14. In his written closing submissions, Mr Clark put the defendant’s case as follows:-

“The only conclusion must be that the glass was broken in some other way than that claimed by [the plaintiff], either by direct impact with a hard object causing it to break or by [the plaintiff] (or possibly his wife) pushing the glass pane out from the door either accidentally or on purpose.”

1. If this is what happened on the night of the accident, it must mean that the plaintiff’s entire claim against the defendant has been a complete and total fabrication on the plaintiff’s part, right from the very beginning and perpetrated over the course of the past few years up to the conclusion of the present trial.
2. It will be recalled that he immediately complained to the defendant on the day after the accident. He later complained to Apple Daily and the Consumer Council. In his complaint to the latter, he specified a claim amount of $1,000,000. It is no doubt an unrealistic amount and does not reflect well on him, given the very minor injuries which he had suffered. However, it is notable that when he commenced the legal action two years later in 2014, the claim was reduced drastically to a much lower figure of about $125,000 – see the original statement of damages filed on 3 March 2014. It should also be borne in mind that the plaintiff is not legally aided in this action. Much legal costs would presumably have been incurred by him by now, including the fees required to engage his expert and to retain counsel.
3. When the above is taken into account, one must ask oneself – realistically speaking, if the whole case against the defendant was fabricated from the very beginning, what would be the likelihood of the plaintiff commencing an action two years after the accident only to claim a much reduced amount of $125,000 (which has been further cut down to about $85,000 at the trial)? Further, how likely would it be that he then persevered through a full-blown civil lawsuit over the next four years and all the way to the conclusion of the trial, presumably having to bear the legal expenses upfront by himself? At the end of the day, even if the plaintiff is awarded damages in full, does he really stand to make any meaningful monetary gain from the whole exercise? That is already the best case scenario for the plaintiff. What if he fails in his claim? He would receive no compensation from the defendant and would have to pay its legal costs and possibly damages for the defamation counterclaim. I must ask myself how inherently plausible a person in the plaintiff’s position would take this course of action if his intention was to get money off the defendant relying on a purely bogus claim.
4. It is true that the plaintiff has exaggerated his injuries and his evidence in that regard is rendered unreliable. But a fabrication of an utterly fake claim in the way suggested by the defendant seems to me to be an entirely different matter altogether. When the defendant’s theory is tested against common sense, it seems to me that its case does not sit well with inherent probabilities and I have real difficulty in convincing myself that that is what in fact happened.
5. As far as Hui’s evidence is concerned, there is really no reason why the court should not accept as true. Ms Percy Yue, counsel for the plaintiff, has not pointed to any. I find his evidence to be generally credible.

*Evaluation of the expert evidence*

1. As noted above, while the experts broadly shared the same observations concerning the physical state of the upper cabinet door, the lower cabinet door and the glass fragments, they proffered effectively opposing views on practically everything else which include, materially, the suitability of silicone gel as an adhesive for the kitchen cabinets in question. I should like to state at the outset that I have found it difficult to come to any decisive view on whose opinions I should prefer. I say this because there are some notable limitations insofar as the basis of the opinions are concerned, as revealed in cross-examination.
   1. First, it is common ground between the experts that differently formulated silicone gel would possess different adhesive quality. However, as confirmed by Professor Cheah in cross-examination, the experts have not been informed of the brand of the silicone gel actually used in this case or the type of paint used. As such, as would be clear from the joint report, the opinions of the experts are confined to generic statements as to what they understand to be the general properties of the materials involved. The experts have not been able to address the issues more specifically by reference to the actual brand or type used.
   2. Secondly, the experts conducted a visual inspection of the kitchen cabinets in question. No further test was done to support their opinions. For instance, on the question of whether there was sufficient silicone gel applied to securely attach the glass pane to the door frame, there was no quantitative analysis undertaken by either expert. Professor Cheah accepted in cross-examination that it should be possible to work out the sticking force required to hold the glass pane in question, rather than relying solely on a visual inspection. No such exercise was conducted however. And, as I understand it, the opinions expressed by the experts on this issue are based solely on a visual inspection of the silicone gel still remaining on the cabinets in question. Dr Lim said that the retaining force would have been stronger if “more silicone gel had been applied along the whole contact surface” whereas Professor Cheah was of the view that the quantity was sufficient. In the absence of any quantitative or more concrete analysis, I have found it difficult to choose between the two potentially conflicting opinions.
   3. Thirdly, on the material issue of whether silicone gel adheres to paint surface, all that Dr Lim had cited in support of his negative opinion is effectively one sentence from a practitioner’s handbook whereas Professor Cheah put forward a rather generic statement that it depends on the type of paint and the condition of the paint surface. Again, it is effectively one bare assertion against another bare assertion.
2. Doing it as best I can, I have arrived at the following conclusion on some of the more material issues addressed by the experts, placing heavy reliance on the objective facts established or agreed in this case.
3. To the extent that Dr Lim was suggesting that the silicone gel used in this instance provided poor adhesion to the paint surface of the door frame, I do not agree. I find that the silicone gel used was *capable of* adhering to the paint surface in question. On this issue, I take into account the following:-
   1. Dr Lim’s observation that some silicone gel was seen at the top right hand corner of the lower door frame and his acceptance that that is evidence that the silicone gel did provide some adhesive force to the paint surface.
   2. Although the right hand side of the glass pane of the upper cabinet had partly detached, the glass pane remained attached to the frame in other places. It should be recalled that the cabinets were installed in December 2011 and the upper cabinet door was taken down only in December 2017. This objective fact is at least some evidence that the silicone gel did seem to be capable of adhering to the paint surface here and therefore goes contrary to Dr Lim’s general statement that silicone gel does not adhere well to paint.
   3. Hui’s evidence, which I find to be credible, that he has known of no complaint concerning the defendant’s cabinet sets apart from the plaintiff’s, when there were about 20 transactions recorded by the defendant in the three-year period around the time of the sale of the cabinet set to the plaintiff. The relevance of the evidence is that if the silicone gel used by the defendant was in fact a poor adhesive, one would have expected complaints from other customers.
4. I do not agree with Professor Cheah’s opinion as set out in para 63(g) above. I prefer Dr Lim’s view that if an external force or impact had been applied to the glass pane so as to cause it to detach, it would have been of a high magnitude and this possibility is inconsistent with there being no damage being found to the stoppers or the wooden frame. Also, I prefer Dr Lim’s view that it would be equally possible for the glass pane to fall whether it was in a horizontal position or when the door was closing. I would think that should be correct since in either case, there was no other mechanical means or counter-force to stop the glass pane from falling at the point when the adhesive failed completely to hold the weight of the glass. As remarked by Dr Lim, while the detachment itself was an abrupt action, the deterioration of the adhesion was a gradual process. Detachment happened at the point when the adhesion completely failed. It could happen when the door was partly open as well as when it was fully open.
5. For the above reasons, among the three possible causes for the detachment of the glass pane as set out in paras 34 and 35 above, it seems to me that the more likely cause would be that insufficient silicone gel had been applied to the cabinets in question.

