Published on e-First 24 July 2018

26. TORT LAW

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Causing loss by unlawful means

26.1 Prior to the High Court decision in *Wolero Pte Ltd v Lim Arvin Sylvester*,[1] causing loss by unlawful means, though clearly recognised in England,[2] had not been extensively examined in Singapore. The plaintiff company, which provided limousine services to corporate clients and private individuals, rented a limousine to the defendant pursuant to hire and service agreements with a guaranteed number of job assignments. The tortious claim was that the defendant caused the plaintiff loss by unlawful means and unlawfully interfered with its contracts. The defendant had written to and obtained from the Land Transport Authority ("LTA") a written response that the limousines were required to be covered by insurance, which extended to employees. The plaintiff alleged that the defendant had published the LTA response to a WhatsApp group and called on the recipients to return their cars to the plaintiff, with some drivers terminating their contracts. In any event, based on the facts, there were no unlawful means used by the defendant in sending the LTA response to the drivers and calling upon them to return their cars. Further, there was no evidence that the freedom of the drivers to perform their contracts had been interfered with via unlawful means.

26.2 On the state of the law, Tan Lee Meng SJ explained, consistently with Lord Hoffmann's opinion in *OBG Ltd v Allan*,[3] that the tort of causing loss by unlawful means is a tort of primary liability that does not require a wrongful act by anyone else. In response to the plaintiff's

1 [2017] 4 SLR 747.
2 See *OBG Ltd v Allan* [2008] 1 AC 1.
3 *OBG Ltd v Allan* [2008] 1 AC 1 at [8].

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counsel, the learned judge also clarified that the tort exists and is part of Singapore law, citing *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd*,[4] *per* Judith Prakash J (as her Honour then was), in which a claim for causing loss by unlawful means was dismissed on the facts, and *obiter dicta* from *Tribune Investment Trust, Inc v Soosan Trading Co Ltd*[5] and *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd*[6] ("*EFT Holdings*") to support the judicial stance. Nonetheless, Tan SJ recognised the "divergent views" on the scope of "unlawful means" in *OBG Ltd v Allan*, namely, whether the unlawful act has to be independently actionable by the third party and exclude criminal and statutory offences *or* if "unlawful means" should embrace all acts not permitted under civil or criminal law. A definitive judicial response on this issue will have to wait another day. However, it would seem that the former approach of defining the scope of unlawful means as requiring independent actionability by the third party under civil law would be more consistent with Tan SJ's classification above of this tort as one of primary (as opposed to accessory) liability.

Conspiracy

26.3 This section discusses seven cases on conspiracy involving the alleged use of unlawful means (including fraud, which is the most common, breach of confidence, conversion, inducing breach of a consent order, breach of director's duties and criminal breach of trust).

26.4 The interpretation of contractual clauses can at times have a direct and significant influence on the viability of related tortious claims (in this case, under the tort of unlawful conspiracy). This is illustrated by the following High Court decision in *Centre for Laser and Aesthetic Medicine Pte Ltd v Goh Pui Kiat*[7] and the Court of Appeal decision in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd*[8] respectively. Two doctors, Dr Goh PK and Dr Kelvin Goh, who specialised in aesthetic treatment, co-owned and operated two clinics, one of which was the appellant company. A dispute arose between the two doctors which eventually led to them entering into a settlement agreement.

26.5 Under the settlement agreement, the two doctors were to procure the sale of the two clinics at a certain minimum price. Pending the sale of the clinics, the two doctors were obliged to work at the

4 [2014] 4 SLR 574 at [83].
5 [2000] 2 SLR(R) 407.
6 [2014] 1 SLR 860 at [71].
7 [2017] SGHC 72.
8 [2018] 1 SLR 180.

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Orchard Clinic on different days, such that one of them would be on duty at the Orchard Clinic on any given day of the week. The Orchard Clinic was owned by the appellant company, which in turn was owned in equal shares by the doctors' wives. The wives are registered directors of the appellant company, while Dr Kelvin Goh and Dr Goh PK are the appellant's *de facto* directors.

26.6 Dr Goh PK set up his new clinic, GPK Clinic, close to the clinic operated by the appellant company. He copied the patient and inventory database of the appellant without the permission of Dr Kelvin Goh. With the information in the database, Dr Goh PK actively diverted patients from the appellant to GPK Clinic. The High Court held that Dr Goh PK and GPK Clinic were liable for breach of confidentiality and for conspiracy to injure the appellant through Dr Goh PK's breach of confidentiality but dismissed the other claims by the appellant (based on breach of fiduciary duties and inducement of breach of employment contracts). Chua Lee Ming J applied the elements of breach of confidence: (a) the information must possess the necessary quality of confidentiality; (b) the information must have been imparted (or received) in circumstances importing an obligation of confidence; and (c) there must be an unauthorised use of that information to the detriment of the party from whom the information originated.[9] There was, however, a distinction in the state of mind of Goh PK, his wife, Mdm Wong and GPK Clinic. As Goh PK was a director of GPK Clinic, Goh PK's state of mind and knowledge were attributed to the latter.[10] GPK Clinic was therefore liable for breach of duty of confidence in using the confidential information. Mdm Wong, on the other hand, had no knowledge of the business plans or operations of GPK Clinic and had not participated in Goh PK's breach of confidentiality.

26.7 The elements of unlawful means conspiracy require (a) a combination of two or more persons to do certain acts, (b) that the alleged conspirators must have the intention to cause damage or injury to the plaintiff by those acts, (c) the acts must be unlawful, (d) the acts must be performed in furtherance of the agreement, and (e) the plaintiff must have suffered loss as a result of the conspiracy.[11] Based on the proposition that a company may conspire with its director, Chua J held that Goh PK and GPK Clinic (but not Mdm Wong) had conspired to injure the appellant by means of the breach of confidentiality.

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9 *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 at [64]; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [129].

10 *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 at [47]–[48].

11 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [112].

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26.8 Chua J dismissed the claim in respect of the diversion of patients on the basis that the settlement agreement expressly permitted such diversion. Clause 10 of the settlement agreement stated:

> [The parties] shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from [the companies].

26.9 On appeal, the Court of Appeal took a contrary view of the interpretation of the agreement. It found that cl 10 did not permit Dr Goh PK to actively divert patients from Orchard Clinic to GPK Clinic and allowed the diversion claims against Dr Goh PK. In addition, the Court of Appeal held that GPK Clinic was liable for conspiracy to injure the appellant by unlawful means in relation to Dr Goh PK's acts in diverting the patients from the appellant to GPK Clinic.

26.10 *Automatic Controls and Instrumentation Pte Ltd v Tan Thiam Soon*[12] involved conspiracy and conversion. The plaintiff company alleged that two of its former employees, a field service manager (the first defendant) and a senior supervisor (the second defendant) had wrongfully and with intent to injure the plaintiff conspired to commit fraud against the plaintiff. In particular, the plaintiff company alleged that the defendants sent the company's workers to job sites where the plaintiff company did not have any projects. The plaintiff further claimed that both the defendants had wrongfully interfered with the plaintiff's goods by committing acts of conversion.

26.11 The plaintiff had earlier obtained judgment against the second defendant in default of appearance. In the present trial focusing on liability, Woo Bih Li J granted the plaintiff interlocutory judgment against the first defendant for conspiracy with the second defendant to injure the plaintiff as well as against both defendants in the tort of conversion. The learned judge found that the second defendant had directed manpower paid by the plaintiff to certain projects and had used materials and tools of the plaintiff for such projects, thereby injuring the plaintiff. The first defendant was a party to such wrongful conduct so as to constitute the tort of conspiracy by unlawful means and the tort of conversion.

26.12 There was no direct application of the legal elements in both the torts of conspiracy and conversion to the facts of the case. Nonetheless, the following evidence adduced at trial would appear to be relevant to the judicial findings. One director of a company, who was given a project at one of the sites, testified that he had approached the first

12 [2017] SGHC 77.

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defendant to help him with manpower shortage and the first defendant had referred him to the second defendant who then put him in touch with a supplier for the required manpower. The second defendant – who was convicted of criminal charges for deceiving the plaintiff into paying a worker at a worksite managed by the plaintiff – had testified that the first defendant was his supervisor and that the first defendant had told him to sign the time cards to verify the hours worked by the workers. The managing director of the plaintiff company testified that the first defendant was the mastermind in defrauding the plaintiff through the use of fake invoices for workers who were sent to work in the projects. Finally, the first defendant had signed the payment vouchers with knowledge of the amounts claimed for the supply of labour.

26.13 The next case, *Yeo Boong Hua v Turf Club Auto Emporium Pte Ltd*[13] ("*Yeo Boong Hua*"), examined the unique situation in which the conspirators were alleged to have conspired to breach a consent order. Here, the High Court analysed the case as a conspiracy to breach a contract. Local cases have treated a consent order as a contract.[14] The corollary appears to be that the breach of a consent order should be regarded as a breach of contract. A plausible alternative is to treat it as a breach of a court order which can amount to contempt of court. In this regard, we note that the recent English case of *JSC BTA Bank v Khrapunov*[15] has ruled that a contempt of court can constitute unlawful means for the purpose of the tort of conspiracy.

26.14 The plaintiffs and the SAA group comprising five individual defendants entered into a joint venture in order to develop and operate a site. Two joint venture companies were formed to develop and operate the site. The plan of the parties was that the successful bidder for the tender for the lease of the site by the Singapore Land Authority ("SLA") (head lease) would grant a subtenancy to each of the joint venture companies on the same terms as the head lease. Disputes subsequently arose between the parties which led to two legal actions. Whilst the legal actions were ongoing, the 2001 head lease expired and SLA granted a second tranche of a three-year lease to SAA (that is, the 2004 head lease) and SAA granted a second tranche of the subtenancies to the joint venture companies. Subsequently, the three plaintiffs and some of the defendants entered into a consent order relating to an investigation into the plaintiffs' allegations regarding the financial affairs of the joint venture companies, the valuation of the joint venture companies, the sale of shares in the joint venture companies and their eventual

13 [2018] 3 SLR 806.
14 *Yeo Boong Hua v Turf City Pte Ltd* [2008] 4 SLR(R) 245 at [11]; *CSR South East Asia Pte Ltd v Sunrise Insulation Pte Ltd* [2002] 3 SLR 281.
15 [2018] 2 WLR 1125.

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termination, and the submission of the report by KPMG entities responsible for the investigations and valuation.

26.15 Though the head lease was further renewed for another three years ("2007 head lease"), SAA, the successful bidder, did not grant any subtenancies under the 2007 head lease to any of the joint venture companies. The High Court had to deal with the question of whether three of the defendants (Tan CB, Ong CK and Tan Senior) had conspired to procure and/or induce the breaches of the consent order by the other defendants. Under the consent order, SAA was obliged to grant subtenancies to the joint venture companies under the head lease. In refusing to do so, SAA acted contrary to the consent order and caused the plaintiffs' losses.

26.16 With respect to the action in unlawful means conspiracy, Woo J found that Tan CB had decided that SAA would not grant the subtenancies to the joint venture companies. Moreover, Tan CB knew that if the subtenancies were not granted, this would cause the plaintiffs to overbid for the joint venture companies' shares or cause them to be deprived of the opportunity to receive fair value for their shares in the joint venture companies, thereby causing them to suffer losses. Even if the evidence was that Tan CB also desired to benefit himself and SAA, Woo J argued that the deprivation of the plaintiffs of the benefits under the 2007 head lease was the "necessary means" by which Tan CB would achieve his desired benefit (that is, the end) thus satisfying the intentionality requirement of the tort. Tan CB's decision for SAA not to grant the subtenancies to the joint venture companies, which constituted a repudiatory breach of the consent order, was an unlawful act under the tort of conspiracy.

26.17 With respect to one of the parties to the consent order, the shareholder and director of the joint venture companies (Roger Koh), Woo J found that he had acquiesced in Tan CB's decision to deprive the plaintiffs of the benefits of the subtenancies and thereby caused injury to the plaintiffs by unlawful means. There was no evidence of a positive act by Roger Koh towards the conspiracy. In this regard, the learned judge referred to *The Dolphina*[16] for the proposition that unlawful means in conspiracy could be effected through an omission.

26.18 *Liu Tsu Kun v Tan Eu Jin*[17] is a case of conspiracy by unlawful means and fraudulent misrepresentations respectively. The unlawful means in question was the fraudulent misrepresentation by the defendants. The allegedly fraudulent misrepresentations were made in

16 [2012] 1 SLR 992 at [269].
17 [2017] SGHC 241.

