De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co Ltd and Others [2003] SGHC 229

Case Number : Suit 731/2002

Decision Date : 03 October 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Raj Singam, Wendell Wong and Tan Siu-Lin (Drew & Napier LLC) for the plaintiff; Simon Tan and Philip Lam (Attorneys Inc LLC) for second and third defendants; B Rao and G Hardial Singh (B Rao & KS Rajah) for the fourth defendant; Lok Vi Ming and Kelvin Poon (Rodyk & Davidson) for fifth defendant

Parties : De Cruz Andrea Heidi — Guangzhou Yuzhitang Health Products Co Ltd; HealthBiz Pte Ltd; Semon Liu Kelun; TV Media Pte Ltd; Rayson Tan Tai Ming

Companies – Directors – Liabilities – Whether director of company personally liable for torts committed by the company

Contract – Intention to create legal relations – Whether there was intention to create legal relations in situation where defendant doing plaintiff a favour – Relevance of defendant making secret profit or commission from plaintiff

Damages – Quantum – General damages for pain and suffering – Whether award of $250,000 for general damages too high – Multiplier for annual medical expenses

Damages – Quantum – Loss of earning capacity in entertainment industry – Multiplicand and multiplier to be used

Tort – Negligence – Breach of duty – Whether importer and distributor of slimming pills in breach of duty of care for failing to keep proper records of consignments of pills and to do proper batch tests – Whether wholesaler of slimming pills in breach of duty of care for placing blind faith in the importer and distributor

Tort – Negligence – Causation – Whether circumstantial evidence proved on a balance of probabilities that slimming pills had caused the plaintiff's liver failure – Whether break in chain of causation when the plaintiff obtained the pills from non-official retail sources

Tort – Negligence – Damages – Types of damages claimable by plaintiff – Whether plaintiff obliged to mitigate loss by having liver transplant operation done at National University Hospital instead of Gleneagles Hospital

Tort – Negligence – Duty of care – Whether importer and distributor of slimming pills owed duty of care to customers – Whether duty of care extended to conducting "due diligence" check on the manufacturer – Whether wholesaler of slimming pills owed duty to consumers to exercise reasonable care in promotion, endorsement and advertisement of the pills

1 This is an action by the plaintiff for damages suffered by her as a result of consuming a slimming drug known as Slim 10. Her liver failed and she had to undergo a living donor liver transplant in May 2002.

The plaintiff's case

3 The plaintiff graduated with a degree in Clinical Psychology from the University of San Francisco in 1997. She returned to Singapore in 1998 and worked as a Clinical Psychologist in a clinic for about a year. She then joined Television Corporation of Singapore, the predecessor company of MediaCorp, and has been working there for the last five years. She did mostly hosting assignments and also acted in movies and dramas. In 2001, she had her big break when she was cast in the

Chinese drama series 'No Problem' as the Chinese language entertainment market was much bigger than the English language one.

4 She led a very hectic but happy life. When she was not filming, she would often be at the gymnasium participating in all sorts of exercise classes. She and her fiancé, Pierre Png, loved outdoor activities and would frequently go to the beach, cycle, swim and go for joy rides on his motorcycle.

5 Sometime in December 2001, she got to know the fifth defendant and his wife, Chen Liping, also a MediaCorp artiste, when they were all cast together in 'No Problem'. The plaintiff was cast as the fifth defendant's wife and therefore spent a lot of time together during filming. It was also during this period that the plaintiff saw the fourth defendant's television commercials on Slim 10 which featured Chen Liping who was known to be having problems with her weight.

6 The commercials showed 'before and after' pictures of the artiste and the difference was astounding to the plaintiff. Although the plaintiff did not normally pay much attention to nor believe advertisements relating to slimming, those commercials made an impact on her because Chen Liping 'was well known for having been pudgy and here she was in the advertisements looking so slim'. The thirty-second commercial in the Chinese and the English versions was played in Court. The commercials were 'informercials' which were not ordinary advertisements but were much longer and full of information. They represented that Chen Liping had tried the pills which were completely herbal. They featured the fourth defendant's name at the end and stressed that the company was the distributor of Slim 10.

7 The plaintiff also saw life-sized cardboard cutouts of Chen Liping and huge posters of her advertising Slim 10 at the fourth defendant's retail outlet in Beach Road. She knew the fourth defendant was a large and reputable company. Her family had bought products from the company before. She had also seen its advertisements in the United States of America while she was studying there. She therefore believed that the fourth defendant would have made the necessary checks before endorsing and pushing the slimming product so aggressively and that Slim 10 was safe for consumption.

8 She continued to see the advertisements aired over various television channels here until late March 2002 when she went to Bangkok to visit her fiancé who was doing some filming there.

9 For the plaintiff, health supplements had a lot to do with reputation, reliability and credibility of the product. She would not have bought Slim 10 from the fifth defendant had it been marketed by the first, the second or the third defendants as she knew nothing about them and they had no reputation here.

10 During one of the filming sessions for 'No Problem' in December 2001, the plaintiff commented to the fifth defendant that she had seen the Slim 10 advertisements and complimented him on how much weight his wife had lost. The fifth defendant replied that the pills really worked. She then said she had not been going to the gymnasium recently due to an operation to remove a lump from her left breast in November that year after which she was advised to reduce physical exertion. As a result of that and the erratic meal times caused by filming, she was gaining weight and was concerned. The fifth defendant told her she should take Slim 10 to help maintain her weight.

11 A few days later, the fifth defendant asked her in the film studio 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 the $149.90 in the retail outlets. The plaintiff decided to buy two bottles and was given two clear, unmarked test tubes of the capsules later that day. Before she took them

from him, she asked him if there would be any side effects and was told she might suffer insomnia, feel a little bit cold and her calves might hurt a little. Other than those, he said the pills were definitely safe as they were all natural and contained only Chinese herbs. She paid him $260 in cash.

12 The plaintiff had no doubt that she was given the Slim 10 advertised by the fourth defendant as Chen Liping, the wife of the fifth defendant, was the spokesperson or poster girl and the fifth defendant's description of the product was the same as that given in the advertisements. The transparent test tubes and the white or off-white colour of the capsules were also like those shown in the advertisements.

13 As filming was still ongoing then, the plaintiff decided not to start taking the pills. She was already having a hard time trying to memorise the script in Chinese and did not want her performance to be affected by insomnia. She only started consuming Slim 10 in late January or early February 2002 when filming was completed for the series. She recalled in Court it was close to Chinese New Year which fell on 12 and 13 February 2002. Four capsules were to be taken three times a day and each set of 120 capsules would therefore last 10 days. When she first started consuming the pills, she followed the recommended dosage. She felt some of the side effects mentioned by the fifth defendant. She also experienced palpitations. After a while, she decided to reduce the intake to four-four-two per day as she wanted to minimize any disruption to her sleep. During filming, she could have skipped some dosages because of the irregular filming hours.

14 On 12 February 2002, the plaintiff sent the following text message by mobile phone via the Short Message Service ('SMS') to the fifth defendant:

'Hi, wishing u, Li Ping & baby gd health & prosperity this CNY!

Luv Andrea'.

On 15 February 2002, she sent another message to him as follows:

'Gd morning Mr Extremly Naughty, did Cai Shen bring u a

lot of wealth this CNY? Anyway i hv run out of skinny pills.

Will u be around mcs 2day?'

These messages were retrieved by the fifth defendant from his mobile phone..

15 Sometime on 18 February 2002, the fifth defendant handed her the second batch comprising another two sets of 120 pills each. Before she could even ask him why those two sets were packed in aluminium foil, he told her he had asked the Slim 10 'lao ban' (meaning 'boss') to pack them that way as he always kept the pills in his car which was often parked in the open and did not want them to be affected by the heat. For the same reasons stated earlier, she had no reason to doubt that the pills were Slim 10. She did not ask him why the pills were kept in his car. She paid him $260 by way of a cheque dated 18 February 2002.

16 The plaintiff started consuming the second batch sometime in early to mid March 2002 after finishing the first batch of two test tubes. During cross examination, she mentioned that she had in fact one more test tube of pills left in the refrigerator which she had overlooked when she ordered the second batch.

17 On 29 March 2002, she travelled to Bangkok to visit Pierre Png who was filming there. She brought along what was left of the second batch of Slim 10 and finished them there according to her usual dosage pattern.

18 On 11 April 2002, she returned to Singapore. As she had no more Slim 10 pills, she sent a text message to the fifth defendant to order some more. She could not recall the words of that message and the fifth defendant was not able to retrieve that message. He left two bottles of the pills in her pigeon hole at MediaCorp which she picked up sometime between 12 and 15 April 2002 when she sent Pierre to the studio. She did not have a chance to pay the fifth defendant for this third batch of pills as she was hospitalised soon thereafter.

19 On Sunday, 14 April 2002, the plaintiff, her family and Pierre went to church together. At lunch later, her sister commented that the plaintiff's eyes looked very yellow and jaundiced. It was decided that she should seek medical attention.

20 Accordingly, the next day, Pierre accompanied the plaintiff to see their regular general practitioner doctor in her clinic. The doctor told them the plaintiff's liver was inflamed and her eyes were very jaundiced and suggested that she be admitted into hospital immediately. The couple went home to pack some personal effects and then left for Changi General Hospital. There, it was confirmed that the plaintiff's liver was inflamed and she had to be hospitalised. Unfortunately, the hospital did not have any single-bed rooms available. The plaintiff was then referred to Mount Alvernia Hospital. She arrived there in the early hours of 16 April 2002.

21 Dr Chia Siew Cheng was the doctor in charge of her throughout her stay at Mount Alvernia Hospital. Despite undergoing many medical tests, the hospital was none the wiser about her ailment. The plaintiff's gums bled every morning when she brushed her teeth and the bleeding continued throughout the day because there was something wrong with her blood clotting mechanism. She also had bruises all over her body caused by the drawing of blood for the various tests.

22 Sometime in the second week of her hospitalisation, she had to undergo a liver biopsy. The pain was excruciating and her body went into shock, shaking and trembling uncontrollably. After that, things happened in a blur. However, the results of the biopsy were still inconclusive.

23 On 3 May 2002, Dr Dede Selamat Sutedja of the National University Hospital ('NUH') liver team went to see the plaintiff. He prescribed some drugs for her but she kept vomitting them out after consumption. On 4 May 2002, the plaintiff was moved to NUH. On 5 May 2002, the plaintiff was encephalopathic. She could not recognise anybody and was babbling incoherently. She was taken to the Intensive Care Unit for immediate liver dialysis which allowed her to regain her lucidity temporarily. A liver transplant was necessary but all the people related to her were found to be unsuitable as donors for one reason or another. The policy then was that only relatives of the patient could be donors. Pierre was willing to be a donor and was found to be suitable. The plaintiff's family managed to get the approval of the Ministry of Health to grant special permission for an unrelated living donor transplant to be carried out.

24 On 7 May 2002, the plaintiff's family decided to transfer her to Gleneagles Hospital because the NUH liver team had never done a living donor transplant before whereas Dr Tan Kai Chah ('Dr K C Tan') at Gleneagles Hospital had such experience. There, the plaintiff was found to have a thyroid problem. Medication was given to her to control it and that delayed the operation. That night, the transplant was performed over some twelve hours. It was a great relief to the families of the plaintiff and of Pierre that it was successfully carried out. About two weeks or so later, the plaintiff was discharged from hospital.

25 On the day of her discharge from Gleneagles Hospital, a press conference was held. However, she did not admit to having taken Slim 10 because:

(1) the family spokesman, her brother-in-law, advised that she should not be seen to be blaming Slim 10 because it had not been conclusively proved that the slimming pills caused her liver failure;

(2) her manager told her not to mention the slimming pills because Chen Liping was the poster girl for Slim 10 and MediaCorp did not want any adverse publicity for her.

26 The plaintiff explained that she purchased Slim 10 from the fifth defendant instead of buying it from the commercial retail outlets for three reasons:

(1) to avoid public scrutiny into her private life;

(2) for convenience, as she and the fifth defendant were on the same show and she would also not need to ask someone to buy it on her behalf;

(3) the fifth defendant had said he could sell it at a discounted price which was $9 or $10 less than the retail price.