*Factual findings*

1. Based on my views on the credibility and reliability of the factual evidence and the expert evidence and having considered the matter on an overall basis, I make the following findings.
2. I accept the plaintiff’s factual account in general subject to two exceptions. First, I find that he did not suffer from a cut to his right big toe in the accident and that he has not suffered from the residual symptoms after the accident as alleged, such as numbness and pain to his right thigh and right foot and his sleep being affected. Second, contrary to the plaintiff’s denial, Hui visited the plaintiff’s flat to check the installation on 28 December 2011. That is well supported by a contemporaneous report.
3. Accordingly, I find that the accident happened in the way as the plaintiff alleges. The glass pane did not fall off because an external force or impact was exerted on it by the plaintiff or someone else, as suggested by the defendant.
4. I accept Hui’s evidence as credible and reliable. More specifically, based on his evidence, while the defendant was engaged in some 20 transactions involving the sale of kitchen cabinets, Hui was aware of only the plaintiff’s complaint and no others.
5. I reject the plaintiff’s contention that the silicone gel used by the defendant could not provide proper adhesion to the paint surface. However, it would appear that insufficient silicone gel had been used for the cabinets in question resulting ultimately in the falling off of the glass pane only some five months after the installation. This constitutes negligence on the part of the defendant. Liability is therefore established.
6. Mr Clark confirmed in opening that if the court finds for the plaintiff on his factual case on liability, the counterclaim for defamation would necessarily fail. Accordingly, I dismiss the counterclaim.

*Quantum*

1. For PSLA, the plaintiff claims a sum of $80,000. Against this, the defendant says that an award of $10,000 would be appropriate.
2. I have considered the cases cited by Ms Yue and Mr Clark and find these two cases to be comparable to the present situation – *Lee Fu Wah v Hoffman* DCPI 2390/2011, 25 June 2013 and *Kumara Debanama v Lui Pui Wai* [2016] 4 HKLRD 501. Both cases concern dog attacks resulting in abrasion, laceration wounds or puncture wounds. I consider that in the present case an appropriate award for PSLA would be $30,000, given that the injuries are of a very minor nature and degree, being right hand abrasion and a cut to the right thigh which has resulted in a 1 cm scar and no other residual symptoms.
3. On the facts as found, I would also award special damages in the sum of $204, comprising medical charges at the A&E ($100), injection charges ($34), travelling expenses to the A&E ($70). I disallow the claim for tonic food, plastic strap and scar remover, given the minor nature of the injuries.
4. The total award is therefore $30,204.

*ORDER*

1. There be judgment in the sum of $30,204 for the plaintiff and the counterclaim be dismissed. Interest should accrue at 2% p.a. on the PSLA award from the date of the writ to judgment and interest on special damages should be awarded at half the judgment rate from the date of accident to the date of judgment.
2. I also make an order *nisi* that the defendant do pay the plaintiff’s costs of the action and the counterclaim, to be taxed if not agreed, with certificate for counsel.

( Winnie Tsui )

District Judge

Ms Percy Yue, instructed by Yip, Tse & Tang, for the plaintiff

Mr Douglas Clark, instructed by Benny Kong & Tsai, for the defendant