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respect of two investments (namely Autostyle and VDPL investments) purchased by the plaintiffs. Tan Siong Thye J found that the second defendant, who was the alternate director of the third defendant company, was not liable for conspiracy and fraud. The claim failed as the second defendant had not made any fraudulent misrepresentations in relation to the Autostyle or VDPL investments. With respect to the Autostyle investment, the fact that the second defendant was copied on an email – which the first defendant sent to Ng (another director of the third defendant company) and that allegedly formed the basis for a conspiracy to defraud – did not mean that the second defendant was involved in the conspiracy. For the VDPL investment, the second defendant's role was very limited and he was not involved in the marketing of the investment to the plaintiffs.

26.19 Instead, the first defendant, who was the director of the third defendant company, was found liable for conspiracy and fraud together with Ng based on largely circumstantial evidence. Hence, the plaintiffs were entitled to recover from the first defendant the moneys they had paid for the investments. With respect to the Autostyle investment, the first plaintiff's investment was secured by a banker's guarantee which was subsequently discovered to have been forged. Tan J found that the first defendant had knowledge of the forgery and that the Autostyle investment was not genuine. Further, the first defendant and Ng had actively marketed the Autostyle investment to third-party investors. The first defendant also admitted that there were false statements in the Autostyle investment prospectus.

26.20 One point to note, however, is that the first defendant did not make direct representations to the first plaintiff; it was Ng, not the first defendant, who approached the first plaintiff. The first defendant was thus not liable for fraudulent misrepresentation in respect of the Autostyle Investment but only liable in conspiracy with Ng. In so far as the claim in conspiracy was concerned, the plaintiff only needed to show that each conspirator had taken some act or step to further the common design *vis-à-vis* the plaintiff. Here, the first defendant had only taken positive steps with regard to other third party investors but not the plaintiff. Tan J did not specifically discuss the intentionality requirement (namely, whether the first defendant must have intended to injure the first plaintiff or whether it sufficed to prove the intentionality requirement *vis-à-vis* the group of investors of which the first plaintiff was a member). According to *EFT Holding*,[18] a conspiracy can be targeted at a class of persons, provided the members of that class were ascertainable at the time of the conspiracy. Based on the above, it is

18 *EFT Holding, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [111].

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argued that the first defendant is liable in conspiracy notwithstanding he did not directly make fraudulent representations to the first plaintiff.

26.21 With respect to the VDPL Investment, the first defendant knew of the increased cost and risk of the investment but did not highlight them to the plaintiffs. The first defendant marketed the investment to the second plaintiff (the first plaintiff's father) and provided the term sheet and materials to another party with the intention that they would be forwarded to the first plaintiff. The first defendant also knew about the forged receipt vouchers issued by Ng to reassure the plaintiffs about the investments. The third defendant company was eventually found jointly and severally liable with the first defendant with respect to the two investments on the ground that the first defendant and Ng were acting in their capacity as the third defendant's directors in those investments.

26.22 In *Ong Han Ling v American International Assurance Co Ltd*[19] ("*Ong Han Ling*"), the plaintiffs, a wealthy Indonesian couple, alleged that they were victims of fraud perpetrated by an insurance agent of the first defendant. They claimed that the defendants (insurance companies) were vicariously liable for the agent's fraud or were negligent in not detecting the fraud and sought to recover the balance of their loss. They also claimed in vicarious liability and negligence respectively against the third defendant for the failure to train and supervise the agent. The negligence and vicarious liability claims will be discussed below.[20]

26.23 The defendants counterclaimed that the plaintiffs and the agent had conspired to defraud the defendants. The allegation was that the plaintiffs and the agent conspired to create a fictitious insurance policy in which the plaintiffs would pay the defendants the purchase money, and upon maturity, would demand the principal sum and assured returns from the defendants on the ground that they were unaware of the fraud. This counterclaim failed. This was because the defendants were not able to prove any loss flowing from the alleged conspiracy. The cost of defending the suit did not constitute losses claimable in tort. There was also no evidence of reputational damage tied to loss of business profits nor the costs of investigation incurred with regard to the conspiracy. Moreover, the defendants failed to prove the existence of an agreement between the agent and the first plaintiff to defraud the defendants.

19 [2017] SGHC 327.
20 The former will be discussed in in paras 26.115–26.117 and the latter in paras 26.171–26.174 below.

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26.24 Similarly, the case of *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[21] ("*Sandipala*") concerned a claim in conspiracy based on allegedly fraudulent misrepresentations. A contract was entered between the plaintiff, Sandipala and the second defendant, Oxel for the supply of microchips from the first defendant, ST-AP, pursuant to an Indonesian government tender. These microchips were needed to fulfil Sandipala's obligations under an Indonesian government contract to produce electronic identification cards ("E-KTP Cards") for its citizens. Mr Tannos was Sandipala's President Director. The third defendant, Mr Cousin, was ST-AP's country manager for Indonesia and Mr Winata Oxel's Sales and Marketing Representative in Indonesia. Sandipala discovered that the microchips from Oxel did not work and were rejected by the Indonesian government, and claimed that the defendants conspired to injure Sandipala by convincing Tannos to purchase microchips from Oxel in order to offload the same from the defendants' other projects.

26.25 The claim in fraudulent misrepresentation against ST-AP, Oxel and Cousin rested on the alleged representation that Oxel was the exclusive distributor of the ST-AP chips. George Wei J found no evidence that Winata or Cousin had represented that Oxel was the exclusive distributor of ST-AP chips in Indonesia. Moreover, even if the representation was made, Tannos was unlikely to have relied upon it when he entered the agreement with Oxel. The second alleged representation that Oxel would supply microchips that were identical to the tender evaluation chips was found to be untrue. The third representation that Oxel would supply Sandipala with the chips needed to make E-KTP Cards was not in fact made. Hence, the entire claim in fraudulent misrepresentation failed. As the conspiracy claim rested upon the fraudulent misrepresentation claim, it could not succeed. Instead, Oxel successfully counterclaimed against Sandipala, Mr Tannos and his wife (both directors of Sandipala) for conspiracy to injure Oxel by unlawful means (via a breach of contract and/or by extricating Sandipala from its contractual obligations without having to bear the consequences of breach) (Note: In the appeal against this decision, the Court of Appeal in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[22] has, on 6 April 2018, allowed Sandipala and the Tannoses' appeal against Oxel in respect of the counterclaim in unlawful means conspiracy. One important reason was that the Tannoses, as directors of Sandipala, should be exempted from personal liability for contractual breaches by Sandipala under the principle in *Said v Butt*[23] as

21 [2017] SGHC 102.
22 [2018] 1 SLR 818.
23 [1920] 3 KB 497.

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there was no evidence that they had acted in breach of their personal legal duties to the company.)

26.26 In *Von Roll Asia Pte Ltd v Goh Boon Gay*,[24] the first defendant was the Regional Head of Sales for Asia of the plaintiff company. The second to fourth defendants were companies ("SSI group") and the fifth defendant was a director of the third and fourth defendants. The case was only concerned with the claims against the first and third defendants as default judgment has already been entered against the other defendants. In addition to the claims against the first defendant for breach of director's duties and against the third defendant for dishonest assistance, the plaintiff alleged that the first to fifth defendants unlawfully conspired to cause loss to the plaintiff by diverting to the SSI group both the plaintiff's existing and prospective clients, and procuring through fraud various commissions and payments to the SSI group. The High Court eventually allowed the plaintiff's claim for damages or account of profits against the defendants arising from the alleged conspiracy.

26.27 First, Chan Seng Onn J held that there existed an agreement amongst the conspirators to cause loss to the plaintiff as inferred from the evidence of the first defendant's undue preferential treatment of the SSI group as compared to other agents and distributors as well as the close financial relationship amongst the conspirators. The court found that the first defendant had diverted the plaintiff's current and prospective clients to the SSI group and provided the SSI group with extended credit terms that were not offered to the plaintiff's customers or distributors. Further, pursuant to the first defendant's instruction, the SSI group enjoyed lower cost prices compared to other distributors of the plaintiff. The close relationship was evidenced by the first defendant's use of the internal email system of the SSI group.

26.28 Secondly, certain preparatory steps were taken in furtherance of the conspiracy in order to cause loss to the plaintiff. The court found that the agreement with one of the plaintiff's distributors was terminated by the first defendant so as to "pave the way" for the SSI group to be appointed as a distributor of the plaintiff. The first defendant also employed people who were close to him in order to maintain control within the plaintiff company and created new positions and appointments for certain individuals to be placed within the plaintiff's staff. The first defendant diverted the plaintiff's clients and caused the payment of commissions from the plaintiff to the SSI group in respect of the existing customers that had been diverted to the SSI group. In addition, the SSI group had copied the formulae of the

24 [2017] SGHC 82.

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plaintiff's chemical products to make imitation products for sale. The first defendant appointed a chemical mixing company which was partially held by the fourth defendant in order to obtain the formulae. The first defendant also caused the plaintiff to rent, at the plaintiff's expense, more warehouse space than what was required by the plaintiff such that there would be spare warehousing space likely for the SSI group's own use.

26.29 Thirdly, with respect to the requirement of unlawful means, Chan J held that the first defendant's preparatory steps, diversion of clients, payment of commissions and sale of imitation products were acts amounting to breach of the first defendant's duty as a director to act honestly in discharge of his duties under s 157(1) of the Companies Act.[25] The manufacturing of imitation chemical products for sale using confidential technical information belonging to the plaintiff was potentially an infringement under the tort of breach of confidence. Chan J also stated that as the first defendant had allowed unused warehouse space, which was entrusted to him in his capacity as director of the plaintiff, to be used by the SSI group free of charge, and assuming the SSI group used the premises, this could constitute criminal breach of trust under s 405 of the Penal Code[26] and a breach of director's duties under s 157(1) of the Companies Act. Chan J did not, however, mention the use of fraud, as alleged by the plaintiff above, in the procurement of payments and commissions to the SSI group.

26.30 With regard to the requirement that the conspirators had intended to cause harm to the plaintiff, the learned judge appeared to have inferred this from the existence of the agreement amongst the conspirators and the acts in furtherance of the agreement.[27] The plaintiff was therefore entitled to recover losses from the diversions of the plaintiff's current and prospective customers to the SSI group, the commissions paid to the SSI group, the payment for warehousing facilities that the plaintiff did not require, and the profit arising from the sale of imitation goods.

Conversion

26.31 *Ong Teck Soon v Ong Teck Seng*[28] involved a claim in conversion by the executor of a will arising from the withdrawals of moneys by the first defendant (one of the plaintiff's siblings) from the testator's bank

25 Cap 50, 2006 Rev Ed.
26 Cap 224, 2008 Rev Ed.
27 *Von Roll Asia Pte Ltd v Goh Boon Gay* [2017] SGHC 82 at [24].
28 [2017] 4 SLR 819.

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account by issuing two unauthorised cheques. These withdrawals, according to the High Court, constituted unauthorised dealing with the testator's pre-signed cheques. The testator had the right to immediate possession of the pre-signed cheques as he was entitled to the moneys represented under the cheques. In this case, the first defendant had purportedly misappropriated the cheques by inserting the face value and payees' names into the pre-signed cheques. This, according Steven Chong JA, amounted to "interference with the account holder's title to the cheque and the chose in action represented thereunder".

26.32 The case of *CPIT Investments Ltd v Qilin World Capital Ltd*[29] related to a loan agreement (with CPIT as borrower and Qilin as lender) under which shares were pledged as collateral for the loan. The pledged shares were transferred to Qilin's account. Qilin then began selling the pledged shares from its account. On 4 January 2016, CPIT's lawyers informed Qilin that the agreements would be terminated as a result of Qilin's repudiatory breaches in transferring the pledged shares out of the account and thereafter fraudulently and/or unlawfully selling and/or disposing of CPIT's pledged shares. CPIT applied for and obtained an injunction restraining Qilin from disposing the pledged shares. It was subsequently disclosed that Qilin had sold part of the pledged shares.

26.33 Vivian Ramsey J of the Singapore International Commercial Court ("SICC") found that CPIT had accepted Qilin's repudiatory breach of certain clauses as terminating the loan agreement. Hence, the loan agreement was terminated by the letter of 4 January 2016. The main tort issue the learned judge had to determine was whether Qilin, by selling shares after 4 January 2016, converted the remaining pledged shares. The related inquiry was whether the pledged shares, being intangibles, could be the subject of an action for conversion. Ramsey J answered in the negative. The tort of conversion typically protects interests in tangible property or things capable of being in someone's possession. In *Alwie Handoyo v Tjong Very Sumito*[30] ("*Alwie Handoyo*"), this general rule was extended to cover intangible property that is represented in tangible documentary form.[31] The Court of Appeal in *Alwie Handoyo* held that the share certificates, which were linked to the book-entries in the Central Depository register, were capable of being the subject matter of conversion. However, in the present case, there was no evidence as to how the share certificates were dealt with or how the shares were registered or the nature of any book-entries or the way in which sales of shares were recorded. As such, there was no proof of any interference with the share certificates that amounted to conversion.