While she had taken up the fifth defendant's offer during the filming of 'No Problem' to buy products from GNC (a health food supplement retailer) on her behalf because of a 40% birthday discount given to him, the buying of Slim 10 was a commercial matter. In that incident, she had asked him to buy six bottles of Biotin shampoo for her and he obliged. She picked up the shampoo from the outlet herself later and paid him the discounted price. Others working in MediaCorp also purchased Slim 10 from the fifth defendant. They included her manager (who purchased for her friend), the two producers, a fellow member of the cast in the show and a soundman.

27 Although the fifth defendant mentioned to her that he knew the Slim 10 'lao ban', she did not know who he was at that time. No details of the relationship were given by the fifth defendant.

28 The medical notes taken at Mount Alvernia Hospital recorded the plaintiff as having said that she took Slim 10 between December 2001 and January 2002 while those at NUH reflected the dates of consumption as between November 2001 and February 2002. The plaintiff said those dates were inaccurate. The errors could have been due to the fact that she was not very coherent and clearheaded during her hospitalisation. She could have mistakenly given the dates of purchase rather the period of consumption. Now that she was herself again, she was able to state for certain, by reference to the events, that she started taking the pills in late January or early February 2002 and stopped taking them in April 2002 when the supply ran out while she was in Bangkok.

29 Although the liver transplant was a success, there still existed the risk of acute liver rejection occurring at any time. To avert this, the plaintiff was put on immuno-suppressant medication to suppress her body's natural immune system. She has to take the medication for the rest of her life and that would mean a weakened immune system, rendering her highly susceptible to infection, which became even more frightening with the outbreak of the Severe Acute Respiratory Syndrome ('SARS'). There would also be side effects like increased risks of renal failure and of skin cancer. She was therefore advised not to go under direct sunlight. If she did go outdoors, she would need to wear sunscreen with sun protection factor of 15 or higher, even on cloudy days. If she expected to be outdoors for a lengthy period, she would have to be fully covered up. This impediment has affected her social and working life. Outdoor shoots, common in her profession as an artiste, would be very

difficult and inconvenient. The type of jobs she could undertake would be limited. Directors and producers would be reluctant to engage her on long-term projects.

30 She was also restricted in the types of food she could consume. She could not take seafood, raw food and chocolates. She also could not take oily food as her gall bladder was removed during the transplant. For someone like her who loved food, life would not be the same anymore. Further, her dietary restrictions would also affect her love for travel overseas. She also could not engage in strenuous activity anymore. She would become tired and breathless very easily.

31 Her bladder had become very weak resulting in interrupted sleep at night. She suffered from migraines and body aches and would fall ill practically every month. She also suffered from the mental torture of never knowing when her body might fail her suddenly or when she might succumb to some virus as a result of her weakened immune system. Although her wedding has been set tentatively for 18 October 2003, she was not heavily involved in the preparations as she did not wish to be disappointed by any untoward turn in her condition.

32 One of the most devastating consequences was the medical advice against pregnancy as she loved children and would have wanted six of her own. In the event of pregnancy, the current immuno-suppressant drug (Prograf) that she was taking would have to be changed and there was a risk that her liver might not take well to the new drug or that the foetus might be adversely affected. Adoption was an option but it was not quite the same as having one's own offspring.

33 Recently, the plaintiff's manager advised her not to come across in public as someone who was ill or she would not be hired for any work. She therefore had to portray the same bubbly personality as before and show only her 'public celebrity side'. The real situation was far from rosy – there were times she could not even get out of bed because of pain and there were also bouts of depression she was prone to.

34 The plaintiff lost out on a few jobs during her hospitalisation. She missed the whole second season of 'All Change', a make-over programme the script of which she wrote for the first season and which she hosted. She also lost the contracts to host a Swarovski event, the Sing Singapore launch and the National Day Parade 2002 and a sponsorship deal with L'Oreal for Helena Rubinstein products. All these would have resulted in an income of some $14,500 for her. Although she was still receiving her salary from MediaCorp, a substantial part of her income from outside engagements would be lost as a result of her medical condition.

35 She paid for the costs of her medical treatment and the liver transplant although some of those costs were covered by insurance. She was still paying for the costs of her post-operation care. She also paid for the medical costs of Pierre.

36 This incident also made her uninsurable. Should she need another operation in future, she would be in financial difficulty. The fallout from this unhappy incident affected her, her fiancé and her family.

37 In the course of preparing for the trial, the plaintiff came across reports in the press and over the Internet that China's Ministry of Health had banned one of the 1st defendant's slimming products in January 2000 as it contained prohibited substances. Nevertheless, the 1st defendant continued selling its products leading to health problems in China in 2001. It was clear therefore that the 2nd to the 4th defendants did not conduct any checks on the reliability and track record of the 1st defendant.

38 The second defendant pleaded guilty to eight charges of contravening Reg. 3(2)(d)(i) of the Medicines (Licensing, Standard Provisions and Fees) Regulations for having made sales to the fourth defendant without the requisite declaration that each consignment of the medicinal products was free from poisons and active synthetic substances. The second defendant also pleaded guilty to an offence of failing to keep records of the importation of Slim 10 under the same regulations. The fourth defendant pleaded guilty to having sold a medicinal product by way of wholesale dealing when it did not have a Wholesale Dealer's Licence and to having sold a medicinal product which it knew was not in conformity with the manufacturer's declared specifications in that it contained nicotinamide, offences under the Medicines Act.

39 Another lady, Rajakrishnan Selvaraniee ('Ms Raja'), also took Slim 10 and died from liver failure on 1 June 2002. At an inquiry in March 2003, the Coroner found that her death was caused by the consumption of Slim 10.

40 When the plaintiff was asked by her counsel to comment on a statement made by the fifth defendant in his affidavit of evidence-in-chief that her civil suit against him was a betrayal of trust and friendship, the plaintiff indignantly replied that betrayal was when a trusted colleague sold her pills that nearly took her life and that further betrayal was when she found out that that colleague actually profited when she was hanging on for dear life. She would consider the fifth defendant a colleague rather than a friend because her idea of a friend was someone she would go shopping and having meals with.

41 She accepted that she had been taking two other health supplements – Spirulina and Pycnogenol - for the last two and a half years and right up to the time of her hospitalisation.

42 Pierre Png added that during the plaintiff's stay in Mount Alvernia Hospital, there were various occasions when he witnessed her hallucinating or speaking incoherently. He also knew that the fifth defendant had sold the slimming pills to others in MediaCorp, including one of the directors. During the first week the plaintiff was in Mount Alvernia Hospital, the fifth defendant visited her and told Pierre outside her room that his friends, the importers and suppliers of the pills, deeply regretted whatever the plaintiff was going through and that if the doctors could not treat her, he and the Slim 10 'lao ban' would be willing to bring her to China and pay for her medical treatment. The fifth defendant asked to be informed once the doctors could show conclusively what was wrong with the plaintiff.

43 Kevin Pereira, the husband of the plaintiff's elder sister, testified that when he was doing research into the possible causes of liver problems, he chanced upon an article in the Today newspaper about several cases of consumers of Slim 10 suffering adverse reactions to the drug. These included liver problems, heart problems and hyperthyroidism. It occurred to him that the plaintiff might have taken Slim 10 and he therefore asked his wife to check with her sister whether that was indeed the case. He was told by his wife later that Dr Chia Siew Cheng had noted that the plaintiff stopped taking Slim 10 in late January 2002 and that the slimming pills could be ruled out because of the time gap.

44 On 30 April 2002, Kevin saw another newspaper article about Slim 10 and how it could contribute to liver problems. When he checked with another of the plaintiff's doctors, he was told again that Slim 10 was unlikely to be the cause as the plaintiff had stopped taking the pills by the time she left for Thailand.

45 Noting that the plaintiff was not her usual self, Kevin did not think they could rely on the dates given by her to the doctors. He asked the doctors hypothetically whether Slim 10 could have been the cause if the last ingestion was in March 2002. They said they could not confirm one way or

the other.

46 After the plaintiff was transferred to NUH, Kevin mentioned Slim 10 to the NUH liver team and the doctors told him that, based on their experience, if she had taken Slim 10, there was a very high chance that that was the cause of her problems.

47 Terry Chan, a soundman working in MediaCorp, testified that in late 2001 or early 2002, he noticed that Chen Liping has lost a lot of weight. During a break in filming, he went to ask her how she achieved the weight loss and was told she had been taking a Chinese slimming tablet. He was very impressed and asked her whether she could get some for his friends. She said she could but there was a waiting period as the product was not ready yet.

48 A few weeks later, he met Chen Liping again and enquired about the slimming product. This time, she said it was ready and could be obtained from her at $120 per packet. She explained that there were 120 tablets in each packet and told him the four-four-four per day dosage. She also mentioned some side effects such as muscle and joint aches. Terry then ordered two packets from her and paid her $240 in cash.

49 He gave the slimming pills to a female friend but, one week later, she developed a high fever and stopped taking the pills. Terry called Chen Liping about this but was assured by her that it was a normal side effect. She also advised him that his friend should drink more water. He passed the advice to his friend who proceeded to finish the two packets of pills but failed to lose weight.

50 Some time later, the slimming pills were launched and advertised as Slim 10. Terry told Chen Liping he would like to buy some more for another friend. However, she told him that such matters were now handled by her husband and told Terry to call the fifth defendant on his mobile phone. Terry did so and subsequently met the fifth defendant in the studios. He was given one packet of the pills and he paid $120 in cash to the fifth defendant. He told the fifth defendant he had other friends who wanted to buy the product but would like to know what the ingredients were. The fifth defendant handed him a photocopied pamphlet listing the ingredients in English. Terry made copies for his friends but did not have any copy anymore.

51 All the pills were packed in rectangular silver foil packets with no markings on them. Chen Liping told Terry they were packed thus because they came direct from the factory and were cheaper that way.

52 Teo Lian Huay, an artiste manager at MediaCorp who managed the plaintiff, confirmed the outside engagements mentioned by the plaintiff and said that it was likely they were not confirmed due to the plaintiff's medical problems. Artistes were allowed to take part in such outside engagements provided they were negotiated through MediaCorp which would take a cut of 20% from the artistes' emoluments from such.

53 Dr Dede Selamat Sutedja, a consultant in the Division of Gastroenterology and in the Liver Transplant Programme, NUH, prepared an Expert Witness Report dealing with the issues whether the plaintiff's liver failure was caused by viral hepatitis, was drug-induced or was a result of any other cause, what drug was involved if it was drug-induced and the consequences of the plaintiff's liver transplant. He graduated in 1989 with a MBBS from the National University of Singapore and worked in various local hospitals before moving to the Division of Gastroenterology, NUH, in 1995. He became a consultant in July 2000.

54 Dr Dede was involved in the diagnosis and treatment of the plaintiff between 3 and 7 May

2002. He took the period of ingestion of Slim 10 as between December 2001 and January 2002 and opined that the temporal relationship between the last ingestion of Slim 10 and the onset of liver derangement was compatible with a possible drug hepatotoxicity. He was more concerned about the onset of liver injury rather than the onset of symptoms of such. He eliminated non drug related causes. He considered a Health Sciences Authority update of 24 April 2002 warning of possible adverse effects from Slim10 and a histopathology report of 26 April 2002 by Dr Jean Ho, a consultant pathologist. He concluded from all the evidence placed before him and from medical literature that the plaintiff's acute liver failure was drug induced.

55 Dr Dede then considered the three products taken by the plaintiff near the time of her illness. There was no reported case of adverse effects from Spirulina, a blue-green algae rich in proteins and many elements and vitamins. Similarly, Pycnogenol, an extract from the French maritime pine bark was an anti-oxidant with no known adverse effects. Moreover, the plaintiff had been consuming these two supplements regularly for two and a half years without any problem.

56 Slim 10 was a herbal preparation found to contain the undeclared substances of nicotinamide, fenfluramine, thyroid gland extract and N-nitrosofenfluramine. Nicotinamide could cause hepatotoxicity when taken in excessive amounts. Fenfluramine, a banned slimming medication, did not normally cause liver damage. N-nitrosofenfluramine was a nitrosamine which was an N-nitroso compound and such compounds were generally thought to be hepatotoxic.

57 Of the three products consumed, only Slim 10 contained hepatotoxic substances and it was the only new medication taken in recent times before the onset of liver illness. Dr Dede was therefore of the view that it was the likely cause of the liver failure.

58 Dr K C Tan, the surgeon who performed the successful liver transplant, also prepared an Expert Witness Report. He graduated in 1978, lectured in surgery in the University of Malaya and in the University of London, and was a consultant surgeon in King's College Hospital between 1988 and 1994. Between 1995 and 2002, he was the Director of the Liver Transplant Programme in NUH. He has been a consultant hepatobiliary and liver transplant surgeon in Gleneagles Hospital since 1994.