29 [2017] 5 SLR 1.
30 [2013] 4 SLR 308.
31 See *OBG Ltd v Allan* [2005] QB 762 (on appeal at *OBG Ltd v Allan* [2008] 1 AC 1).

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Defamation

26.34 The decision in *Goh Lay Khim v Isabel Redrup Agency Pte Ltd*[32] ("*Goh Lay Khim*") has made an important clarification on the law of defamation relating to privileged statements. Prior to this case, there was some doubt whether a defamatory statement contained in a police report would enjoy absolute or qualified privilege. In *D v Kong Sim Guan*,[33] the alleged defamatory statements were contained in written explanations by Dr Kong to the Complaints Committee of the Singapore Medical Council ("SMC") in response to a complaint by a father of a child whom Dr Kong had earlier concluded in a report had been sexually assaulted by the father. The High Court held that the written explanation was protected by absolute privilege as SMC's disciplinary functions were similar to those in a court of law and Dr Kong's responses were a necessary step in the adjudication of the complaint by SMC. In *Silas Saul Robin v Sunrise Investments (Pte) Ltd*[34] ("*Silas Saul Robin*") and *Tang Liang Hong v Lee Kuan Yew*,[35] however, the police reports in question enjoyed qualified privilege. The practical difference is that the defence of qualified privilege, unlike absolute privilege, is defeated on proof of malice by the maker of the statement due to an ulterior motive in making the statement or a lack of genuine belief in the truth of the statement.

26.35 The plaintiffs, the managing director of an agency and the agency, claimed that the defendant, a representative of certain property owners tasked to arrange a sale of properties, made defamatory statements in a police report and complaint made to the Council of Estate Agencies ("CEA"). The report and complaint were also forwarded to a journalist from *The Straits Times*. The defendant's statements in the CEA complaint with the use of the words "in all probability" in relation to the managing director's act of forgery, imputed that there were more than reasonable grounds to suspect that the plaintiff had forged a draft option agreement relating to the property. The defendant's police report referred to the word "suspect" thereby imputing a reasonable suspicion of forgery by the managing director in line with the level 2 meaning in *Chase v News Group Newspapers Ltd*.[36]

26.36 Significantly, the Court of Appeal held that the police report and the complaint made to CEA, though defamatory of the managing director, were not made on occasions of absolute privilege but *qualified*

32 [2017] 1 SLR 546.
33 [2003] 3 SLR(R) 146.
34 [1991] 1 SLR(R) 169.
35 [1997] 3 SLR(R) 576.
36 [2003] EMLR 11.

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privilege. Granting absolute privilege to police reports would be "wholly disproportionate to and unnecessary" for the objective to encourage members of the public to report suspected wrongdoings. Citing the Australian decision in *Mann v O'Neill*,[37] the Court of Appeal stated that with qualified privilege attaching to police reports, an informant would be able to freely make a report as long as it was not malicious. This would also allow aggrieved parties defamed by malicious reporting to seek redress for attacks on their reputation. This case marks a clear departure from the English position in *Westcott v Westcott*[38] and *Buckley v Dalziel*.[39] With respect to the local cases, the Court of Appeal in *Goh Lay Khim* noted that investigations had already begun in *D v Kong Sim Guan* at the time the written explanations were published, and therefore it did not stand for the proposition that absolute privilege attached to gratuitous complaints made to the authorities. Further, it observed that the issue of absolute privilege attaching to the police reports was not raised in *Silas Saul Robin* and *Tang Liang Hong v Lee Kuan Yew*.

26.37 The defendant was found to be malicious in making the statements contained in the report and complaint as his dominant motive was to injure the managing director and he did not genuinely believe in the truth of the statements. The defence of qualified privilege was thus nullified. In line with a similar factual matrix in *Yeap Beng San Louis v Choo Pit Hong Peter*,[40] the Court of Appeal upheld the quantum of $40,000 of damages to be paid by the defendants.

26.38 In contrast to the police report and CEA complaint, the statement to the press did not enjoy qualified privilege due to a lack of a specific duty and interest on the part of the communicator and recipient. In addition, the defence of justification failed as there were no reasonable grounds to suspect that the managing director had committed the offence of forgery. The option was unsigned and merely a draft circulated for acceptance which was "subject to contract". Moreover, the managing director had inserted the commission clause in the option, which had earlier been approved by the defendant in prior drafts, without any intention to cause any wrongful loss or with intent to defraud.[41]

37 (1997) 145 ALR 682.
38 [2009] QB 407.
39 [2007] 1 WLR 2933.
40 [1999] 1 SLR(R) 397.
41 Penal Code (Cap 224, 2008 Rev Ed) s 464(1).

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26.39 The next case *Ezion Holdings Ltd v Credit Suisse AG*[42] centres on the procedural requirements and substantive test for malice. The defamation action arose from the defendant bank's report on Ezion concerning a lawsuit commenced by AMS against Ezion for conspiracy and that Ezion's shares were "expected to underperform". The report also mentioned Ezion's belief that the claims against it were "frivolous and without merit". The bank report was published on the bank's website, which was accessible by its clients and investors. The bank also sent an email containing the report to clients. Subsequently, the suit against Ezion was discontinued by AMS. In the defamation action, the bank disputed defamatory meaning and raised justification and qualified privilege. Ezion pleaded in the amended reply that the publications were made with malice on the bank's part. The bank then sought to strike out the plea of malice under O 18 r 19 of the Rules of Court[43] ("RoC").

26.40 The assistant registrar struck out the amended reply. On appeal, agreeing with the bank's position, the High Court upheld the asst registrar's decision. First, Hoo Sheau Peng JC (as her Honour then was) assumed that the statements imputed that there were reasonable grounds to suspect and/or grounds to investigate Ezion's guilt and that they were made on occasions of qualified privilege. Her Honour found that Ezion's allegation that the bank lacked honest belief in or was recklessly indifferent to the truth of the publication was not supported by particulars. Under O 78 r 3(3) of the RoC, Ezion had to provide specific particulars from which malice could be inferred. On the facts, the bank did not lack honest belief or act with reckless indifference with respect to the statements made. In fact, the bank report made several references to AMS's views and Ezion's responses and beliefs. Distinguishing the case of *Lee Kuan Yew v Davies Derek Gwyn*,[44] the court clarified that the bank, having relied on the statement of claim in the AMS suit and the SGX statement released by Ezion, was not recklessly indifferent in not obtaining further verification of the publication from Ezion.

Harassment

26.41 There are two important cases on statutory harassment: the first involving a split in judicial opinion within the Court of Appeal; and the second, online harassment. The first decision of *Attorney-General v Ting Choon Meng*[45] concerned the issue of whether the Government was

42 [2018] 3 SLR 356.
43 Cap 322, R 5, 2014 Rev Ed.
44 [1989] 2 SLR(R) 544; see also *Roberts v Bass* (2002) 212 CLR 1 at [109] and *Hytech Builders Pte Ltd v Goh Teng Poh* [2008] 3 SLR(R) 236 at [50].
45 [2017] 1 SLR 373.

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entitled to invoke s 15 of the Protection from Harassment Act[46] ("PHA") to obtain an order for a "person" to be prevented from publishing or to cease publication of a false statement of fact and, if so, when it would be "just and equitable" to do so. A company, MobileStats, commenced a lawsuit against the Ministry of Defence ("MINDEF") for patent infringement. The action was discontinued midway. Subsequently, Dr Ting, a director of MobileStats, alleged that (a) MINDEF had intended to infringe the patent and acted in a "premeditated" way to revoke the patent, and (b) MINDEF had been conducting a "war of attrition" in the lawsuit to deplete MobileStats' financial resources. MINDEF refuted the allegations on its Facebook page. The High Court took the view that s 15 was restricted to false statements that were "capable of affecting their intended [subjects] emotionally or psychologically" and that only natural persons may apply for a section 15 order.

26.42 On appeal, the majority judges (Andrew Phang Boon Leong and Chao Hick Tin JJA) agreed with the High Court and acknowledged that the text of s 15 of the PHA, which refers to a "person" would appear to be broad enough to encompass the Government. However, upon examining the Minister's speech in Parliament, the majority judges held that "*s 15 was intended by Parliament to confer upon human beings (only) an additional (albeit somewhat different) remedy*" [emphasis in original].[47]

26.43 With respect to the question of whether it would be "just and equitable" to grant a section 15 order, Phang JA referred to "useful guidance" drawn from s 5(2) of the Community Disputes Resolution Act 2015,[48] which states that the court, in deciding whether it is just and equitable to grant an order in relation to interference with the enjoyment or use of a place of residence, must consider, amongst other factors, the impact of the order on the respondent and the ordinary instances of daily living that can be expected to be tolerated by reasonable persons living in Singapore. In addition, the court may consider the following non-exhaustive factors:[49]

> (a) the nature of the false statement and the seriousness of the allegation made;
>
> (b) the purpose of the false statement, for example, whether it is said in jest or for the purposes of satire;

46 Cap 256A, 2015 Rev Ed.
47 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [22].
48 Act 7 of 2015.
49 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [43].

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(c) the impact of the statement on the subject and the degree of adverse emotional or psychological harm suffered;

(d) the degree to which the false statement has been publicised to the public;

(e) whether the subject has the means to publicise his or her own version of the truth (and on a channel that is accessible to the readers of the false statement);

(f) whether the author and/or publisher of the statement has made genuine efforts to point out that the veracity of the statement is not undisputed; and

(g) the ordinary instances of daily living that may be expected to be tolerated by reasonable persons.

26.44 Even if the Government was entitled to invoke s 15 of the PHA, the majority judges would not have found it just and equitable to grant a section 15 order. It emphasised that "[mere] vindication of the truth *alone cannot* be *the* touchstone" [emphasis in original] and that the applicant must go beyond proving a false statement in order to obtain a section 15 order. Conversely, the District Court should be "slow" to grant such an order unless "the statements complained of are more likely than not to be false".

26.45 Sundaresh Menon CJ (dissenting) took the contrary view that the Government should be entitled to invoke a section 15 order. First, s 2 of the Interpretation Act[50] defines a "person" as including "any company or association or body of persons, corporate or unincorporated". It could therefore include the Government. Moreover, Menon CJ noted that there was no express statement to the contrary within the PHA to suggest that the definition of persons under the Interpretation Act should not apply to s 15 of the PHA. His Honour opined that the legislative intent of the PHA was to penalise false statements as a *standalone* remedy "in the sense that it *can* also be invoked even if no other remedy can be resorted to" [emphasis in original]. Hence, there was no reason to restrict the class of its beneficiaries by reference to the other provisions (such as ss 3–7 of the PHA), which applied only to natural persons. The specific purpose and object of s 15 was targeted at false statements and allowed a subject aggrieved by such a statement to seek an order that required the maker of the statement to "bring attention to the falsehood and the true facts". It did not require a take-down of the article or an award of damages.

26.46 In this regard, Menon CJ held that s 15 of the PHA does not impermissibly inhibit the right to free speech. As it does not allow the

50 Cap 1, 2002 Rev Ed.

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applicant to claim damages against the publisher of the statement, the decision in *Derbyshire County Council v Times Newspapers Ltd*[51] can be distinguished. Strictly speaking, the publisher of the statement is not prevented from continuing to publish the statement but merely to provide a notification as to the falsehood and the true facts. Moreover, as highlighted in *Review Publishing Co Ltd v Lee Hsien Loong*,[52] false speech that is proven so in a court of law is of little value to the marketplace of *ideas*

26.47 On the issue whether it was just and equitable to make an order, Menon CJ referred to the following factors:[53]

> (a) whether the false statement of fact is of a nature that it would not be taken at face value, such as where it appears to be facetious or a parody or satirical speech;
>
> (b) whether the false statement is of a minor or incidental nature and is on the whole innocuous and unlikely to cause any prejudice;
>
> (c) whether the applicant has acted in a way that was oppressive such that it would be inequitable if the remedy were to be granted; and
>
> (d) whether the applicant had caused or contributed actively to the falsehood being stated.

26.48 On the facts, Menon CJ noted that the link provided to MINDEF's Facebook statement only drew the reader's attention to MINDEF's account of the allegations relating to MINDEF infringing MobileStats' patent, but did not contain adequate information to correct or clarify the false statement made by Dr Ting relating to MINDEF conducting a "war of attrition" against MobileStats. His Honour thus took the view that it would be just and equitable to grant a section 15 order requiring the following notification:[54]

> Statements herein which state and/or suggest to the reader that MINDEF waged a 'war of attrition' against Mobilestats, by deliberately delaying the court proceedings in Suit 619 of 2011 and asking for more trial dates than necessary, thereby increasing legal costs, have since been declared by the Singapore Courts to be false.

26.49 The next case of *Benber Dayao Yu v Jacter Singh*[55] involved harassing conduct via an Internet publication. It concerned an application by the appellant for a protection order under s 12 of the

51 [1993] AC 534.
52 [2010] 1 SLR 52.
53 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [125].
54 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [129].
55 [2017] 5 SLR 316.