59 Based on the medical evidence and medical literature and the facts of the case, he concluded by a diagnosis of exclusion that drug-induced liver failure was strongly indicated as the cause of the plaintiff's liver failure. He found support for this in the aforementioned histopathology report of Dr Jean Ho, in the fact that the liver was severely damaged and in the pathology report of Dr Wong Su Yong, a consultant pathologist, made on 8 May 2002. By the same diagnosis of exclusion, he came to the same conclusion as Dr Dede that Slim 10 was the only possible causative drug. He found further support for this conclusion in the Coroner's findings on the cause of death of Ms Raja. It was, Dr KC Tan said, an idiosyncratic drug reaction.

60 Reference was also made to report dated 12 February 2003 from the Japanese Ministry of Health entitled 'Results of Investigation into Chinese Diet Health Food Products'. That document commented on three Chinese diet food products with Japanese names. N-nitrosofenfluramine was detected in the three products. The report stated:

> 'IV Toxicity of N-nitrosofenfluramine
>
> The results of laboratory tests on animals clearly showed the following hepatic toxicity effects of N-nitrosofenfluramine.
>
> N-nitrosofenfluramine caused transient neurological effects, a decrease in food consumption and

worked to suppress weight gain.

Although weight gain was suppressed, an increase in the absolute liver weight was also observed, and the results of biochemical testing of blood serum 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 causes hepatic toxicity in the broadest possible sense including possible damage to the biliary system.'

61 Both Dr Dede and Dr K C Tan agreed that the plaintiff would require lifelong medication and medical follow up as she was at a heightened risk of certain diseases and illnesses due to her medication. Her lifestyle and life expectancy were permanently and detrimentally altered by the ingestion of Slim 10 and the subsequent treatment of her liver damage. They were also of the opinion that the use of Prograf at 6mg daily for the rest of her life was not necessary as the dose could be reduced over time, depending on the clinical review. The need for yearly mammogram was no greater than for any woman over the age of 40.

62 Dr Bosco Chen Bloodworth, a Consultant Analytical Scientist, is the Head of the Pharmaceutical Laboratory and of the Poisons Information Centre, Health Sciences Authority ('HSA'). He testified orally as a witness of fact.

63 Dr Bloodworth said that the second defendant submitted two test reports from Setsco Services Pte Ltd, an accredited test laboratory, when it applied for an import licence for the slimming pills from the HSA. He believed one of them came with a sample for analysis. However, the HSA did not rely on reports submitted by vendors, particularly when the reports did not have any comments. Without the electronic data, they were basically meaningless. Even if something was found in those reports, the HSA would still need to do its own analysis to confirm it. Fenfluramine was stated in the Setsco reports as a chemical name and chemists did not work with nor try to remember chemical names unless they were structural chemists. The chemical names could appear in different permutations. It would be far fetched to expect the HSA laboratory to pick up fenfluramine from the Setsco reports without the Setsco tester qualifying it by saying that fenfluramine was detected.

64 The HSA based its decision to grant the import licence on its own test results. Tests for fenfluramine would always be conducted for slimming products and none was detected by the HSA's own tests. While an importer may be advised by the HSA, nobody could guarantee a product's absolute safety for him The importer would be ultimately responsible for the safety of the product he was importing. It would be virtually impossible to test for every possible contaminant in Chinese proprietary medicine.

65 N-nitrosofenfluramine was not listed in the Poisons Act. A general screening for poisons done before June 2002 would not have detected the compound. There was no known literature about it and it was completely unknown to many chemists before this case.

66 A general letter dated 2 July 2003 from Nutricia, USA (the manufacturing arm of GNC) was produced by the plaintiff. This letter concerned the Spirulina marketed in Singapore by GNC which was bought and consumed by the plaintiff. It stated that every batch of the raw material used was screened for microcystins by the grower and that the material met all applicable USA food law requirements. The Spirulina was grown and harvested from controlled, artificial fresh water ponds.

The case for the 2nd and 3rd defendants

67. The 33 year old 3rd defendant testified on behalf of the 2nd defendant and himself. He has a degree in Business Administration from the Canterbury University of New Zealand and a double degree in marketing and finance from the University of Southern California. He started his first business in 1992 dealing with telecommunications equipment, moved on to the food and pet shop businesses and then set up an indoor archery at Marina Square.

68 He was grossly overweight at 135 kg in early 1999. On a visit to Shanghai, he was introduced to a slimming capsule called 'yue zhi tang qing zhi shu'. He purchased six bottles to try out over two months. At the end of the two months, he was amazed that he had shed 12 kg. He bought more of the capsules on his next trip to Shanghai and by July 1999, lost another 20 kg without suffering any side effects. In 2000, he bought more of the product for himself and his family and friends. He took thirty capsules a day. By the end of 2000, he was half of his former self at 69 kg. He produced a photograph of his former self to demonstrate the effectiveness of the slimming product.

69 In January 2001, on a business trip to Guangzhou in China, he was introduced by the Shanghai distributor to the manufacturer of the slimming product, the first defendant. He remained there for almost one month to discuss with the manufacturer his interest in distributing the product in Singapore and elsewhere. In March 2001, he ordered 200 bottles from the first defendant for product testing and for consumption. The capsules were blue and white in colour and represented the first batch purchased by the second defendant for testing.

70 The third defendant decided to use a dormant company set up by him (Goldbiz International Pte Ltd) to carry out the business of importing and selling the slimming product. The name of the company was subsequently changed to HealthBiz Pte Ltd. He engaged Peter Boo, then an employee working in the said archery, to assist him. Peter Boo was a meticulous and careful person. They decided to split up their responsibilities. Peter Boo would make all necessary enquiries as to what needed to be done to get the requisite licences and to comply with the relevant regulations. The third defendant would concentrate on negotiating with the Chinese manufacturers. Both of them were new to the business of importing slimming products for sale.

71 The third defendant searched for specialist laboratories and contract manufacturers and chanced upon DAC Pharmalab Pte Ltd ('DAC'). Peter Boo and he visited DAC and were told that DAC could carry out manufacturing, packaging and storage and had experience in this business. They were also told that they had to do a microbiological test and toxic heavy metal chemical analysis test. The third defendant, on behalf of the second defendant, then arranged for some of the slimming capsules to be sent to DAC so that they could in turn be sent for testing at DAC's associated laboratory, Setsco.

72 In April 2001, the results of the two tests were furnished by DAC to the second defendant. As the third defendant and Peter Boo were in no position to know what the results meant, they consulted DAC and were told that nothing harmful was detected. The third defendant then left for Guangzhou where he signed an agreement on behalf of the second defendant with the first defendant. Under the agreement, the second defendant would have the right to market the slimming capsules in Singapore, Malaysia and Thailand. The second defendant informed the manufacturer that all future capsules would have to be the white on white type in order to distinguish them from the ones sold by the manufacturer.

73 In early May 2001, Peter Boo purchased a guide on the control of Chinese Proprietary Medicines from the HSA. Submissions were made for an importer and wholesale dealer licence.

74 On 11 May 2001, the present name of the second defendant was adopted. One Tan Eng Kiat

became a shareholder and director in April 2001. The third defendant was the majority shareholder. On 1 June 2001, the second defendant offered Peter Boo a full-time job as its Vice President. The third defendant was its President. He chose the name Slim 10 for the slimming product. Tan Eng Kiat divested himself of all his shares in February 2002 and 1% of the shares in the second defendant was given to Peter Boo. A search of the records kept by the Registry of Companies and Businesses conducted by the plaintiff's solicitors on 17 July 2003 revealed that the directors were one Lau Hong (appointed on 24 May 2002) and the third defendant. The same search showed that the only shareholders were Tan Eng Kiat (245,000 shares) and the third defendant (255,000 shares).

75 The third defendant went to China again to meet the manufacturer. He requested all relevant documents from the manufacturer, such as the company licence, product testing results on animals and on human beings, all other test results and licences.

76 On his return, the third defendant approached the fourth defendant to be the distributor for Slim 10. He presented his personal portfolio, curriculum vitae and 'before and after' photographs of himself to the fourth defendant. In the course of discussions, it was suggested that a spokesperson be appointed to promote the product and Chen Liping was chosen. On 1 March 2001, a sole distributor agreement was entered into between the two companies, with the second defendant agreeing to pay the endorsement fee for the chosen spokesperson.

77 Through his contact in MediaCorp, the third defendant got in touch with the fifth defendant and made an appointment to meet him and his wife. Tan Eng Kiat, the other director of the second defendant, also attended that meeting held in a hotel. They gave the fifth defendant and Chen Liping some articles about the product and the first two Setsco test reports. A few days later, Chen Liping tried some samples of the slimming pills. Within two weeks, she lost ten kg.

78 MediaCorp wanted an endorsement fee of $100,000 for Chen Liping. The third defendant found this amount to be exorbitant and decided to negotiate through the fifth defendant for a lower amount, suggesting to him that if the product was successful, he would compensate him in some other way, for instance, by a higher endorsement fee on renewal and by providing free samples of the product. The fifth defendant told him that many of his friends and relatives were interested in trying out the slimming pills after witnessing the remarkable results shown in his wife.

79 The third defendant in his affidavit of evidence-in-chief stated that the fifth defendant indicated he would eventually be interested in marketing the product in Indonesia by way of multi-level marketing and might re-brand the product himself. In Court, he said he was mistaken and the person who indicated thus to him was actually another former artiste whom he named. The third defendant also qualified his statement that the special price offered to the fifth defendant for the samples was $100 per packet. He said it was increased to $130 per packet sometime in November 2001 when the distribution agreement with the fourth defendant was about to take effect (on 1 December 2001).

80 On 1 June 2001, the second defendant submitted to HSA an application for the import and wholesale dealer licences and another application for the product listing of Slim 10. The second application included the product information form for sale of Slim 10 in different packaging, the full product formula listing the five herbal ingredients, a confirmation for product imported/manufactured for assembly only and conversion of name from 'yue zhi tang qing zhi shu' to 'Slim 10', the preliminary design for the box, the wording on the box and the bottle, the first two Setsco test reports, the manufacturer's independent laboratory test report and factory inspection certificate and the Chinese Health Ministry's National Health Product Permit for the capsules. A third application was submitted for approval that the product be assembled by DAC.

81 After some correspondence with the HSA, the second defendant received the import and wholesale dealer's licence for Slim 10 on 27 June 2001.

82 In July 2001, the third defendant went to Guangzhou to attend the launch of a new product by the first defendant known as 'yue zhi tang jian fei jiao nang', slimming capsules which were improved but similar to the ones sold to the second defendant earlier. He was given a handbook and some brochures on the new product. Due to the confusion in the two Chinese names submitted, the HSA asked for clarification as to which of the names was submitted for approval. The second defendant confirmed it was the latter one and had to submit all relevant documents on the improved version of the capsules.

83 In August 2001, HSA asked the second defendant why there was a difference in the colour of the capsule of the Chinese product (blue and white) and Slim 10 (white) and why the powder therein differed in colour and in smell. The second defendant called the first defendant and relayed its reply to HSA. Further correspondence and a meeting followed. HSA then asked the second defendant for comments from Setsco on the physical and chemical characteristics of the contents in the Slim 10 capsule tested in April 2001. The third defendant and Peter Boo met Setsco which recommended some supposedly more accurate tests. The second defendant wanted Setsco to use whatever remained of the test samples for the further tests but Setsco had already discarded them. This information was conveyed to HSA.

84 In late August 2001, the second defendant asked Setsco for further tests to be carried out on the Chinese blue and white capsules. This was to enable HSA to confirm that the Chinese capsules and Slim 10 were similar. In September 2001, the documents pertaining to the two products were re-submitted to the HSA. In a letter dated 3 September 2001, the second defendant addressed various concerns of the HSA, expressing regret that the HSA was unable to accept the explanation of the manufacturer on the colour of the powder. The letter went on to say that *'in order to avoid further confusion, our manufacturer (first defendant) has informed (second defendant) that their China factory has stopped producing the brown, fragrant and coarse powder slimming capsules (with effect from 15 August 2001). For all new production in China from 15 August 2001 onwards, the Yue Zhi Tang Jian Fei Jiao Nang slimming capsules (to be repacked as Slim 10) will contain only the yellowish/orange colour smooth powder.'*

85 In October 2001, the second defendant got Setsco to do a cholesterol test on Slim 10 because of a suspicion raised that the product might contain an extract from shellfish. Such a test was not required under the HSA's guidelines but the second defendant wanted to show that the capsules were 100% herbal. The cholesterol test report and further documents from the Chinese manufacturer were sent to HSA.

86 On 1 November 2001, the second defendant, at the request of HSA provided a letter of undertaking in the following terms (with the second defendant being referred to as 'HBPL'):

> 'Thank you for your support for our company. We refer to our telephone conversation on 1 November 2001.
>
> 1) Advertisement of Chinese Proprietary Medicine ('CPM')
>
> ……
>
> 2) Assurance on Product Safety & Quality

To the best of HBPL's ability, HBPL shall ensure that Slim 10 slimming capsules shall not contain any poison or synthetic substances or drugs in Slim 10.

HBPL shall comply to HSA's requirements to submit the Test Results for Toxic Heavy Metal and Microbial Contamination within two (2) months of the import of the consignment of Slim 10 capsules from China.'

The letter was signed by Peter Boo on behalf of the second defendant.

87 On 2 November 2001, HSA approved the product listing for Slim 10. The next day, the second defendant submitted to the first defendant the first purchase order for 5,000 bottles of Slim 10. The third defendant informed Wilfred Wong, a director of the fourth defendant, that the second defendant was providing both Chen Liping and her husband free packets of Slim 10. The second defendant also procured samples from the fourth defendant to give to celebrities here and abroad. It was agreed that the distribution agreement signed on 1 March 2001 would only take effect from 1 December 2001 in view of the delay in getting the official approval.

88 Between October 2001 and 8 March 2002, the fifth defendant became more enthusiastic about selling Slim 10. He was of the view that if Slim 10 worked for the artistes, they would be good ambassadors for the product. He therefore suggested to the third defendant that Slim 10 be sold to the artistes at a discount in order to entice them to try it. It was a good publicity ploy and would also enable the second defendant to identify the next spokesperson for the product. The fourth defendant agreed with this idea. Accordingly, the second defendant sold to the fifth defendant small quantities of Slim 10 in whatever form they arrived from the Chinese manufacturer. The third defendant or Peter Boo would meet the fifth defendant at locations convenient to him to hand him the capsules and he would sign hand written receipts. The receipts produced at the trial showed that the fifth defendant received 950 sets of Slim 10 altogether.

89 On 30 November 2001, a second order for 5,000 bottles of Slim 10 was made. On 4 January 2002, another 10,000 bottles were ordered. On 7 January 2002, the second defendant submitted the latest batch of Slim 10 to Setsco for batch testing. The two Setsco reports indicated that one sample labelled as batch number L1-2001 with batch expiry date stated as 31 December 2003 was submitted and tested. The reports were sent to the HSA on 30 January 2002 with the explanation that L1 meant December Lot number 1 and 2001 was the year of production. It was also stated that the lot size planned was 5,000 sets but the actual quantity produced and delivered was 5,067 sets.

90 On 1 February 2002, another 10,000 sets were ordered. On 25 February 2002, Setsco was asked to do the same two tests on another batch of Slim 10. In addition, another test on the physical and chemical characteristics was conducted. On the same day, the second defendant sent the same batch of Slim 10 samples to HSA's Centre for Analytical Science for a general screening for poisons and synthetic drugs. All the reports were sent to HSA. The reports indicated that the sample given was merely marked 'Slim 10' although the second defendant's letter of 4 March 2002 stated the manufacturing details as A1-2002, meaning January Lot number 1 produced in 2002. It also noted that the powder in the capsules was brownish in colour.

91 A revision of the wording on the box and the label was also submitted for approval. That was approved after amendment.

92 Between 2 and 15 April 2002, the third defendant was in Guangzhou intending to make payment for an order of 30,000 bottles of Slim 10. However, on 2 April 2002, he got a call from Peter Boo saying he had just attended a meeting which was convened urgently by the HSA because there

were people who had consumed Slim 10 complaining of medical problems. After discussing with Peter Boo, a letter was sent to HSA the same day stating the second defendant had agreed to ask the fourth defendant to have a voluntary two-week suspension of distribution and sale of Slim 10 and to arrange for a temporary recall of the product. The second defendant also pledged its assistance and co-operation. In the meantime, the third defendant made enquiries with the Chinese manufacturer which expressed surprise at the information and handed him an undated newspaper article stating the manufacturer had been conferred a Good Manufacturing Practice Standard, an industrial standard recognised worldwide. The third defendant waited in vain for the general manager of the manufacturer, with whom he had been dealing, to appear.

93 On 3 April 2002, the third defendant and Peter Boo decided to write a letter to the HSA to appeal against the recall of Slim 10 which would have devastating consequences for the second defendant. They asked that they be given until 8 April 2002 to revert with the results of the investigations by the Huizhou branch of the Chinese Medicine Technology Innovation Centre. On 4 April 2002, they sent one box containing 120 Slim 10 capsules to the HSA for testing as they were informed by DAC that the problem could lie with thyroxine, fenfluramine and dexfenfluramine, poisons previously identified in other slimming pills. However, the HSA informed them it could not carry out the test due to a conflict of interest. Setsco and other laboratories approached said they did not have the facilities to carry out such tests.

94 When the third defendant returned to Singapore on 15 April 2002, the company received a letter from the HSA informing it to suspend all sales of Slim 10 immediately and to withdraw the product from the market by 29 April 2002. The second defendant held a meeting with the fourth defendant the next day to inform the distributor to effect the immediate recall of Slim 10. The third defendant and Peter Boo went to the extent of conducting random checks on the retail outlets to ensure that that was done.

95 On 20 April 2002, the third defendant went to China to try to find out from the manufacturer more about the contents of the slimming product but the manufacturer was not forthcoming with the information. Again, he could not reach the general manager.

96 On 30 April 2002, the second defendant learnt from a press release by the HSA that fenfluramine, a controlled substance under the Poisons Act, was detected in Slim 10. In May 2002, the company refunded some $606,000 to the fourth defendant.

97 In June 2002, the company and the third defendant were charged for various offences relating to Slim 10. After representations made by their solicitors, nine charges under the Medicines (Licensing, Standard Provisions and Fees) Regulations were proceeded with against the company which pleaded guilty and was fined a total of $45,000. All charges against the third defendant were withdrawn.

98 The second defendant sent samples of Slim 10 to the Chemistry Centre (Western Australia) for testing. An opinion was also sought from Dr David Joyce, an Associate Professor of Pharmacology at the University of Western Australia, on the constituents of Slim 10 and their effects. The evidence on these was adduced at the trial by the fourth defendant as the second and the third defendants did not call the experts in question to testify.

99 The third defendant maintained he did everything relating to Slim 10 on behalf of the company and denied any personal liability. He believed the second defendant had done everything possible in the circumstances of the case. Unlike the manufacturer, he did not abscond despite the controversy surrounding Slim 10. That demonstrated he was a responsible and serious-minded

businessman.

100 He admitted that the registered address of the second defendant was that of his residence and that the slimming product arrived in Singapore as and when the manufacturer was able to produce enough. There were no fixed times or amounts for delivery. As admitted in the criminal proceedings, the product arrived by air parcel as unlabelled capsules in aluminium foil or in plastic bags, unaccompanied by any documentation as to their identity or source. The parcels were unmarked or marked as 'Gifts' and the contents were not declared to the customs authorities here. They were delivered either to the third defendant's home or office or to Peter Boo's home. No records of the imports were maintained and there were therefore no details available on the various consignments.

101 He had thought that one declaration on the safety of the product was all that was required under the regulations and that he did not need to make a declaration for each batch brought in. Up to the time of the fifth sale to the fourth defendant on 1 February 2002, the second defendant had still not tested any samples from the imported consignments for poisons.

The case for the 4th defendant

102 Wilfred Wong, the Regional Marketing Director of the fourth defendant at the material time, testified that when he and his subordinate first met the third defendant, the latter introduced himself with the business card of his archery. He presented his business profile and showed photographs of himself with local celebrities and with the Thai Prime Minister. He also mentioned his illustrious grandfather, the artist Liu Kang and his prominent uncle, architect Liu Tai Ker. He showed them photographs of his former self and attributed his weight loss to slimming capsules which he claimed were herbal Chinese medicine. He had with him several vials of them.

103 At subsequent meetings, the third defendant brought along a local celebrity who confirmed he was taking the slimming pills and had lost weight. He gave them three packets of the pills to try out. The half blue and half beige-white pills were contained in 'Ziploc' plastic bags. Wilfred Wong and two of his staff took one packet each.

104 At one of the meetings, the third defendant coined the name Slim 10 from the movie '10' starring Bo Derek as the perfect woman and also from the ten days that it would take to consume the 120 pills in each vial on a dosage pattern of 4 pills 3 times a day.

105 The third defendant told them the owner of the manufacturing company in China was one Chen Guang Yu who had a fine reputation and was well respected in the field of traditional Chinese medicine. He also showed photographs of a modern factory facility in China where the pills were purported manufactured but took care not to reveal its location or the name of the company as no deal had been struck yet with the fourth defendant and he did not want to be by-passed. He claimed he had a share in the manufacturing company as he had invested money in his personal capacity and addressed Chen Guang Yu and his son as godfather and god brother.

106 The third defendant assured them the herbs used were of the highest quality and the pills to be sold here were manufactured with the aim of ensuring results in ten days. He did not wish to reveal the ingredients. He said he would be responsible for obtaining the requisite approvals from the HSA and showed them copies of the Setsco test reports. He offered the vials at US$30.50 each which would include the cost of testing each and every batch of the product brought into Singapore, something he said would be done. He claimed he would be manufacturing and packing it here in order to ensure the highest quality control. In fact, the price was subsequently raised to US$32 per set

purportedly to cover the high cost of the imported raw materials and the freight charges. He assured them the product was safe as it had been in the market in China for about three years already. He also showed them the HSA guide issued in April 2001 entitled 'Control of Chinese Proprietary Medicines'.

107 After Chen Liping had been signed on by the second defendant as the poster girl, the fourth defendant met her and her husband. She started taking the pills in September 2001 and was quite happy with the results.

108 The advertisements that the fourth defendant had drawn up had to be vetted and approved by the HSA. Approval for the television commercials was given on 7 December 2001. Because of Chen Liping's busy schedule during the filming of 'No Problem', they only managed to shoot the television commercial on 16 December 2001. The 30-second commercials went on air on 28 December 2001 and the longer versions were broadcast only on 24 January 2002.

109 After the ingredients of Slim 10 were revealed, Wilfred Wong conducted research on them. They were listed on the grey cardboard box packaging in white lettering. The transparent plastic vials containing the pills also had the ingredients listed on them. He found nothing controversial, harmful or even questionable about the listed ingredients. As the HSA had approved the product for sale, the fourth defendant assumed it was safe for consumption and therefore did not take medical advice about it.

110 The fourth defendant received favourable reports from their contacts in other countries who were trying Slim 10. When those who fell ill after taking Slim 10 were advised to reduce the dosage and to drink plenty of water, there were no further problems.

111 In December 2001 and January 2002, the third defendant was constantly in the office of the fourth defendant to help the call centre with complaints from customers. The contact number of the fourth defendant was included on the box. He assured the fourth defendant that the complaints about headache, nausea or heatiness were normal reactions exhibited by some people. Nevertheless, he checked with the manufacturer and in early January 2002, advised that the dosage for people with such complaints should be reduced to two capsules three times a day and only after having eaten food. The dosage instructions on the boxes were subsequently changed in March 2002 to advise that lower dosages be taken initially.

112 On 18 March 2002, Wilfred Wong noticed a marked escalation in the number of complaints from customers about side effects. The third defendant explained later that the potency of the herbs in each batch varied and that those in the recent batch would have contained herbs of higher potency. He said if the dosage was reduced, the side effects would go away. The second defendant was at that time in the process of formulating a detailed information sheet on the product which was to have been inserted into the boxes but that did not materialise because of the events of early April 2002.

113 On 2 April 2002, at about 5.30pm, Peter Boo went to the fourth defendant's office to inform them about the meeting with the HSA that morning. He showed them a copy of the second defendant's letter of the same day agreeing to a voluntary recall of the product. They communicated with the third defendant who was in China consulting the manufacturer. The third defendant was convinced that there was nothing wrong with the product and that any problems encountered were dose-related. He mentioned that the Singapore formulation had a purer concentration of herbs compared to that of China so as to achieve slimming results within ten days. His godfather was prepared to sign a letter confirming the quality of the pills. He therefore decided to appeal against the

voluntary recall.