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PHA.[56] The appellant was an ex-employee in the respondent's sports coaching company. The respondent's business webpage was posted on the Internet and contained within the web post were the following allegations:[57]

(a) The appellant's employment had been terminated by the respondent.

(b) The appellant had misrepresented to others that he was a Philippines national team coach and/or a Philippines national athlete.

(c) The appellant had a molestation case against him in the Philippines and had molested the athletes he coached.

(d) The appellant's training methods had caused injuries to the athletes that he coached.

26.50 See Kee Oon J ordered, *inter alia*, the removal of all publications set out in the webpage, and that the respondent desist from publishing further the insulting or abusive communications set out in that webpage.

26.51 The respondent had contravened the requirements in ss 3 and 4 of the statute. He had used abusive and insulting words with the intent to cause harassment, alarm or distress (s 3 of the PHA), and these words were seen and perceived by the appellant (s 4 of the PHA). Sections 3 and 4 were adapted from the repealed Miscellaneous Offences (Public Order and Nuisance) Act,[58] which added the phrase "by any means" to the words, behaviour or communications used or made under the provisions. This covered harassing conduct via the Internet.

26.52 The web post, when read as a whole, was intended to show that the appellant was guilty of molest and was a repeat offender who had managed to evade detection and prosecution for numerous unreported cases. It contained "serious and unfair allegations of criminal conduct, and the words were "cast in highly pejorative terms" and "purely accusatory" against the appellant. With regard to the molest case, the respondent knew that a complaint, which was made three years ago by a female athlete against the appellant for molesting her, had been dismissed by the Philippines authorities for lack of probable cause. However, there was no mention in the web post of the context of the previous complaint of molest against the appellant.

26.53 In addition, the respondent's conduct was not "reasonable" under ss 3 and 4 of the PHA. In this regard, See J examined the nature

56 Cap 256A, 2015 Rev Ed.
57 *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316 at [6].
58 Cap 184, 1997 Rev Ed.

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and context of the offending act and the effect on the appellant. The respondent's post was "vituperative" and his motive was to "name and shame" the appellant and show to the readers that the appellant was guilty of molest. The court considered the gravity of the allegations and the context of the posts which were made on a business webpage that was openly accessible to anyone on the Internet. The statement that the appellant's training methods had caused injuries to the trainees was made without factual basis. The learned judge found that the respondent in making the allegations on the web post was actuated by bad faith. In addition, one would, applying the objective standard of a reasonable person, expect the appellant to be distressed. Overall, the respondent's harassing conduct was not reasonable notwithstanding that there was some truth to the two allegations on the web post concerning the termination of the appellant's employment and the appellant was not involved as the Philippines national team coach.

26.54 See J considered the factors highlighted by the Court of Appeal decision in *Attorney-General v Ting Choon Meng* in respect of the grant of a section 15 order[59] and adapted them so as to determine that it was just and equitable to grant a protection order under s 12 of the PHA.

Inducement of breach of contract

26.55 In *Tozzi Srl v Bumi Armada Offshore Holdings Ltd*,[60] the first defendant ("BAOHL") was a wholly owned subsidiary of the second defendant ("BAB"). Both defendants made a bid for a project. Under the pre-bid agreement, the plaintiff was obliged to work exclusively with the defendants to supply certain gas-processing facilities and in exchange, the defendants granted the plaintiff a right of first refusal. After BAOHL was awarded the project, it denied the plaintiff the right of first refusal and awarded the subcontract to another party. The plaintiff pleaded breach of contract. SICC held that there was a valid agreement granting the plaintiff right of first refusal in respect of the gas-processing facilities and that BAOHL had breached the agreement.

26.56 In order to establish BAB's inducement of BAOHL's breach of contract, the plaintiff had to prove that BAB (a) acted with the knowledge of the existence of the agreement and (b) intended to interfere with the plaintiff's contractual rights. The main legal issue was whether it was BAB (the parent company) which had induced BAOHL (the subsidiary) to breach the agreement. The defendants cited *ARS v*

59 See para 26.43 above.

60 [2017] 5 SLR 156, *per* Steven Chong JA, Carolyn Berger and Henry Bernard Eder JJ.

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ART[61] for the proposition that "the mere fact that a company is a wholly owned subsidiary controlled by the parent company does not enable the court to draw the inference that the directors of the subsidiary treated the requests of the parent company as if they were instructions to be executed". SICC distinguished *ARS v ART* on the facts. The acts of the subsidiary's directors in *ARS v ART* could not be attributed to the parent company. In comparison, BAOHL (the subsidiary) did not have any employees of its own and the plaintiff had only corresponded with BAB's (parent's) employees and executives. The New South Wales Supreme Court case of *Australian Development Corp Pty Ltd v White Constructions (ACT) Pty Ltd*[62] was also distinguished. In that case, the parent company had appointed its employees as the project manager for the subsidiary's project; thus, the employees were acting on behalf of the subsidiary and not the parent company. Based on the above reasons, the plaintiff succeeded in proving that BAB induced BAOHL's breach of the plaintiff's right of first refusal.

26.57 In *Yeo Boong Hua*,[63] the court found that the consent order had indeed been breached and the plaintiffs suffered damage as a result. Tan CB directly procured SAA's breach of the consent order. His conduct was not *bona fide* in discharge of his office as director of SAA under the exception in *Said v Butt*. Woo J found that he had procured the breach of consent order for other reasons and not for the interest of SAA, and there was no defence of justification to absolve Tan CB from liability for inducing breach of contract. The learned judge also held that Tan Senior had agreed with Tan CB to breach the consent order and had therefore, by the fact of agreement with Tan CB, induced the breach of contract. Normally, some direct evidence of inducement would be required but the learned judge cited the proposition in *Abani Trading Pte Ltd v P T Delta Karina Mandiri*[64] that inducement may be proved by circumstantial evidence and need not be proved by direct evidence.

Malicious prosecution and abuse of process

26.58 In *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301*,[65] the plaintiff ("Lee Tat") sued the management corporation of a condominium development known as Grange Heights ("MCST") in the torts of abuse of process, malicious prosecution, malicious falsehood and trespass. This present lawsuit was set against

61 [2015] SGHC 78 at [252].
62 30 January 1996, NSWSC.
63 *Yeo Boong Hua v Turf Club Auto Emporium Pte Ltd* [2018] 3 SLR 806; see also discussion in paras 26.13–26.17 above.
64 [2001] 3 SLR(R) 404.
65 [2017] SGHC 121.

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the background comprising earlier proceedings between the two parties involving a right of way to access the condominium development for the residents. With respect to the first two torts, the main issue was whether the MCST commenced the earlier proceedings (on the right of way to access Grange Heights for condominium residents) for an improper or collateral purpose (to enhance the value of the land by retaining the Grange Heights address and name). The torts of malicious falsehood and trespass will be examined in subsequent sections below.[66]

26.59 Lot 687 on which Grange Heights sits is an amalgamation of two lots: Lot 111-34 and Lot 561. The owners of Lots 111-30, 111-32, 111-33 and 111-34 ("Dominant Tenements") were granted a right of way over Lot 111-31 ("Servient Tenement") by way of certain conveyances in 1919. Hence, Grange Heights sat on Lot 111-34, which was a dominant tenement as well as Lot 561, which was not a dominant tenement. Since 1997, Lee Tat has owned the Servient Tenement and two of the Dominant Tenements (Lots 111-32 and 111-33).

26.60 There were five legal actions and three contempt proceedings involving the two parties prior to the present lawsuit.

26.61 The First Action was an application by Collins (former name of Lee Tat) in 1974 for a declaration that HLH (predecessor in title of the MCST) and the Grange Heights residents were not entitled to use the Servient Tenement to access Grange Road and an injunction restraining such use. HLH counterclaimed for a declaration that it was entitled to use the right of way. The High Court dismissed both the claim and counterclaim and this was affirmed by the Court of Appeal.

26.62 The Second Action was where the MSCT applied for an injunction to restrain Lee Tat from restricting its access to the Servient Tenement. Lee Tat, in response, argued that (a) the amalgamation of Lot 111-34 and Lot 561 had extinguished the MCST's right of way over the Servient Tenement ("Amalgamation Issue"); and (b) the MCST and Grange Heights residents were not entitled to use the Servient Tenement to access the Grange Heights apartments (on Lot 561) as the benefit of the right of way did not extend to Lot 561, which was not a dominant tenement ("Extension Issue"). (Note: By the time of the Second Action, Lots 111-34 and 561 had already been amalgamated to form Lot 687, which was owned by the MCST. Lee Tat had not acquired ownership of the Servient Tenement at that time.)

26.63 Punch Coomaraswamy J found that the amalgamation did not extinguish the right of way enjoyed by the MCST, and that Lee Tat was

66 See paras 26.77–26.78 and paras 26.151–26.152 below.

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not entitled to close the right of way as it was not the owner of the Servient Tenement. The judge granted an injunction restraining Lee Tat from obstructing the MCST's right of way over the Servient Tenement. Neither the judge nor the Court of Appeal, which affirmed the High Court judgment, addressed the Extension Issue.

26.64 Lee Tat acquired ownership of the Servient Tenement in 1997 and erected a "No Trespassers" sign. Three contempt proceedings were instituted by the MCST against Lee Tat for breach of the injunction granted in the Second Action.

26.65 In the Third Action, the MCST sought a court declaration that it was entitled to repair and maintain the right of way over the Servient Tenement. This was followed by the Fourth Action and the judgment in the Fourth Action.

26.66 In the Fourth Action, Lee Tat sought a declaration that the right of way could not be used for access to Lot 687 and that a permanent injunction prevented the MCST from using the right of way. In this action, Lee Tat raised the Extension Issue again. The majority of the Court of Appeal agreed with the MCST that Lee Tat should be estopped from relitigating this issue as it had already been decided against Lee Tat (and Collins) in the Second Action. Chao JA (dissenting) took the view that issue estoppel did not apply as Lee Tat, not being the owner of the Servient Tenement at the time of the Second Action, had no *locus standi* to raise the Extension Issue and the court in the Second Action did not rule on the Extension Issue. Further, based on the principle in *Harris v Flower*,[67] the MCST could not extend the right of way beyond the terms of the original grant to benefit Lot 561.

26.67 After the judgment in the Fourth Action, the Court of Appeal in the Third Action ruled in favour of Lee Tat and held that the court in the Fourth Action had been incorrect to find issue estoppel. It found that the Extension Issue had not been decided in the Second Action as Lee Tat at that time lacked *locus standi* to raise the Extension Issue. The Court of Appeal in the Third Action also found that the parties were not bound by the Fourth Action judgment, that the Grange Heights residents were not entitled to the right of way and, finally, that the right of way *vis-à-vis* Lot 111-34 had been extinguished due to the amalgamation.

26.68 In the Fifth Action, the MCST applied to the Court of Appeal to reconstitute itself to set aside its judgment in the Third Action on the

67 (1904) 91 LT 816.

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ground of breach of natural justice. The application was dismissed by the High Court and Court of Appeal respectively.

26.69 Returning to the present case, Lee Tat claimed that the MCST had participated in the Second, Third, Fourth and Fifth Actions for the collateral purpose of enhancing the value of its land by retaining the Grange Heights address and name via the right of way. Further, Lee Tat alleged that the MCST's committal proceedings were commenced to coerce Lee Tat and another owner of the Servient Tenement to provide certain undertakings.

26.70 On the tort of abuse of process, Kannan Ramesh JC (as his Honour then was) cited Lord Sumption JSC's speech in the Privy Council decision of *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*[68] that it is based on an "abuse of civil proceedings for a predominant purpose other than that for which they were designed" (that is, for the purpose of obtaining some wholly extraneous benefit other than the relief sought). In addition, Ramesh J applied the test of Brennan J in the Australian decision of *Williams v Spautz*[69] that "an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding".

26.71 The learned judge did not make any decision on whether the tort should be recognised in Singapore. In any event, even if the tort were to be recognised in Singapore, Ramesh J decided that it would not be applicable on the facts. First, the alleged purpose of retaining the Grange Heights name and address was "wholly contingent on the existence of the MCST's purported right of way over the Servient Tenement, which was the subject matter in the Second to Fifth Actions".[70] Secondly, the contempt proceedings were meant to enforce the injunction ordered by Coomaraswamy J in order for the MCST to gain physical access to the Servient Tenement and not merely for the purpose of obtaining the financial benefits of retaining the Grange Heights name and address. Based on the evidence, the condominium residents have been using the right of way.

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68 [2014] AC 366 at [149].
69 (1992) 174 CLR 509 at 537.
70 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2017] SGHC 121 at [35].