114 As it was about 10pm already by then and Peter Boo was exhausted, Wilfred Wong was requested to help draft the letter of appeal for the third defendant to approve so that Peter Boo could send it to the HSA the next morning. After three drafts had been faxed to China, the third defendant approved the final version.

115 Peter Boo informed the fourth defendant the next day that the letter had been delivered but he was unable to meet any of the HSA's senior people. On 5 April 2002, Peter Boo handed the fourth defendant a letter telling Wilfred Wong that the HSA had instructed that while the appeal was under consideration, Slim 10 was not to be distributed to the retailers and that the product testing would take about two more weeks. The next day, Peter Boo telephoned Wilfred Wong to say that the second defendant had decided to recall all batches of Slim 10 delivered prior to 12 March 2002 as the boxes had the old dosage instructions. The recall got underway on Monday, 8 April 2002. That afternoon, an inspector from the HSA went to the fourth defendant and took away with him a sample box of each of the three batches of Slim 10 delivered to the fourth defendant.

116 On 11 April 2002, the fourth defendant was informed by letter from the second defendant that permission was given to resume delivery to the retailers. By then, the new dosage instructions were on the boxes and the vials. However, on 16 April 2002, the fourth defendant was told that the HSA had given notice for an immediate recall. Apparently, the HSA wanted nicotinamide (or vitamin B3) which was detected in the capsules to be reflected in the list of ingredients.

117 In its first update of 24 April 2002, the HS A mentioned possible adverse drug reactions to Slim 10 but stated that the evidence for a direct causal effect could not be established as yet. In its second update of 26 April 2002, it advised consumers to stop taking Slim 10 as a precautionary measure. When it was announced on 30 April 2002 that fenfluramine had been detected in Slim 10, the fourth defendant made arrangements for an orderly refund for customers who had bought the product.

118 During the refund exercise, the fourth defendant had customers returning vials and capsules which were different from those marketed. One of the staff reported that a MediaCorp artiste (Sean Say) had returned a total of 206 capsules in a plain plastic bag claiming he had no proper vials. There were several other such cases where the capsules were returned without vials, one case where they were returned in silver foil packets and another where they were in a large vial different from the one marketed by the fourth defendant. One customer tried to return capsules of a slightly different beige shade and size.

119 The fourth defendant did not know what pills the plaintiff bought from the fifth defendant as they were in totally different packaging from Slim 10. The fifth defendant was given supplies by the second defendant from as early as 16 October 2001 as evidenced by the receipts signed by him which made no mention of the name Slim 10. There was no verification as to the contents of those capsules.

120 The fourth defendant did not apply for a wholesale licence as it was told by Peter Boo that the second defendant already had one. The fact that it was the distributor was clearly stated on the boxes containing the vials, the script of which had to be approved by the HSA.

121 Wilfred Wong said he knew the third defendant was giving samples to the fifth defendant but did not know he was selling so many sets to him. He only found out when the third defendant mentioned this to him in a casual conversation in March 2002 while on an overseas business trip

together, lamenting that it was difficult to collect payment from the fifth defendant.

122 Jacqueline Chan, the Chief Operating Officer in charge of marketing and distribution in the fourth defendant, testified on essentially the same matters as Wilfred Wong.

123 Keith William Norman was a Chemist and Research Officer in the Department of Forensic Science Laboratory, Chemistry Centre (Western Australia) before his present appointment as a Scientific Officer in the Australian Federal Police Force in Canberra. He conducted tests on three samples of Slim 10 sent to him in July 2002 and another three samples sent to him in August 2002 by the second and the third defendants. On 17 March 2003, he was informed by the previous solicitors for the said defendants that the solicitors for the fourth defendant would be contacting him shortly and they had no objections to the sharing of information as all three defendants had a common defence in this suit. However, due to the outbreak of SARS here, it became impractical for the fourth defendant's solicitors to travel to Perth to have a conference with him. He was subsequently called as an expert witness by the fourth defendant.

124 Keith Norman's reports noted that each of the three containers sent to him contained off-white capsules containing brown powder. The containers were sealed with the HSA's seals. In his 29 July 2002 report, he calculated the amount of fenfluramine in each capsule at between 0.002 to 0.005 milligrams. Nicotinamide was calculated at between 4 to 4.6 milligrams per capsule. He did not detect the presence of thyroxine. In his 9 August 2002 report, later re-issued on 12 August 2002 with some modifications, fenfluramine was calculated at between 0.001 to 0.002 milligrams per capsule, while nicotinamide was calculated at between 11.5 to 13.2 milligrams per capsule. Again, he did not detect thyroxine.

125 During the trial, it transpired that Keith Norman had done further tests on the samples at the request of the third defendant made on 29 August 2002 to see if N-nitrosofenfluramine was present. The next day, Keith Norman spoke to the third defendant and informed him the compound was detected in all the samples. No quantitative analysis was undertaken. Keith Norman then informed the Australian Therapeutical Goods Administration ('TGA') about the presence of N-nitrosofenfluramine and trace amounts of fenfluramine found in Slim 10 'as a matter of public safety as these products or similar products may be imported into Australia'. However, the TGA was already aware of it. He also published a one-page report on the discovery in the October 2002 issue of the Journal of the Clandestine Laboratory Investigating Chemists Association.

126 Dr David Joyce is a Physician, Clinical Pharmacology and Toxicology and an Associate Professor, Medicine and Pharmacology in the School of Medicine and Pharmacology of the University of Western Australia. Dr David Joyce applied a test suggested and partly validated by Naranjo and others in 1981 for the purpose of estimating confidence in attributing an illness to a drug. Some of the criteria in that test could not be applied because they required the re-taking of the suspect drug which was of course impossible in a case such as the plaintiff's. A score of 0 would make the association between the drug and the illness 'doubtful'. A score of 1 to 4 would make it 'possible', 5 to 8 would make it 'probable' and anything above 9 would signify a 'definite' association. The score using that test was 2 or 3, putting it in the 'possible' zone.

127 Concern about the safety of Spirulina arose in 1999 because other blue-green algae (cyanobacteria) had evidence of contamination with cyanobacteria species that could produce toxins. However, since 1999, there were no cases of liver failure conclusively linked to Spirulina contamination although the potential for contamination was recognised. Using the same Naranjo test, it could be said that there was a possible link between Spirulina and liver failure.

128 Since the plaintiff was in Bangkok and had eaten seafood, it was not possible to exclude a seafood source of hepatotoxin in this case.

129 N-nitrosofenfluramine is a nitrosamine and some nitrosamines were known to be hepatotoxic in various degrees. NDMA was the most toxic nitrosamine but it was associated with cirrhosis rather than acute liver failure. Further, nitrosamines were rapidly metabolised. If the new compound found in Slim 10 worked in the same way as NDMA, the plaintiff would need to take 480 Slim 10 pills at one go in order to suffer fulminant hepatic necrosis. The amount of fenfluramine and nicotinamide in Slim 10 was much too low to be the cause of the plaintiff's liver problems.

130 Dr David Joyce therefore concluded that the link between N-nitrosofenfluramine and hepatotoxicity was not sufficiently established.

131 Dr Julia Alexis Wendon is a Senior Lecturer/Honorary Consultant Physician at the Institute of Liver Studies, King's College Hospital in London. She is the lead clinician and is responsible for the day to day running of the Liver Intensive Care Unit. The Unit sees about 500 patients a year with a variety of pathologies including acute liver failure and chronic liver disease with multiple organ dysfunction. About 120 to 180 cases of acute liver failure are admitted each year. The Institute of Liver Studies is presently one of the largest transplant programmes in Europe. Dr Wendon also has teaching and management responsibilities. She has also co-authored numerous articles in peer reviewed journals, including one with Dr K C Tan, the expert witness for the plaintiff.

131 Dr Wendon opined that the clinical course with ongoing rise in transaminases following admission suggested that the toxic insult to the liver had been delivered in the relatively recent past. The medical literature did not suggest that fenfluramine was hepatotoxic. Its side effect profile pertained to cardiac valvular dysfunction and pulmonary hypertension and this was both dose and duration related. N-nitrosofenfluramine and nitrosamines were very rarely associated with liver toxicity and were related more to chronic cirrhosis and carcinogens rather than to acute hepatic necrosis. However, nitrosamines could render an individual potentially at greater risk from hepatotoxicity from an unrelated source. There was no significant evidence of hepatotoxicity where nicotinamide was concerned. Thyrotoxicosis was not reported in medical literature as causing acute hepatic necrosis but could cause mildly abnormal liver function tests. The constituent parts of Slim 10 thus did not appear to have any direct hepatotoxic effects although they might render the risk of hepatotoxicity greater should an individual be exposed to a given hepatotoxin.

132 It was becoming increasingly recognised that blue-green algae could be contaminated with microcystins. The amount of potential toxin with which it might be contaminated depended on sun exposure, water depth and mineral content within the water on which the algae was growing. Spirulina has not been found to be contaminated with a toxin but as growing conditions were variable, it could be contaminated. Microcystin toxicity particularly affected the liver resulting in necrosis and the risk of toxicity increased with the duration of ingestion. It was also more prevalent in lower weight individuals and was therefore particularly toxic in children. She cited a case reported in a letter to the editor of the American Journal of Gastroenterology published in the December 2002 issue. There, five doctors from the Mie University School of Medicine in Japan described the case history of a 52 year old Japanese man who had started taking Spirulina five weeks before he was admitted to hospital and concluded that 'Spirulina may be associated with liver injury in this case'.

133 Dr Wendon concluded from the clinical and histological evidence that she did not believe that a definitive cause of the acute liver failure could be determined. Sero-negative hepatitis, which was a diagnosis of effective exclusion of other causes of acute liver failure, could not be ruled out. Essentially, she meant that this was a case of liver failure due to an unknown viral cause. This

accounted for between 7 to 40% of such failure.

134 Applying the Maria and Victorino clinical scale as a guide to assess whether hepatotoxicity was related to Slim 10, Dr Wendon got a score of between 3 and 7 on the basis of the plaintiff's third set of dates of consumption, i.e. between February to early April 2002. A score of more than 17 was rated 'definite drug associated injury', between 14 and 17 was 'probable', between 10 and 13 was 'possible', between 6 and 9 was 'unlikely' and anything below 6 was 'excluded'. The present case would therefore be in the regions of 'excluded' and 'unlikely'. Even if the plaintiff consumed Slim 10 until early April 2002, Slim 10 would merely be the more likely culprit of the two unlikely ones (i.e. Slim 10 and Spirulina) but it was still unlikely to be the cause of the liver failure.

135 Dr Jean Ho was called to clarify her Histopathology Report of 2 May 2003 and the Supplementary Report of 4 May 2002 as the plaintiff's experts had relied on the earlier report and were of the view that it supported their opinion that the liver injury was drug related. Dr Jean Ho explained that while the earlier report leant towards drug-induced liver failure, after further tests and research, she was unable to come to a conclusion on the biopsy specimen alone whether the cause was a toxic substance or a viral infection.

The case for the 5th defendant

136 The fifth defendant has been married to Chen Liping for five years. They have a one year old son. The fifth defendant and his wife did not know the third defendant before he approached them about Slim 10. At their first meeting, the third defendant was with his business partner. The third defendant showed the couple his portfolio containing many photographs of himself. He told them he had taken the slimming pills, which he was going to import, for about two years already. He assured them of the effectiveness and safety of the pills, saying that they were made primarily from substances extracted from plant products and other herbal ingredients. He also explained the regulatory process involved before the pills could be sold here.

137 The couple believed that if the HSA was involved in the approval process, then the pills once cleared for sale must be safe. Further, the third defendant would have to negotiate an endorsement agreement with MediaCorp and this gave them additional assurance as they knew that their employers would not consent to any such endorsement unless the sale of the product had been cleared by the authorities.

138 Sometime in July 2001, Chen Liping was asked by the third defendant to start taking the slimming pills as he had no doubt the HSA would shortly give its approval. She did so. The results over the next two months were amazing. Close friends and relatives began to ask her about the secret of her weight loss and she told them about the pills. Some of them then asked her to help them purchase the pills. She agreed.