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26.72 The elements of the tort of malicious prosecution were stated in *Zainal bin Kuning v Chan Sin Mian Michael*:[71] (a) the plaintiff must show that he was prosecuted by the defendant; (b) the prosecution must have been determined in the plaintiff's favour; (c) the prosecution must have been without reasonable and probable cause; and (d) the prosecution must have been malicious. It has traditionally been applied to criminal proceedings. The tort has been extended to civil proceedings by slim majorities in the Privy Council decision in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*[72] and the UK Supreme Court case of *Willers v Joyce (No 1)*[73] respectively. The decisions were based primarily on the interpretation of English case precedents and the need for a remedy for aggrieved victims arising from malicious prosecution.

26.73 Ramesh J left open the issue as to whether the tort should extend to civil proceedings in Singapore. Even if the tort exists, it would not be applicable on the facts according to the learned judge. With regard to element (c), the test is whether the defendant believed that there was a case against the plaintiffs fit to be tried.[74] According to the learned judge, the MCST had reasonable and probable cause with respect to the First to Fifth Actions. It was not obvious that the Grange Heights residents were not entitled to use the right of way.

26.74 Lee Tat also alleged that the MCST took inconsistent positions in the Second Action (submitting that Lee Tat lacked *locus standi* to argue the Extension Issue) and the Fourth Action (arguing that the Extension Issue was *res judicata*) respectively. Ramesh J noted that the MCST could have honestly believed in its assertion that the Extension Issue was *res judicata*. This was because, despite Lee Tat's lack of *locus standi*, the courts in the Second Action appeared, from the MCST's perspective, to have proceeded to decide on the Extension Issue in the MCST's favour.

26.75 In response to Lee Tat's argument that some members of the MCST expressed doubts concerning the MCST's legal entitlement to a right of way, Ramesh J stated, "doubts about one's case do not amount to an absence of reasonable and probable cause. Doubts are to be expected save in the most clear-cut of cases". Further, there was insufficient evidence that the MCST commenced the Third and Fifth Actions contrary to the advice of its lawyers.

71 [1996] 2 SLR(R) 858.
72 [2013] 3 WLR 927.
73 [2016] 3 WLR 477.
74 See *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858 at [57].

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26.76 With respect to the element of malice, Ramesh J found that the MCST commenced the Third and Fifth Actions based on their genuine interest in having the issue of the right of way adjudicated primarily for their financial interests and did not bear any ill will towards Lee Tat. Hence, Lee Tat's claim in malicious prosecution failed.

Malicious falsehood

26.77 There are two cases examined for malicious falsehood – one substantive and the other procedural in nature. In *Lee Tat*,[75] there were two statements: (a) a *The Straits Times* article in 1997 in which the then chairman of the MCST was reported as stating that the residents have the right to access to the land; and (b) an advertisement in *The Straits Times* in 2007 by the MCST's property agents regarding the sale of Grange Heights that there was "convenient access from Grange Road". Ramesh J decided the two statements did not amount to malicious falsehoods. First, Ramesh J found that the two statements were true at the time they were made. The 2007 statement fell within the scope of the property agent's authority and was authorised by the MCST.

26.78 The 1997 statement was made after the conclusion of the Second Action. The court judgments in respect of the Second Action stated that the MCST was entitled to use the right of way. The 2007 statement was made after the arguments were heard in the Third Action appeal but before the Court of Appeal released the judgment. By then, there were judicial pronouncements by the High Court in the Third Action as well as by the Court of Appeal in the Fourth Action. These two judicial pronouncements indicated that the residents were entitled to use the Servient Tenement to pass between Grange Road and Grange Heights. Based on the test for malice in three judgments,[76] Ramesh J ruled that there was also no malice (that is, no knowledge of falsity, recklessness as to the truth or a predominant intention of injuring Lee Tat). Moreover, the statements were not likely to cause pecuniary damage to Lee Tat within the scope of s 6 of the Defamation Act.[77] It was not the statements but the judicial pronouncements which may have an effect on Lee Tat's ability to develop the land. It was Lee Tat's own decision not to redevelop the land and that decision could not be attributed to the statements.

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75 The facts of the case are stated in paras 26.58–26.69 above.

76 *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [82]; *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd* [2008] 4 SLR(R) 727 at [72]; *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [92] and [163].

77 Cap 75, 2014 Rev Ed.

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26.79 The case of *Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd*[78] ("*Intas Pharmaceuticals*") involved a partially successful application for pre-action interrogatories[79] and pre-action discovery[80] against the defendant essentially seeking the disclosure of (a) the communications between the sources and the defendant, and (b) the identity of the sources for the purpose of bringing a claim in malicious falsehood. On the website operated by the defendant, an article reported that a competitor of the plaintiff, an India incorporated company, was in talks to acquire the plaintiff and cited several unnamed sources.

26.80 The test for pre-action interrogatories and discovery is "justness underpinned by necessity".[81] The court in *Intas Pharmaceuticals* held that disclosure of both the communications and sources are necessary to determine whether there has been any malice on the defendant's part. Malice refers to an improper or ulterior motive, or lack of honest belief that the statement was true or where the defendant has acted with reckless disregard as to the truth of the statements.[82] Order 18 r 12(1)(*b*) of the RoC requires every pleading to contain necessary particulars of the allegation of malice. The "position, standing, character and opportunities of knowledge" of those sources were material to the issue of malice[83] in so far as they were relevant to the issue of whether the defendant had been reckless as to the truth in publishing information received from those sources. In addition, it would be just to order the disclosure of the communications and/or sources as there was sufficient evidence of a nexus between Singapore and the intended cause of action against the defendant, a Singapore-incorporated company and the article in question was accessible in Singapore.

26.81 Limits must, however, be placed on disclosure only to the extent necessary for the plaintiff to plead a viable case of malice. A balance must be struck between the plaintiff's interest in ascertaining the viability of its intended claim and the defendant's interests in maintaining the confidentiality of the sources. In this case, there were no compelling public interest considerations that justified protecting the sources' confidentiality. Nonetheless, the plaintiff was not entitled to pre-action disclosure in order to bring claims against the sources in Singapore. The High Court found it unlikely that the plaintiff would bring a claim in malicious falsehood against the sources themselves. It

78 [2017] 4 SLR 684.
79 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 26A rr 1(1) and 1(5).
80 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 rr 6(1) and 6(5).
81 See *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208.
82 See *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd* [2008] 4 SLR(R) 727 at [72].
83 See *South Suburban Co-operative Society, Ltd v Orum* [1937] 3 All ER 133.

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was therefore sufficient for the defendant to disclose the nature of the sources and not their actual identity.

Misrepresentation

26.82 *Arnold Nicklaus D'Cruz v Alexander Migunov*[84] involved the sale and purchase of a yacht. The first defendant was the owner of the yacht in question and the second defendant, which was in the business of selling and maintaining new and pre-owned yachts, placed an advertisement to sell the first defendant's yacht. The plaintiffs, after purchasing the yacht, discovered several defects and alleged that the second defendant had misrepresented the condition of the yacht. In addition to a claim for breach of contract, the plaintiffs also alleged fraudulent misrepresentation and negligent, as well as innocent, misrepresentation, relying on the Misrepresentation Act.[85]

26.83 The fraudulent misrepresentation claim fell at the first hurdle as the plaintiffs could not prove that the second defendant had made a false representation, as the second defendant had evidence showing the maintenance records and condition of the yacht. Further, it was held that even if the representation was false, the plaintiffs could not prove that the second defendant knew the statements were false or did not believe they were true.

Negligence

26.84 *Cheong Chung Kin v David Sim Teck Seang*[86] involved a luxury yacht that sank. The defendants provided cleaning and maintenance service to boat owners. The plaintiff, whose boat suffered a grounding incident, asked the first defendant to check it. The first defendant advised that a proper check required the boat to be up slipped. The facilities to do that were not available where the boat was berthed, and hence it had to be sent to Punggol. The boat sank on its voyage to Punggol. The plaintiff sought to recover through a cause of action in bailment and in negligence. The key issues in the negligence claim were whether the defendants owed the plaintiff a duty to take reasonable care and whether they had breached that duty, which they clearly did.

26.85 *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd*[87] concerned a fire that broke out in the appellant's premises and

84 [2017] SGDC 75.
85 Cap 390, 1991 Rev Ed.
86 [2017] SGDC 285.
87 [2018] 1 SLR 76.

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spread to the respondent's adjoining premises, damaging both premises. The appellant had converted part of its premises for use as accommodation for its foreign workers, permitting them to cook their meal there. The appellant pleaded guilty to charges under the Fire Safety Act.[88] At trial, the appellant had argued that the fire had started in the respondent's premises, but conceded on appeal that the fire had started in its own premises. The key issue on appeal was the application of the *res ipsa loquitur* rule by the trial judge to find the appellant negligent.

26.86 Chong JA referred to the three requirements for the application of the *res ipsa loquitur* maxim set out in *Scott v The London and St Katherine Docks Co*:[89]

> (a) the defendant must have been in control of the situation or thing which resulted in the accident ("the first requirement");
>
> (b) the accident would not have happened, in the ordinary course of things, if proper care had been taken ("the second requirement"); and
>
> (c) the cause of the accident must be unknown ("the third requirement").

26.87 Chong JA affirmed that the rule was an evidential one, requiring the defendant to rebut the *prima facie* case of negligence, when the three requirements were met. The legal burden remained with the plaintiff.[90] Chong JA began by noting that the first requirement was not at issue as the appellant clearly was in control of the premises where the fire broke out. Significantly, Chong JA emphasised that a defendant could not attempt to exclude the application of the *res ipsa loquitur* rule simply by suggesting alternative possible explanations for the incident. A defendant could only rebut the presumption of negligence by pointing to an alternative explanation that suggested non-negligence by the defendants. On the facts, the appellant could not point to any cause of the fire that was "consistent with reasonable care or which does not connote negligence" on the appellant's part.[91]

26.88 Moving to the third requirement, Chong JA noted that the expert reports on the possible cause of the fire only raised possibilities as to the cause of the fire. The actual cause remained unknown, and hence

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88 Cap 109A, 2000 Rev Ed.

89 (1865) 3 H & C 596; see also *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [39].

90 *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [63].

91 *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [69].

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the *res ipsa loquitur* rule could be applied. Chong JA cautioned that the *res ipsa loquitur* rule was not designed to get around evidential difficulties; the burden remained with the plaintiff. The rule was simply a common sense approach to inferring negligence in cases where there was simply no evidence on which to make a factual finding of negligence.

26.89 The plaintiff in *Singapore Shooting Association v Singapore Rifle Association*[92] ("*SSA v SRA*") was the Singapore Shooting Association ("SSA") which sued the Singapore Rifle Association ("SRA") to recover vacant possession of premises occupied by SRA. SSA was leasing the premises from Sport Singapore and had allowed SRA to occupy part of it. SRA counterclaimed for losses caused by damage due to flooding, which it alleged was a result of SSA's negligence. SSA subsequently withdrew its claim and the case concerned SRA's claim only.

26.90 The facts were that SSA and Sport Singapore had arranged for renovation works to be carried out at the premises. The first flood occurred on 24 December 2014, almost one month after the completion of the renovation works by the independent contractor. A Board of Inquiry convened by SSA's Council concluded that the flood was caused by a combination of factors: heavy rainfall; a "landslip" at the unlined drain due to a "failure of the newly constructed embankment"; and debris that clogged the pipe causing a backflow. The Public Utilities Board subsequently surveyed the premises and recommended adding additional pipes for drainage or replacing the unauthorised crossings with footbridges, in addition to the more immediate need for regular maintenance of the unlined drain to prevent blockage. On 3 May 2015, the second flood occurred.

26.91 SRA sued SSA, as occupier of the premises, in negligence. Debbie Ong J began by noting that the law on occupiers' liability had been subsumed within the general principles of negligence in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*[93] ("*See Toh*"). Noting that there was a divergence of views between V K Rajah JA and Menon CJ in *See Toh*, Ong J appeared to prefer Menon CJ's approach which was to approach each case applying the *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[94] ("*Spandeck*") principles rather than presume a *de jure* duty of care to lawful entrants.[95]

92 [2017] SGHC 266.
93 [2013] 3 SLR 284.
94 [2007] 4 SLR(R) 100.
95 *Singapore Shooting Association v Singapore Rifle Association* [2017] SGHC 266 at [21]–[22].

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26.92 The factual foreseeability threshold was easily met. On whether there was legal proximity, Ong J noted that SRA was a lawful entrant, which had a long relationship with SSA. Further, although the technical distinction between static and dynamic conditions was no longer critical, they remained relevant to the factual inquiry. Here, the flood was due to the static condition of the premises and not to any activity of SSA. Thus, it was relevant to inquire whether SSA was in control of the premises. Ong J found that it was, buttressing the existence of proximity. Having found a duty, the question was whether there was a breach of duty.