139 By November 2001 when the product approval was obtained, Chen Liping had been taking the Slim 10 pills for almost four months. The newspaper advertisements featuring her had great impact. They were followed by the successful launch over television.

140 The third defendant was deeply appreciative of the trust reposed in him and therefore told Chen Liping he was prepared to sell the Slim 10 pills to their close friends and relatives at a discount. Many such people did approach her to do them the favour of obtaining the pills. The fifth defendant and his wife did not canvass for sales. They were busy with their careers as artistes.

141 In December 2001, Chen Liping became pregnant. They asked her gynaecologist about the

effect Slim 10 might have on the foetus, producing the packaging with the printed contents, and were told that the pills should not affect the pregnancy.

142 As a result of the pregnancy, the fifth defendant began running errands for her by helping her deliver the pills that she had bought for her close friends and relatives. He also settled the purchases with the third defendant, paying initially by cash and subsequently by cash cheques and by cash.

143 In early December 2001, the fifth defendant and the plaintiff were cast together as husband and wife in 'No Problem' while Chen Liping was cast as his sister. The filming for the drama series was done over the period 3 December 2001 to 11 February 2002. They worked closely together as main leads and became good friends. They would often chat in between shoots and send SMS messages to each other during their free time. The plaintiff bought him a gift for Christmas and Chen Liping helped her husband choose a gift for the plaintiff to reciprocate her friendly gesture. The plaintiff even told the fifth defendant personal details like how much she was earning at MediaCorp.

144 In late December 2001, during one of their usual casual conversations on the production set, the plaintiff told him that she observed his wife had slimmed down a lot and asked him for the secret of her weight loss. It occurred to the fifth defendant that this was meant to be a conversation starter because by then, it was common knowledge on the production set that Chen Liping had been taking Slim 10. The plaintiff then expressed great interest in Slim 10 and asked what the pills were made of. He repeated what he and his wife had been told by the third defendant. She then asked him about the price of the pills. He told her the Slim 10 boss was giving a discount to their friends and relatives only.

145 In a subsequent casual conversation, the plaintiff asked the fifth defendant whether he could help her buy some Slim 10 pills from the boss. He was rather taken aback by the request as she was already very slim. However, she told him her arms were fat. He advised her against taking the pills but she persisted, imploring him with her feminine charm and asking him to 'help me leh, help me leh!'. He finally agreed to do her the favour. There was no discussion on payment or on the delivery date. She also asked him not to disclose the fact that she was going to take slimming pills to anyone, including her boyfriend, Pierre Png.

146 He also purchased Biotin shampoo for her using the birthday discount given to him by GNC. His birthday was on 12 January. She offered to return the favour when her birthday in June arrived. As the GNC outlet did not have the stocks when he went there, he placed the order and paid for her. He then asked her to go and collect the shampoo when the stocks arrived.

147 On 11 January 2002, some two weeks after the plaintiff requested him to buy Slim 10 for her, he handed her two sets of 120 pills each after collecting them from the third defendant. She paid him $260 in cash. Chen Liping was also there in the studio. The two ladies had a chat and Chen Liping told the plaintiff she was fine taking the pills and there was no need to diet. She also advised the plaintiff to continue with her regular meals and to drink lots of water while taking the Slim 10 pills.

148 On 15 February 2002, the plaintiff sent him the SMS message (set out earlier) about having run out of skinny pills. He managed to retrieve this message from his mobile phone's memory. This was followed by a telephone call from her requesting more Slim 10. He obliged, helped her purchase two more sets from the third defendant and placed them in her pigeonhole at work. He then informed her about this via SMS. She collected the pills and left a cheque for $260 dated 18 February 2002 in his pigeonhole.

149 Sometime around 21 March 2002, the fifth defendant got another SMS message from the

plaintiff requesting him to help her buy more Slim 10 pills. He did not have this SMS message in his mobile phone anymore. This was followed by a telephone call from her telling him to buy two bottles. He told her she was already very slim and did not need to take any more of the pills. She said she wanted the pills only for 'maintenance' as she was going for a holiday in Bangkok. He then obliged her again for the third time. He got the pills from the third defendant and left the two bottles in her pigeonhole. The plaintiff collected them but did not pay him.

150 In April 2002, he received a telephone call from the plaintiff who was in hospital. She asked him if she could return the third batch of two bottles of Slim 10 as she had not paid for them and had not opened the containers yet. He told her to take care of herself first and discuss this matter after her recovery. The third batch of pills remained with the plaintiff.

151 The fifth defendant maintained he was not a seller of Slim 10 and, in particular, was not a seller to the plaintiff. He had been buying the pills for her as a favour. This suit against him was more than a mere disappointment to him as it was a betrayal of trust and friendship.

152 The fifth defendant agreed he had visited her in hospital but denied having made the offer that the Slim 10 boss and he send her to China for treatment. He also denied he had taken 950 sets from the second defendant as indicated in the receipts he signed. He insisted the total was no more than 800 plus. The receipts did not mean he was collecting those round numbers of sets of pills at the time of signing. They were consolidated statements, the accuracy of which he did not check. Further, there could have been double accounting by Peter Boo as a result of miscommunication between Peter Boo and the third defendant. Some of the receipts also referred to sachets (of 20 pills each) instead of sets (of 120 pills each). He also maintained the price for each set was $130 although he gave a cash cheque for $10,000 dated 9 March 2002 as payment for 100 sets of Slim 10 he received on 8 March 2002 at 9.20pm. He claimed that payment was made to the second and the third defendants haphazardly, sometimes in cash and sometimes by cheques. He also denied having sold to Terry Chan at $120. He denied having made any profit from the plaintiff.

153 Two colleagues from MediaCorp testified for the fifth defendant. Chew Chor Meng said he saw the noticeably slimmer poster girl in the newspapers in November 2001 and became interested in Slim 10 as he felt overweight then. He approached the fifth defendant to help him purchase one set of the pills as it would be inconvenient for him to buy from the retail outlets. He asked him whether there would be a discount in the price but the fifth defendant did not make him any promise. He merely said he would try to get the pills for him on account of their friendship. The fifth defendant actually chastised him for wanting to take slimming pills when he was already like a thin monkey but Chew told him he felt he had too much fat on his face.

154 A few days later, the set of Slim 10 was left in his pigeonhole and in turn, he placed a cheque in the fifth defendant's pigeonhole. He could not recall the amount paid. After taking the pills over ten days, he did not meet the fifth defendant again for one or two months.

155 When they next met, Chew asked him to buy three more sets for him but he did not seem particularly keen to do so. In the end, he agreed on account of their friendship. There was nothing said about when the pills would be given to Chew. Payment was again made by cheque.

156 After that lot of three sets had been consumed, Chew felt no more need to take the pills and the fifth defendant did not ask him if he wanted some more. Chew had never seen him encouraging anyone to buy Slim 10. To him, it was clearly a favour done by the fifth defendant out of friendship.

157 Carole Lin joined MediaCorp in 1995. She got to know the fifth defendant when they were

cast together in a Chinese drama and became good friends. She did not know the plaintiff but felt she was a friendly person.

158 In November 2001, Carole's close friend said she had seen the slimmer Chen Liping on television and asked Carole to find out the secret of the weight loss. She approached the fifth defendant about this and was told about Slim 10. She then asked him whether he could help her get one or two sets but he scolded her and told her not to take such products as she was already very slim. Carole explained that the pills were for her friend. He told her to tell the friend not to take such things and said he was not very keen on helping me as it was troublesome. He said he would have to make a trip to the studio to hand the pills to her. He suggested that her friend buy from the retail outlets.

159 Subsequently, Carole's friend asked her to approach the fifth defendant again as she believed it would be cheaper to buy through the husband of the poster girl. When she asked him for the favour, he was reluctant but finally obliged her, telling her not to go around telling others he could get Slim 10 for them because he could not. After that one set of pills, Carole did not ask him to buy for her friend again and neither did he ask her whether she would like to have some more.

The decision of the court

160 There can be no doubt that the plaintiff has undergone a life-threatening and life-changing event. In May 2002, at the age of 27, this erstwhile healthy and lively artiste was on the verge of making an untimely exit from the stage of life. A fortuitous combination of inspiring love of a selfless boyfriend, of impressive skill of a renowned surgeon and of immediate action of an enlightened Ministry of Health, Singapore made the living donor liver transplant possible and restored the plaintiff to the world of life.

161 Were the slimming pills taken by her Slim 10? They came through an unbroken chain from the importer to the fifth defendant to the plaintiff. They were not packed and marked in the way Slim 10 was in the retail outlets but the fifth defendant. had absolutely no reason to doubt the third defendant or Peter Boo and the plaintiff had every reason to trust the husband of the Slim 10 poster girl. The second defendant's receipts may not have mentioned Slim 10 by name but no one was in any doubt that the only slimming pills imported by the company were those meant to be marketed as Slim 10. The third defendant also said that he handed only Slim 10 to the fifth defendant and his wife. The representatives of the fourth defendant knew that Slim 10 came in vials and in silver foil packets before packaging by DAC. They were also informed that the second defendant was conducting product testing with the artistes by giving them the pills in their original packaging without any brand or name to identify them. They knew and assented to the third defendant supplying unmarked Slim 10 to the fifth defendant even if they did not know what the exact quantity was. I have no doubt that what the plaintiff obtained and consumed was indeed Slim 10.

162 When did the plaintiff start and stop consuming Slim 10? There was no cogent answer from her on the discrepancies in the three sets of dates. Perhaps she was just nonchalant in her answers during the taking of her medical history. Perhaps she was distraught and confused at the discovery that her liver might have some problems. However, this would be inconsistent with the observation of Dr Chia Siew Cheng at Mount Alvernia Hospital that she was alert and could go about doing normal things. She was certainly not encephalopathic at that stage. She was also able to mention Spirulina and Pcynogenol and to give a fairly accurate estimation of how long she had been consuming those supplements.

163 Ironically, the person who rescued her from the distressing discrepancies in dates was the

one she decided to add as a defendant in this suit. The fifth defendant's evidence on the dates of the three batches of pills made the most sense. The dates provided by him matched the events during that period and were supported by objective evidence like the SMS message sent by the plaintiff on 15 February 2002 and her cheque dated 18 February 2002. The pills could not have been obtained in November 2001 because the plaintiff and the fifth defendant only got to know each other during filming of 'No Problem' in December 2001. He also had no reason to state the dates falsely and would certainly gain nothing by assisting the plaintiff in advancing her case!

164 I am of the view that the starting date of consumption of Slim 10 was sometime in late January or early February 2002. It accords with the plaintiff's evidence that it was near the end of filming for 'No Problem' as she was concerned about the side effects mentioned, especially insomnia, and wanted to be sure she would not be adversely affected in her first major role in a Chinese show. If she dutifully took the dosages advised, i.e. four pills three times a day, she would take 20 days to finish the two sets of 120 each. As she testified, during the erratic hours of filming, she could have missed some dosages. She also reduced to two pills for the evening intake at some point in time as she wanted to minimise the chances of having insomnia.

165 By 15 February 2002, she would have finished the first set of pills and have started on the second set. Hence the SMS message to the fifth defendant for more 'skinny pills'. I accept that the SMS message read literally meant that she had already run out of the pills by 15 February 2002. However, it is a well known fact that users of SMS messages are not too fastidious about grammar or about spelling. The plaintiff's SMS messages to the fifth defendant bear out what I have just said, at least where spelling is concerned. I do not accept that the plaintiff overlooked one tube of the pills in the refrigerator. This evidence surfaced very late during her testimony and appears to have been conjured up to match a starting date of consumption closer to the Chinese New Year.

166 On the basis that the plaintiff took the reduced dosage of ten pills a day, which would translate into 12 days for completion of one set of Slim 10, and if she started on the second batch of pills around 24 February 2002, she would finish that batch around 20 March 2002. This accords with the fifth defendant's recollection that she asked for the third batch around that time. Of course, the dates are all approximate ones. Pill popping (especially not of prescribed drugs) is not something that people normally record on paper nor register deeply in their minds.

167 I find it more convincing that she probably collected the third batch sometime before leaving for Bangkok on 29 March 2002 rather than upon her return because she said she drove Pierre to the studio and collected it but Pierre said he was on leave after returning from Bangkok on Thursday, 11 April 2002. Besides, if she collected the third batch on Friday, 12 or Saturday 13 April 2002, I doubt she would have forgotten about it upon admission to hospital a few days later. The third batch was not opened and it follows that she did not consume any Slim 10 pills while in Bangkok. I do not think she would have brought unmarked, loose pills without a prescription on board an aeroplane as they might be suspected of being illegal narcotics. Further, it was apparent that Pierre believed in trimness by pounding treadmills rather than by downing pills. It was unlikely that the plaintiff would risk incurring his displeasure by bringing the pills and consuming them at meal times when she was likely to be with him.