26.93 Ong J held that SSA had not been negligent in relying on Sport Singapore to supervise the renovation works, but that once the works were completed SSA had responsibility to ensure the premises remained safe. Here, SSA had breached its duty by failing to "inquire and conduct checks on the Premises' drainage capabilities after the works on the unlined drain".[96] However, even though SSA was not negligent, it was not liable because causation was not made out. Ong J held that the time frame was too short between the end of renovation works and the flood. Even if SSA had discharged its duty by making the necessary inquiries and checks, it was not clear that such checks would have revealed any defects, and even if they had, the 24-day period between the end of renovation and the flood would have been too small a window for SSA to have done anything to avert the flood. Thus, SSA was not liable for the damage following the first flood.

26.94 With respect to the second flood in May, SSA had sufficient time to have undertaken investigations and rectification. Its failure to do so led to the clogging of the drains and subsequent flood for which it was held liable.

26.95 The proper framing of the duty of care issue in the tort of negligence is the focus of the next case – *Sandipala*.[97] Sandipala claimed that ST-AP and Oxel owed a duty of care:

> (a) To exercise reasonable care and skill when proposing to Sandipala chips for producing E-KTP Cards;
>
> (b) To alert Sandipala to the fact that the chips that were prepared to be supplied by ST-AP through Oxel could not or could possibly not be used to produce E-KTP Cards; and
>
> (c) To assist Sandipala to render such chips usable for producing E-KTP Cards if they were not so usable.

96 *Singapore Shooting Association v Singapore Rifle Association* [2017] SGHC 266 at [47].

97 The facts of this case are provided in paras 26.24–26.25 above.

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26.96 The High Court found that there was no factual basis for the first two allegations. For the third, Wei J held that there was no legal basis for the duty of care alleged by Sandipala. In this regard, Wei J cited the Court of Appeal decision in *Go Dante Yap v Bank Austria Creditanstalt AG*[98] to support the proposition that a duty of care should *not* be framed as a "specific positive obligation" without reference to any contractual duty. Two statements from the Court of Appeal bear repeating: (a) "[a] duty of care in the tort of negligence … is in general imposed by law upon the tortfeasor, and as a result it is necessarily a broad duty to take care as is reasonable in the circumstances"; and (b) "[to] frame a duty of care in the tort of negligence as narrowly as a specific contractual obligation … would render the question of breach nugatory, for the tortfeasor would then be under a duty to do precisely that which he has been accused of not doing".

Economic loss

26.97 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[99] involved a claim for pure economic loss arising out of a collision at Changi Airport Terminal 2. The second defendant, employed by the first defendant, negligently drove an airtug vehicle into a pillar in the baggage handling area of the building, causing damage to the floor of the transit lounge. The Building and Construction Authority issued a closure notice over the affected area, affecting the plaintiff, a tenant operating a food kiosk in that vicinity. The plaintiff claimed for loss of profits and rental costs during the closure, as well as the cost of rebuilding the kiosk and replacing or repairing damaged equipment. The plaintiff conceded that its property had not been damaged physically. Thus, its losses were purely economic.

26.98 Ong J, in a lucid judgment in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*,[100] began her analysis by noting that a person who suffers economic loss as a consequence of physical damage to property that they do not own generally cannot maintain an action in negligence. These types of cases are commonly referred to as relational economic loss cases for which recovery is permitted under Australian law and, to a lesser extent, under Canadian law.[101] Ong J distinguished the present

98 [2011] 4 SLR 559.
99 [2017] SGHC 250.
100 [1986] 1 AC 785.
101 See, *eg*, *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 and *Canadian National Railway Co v Norsk Pacific Steamship* [1992] 1 SCR 1021.

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case from the defective building cases,[102] holding that there was no defect to the plaintiff's property. Ong J also reaffirmed that there was no general exclusionary rule against recovery for pure economic loss in Singapore following *Spandeck*.

26.99 Applying *Spandeck*, Ong J found that while the threshold foreseeability requirement was satisfied, the proximity requirements were not. There was no causal proximity as the plaintiff's losses did not flow directly from the collision. They were merely part of the "ripple effects of the damage to the pillar of the T2 Building which was common to all business operators in the affected area".[103] Further, the parties lacked circumstantial proximity. There was no antecedent relationship and no assumption of responsibility by the defendant or dependence by the plaintiff. Ong J also noted that policy consideration militated against a duty. This was a situation where liability would be indeterminate and the plaintiff would be in a better position to insure against loss.

26.100 *Tradewaves Ltd v Standard Chartered Bank*[104] involved a US$9m suit against the defendant bank for negligence in managing the plaintiffs' investments. The plaintiffs comprised a large number of individuals and entities who suffered financial loss through their investment in Fairfield Sentry Limited, which was investing in a Ponzi scheme run by the now famous Bernie Madoff. The particular allegations included negligent or fraudulent misrepresentations that induced the plaintiffs to invest in Fairfield Sentry; breach of duty in carrying due diligence checks on Fairfield Sentry; and breach of duty in failing to act on some of the plaintiffs' instructions. In addition, the plaintiffs alleged that the defendant had breached its fiduciary duty, had wrongfully retained and used its money, and was unjustly enriched by collecting fees from the plaintiffs.

26.101 The following five misrepresentations were alleged by the plaintiffs:[105]

> (a) That investments in Fairfield Sentry were safe and stable with consistent good returns and low volatility[;]
>
> (b) That investments in Fairfield Sentry were like cash substitutes and /or like fixed deposits[;]

102 See, *eg*, *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR(R) 134.

103 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2017] SGHC 250 at [37].

104 [2017] SGHC 93.

105 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93.

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(c) That investments in Fairfield Sentry were like gold dust[;]

(d) That investments in Fairfield Sentry were exclusive and Fairfield Sentry was an exclusive and closed in fund[; and]

(e) That the Bank had conducted due diligence on Fairfield Sentry before recommending it to the Plaintiffs.

26.102 Woo J prefaced his findings on misrepresentation by distinguishing this case from other mis-selling of financial products cases following financial crises such as *Als Memasa v UBS AG*[106] ("*Als Memasa*") and *Deutsche Bank AG v Chang Tse Wen*[107] ("*Deutsche Bank*"). The losses in those cases were due to market risk whereas in this case the loss was due to managerial fraud. Thus, the misrepresentations, to be actionable, had to relate to managerial fraud and not simply market risk. This distinction seems to be tenuous. Surely, representations about the safety of an investment product would include implicit representation that the managers are not fraudsters.

26.103 Woo J went on to dismiss the claim based on each of the representations. The first and fifth allegations of misrepresentation were not actionable as they were not about managerial fraud but about market risk. The claim based on the second and third representations were dismissed as Woo J did not believe that the plaintiffs, whom he found to be sophisticated investors, would have believed that the investments were akin to a fixed deposit or like gold dust. The fourth representation was found to be true and thus not actionable.

26.104 On whether the defendant was negligent in its conduct of due diligence, Woo J applied the *Spandeck* approach to find a duty of care. The threshold question of foreseeability was easily met. On proximity, Woo J highlighted that the defendant's relationship managers went beyond merely taking instructions and making basic recommendations, but included a much closer relationship with their clients. The relationship managers had personal meetings to review the portfolios and, working closely with the defendant's investment specialists, provided information on investment products. All this went to creating a relationship of proximity. There were no policy reasons to negate the duty.

26.105 Woo J then went on to consider whether the contractual terms negated the tortious duty owed by the bank to the customer. There were two ways this could occur. One was by way of an exclusion clause where the customer agrees that the bank owes no duty in tort, subject to the

106 [2012] 4 SLR 992.
107 [2013] 4 SLR 886.

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Unfair Contract Terms Act.[108] Another is by way of a non-reliance term, where the parties agree that the bank is not making any representation or recommendation and that the customer is relying solely on his own judgment. Non-reliance terms can give rise to a "contractual estoppel whereby a customer may be estopped from raising true facts contrary to the contractual term".[109]

26.106 The existence of the contractual estoppel is under a cloud in Singapore. Woo J noted that it was accepted in *Orient Centre Investments Ltd v Société Générale*[110] and then doubted in *Als Memasa*, in which the Court of Appeal was concerned about the vulnerability of unsophisticated customers to unscrupulous institutions mis-selling complex financial products. The issue surfaced again in *Deutsche Bank* where the Court of Appeal declined to rule on it, preferring to leave the question to be dealt with in a more appropriate case. Woo J's interpretation of the authorities was that while the application of contractual estoppel in the context of vulnerable plaintiffs was undecided, the concept applied where the plaintiffs were sophisticated investors, as they were in this case. On that basis, Woo J held that the defendant did not owe a duty to the plaintiff. For completeness, Woo J went on to hold that even if a duty existed, on the facts, the plaintiffs had not proved that the bank had fallen below the standard of care required.

26.107 *Cristian Priwisata Yacob v Wibowo Boediono*[111] involved a complex web of fraud and negligence actions. Following the approach of Wei J, the parties and the facts are set out separately before dealing with the legal issues. The plaintiffs were Cristian Priwisata Yacob ("Cristian") and his wife, Nila Susilawaty ("Nila") as well as Cristian's business partner, Denny Suriadinata ("Denny"). The defendants were Wibowo Boediono ("Wibowo"), his wife, Isabelle Koh Teng Teng ("Isabelle") and Wibowo's father, Budiono Kweh ("Kweh"). Toh Twee Jin ("Toh"), the solicitor acting for Kweh with respect to the purchase of a property ("the Chuan"), had applied for a replacement certificate of title ("RCOT") in order to complete the transaction. Tan Lay Pheng ("Tan") was the solicitor acting for Cristian and Nila with respect to the sale of the same property.

26.108 There were three main claims. First, Cristian and Denny sued Wibowo and Isabelle for the recovery of moneys transferred to them for investment in two properties, which Wibowo and Isabelle retained for

108 Cap 396, 1994 Rev Ed.
109 *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at [129].
110 [2007] 3 SLR(R) 566.
111 [2017] SGHC 8.

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themselves. The second claim was by Cristian against Isabelle for conversion of a car that he had bought but which was registered in Isabelle's name. The third claim was by Cristian and Nila against Kweh, Wibowo and Isabelle, alleging that the trio had engaged solicitors fraudulently to transfer a property ("the Chuan") belonging to Cristian and Nila to Kweh. The defendants did not deny the fact that money was retained in the first two cases and that the Chuan was transferred in the third, but argued that in all cases, the money and the property were retained to satisfy a debt owed by Cristian.

26.109 Cristian and Nila also brought negligence actions against the solicitors for carrying out the transaction without checking that proper instructions had been given. Toh sought contribution from Wibowo and Isabelle if he were found liable to Cristian and Nila, arguing that Wibowo and Isabelle had fraudulently misrepresented to him that Cristian and Nila had agreed to the property transaction. Tan brought third-party proceedings against Toh for contribution on the ground that Toh had made negligent or reckless misrepresentations with respect to the transaction.

26.110 Wei J, after a careful analysis of the facts made the following findings, conveniently summarised as follows: in essence, Wei J found that the car was paid for by Cristian and was his property; Cristian and Denny had an agreement with Wibowo to provide funds for property investments; Cristian and Nila did not agree to the transfer of the Chuan; Isabelle was a knowing participant in the fraud with respect to the investment and the Chuan; and Kweh was an active participant in the fraud with respect to the Chuan.[112]

26.111 Following the factual finding, Wei J held as follows. Cristian had title to the car and Isabelle and Wibowo were liable to pay damages for conversion of the car. Wibowo and Isabelle had been unjustly enriched by retaining Cristian and Denny's property investment funds and had to make restitution. Kweh, Wibowo and Isabelle had committed the tort of unlawful means conspiracy in fraudulently transferring the Chuan. Even though Kweh had since died, the action against him survived pursuant to s 10 of the Civil Law Act.[113] The plaintiffs were entitled to damages that represented the value of the property that they had lost.

26.112 With respect to the actions against the solicitors, Wei J noted that the solicitors had rightly conceded that they owed a legal duty to their clients. Toh, although acting for the defendants, had applied for the RCOT purportedly on the instruction of Cristian and Nila, and

112 *Cristian Priwisata Yacob v Wibowo Boediono* [2017] SGHC 8 at [180].
113 Cap 43, 1999 Rev Ed.

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therefore owed a duty to them as well with respect to the RCOT. The standard of care was that of a reasonable, competent solicitor, which was not met in this case as Toh had failed to take reasonable steps to verify the purported instructions from Cristian and Nila. The facts should have aroused suspicion: Kweh was both creditor and buyer with respect to Cristian; Toh never took instructions directly from Cristian or Nila, relying instead on Wibowo and Isabelle; and he never contacted Cristian or Nila directly even when there were complications with the RCOT application.