168 The period of consumption of Slim 10 by the plaintiff was therefore between late January/early February 2002 to no later than 29 March 2002.

169 Since it could not have been in November or early December 2001, I believe the plaintiff when she said her interest in the slimming pills was kindled by the fourth defendant's television commercials proclaiming their herbal source and safety. Her inability to recall the dates she first saw those

advertisements is completely understandable. She testified it was in the last quarter of 2001 and during filming of 'No Problem' and she was not wrong on those scores. Even the fifth defendant said she spoke to him sometime in late December 2001. She was convinced by those advertisements that Slim 10 was effective and safe and she decided to buy the pills after that. I accept her evidence that it was the fourth defendant's corporate backing of the Slim 10 pills that she had relied on and not the names of the importer or the manufacturer, companies which held no meaning for her. While she might have trusted the fifth defendant in other things, she was not likely to have relied on any assurances by him on herbal medicines which had no established reputation here.

170 I now discuss the vexed issue of causation, the cause of much vexation during the trial. I am deeply appreciative of the learned comments made by the expert witnesses, all amply qualified in their fields of study and practice. I believe they have all tried to give their most honest and considered professional opinions on the facts as presented to them even if some spoke with greater passion than others. Where Keith Norman was concerned, I am more than satisfied that he did not try to hide the fact that N-nitrosofenfluramine was detected in the samples tested by him. On the contrary, he told the third defendant and took immediate action to inform the regulatory authority in his country. He even published that discovery in a journal. There was certainly no cause for him to collude with any of the defendants in any way. It was SARS that got in the way of proper communication between him and the fourth defendant's solicitors.

171 From the medical literature discussed, the temporal relationship between a drug and an injury is of high relevance. It provides a starting point for further investigations or, at least, gives an indication as to the priority thereof. Zimmerman on Hepatotoxicity (2nd edition, 1999), an acknowledged authority, states that most instances of drug-induced hepatic injury occur after 5 to 90 days of taking the drug and injury that appears earlier or later is less likely to be caused by the drug. The interval before appearance of injury may exceed 90 days in drugs that produce injury because of presumed metabolic idiosyncracy. Onset of injury is usually during the time that the drug is being taken. However, hepatic injury may appear after the drug has been withdrawn, usually within a few days. Appearance of injury may be delayed for as long as 5 weeks after the drug has been stopped, as is the case with amoxicillin-clavulanate (Augmentin) jaundice. 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 this interval is more than 35 days, it is unlikely to have been caused by the drug.

172 Dr Wendon accepted that the plaintiff's liver injury could have happened a few days before her jaundice was noticed since people tend not to notice subtle changes in those they come into contact with everyday. She placed the probable date of liver injury as 11 April 2002. The inception of ingestion to onset of injury between 1 February and 11 April 2002 is 70 days. If we move the date of inception five days earlier, we would have 75 days. That is still within the 5 to 90 day period stated by Zimmerman. Similarly, if the plaintiff stopped taking Slim 10 on 29 March 2002, the period between stoppage and the onset of injury would be 13 days, suggesting it was likely to have been caused by Slim 10 because it was less than the 15-day period indicated by Zimmerman. If she stopped consuming Slim 10 on 20 March 2002, the interval would be 22 days, still within the 35-day zone mentioned by the learned author.

173 Let us assume the worst case for the plaintiff for a moment. Let us say she started taking Slim 10 in the last 5 days of January 2002 and took exactly 10 days to finish each set of 120 pills. She would have finished the first batch of two sets in 20 days, i.e. by 15 February 2002, taking a literal reading of her SMS message to the fifth defendant. She would have taken 40 days in total to finish both batches, i.e. by 7 March 2002. The gap between 7 March and 11 April 2002 is exactly 35 days. It can be seen that even the worst case scenario still meets the criteria of probability in the Zimmerman test albeit precariously so.

174 I accept that the Maria and Victorino clinical scale test militates against the case of the plaintiff. However, I note the limitations in that test. Some things like the re-challenge or re-introduction of the suspect drug would be impossible in a case like this.

175 It was common ground among all the parties that Pycnogenol could be ruled out as a possible cause of the liver failure. The other candidate for consideration is Spirulina. Based on her history of consumption of this supplement (about two and a half years before her hospitalisation), Spirulina would fail spectacularly the Zimmerman test relating to the interval between commencement of ingestion and manifestation of injury. Other than the one case reported about the 52 year old Japanese man, who was also noted to have a host of other medical conditions, there has been no other known case of it being hepatotoxic. In any event, the Spirulina supplied in Singapore appeared to have come from a reliable source where strict quality control measures were in place.

176 N-nitrosofenfluramine, found in the samples of Slim 10, belongs to a family of compounds known as nitrosamines which are generally accepted as being hepatotoxic. Animal studies conducted by the Japanese Ministry of Health confirmed the harmful effects of this synthesised compound on the liver. Obviously, it would be murderously foolhardy to conduct tests on human beings using this hitherto unknown compound.

177 Dr David Joyce's computation of the amount of Slim 10 pills necessary to deliver a lethal blow to the liver was on the basis that N-nitrosofenfluramine would function in exactly the same way as NDMA. There is of course no literature as yet on whether this would be the case. Dr David Joyce was of the opinion that this new compound was deliberately synthesised by unscrupulous manufacturers in order to circumvent the ban on fenfluramine. Dr K C Tan cautioned that this case was not only about this new compound but concerned also its effect when combined with the cocktail of substances found in Slim 10.

178 I note also that the Coroner in Ms Raja's case accepted the expert opinion there that the deceased's liver failure was related to this new compound in the Slim 10 pills that she had consumed. Dr K C Tan opined that the fact there were only two cases of liver failure from Slim 10 among the many who consumed it showed it was not dose-related and that the plaintiff probably suffered an idiosyncratic drug reaction.

179 On of 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 the plaintiff's massive hepatocellular necrosis. In coming to this conclusion, I take heed of the advice of the House of Lords in *Rhesa Shipping Co. SA v Edmunds and another ('the Popi M')* [1985] 2 AER 712 that it is always open to a trial judge to conclude after hearing all the evidence that the cause of a particular event remains in doubt, with the consequence that the plaintiff has failed to discharge the burden of proof. In the case before me, I do not, unlike Bingham J in that decision, 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.

180 There can be no doubt that the second defendant as importers and distributors owed a duty of care to consumers, like the plaintiff, of its product. Equally, the fourth defendant, as the wholesaler which promoted, endorsed and advertised the product owed a duty to consumers to exercise reasonable care in its promotion, endorsement and advertisement. What the legal duty of care translates into factually is dependent on the circumstances of each case.

181 Insofar as the plaintiff submits that the second defendant's duty of care extends to having to conduct a 'due diligence' check on the manufacturer in China, I think that is overstating the case. The importer intended to buy *from* the manufacturer, not to buy *over* the manufacturer. It is sufficient that the importer knew who the manufacturer was, where it was situated and whether it was properly licensed to produce such goods.

182 What the second defendant has failed to do is to keep proper records of the consignments of pills that were being imported and to do proper batch tests. This was required under the regulatory framework and was made known in the guide published by the HSA. The third defendant was aware of the need to do tests for each batch of Slim 10 brought in. His company gave a written undertaking to the HSA on 1 November 2001 that such would be done. However, due to the hopelessly haphazard way in which the third defendant permitted the importation to be done, there was no definable 'batch' or 'consignment' to even speak of notwithstanding his purported batch numbering in the samples sent for testing. There was no way of knowing which batch any particular set of pills was from. There was no product marking on the parcels and no documentation whatsoever.

183 It may be argued that even if the second defendant had done batch testing, the tests would not have revealed the presence of N-nitrosofenfluramine, which was unknown to even chemists. While that may be true, the tests would have revealed the presence of other banned substances. It was not sufficient for the second defendant to merely commission tests and then perfunctorily throw the reports at the HSA for the authority to tell the company if poisons and synthetic substances were shown. It was required to submit a declaration of the absence of poisons and synthetic substances in the product. How could the second defendant make that declaration if it did not do general screening tests or did not bother to ask for professional help in interpreting the test reports? If it did ask, it would have been advised that there were prohibited substances in Slim 10 and the declaration could not have been made. Accordingly, there would not have been any supply or sale.

184 Further, the importer would have been alerted to the fact that the manufacturer or its process was questionable and would be very careful in checking the future imports. It was also clear that the powder in the pills was not of the colour represented by the manufacturer. The manufacturer would therefore have been dishonest in stating that there was no further production of brown powder pills after 15 August 2001 or was downright unscrupulous in despatching pre-15 August 2001 stock. Due to the third defendant's blind faith in his 'godfather' and presumably because of his personal investment in the manufacturer, the importer has failed miserably in its duty of care by importing and distributing Slim 10.

185 In turn, the fourth defendant was negligent in placing blind faith in everything the third defendant said. The second defendant had no track record of any sort. The third defendant had no experience at all in the importation of Chinese medicines. Without verification, the fourth defendant 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. If the fourth defendant had taken care to insist on seeing the batch test reports and to seek professional advice thereon, it would not have made those claims over television and the plaintiff would not have been lured to the devastating debacle.

186 The second and the fourth defendants cannot take shelter under the argument that it was not foreseeable that someone would obtain Slim 10 from non-official retail sources. Clearly both of them knew about the alternative source of Slim 10, at least in respect of the fifth defendant, and it

was from the fifth defendant that the plaintiff obtained the Slim 10 pills. She was also within the class of people (artistes) that the second and the fourth defendant hoped would consume Slim 10. As mentioned earlier, the fourth defendant was aware that pills from the alternative source were not packed in the approved boxes. It could not therefore defend its position by claiming a break in causation in that the plaintiff had no opportunity of reading the advice to see a doctor if problems were encountered or to call the hotline number to make enquiries. In any event, I do not think a distributor of products, if it was found negligent, would be able to avoid liability merely on the basis of having printed such advice or having provided a hotline for enquiries. It should also be noted that the people manning the hotline were no professionals anyway and at best would have repeated the advice to seek medical attention.

187 Insofar as the events leading from 2 April 2002 onwards are concerned, I need not concern myself with whether the second and the fourth defendants reacted to the adverse drug reactions responsibly or not. Even if they were found to have been irresponsible in not effecting an immediate product recall, that would have no nexus to the plaintiff's claim because, as I have found, she stopped taking Slim 10 by 29 March 2002 and was in Bangkok anyway. Any product recall in Singapore in early April 2002 would not have made a difference to her case as she did not consume the third batch of Slim 10.

188 Accordingly, I hold the second and the fourth defendants liable for the plaintiff's liver failure.

189 The plaintiff seeks to hold the third defendant personally liable in that he authorised, directed and/or procured the second defendant's negligent acts. Reliance is placed on the decision of our Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Others* [1998] 1 SLR 374 which concerns a claim in libel arising from a board resolution passed by the directors. The Court of Appeal held that the board resolution passed by the majority of the directors was an act of the company and said:

> '34 …….What is at stake is a very difficult question of policy. On the one hand, there is the principle that a company is separate and distinct in law from its shareholders and directors, and it is in the interests of commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by the corporation. On the other hand, there is the principle that everyone should answer for his tortious acts. A cause of concern is that, if the directors are made liable too easily, many commercial decisions will be fraught with the danger of personal liability being imposed on the director, who might then become over-cautious in making management decisions lest it render them vulnerable to legal suits. This will in turn be disadvantageous to the company commercially. On the other side of the coin, a director of a company should not be allowed to escape personal liability to third parties for torts which he personally committed by his own hand or mouth merely because he committed the tort in the course of carrying out his duties as a director of the company.
>
> 35 After giving much thought to the opposing considerations above, we came to the conclusion that the principles echoed in *C Evans & Sons Ltd v Spritebrand Ltd* and its predecessor cases represent the position as to the liability of directors for a tort committed by the company. It is an established principle of law that a director can, in certain circumstances, be liable for a tort committed by the company if he directed or procured the commission thereof. ….. Of course, whether a director is so liable depends very much on the factual situation at hand. The level of his involvement needs to be looked at in determining if he did authorise, direct or procure the commission of the tort. This is a matter of degree. If a particular tort is one which requires the satisfaction of the proof of mens rea before personal liability can be founded, then the state of mind of the director when he authorised, directed or procured the act will be

relevant.'

190 The third defendant argues from a line of cases on this point that personal liability has been imposed only if the cases concerned deliberate or intentional torts by a director or an assumption of personal liability by the director so as to rank him as a joint tortfeasor. Where a director was to be fixed with liability as principal, the agency of the company must be established substantively and cannot be inferred from the holding of director's office and the control of the shares alone because any other conclusion would have nullified the purpose for which creation of limited companies was authorised by law. It is further submitted that the words 'direct, procure, authorise' are inappropriate for a claim in negligence and should be confined to deliberate torts such as defamation, conversion, fraud, patent and copyright infringements or passing off. Where the alleged wrong is not an isolated act but a fairly prolonged course of conduct (including omissions), the third defendant says he does not see how a director could procure or direct a company to engage in a negligent course of conduct. It has also been highlighted that the Court of Appeal decision cited above and the English case it referred to concerned striking out applications where the merits and evidence were not fully examined unlike a trial.

191 Firstly, whether the authority concerned an interlocutory matter or a full trial does not matter when it was a point of law that the Court of Appeal was pronouncing. The words 'authorise, direct and procure' are more appropriate for torts of commission and negligence is both a tort of commission and of omission. It seems to me that a director could at least authorise or direct a course of conduct which amounts to negligence in the circumstances.

192 In this case, there can be little doubt that HealthBiz (second defendant) by any other name would still be Semon Liu (third defendant). He was its founder, director and president. He refers to it as 'my company'. The registered address is his residence although the Registry of Companies and Businesses search shows he has moved to another residential address. He is the one constant director and shareholder from its inception. When he approached the fourth defendant for the first time, it was his personal portfolio and curriculum vitae that he showed. He coined the name Slim 10. He appointed Peter Boo who, despite his directorship and the high-sounding title of Vice President, was nothing more than an employee. Even if Peter Boo did get 1% of the shares in the second defendant, it was obviously done at the indulgence of the third defendant, probably as a perk. The uninsured company has no tangible assets anyway. When he went to meet the fifth defendant and Chen Liping, it was again his personal profile that was presented. It is telling that the couple could not even recall the other person's name (Tan Eng Kiat).

193 Nothing was done without the third defendant's knowledge or approval. Only he dealt with the manufacturer. He dealt with it on cash terms and in person. Whatever little we know about the Chinese company came from him. He apparently had some form of beneficial interest in that company because of his personal investment. He regarded its owner as his 'godfather'. Only he could have agreed with, approved or authorised the totally disorganised manner in which the pills were being imported and haphazardly sent for screening. Only he could have decided that a general screening for poisons was not necessary and that a declaration of safety was not even needed for each batch.

194 Reverting to the instruction of the Court of Appeal that the level of involvement of the director in the tort must be looked at, the answer is that the third defendant's involvement in the negligence is not merely very great, it is total. In the very exceptional circumstances of this case, I hold the third defendant personally liable in negligence as well.

195 The claim against the fifth defendant is in contract. Apart from the question whether he was a seller who 'sells goods in the course of a business' [section 14(2) Sale of Goods Act], one of the

fundamentals required for a contractual relationship is an intention on the part of the parties to create legal relations. This is an objective test.

196 However the plaintiff may choose to define her relationship with the fifth defendant, it is clear they were on very good terms with each other between December 2001 and April 2002. I need not repeat the evidence given by him in support of this. Her SMS messages reproduced earlier have the undeniable ring tones of friend greeting and teasing friend. If the words in the 15 February 2002 message were converted into a picture message, 'Mr Extremly Naughty' would probably be looking at a cute, cheeky smiling face.

197 Their friendship may be only a few weeks old but that should not be the sole criterion of how close they were. After all, they were acting together as spouses in the series and the fifth defendant, an eloquent Mandarin speaker, would without a doubt have been helping her cope with the language. Of course, this is not to say that oral contracts can never be made in social surroundings. Sellers and buyers can be pretty friendly to each other too. They may even be relatives. Each case has to be looked at individually.

198 Coupled with the fact that there were no discussions about the time and place of delivery and the price of Slim 10, I find it extremely (and I spell the word correctly this time) difficult to find that a contract was formed. The incident had all the trappings of a friend doing a favour for another by getting something for her. This is reinforced by the plaintiff's outburst of indignation that he made $30 per set from her for if it were a commercial deal, why should she not expect the seller to make a profit, whatever the margin? Accordingly, the claim in contract against the fifth defendant fails at the very first stage of inquiry and I dismiss it on this ground.

199 I do not find it useful to discuss in detail the contentions regarding the number of sets taken by the fifth defendant from the second or the third defendants. 800 plus sets and 950 sets in the circumstances really make no material difference when deciding whether the fifth defendant was conducting a sideline business or not. I am inclined at any rate to believe the detailed receipts signed by him because most of them were carefully written out by a meticulous Peter Boo.

200 I add one more observation before I move away from the claim against the fifth defendant. The evidence suggests strongly that each set was provided to him at $100 throughout, particularly the last receipt dated 8 March 2002 for 100 sets matched by his cash cheque for $10,000. If the price were $100 from November 2001 or so, it is highly unlikely that the third defendant would have made an error about the figure in his affidavit of evidence-in-chief. However, even if a secret profit or commission was made from the plaintiff for getting her the Slim 10 pills, that does not elevate the favour into a commercial transaction. It merely means that the friend doing the favour has decided to keep some part of the discount for himself, perhaps to compensate for his time and expense, without informing the recipient. I mention these two issues because I will be taking them into consideration for the purpose of my order on costs.

Damages

201 The plaintiff incurred the following expenses:

(1)	Mount Alvernia medical fees and costs	$15,875.87
(2)	NUH medical fees and costs	$24,090.41
(3)	Gleneagles living donor liver transplant	$170,840.00

(4) Mount Elizabeth radiology costs $1,078.00.

Out of the above amounts, $135,565.87 was paid by NTUC Income and the plaintiff is obliged under the insurance policy's co-payment scheme to reimburse this amount to the insurers. However, MediaCorp assisted her by paying the amount to NTUC Income for her first by way of an interest-free loan. The insurance company also paid $22,875.60 under the policy and the plaintiff has undertaken to reimburse this amount pursuant to the insurance company's right of subrogation. Although Gleneagles Hospital was not a 'listed hospital' under the policy, the policy covered hospitalisation at an unlisted hospital if the insured is referred there by a doctor from a listed one. This was the case here as the plaintiff was referred to Gleneagles Hospital by NUH, a listed hospital.

202 I find that the plaintiff is entitled to claim the four amounts stated above. There is a suggestion that she ought to have mitigated the loss by having the transplant done at NUH by Dr K C Tan as NUH could have given a subsidy to her upon application. This suggests that a person gasping for air should go around shopping for the cheapest oxygen tank and that cannot be right. What the plaintiff (or the people making the decision for her then) decided in the very trying days before the transplant was completely reasonable.

203 The plaintiff also claims:

1. cost of routine consultation and blood tests and medication as at 12 June 2003 $11,378.90

(2) consultation on 6 June 2003 $145.00

(3) consultation on 25 July 2003 $235.00

(4) transport at $20.00 per round trip for 31 trips $620.00

(5) loss of earnings as a result of hospitalisation $14,500.00.

I also award her these special damages save that item (5) should be reduced by 20% as that would be the amount payable to her employers had she undertaken those outside engagements.

204 In respect of general damages for pain and suffering and loss of amenities, there really exists no comparable local precedent for liver transplant cases. The defendants suggest damages at $35,000 or $40,000 while the plaintiff argues for $250,000. The fourth defendant says this figure is much too high as 'even tetraplegias in Singapore do not get $250,000'.

205 In awarding general damages, the court is attempting to compensate the injured party in monetary terms for what she has suffered and may continue to suffer. The plaintiff was hospitalised for 36 days between 16 April and 21 May 2002. She underwent a liver biopsy and then a transplant. She also suffered from lethargy and jaundice, had hallucinations and vomiting. She also had to undergo numerous blood tests with the consequent taking of blood from her veins. Her physical activities and food preferences are now restricted. Although she has passed the first six months, the most crucial post-operation period, uneventfully, there is always going to be the nagging and gnawing thought whether the transplanted liver will fail or whether her weakened body will succumb to some disease or other. There will be risks to her and to the foetus if she should be pregnant. Visits to hospitals have become a way of life for this once vivacious young lady who is now uninsurable.

206 Is $250,000 too much compensation for this horrific list? Definitely not. I therefore award

$250,000 in respect of this head of damages.

207 The next claim pertains to the life-long medical costs that the plaintiff will have to incur. The most important consideration for these items is the multiplier. The plaintiff, adopting the average life expectancy of 80 years for females in Singapore, argues for a straight line multiplier of 51, i.e. 80 minus her present age of 29, because this will enable inflation in the costs of medication and of medical services to be taken into account. She also submits that the rate of 5% Goods and Services Tax ('GST'), applicable on 1 January 2004, should be adopted in computing the damages.

208 The defendants argue for a multiplier of 18 years. It is also said that since the patent for Prograf will expire in 2008, there is every possibility that generic drugs will appear in the market to drive down the price of Prograf, now standing at $31 for a dosage of 6mg. The plaintiff is now on a reduced dosage of 2 to 3mg a day.

209 In making awards of this nature, we are giving a twist to the admonition that in determining liability, one should not look at past events with hindsight. Here, we are looking at 2004 and beyond with the limited vision of 2003. Deferring to the recommendations of her attending physician, I make the following awards for the plaintiff's yearly medical expenses:

1. Routine consultation and blood tests

	four times a year	$1,200.00
(2)	Prograf (3mg a day at $15.50 x 365)	$5,657.50
(3)	Neovita	$365.00
(4)	Hepatitis A,B,C serology tests	$105.00
(5)	AFP test	$20.00
(6)	CEA test	$20.00
(7)	Lipid screen test	$25.00
(8)	Chest X-ray	$40.00
(9)	ECG	$25.00
(10)	Transport	$80.00
	TOTAL	**$7537.50**

GST at 5% of $7457.50 (i.e. total minus $80.00 for transport) should be included, giving a sum of $7910.50. While I appreciate the argument that Prograf may become cheaper after 2008, I am keeping to the present price as that will take care of inflation over the years. I am not making an award for the mammography and gynaecologist consultation expenses from the age of 40 as both of the plaintiff's expert witnesses were of the opinion that such tests would be advisable for <u>all</u> females in that age group.

210 Bearing in mind the contingencies that may happen in life, I think a fair multiplier would be two-thirds of the expected 51 more years of life, i.e. 34 years. The award is therefore $7910.50 X 34,

giving an amount of **$268,957.00.**

211 I make no award on the claims for the tests and treatment that may be ordered in the future if her doctors deem they are necessary.

212 The last item of the plaintiff's claim is on loss of earning capacity. She could have made $14,500 in three months from outside engagements and endorsements if she had not been hospitalised. Since it represents one quarter of her outside earnings per year, it is suggested that this figure be the multiplicand. The multiplier is suggested as 16 years as her life span in the entertainment industry is up to 45 years of age and she is 29.

213 She could make an average of about $3,900 per month from outside earnings (taking into account the 20% due to her employers) only if such contracts are available on a very regular basis and we know they are not. Without disrespect to any artiste, it is to be expected that the popularity of artistes can wax or wane. I think therefore a loss of $1,000 per month over 8 years (i.e. **$96,000**) is more reasonable and realistic and I so award.

214 Having done what is humanly possible to take care of her present and future needs, I am not making any order for liberty to apply for further compensation. Interest at 6% per annum is awarded on all special damages from the dates they were incurred and on the damages for pain and suffering from the date of the writ of summons.

The orders

215 Judgment is given for the plaintiff against the second, third and fourth defendants for the amounts computed above together with costs to be taxed or agreed. There is to be only one set of costs in respect of the second and third defendants. The plaintiff's claim against the fifth defendant is dismissed. Like the other defendants, the fifth defendant is unsuccessful on the issue of causation. For this reason and the two factual findings I alluded to earlier, he shall be entitled to 85% of his costs to be taxed or agreed.

Plaintiff's claim against 2nd, 3rd and 4th defendants allowed;
Plaintiff's claim against 5th defendant dismissed.

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