26.113 Tan, although acting for Cristian and Nila, never met them nor took instructions personally from them. He relied on Toh, the buyer's solicitor for information and purported instructions from Cristian and Nila. Wei J found Tan negligent for failing to verify his instructions and failing to do a diligent title search, which would have revealed that Toh had obtained an RCOT. Had he done so, he would have checked with Cristian and Nila on the RCOT application and discovered the fraud. Toh argued that the fraud of Wibowo and Isabelle as well as the negligence of Tan broke the chain of causation. Wei J dismissed these arguments, holding that guarding his client against fraud was part of the duty, and that Tan's negligence was merely a contributing cause and not a *novus actus interveniens*.

26.114 On Toh's claim against Wibowo and Isabelle, Wei J found that he was a victim of fraud and entitled to damages for his liability to Cristian and Nila. On Tan's claim against Toh for negligent misrepresentation, Wei J held that Toh did not owe Tan a duty of care as they were solicitors acting for different sides in a conveyancing. However, Tan was entitled to contribution from Toh as both Tan and Toh were liable in negligence to Cristian and Nila.

26.115 In *Ong Han Ling*,[114] the plaintiffs sought to recover pure economic loss (in particular, the loss of the opportunity to recover the amount that they had remitted to the insurers) on the ground that the defendants had acted negligently in accepting the agent's instructions and misapplying the sum of moneys remitted by the plaintiff to the insurance policies. On the question of duty of care, it was foreseeable that failure to take reasonable care in the handling of the money would cause the plaintiffs loss. In addition to relational proximity between the parties, the defendant voluntarily assumed responsibility for the management of the plaintiffs' moneys and the plaintiffs reasonably relied on the defendants to refund the excess moneys. There were no policy considerations against imposing a duty of care on the defendants in handling the plaintiffs' money. This was also consistent with the

114 See the facts of this case in paras 26.22–26.23 above.

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legislative intention under the Financial Advisers Act[115] to hold financial advisers responsible for their conduct in dealing with customers as well as the Guidelines on Standards of Conduct for Financial Advisers and Representatives[116] to protect customers.

26.116 The defendant had breached its duty to take reasonable care to protect its customers' money by failing to train, supervise and monitor its agents in their dealings with customers. Apart from the Rule Book, which provided disciplinary guidelines and penalties in the event of breach, and the training provided to the agents, the defendant could not show that it took reasonable care in handling its policyholders' money. The defendant also failed to adhere to its own standard operating procedure to send out letters for important transactions such as policy application approval, refunds, policy lapses, reinstatements, and surrenders. However, the plaintiffs could not prove that they would have discovered the fraud and recovered their money on a balance of probabilities if the defendant had not breached its duty. As such, the defendant's breaches did not cause the loss.

26.117 The plaintiff's claim against the third defendant for negligence also failed. The third defendant did not owe the plaintiffs a duty of care to protect them from pure economic loss. The third defendant, which trained the agent and helped to transmit policy applications, would reasonably foresee that the plaintiffs would suffer economic loss if it did not take reasonable care. However, there was no relationship of proximity between them. The contract between the third defendant and AIA did not contemplate the term to be enforceable by the third party.[117] Further, the first plaintiff had not relied on the agent as providing services on behalf of the third defendant.

Medical negligence

26.118 There were three medical negligence cases reported in 2017, two of which were landmark Court of Appeal decisions. The facts of *Hii Chii Kok v Ooi Peng Jin London Lucien*[118] ("*Hii Chii Kok*") are reproduced from last year's review of the High Court's decision. The plaintiff, a Malaysian, had been diagnosed in Malaysia with neuroendocrine tumours ("NETs") of the lung and was referred to the second defendant, the National Cancer Centre of Singapore ("NCCS"). NCCS diagnosed him as suffering from pancreatic NETs ("PNETs") and noted the possibility that he could alternatively be suffering from a rare,

115 Cap 110, 2007 Rev Ed.
116 FAA-GO4.
117 See s 2(2) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed).
118 [2017] 2 SLR 492; (2016) 17 SAL Ann Rev 656 at p 687, paras 26.99–26.100.

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but less serious condition, known as pancreatic polypeptide hyperplasia ("hyperplasia"). The consensus opinion of the experts, accepted by the court, was that a definitive diagnosis could only be made through post-operative histopathology.

26.119 The plaintiff, informed of the diagnosis of PNETs and the alternative possibility of hyperplasia, was advised that he could wait for six months for a further scan or undergo surgery. He was referred to a consultant surgeon, the first defendant, who advised that a procedure known as Whipple surgery could resolve the problem. The plaintiff consented to this procedure which was carried out at the Singapore General Hospital ("SGH"). The post-operative histopathology showed that the plaintiff suffered from hyperplasia rather than PNETs. Two weeks after being discharged, the plaintiff vomited blood and underwent further remedial surgery to remove portions of his pancreas and spleen. The plaintiff, suffering adverse effects from the remedial procedures necessitated by the complications arising out of the Whipple surgery, sued the first and second defendants. The particular allegations included the following:

(a) the first defendant owed a non-delegable duty in relation to the Whipple surgery and post-operative care;

(b) both defendants were negligent in diagnosing the plaintiff;

(c) both defendants were negligent in the advice rendered; and

(d) the first defendant was negligent in the post-operative care.

26.120 The High Court found against the plaintiff on all allegations. The appeal to the Court of Appeal was dismissed. The non-delegable duty issue was not pursued at the appeal. The significance of the decision is twofold. First, and most obviously, it changed the law in Singapore by rejecting the *Bolam*[119] test with respect to the duty to advise and inform, preferring instead the material risk test from *Montgomery v Lanarkshire Health Board*[120] ("*Montgomery*"). Secondly, and more subtly, *Hii Chii Kok* offered some clarifications on *Bolam* that arguably dilute the rigid approach adopted in *Khoo James v Gunapathy d/o Muniandy*.[121]

119 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
120 [2015] AC 1430.
121 [2002] 1 SLR(R) 1024.

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26.121 Menon CJ began with a critical analysis of the application of the *Bolam* test, encapsulated in a jury direction by McNair J, explaining when a doctor would be held negligent:[122]

> [A doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view …

26.122 *Bolam* soon came to be applied uncritically by judges who would not find a defendant doctor negligent as long as there was some expert who supported the defendant. Recognising this danger, the test was qualified in *Bolitho v City and Hackney Health Authority*[123] ("*Bolitho*"). Lord Browne-Wilkinson cautioned that judges should not simply defer to medical experts but should be satisfied that the expert opinion represents a body of opinion that is responsible, reasonable or respectable. Judges were still not permitted to decide against the defendant simply because they preferred the plaintiff's expert's opinion, but *Bolitho* required judges to be satisfied that the expert had considered the comparative risks and benefits and that the opinion was logically defensible. This *Bolam/Bolitho* test was endorsed in *Gunapathy*, but the tenor of *Gunapathy* was to enshrine a strict "*Bolamite*" approach with a reading *down* of *Bolitho*, as evident from this passage:[124]

> 64 … The first inquiry … is whether the expert directed his mind at all to the comparative risks and benefits relating to the matter …
>
> 65 The second stage of inquiry relates to whether the medical expert had arrived at a 'defensible conclusion' as a result of the balancing process. We admittedly found cause for concern in the open-textured nature of this phrase. Interpreted liberally, *Bolitho* could unwittingly herald invasive inquiry into the merits of medical opinion. For if 'defensible' were to be given a meaning akin to 'reasonable', the *Bolam* test would only be honoured in lip service. A doctor would then be liable when his view, as represented by the defence experts, was found by the court to be unreasonable. We do not think this was the intention of the House of Lords in *Bolitho* …

26.123 Menon CJ in *Hii Chii Kok* appeared to adopt a different philosophy. Unlike Yong Pung How CJ in *Gunapathy*, who was concerned that *Bolam* should not just be paid lip service, Menon CJ was

122 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 587, cited in *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [54].

123 [1998] AC 232.

124 *Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 at [64]–[65].

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more concerned that *Bolitho* should not be paid lip service.[125] Menon CJ emphasised that *Bolitho was* intended to change the law by reminding judges that, ultimately, it was their judicial function to determine whether the defendant had met reasonable standards:[126]

> In our judgment, the real point of the *Bolitho* addendum was to remind courts and judges that they were not to abdicate the responsibility of assessing the acceptability of the defendant doctor's conduct to the medical expert(s). Rather, the court has to arrive at its own assessment on whether the evidence adduced by the defendant doctor establishes that there was a genuine divergence of professional views on the issue which is worthy of deference, and it should do this by considering specifically whether the position advanced withstands the test of logic … In this context, it is worth noting Lord Browne-Wilkinson's statement in *Bolitho* (at 243) that there are cases which 'demonstrate that … despite a body of professional opinion sanctioning the defendants' conduct, the defendant can properly be held liable for negligence' [emphasis added]. Those cases – *Hucks v Cole* [1993] 4 Med LR 393 ('*Hucks v Cole*') and *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] AC 296 ('*Edward Wong*') – were cases where, in Lord Browne-Wilkinson's view, the courts had found that the alleged body of opinion did exist and did have the content alleged, not only among the specific experts called at trial but in the profession at large, but that *the opinion itself was illogical* and should be rejected (see *Bolitho* at 242). In our judgment, this is an important feature of the *Bolitho* addendum, which has perhaps received less attention than it deserves. [emphasis in original]

26.124 Menon CJ clarified that the professional negligence test applied to all professionals, and that *Bolam* was simply a specific application of the general test, as accepted in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong*[127] and *PlanAssure PAC v Gaelic Inns Pte Ltd*.[128] *Hii Chii Kok* rightly reminds that judges should be aware of their limitations and not second guess doctors. However, it is a departure from *Gunapathy* in two respects: one, it makes clear that, ultimately, it is the court that determines medical negligence and not the medical experts; and two, it clarifies that there is an overarching principle governing the standard of care that applies to all professionals.

26.125 Menon CJ then went on to distinguish the aspects of the doctor's duty with respect to advice and information from that with respect to diagnosis, treatment and care. The *Bolam* test was no longer appropriate to the former due to "the seismic shift in medical ethics, and in societal attitudes towards the practice of medicine". This seismic shift

125 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [111].
126 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [63].
127 [2007] 4 SLR(R) 460.
128 [2007] 4 SLR(R) 513.

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was in part due to greater recognition of patient autonomy and an acceptance of a more collaborative approach to medical decision-making. Rejecting the *Bolam* test as it was "incompatible with even a modest notion of patient autonomy",[129] Menon CJ endorsed the test articulated in *Montgomery*:[130]

> The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of *any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments*. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it. [emphasis added]

26.126 Menon CJ went on to give some guidance on how to apply this test by breaking it down into three related questions:

> (a) Was the information material and relevant?
>
> (b) Was the information, or should the information have been, in the doctor's possession?
>
> (c) Was the doctor justified in withholding the information?

26.127 Whether the information was material or relevant was to be determined almost exclusively from the patient's perspective with patient autonomy being the paramount consideration.[131] The test of materiality and relevance have objective and subjective dimensions. As a general rule, the doctor would have to disclose information that a reasonable patient would want. However, in some cases, the doctor may have to disclose information that a particular patient would want if the doctor knew or ought to have known that the information would be relevant to that particular patient. Some guidance was given on the broad types of information that should be disclosed:[132]

> (a) the doctor's diagnosis of the patient's condition;
>
> (b) the prognosis of that condition with and without medical treatment;
>
> (c) the nature of the proposed medical treatment;
>
> (d) the risks associated with the proposed medical treatment; and

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129 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [122].
130 *Montgomery v Lanarkshire Health Board* [2015] AC 1430 at [87], cited in *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [128].
131 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [132].
132 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [138].

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(e) the alternatives to the proposed medical treatment, and the advantages and risks of those alternatives.

26.128 Significantly, Menon CJ did not limit the type of information to disclosure of risks only, but extended it to any information that would be needed "to enable patients to make an informed decision about their health".[133] This did not mean that doctors would have to disclose every risk, or every alternative. A common-sense approach should be taken.

26.129 With respect to the second question, it was self-evident that if the doctor did not have the information, there could be no duty to disclose it, unless the doctor should have had the information. Whether the doctor should have had the information was treated as a diagnostic question, to be approached from the doctor's perspective, applying the *Bolam/Bolitho* test. One should pause here to question whether it is appropriate to apply the *Bolam/Bolitho* test for two reasons. First, there is an argument that a pure diagnostic matter should be distinguished from treatment and care. Unlike treatment and care, which call on medical judgment, diagnosis is more factual, and there has been a recent decision from the UK suggesting that *Bolam* should not apply to diagnosis.[134] Secondly, given that the purpose of the duty to inform is to protect patient autonomy, it may be anomalous to absolve a doctor from failing to investigate and diagnose a matter that relevant to the patient's decision-making by judging the doctor purely on the *Bolam/Bolitho* test.

26.130 The third question asks whether the doctor who has the information and knows that it is material may, nonetheless, be justified in withholding it. Menon CJ set out three situations where non-disclosure may be justified: where the patient has given an express and unequivocal waiver of the right to the information; where there is a medical emergency and the situation falls within the principle of necessity; and where the doctor is protected by therapeutic privilege. This privilege applies where the patient, although having mental capacity, nevertheless has some impairment of his decision-making capacity. The *Bolam/Bolitho* test applies to the emergency situation but not to the waiver or therapeutic privilege, where the court should decide from the patient's perspective.[135]

26.131 *ACB v Thomson Medical Pte Ltd*[136] ("*Thomson Medical*") was the long awaited decision of the Court of Appeal that decided a novel claim.

133 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [138].
134 *Muller v King's College Hospital NHS Foundation Trust* [2017] QB 987 at [73] and [75].
135 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [150]–[154].
136 [2017] 1 SLR 918.

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The appellant and her husband sought to have a second child through in vitro fertilisation. The procedure was successful and the appellant had a healthy child. However, upon birth and subsequent testing, it was discovered that the biological father of the child was not the appellant's husband but an unknown sperm donor. The respondents had negligently used the wrong sperm sample. The appellants sought to recover, amongst other things, the upkeep costs of raising the child. The four respondents were Thomson Medical Pte Ltd (the hospital), Thomson Fertility Centre Pte Ltd (a clinic owned by the first defendant), the senior embryologist, and the chief embryologist. The High Court, in rejecting the claim for upkeep costs, referred to the wrongful birth cases and endorsed the view in *McFarlane v Tayside Health Board*[137] ("*McFarlane*") that it would be contrary to public policy to award damages for the costs of raising a healthy child.

26.132 The Court of Appeal allowed the appellant's appeal but on different grounds, calling for further submissions by the parties on two additional arguments not canvassed at the trial, namely, whether damages should be awarded for loss of autonomy and whether punitive damages should be available. Phang JA, delivering the court's judgment, agreed with the trial judge and the *McFarlane* view that upkeep costs should not be awarded as they would be contrary to public policy. Phang JA went on to recognise a new head of damage – loss of genetic affinity for which substantive damages were warranted. Further, Phang JA extended the scope of punitive damages, holding that it could be awarded in negligence cases, although declining to do so in this particular case for lack of evidence and argument on the point.

26.133 Phang JA recognised that this case was distinguishable from *McFarlane* in that the appellant in this case had wanted a child and was prepared for the upkeep costs of the child. Thus, there was no economic loss as such. However, the loss was that the appellant now had a child that was genetically not related to her husband and who had ethnic features that were distinguishable from the family. The child's biological father was of Indian descent while the appellant was of Chinese descent and her husband, Caucasian. The negligence of the respondents had detrimentally affected the appellant's right to reproduction and family life. Phang JA was of the view that this affected the appellant's autonomy. Declining to recognise loss of autonomy *per se* as actionable damage, Phang JA, relying on academic writing, held that every person had a right to genetic affinity. This was defined as "all those ties which are partly a result of genetic relatedness and partly a result of the social significance it carries".[138]

137 [2000] 2 AC 59.
138 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [129].

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26.134 Phang JA recognised that this case raised very difficult and sensitive questions about private family life, the value of children and the delicacy of race relations. Nonetheless, and quite rightly, Phang JA stated that a failure by judges to confront such challenges would be a failure of the justice system. The ratio of the case was expectedly narrow:[139]

> In our judgment, the Appellant's interest in maintaining the integrity of her reproductive plans in this very specific sense – where she has made a conscious decision to have a child with her Husband to maintain an intergenerational genetic link and to preserve 'affinity' – is one which the law should recognise and protect …

26.135 Three options for quantification of damages were canvassed: a conventional sum as a symbolic recognition of the loss; an award for "necessary expenses in avoiding or coping with restrictions on autonomy";[140] and a conventional sum for general damages for non-pecuniary loss. Phang JA opted for the third, arguing that the appellant had suffered a real loss and should receive substantial compensation. As there was no way to put a money figure on this loss, Phang JA used the upkeep costs as a benchmark, fixing damages in this case at 30% of the putative upkeep costs, to be determined later. *Thomson Medical* is a complex decision and this review has simply highlighted the key points.[141]

26.136 On punitive damages, Phang JA held that Singapore should not follow the restrictive approach in *Rookes v Barnard*.[142] Preferring a broader test, Phang JA held that "punitive damages may be awarded in tort where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence, and condemnation".[143] There was no need for proof of a subjective state of mind such as intention or recklessness; negligence would suffice. Further, punitive damages could be available even if the defendant had been punished under the criminal law as punitive damages still served a role in vindicating the victim's private interest in punishing the defendant and seeking appeasement.

26.137 *Rathanamalah d/o Shunmugam v Chia Kok Hoong*[144] involved a medical negligence claim brought by the plaintiff against the defendant surgeon. The plaintiff pleaded two causes of action: one for breach of contract and one for breach of duty in the tort of negligence. The facts

139 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [135].
140 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [138].
141 For a fuller discussion, see Kumaralingam Amirthalingam, "Reproductive Negligence: Unwanted Child or Unwanted Parenthood?" (2018) 134 LQR 15.
142 [1964] AC 1129.
143 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [176].
144 [2017] SGHC 153.

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were that the plaintiff was referred to the defendant for a medical condition affecting her legs (the defendant alleged that it was to treat varicose veins and the plaintiff alleged it was to treat hyperpigmentation on her shins). Following further consultations, the defendant performed three procedures on the plaintiff, described by Aedit Abdullah J as follows:[145]

> (a) Endovenous laser therapy ('EVLT'), which involves: (i) the insertion of a laser fibre, guided by a sheath, into the patient's long saphenous vein, (ii) the concurrent injection of tumescent anaesthesia into the surrounding tissue to protect the saphenous nerve, and (iii) the firing of laser at calibrated energy levels, while the laser fibre is slowly withdrawn, to treat the vein;
>
> (b) Foam sclerotherapy ('FS'), which involves the injection of FS to close the vein, after the entire laser fibre from the EVLT procedure is withdrawn but before the sheath is removed; and
>
> (c) Phlebectomy (also known as multiple stab avulsions), which involves the physical removal of veins.

26.138 Some months after the procedure, the plaintiff discovered that she had suffered permanent damage to both her saphenous nerves (these are long nerves running from groin to foot in each leg). The plaintiff sued the defendant, alleging (a) negligence in failing to advise and obtain consent, (b) breaching the duty of care in carrying out the three procedures, and (c) breaching the duty with respect to post-operative care.

26.139 On the first allegation that the defendant had failed to advise and obtain consent, Abdullah J rightly pointed out that a failure to obtain consent would give rise to an action in trespass rather than negligence, although trespass was not pleaded. Referring to *Montgomery* as laying down the test for the duty to inform and advise, Abdullah J noted that in this case, the application of the test was not necessary as the issue turned on the factual question of whether the defendant had in fact given advice. On this, Abdullah J preferred the evidence of the defendant and held that the defendant had not breached the duty to inform and advise. An important point for medical practitioners to note was Abdullah J's observation that even though the defendant had not kept proper medical records, that alone was not sufficient to find against the defendant. Ultimately, the court had to consider the totality of the evidence.

26.140 On the negligent performance of the procedures, Abdullah J accepted the defendant's evidence that damage to the nerve was an

145 *Rathanamalah d/o Shunmugam v Chia Kok Hoong* [2017] SGHC 153 at [7].

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inherent risk of the procedure. The plaintiff's argument that the *res ipsa loquitur* doctrine should apply was dismissed on the ground that three conditions triggering the doctrine were not met.[146] Firstly, the inherent risk of nerve damage meant that the injury could have occurred absent negligence. Secondly, the materialisation of the inherent risk was not within the control of the defendant. Thirdly, there was not an absence of explanation; rather, there was considerable expert evidence from which the court could make a determination about negligence. Applying the *Bolam/Bolitho* test, the defendant had not done anything negligent in carrying out the procedures. Finally, Abdullah J also found that there was no evidence of negligence with respect to the post-operative care.

Employers' liability

26.141 *Md Shohel Md Khobir Uddin v Chen Yongbiao*[147] involved the liability of an employer to a worker who suffered injuries at the workplace. The facts were unusual in that the plaintiff was a foreign worker employed by another organisation under a work permit. The first defendant was a director of the second defendant, a company. The plaintiff's friend, who had worked with the first defendant, suggested to the plaintiff that he could do some casual work as a construction worker. The plaintiff agreed, and while working at the second defendant's worksite, fell into a hole and suffered injury. The first defendant denied employing the plaintiff, but Judith Prakash JA found, on the facts, that he had indeed engaged the plaintiff to work on the site and had been negligent in failing to take care of the safety of workers.

26.142 The defendants argued that the plaintiff was illegally employed, contrary to the terms of his work permit. Prakash JA flatly rejected that argument, pointing out that it was the defendant himself who had employed the plaintiff without a work permit. Further, referring to *Ooi Han Sun v Bee Hua Meng*,[148] and *Hounga v Allen*,[149] Prakash JA held that the illegality defence rested on public policy and the preservation of the integrity of the legal system. On the facts, the defence simply did not apply, and public policy militated against the defence. If it applied, it would encourage employers to discriminate against illegal employees knowing that they could put them at risk without fear of being sued. The plaintiff was found 20% contributorily negligent.

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146 See para 26.86 above for the three conditions.
147 [2018] 3 SLR 160.
148 [1991] 1 SLR(R) 922.
149 [2014] 1 WLR 2889.

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26.143 The plaintiff in *Miah Rasel v 5 Ways Engineering Services Pte Ltd*[150] was a foreign construction worker who fell from a height while replacing sprinkler pipes in the ceiling of the premises where he was working. He had to step out onto the air-conditioning duct to reach some of the areas. Unfortunately, the duct was not strong enough to bear his weight and gave way. The issues at trial were (a) whether the plaintiff's supervisor had negligently instructed him to step on the duct, (b) whether the defendant was negligent as an employer or occupier, (c) whether the defendant's negligence (if proven) had caused the damage, and (d) whether the plaintiff was contributorily negligent.

26.144 On the first issue, See J found that the supervisor had negligently instructed the plaintiff to step on the duct. See J noted that the plaintiff was an experienced employee and could have exercised his own judgment not to obey the instruction or to seek advice from another supervisor. As such, the plaintiff was contributorily negligent. On the second issue, See J found that the employer had breached its duty to provide a safe place of work. See J, referring to the Workplace Safety and Health Act,[151] reiterated that the legislative framework, while not determinative of the common law standard of care, provided the context to assess the employer's duty of care and the relevant standard.[152]

26.145 There was no evidence that the defendant had obtained the necessary permit for works at height or that they had conducted a proper risk assessment and appointed a competent safety supervisor. In finding the defendant negligent, See J noted that the employer's liability could be primary for a direct breach of duty or secondary, through vicarious liability for the negligence of its supervisor. See J also made passing reference to the defendant's liability as an occupier, and reaffirmed that the occupiers' liability rules in Singapore had been subsumed under the general tort of negligence.[153] Causation was clearly established. Having found the plaintiff contributorily negligent, See J reduced damages by 25%.

Road traffic

26.146 *Chong Chye Kong v Chin Chee Poh*[154] involved a road traffic accident where the defendant, driving a car, collided with the plaintiff, riding his bicycle. The district judge found the defendant negligent and the plaintiff contributorily negligent for cutting into the defendant's

150 [2018] 3 SLR 480.
151 Cap 354A, 2009 Rev Ed.
152 *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360.
153 See *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284.
154 [2017] SGDC 197.

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lane. Liability was apportioned at 80% against the defendant and 20% against the plaintiff.

26.147 In *Hapsuwan Sakon v CT Civil Construction Pte Ltd*,[155] the plaintiff cyclist rode into a lorry driven by the second defendant, employed by the first defendant. Woo J found the second defendant negligent in failing to keep a lookout for cyclists and stopping in time or alerting the cyclist by sounding the horn. Woo J found the cyclist contributorily negligent to the tune of 80% as he should have seen the truck and should have avoided colliding into it.

26.148 *Huang Rui Xing v Richard Gregory Quek*[156] involved a road traffic accident between a pedestrian and a motorcycle. The plaintiff, attempting to cross a four-lane road was hit by the defendant's motorcycle. The first three lanes from the centre were filled with stationary vehicles waiting for the light to turn in their favour. The defendant was travelling along the fourth lane and his view of the plaintiff was blocked by the vehicles on the third lane. The plaintiff, noticing the defendant's approach at the last minute decided to make a dash for it and ran in front of the defendant, who hit him. District Judge Chiah Kok Khun found the defendant 20% liable and the plaintiff 80% contributorily negligent.

26.149 In *Pollmann, Christian Joachim v Ye Xianrong*,[157] the defendant, driving a car, negligently collided with the plaintiff who was cycling along the leftmost lane of the road. The defendant conceded negligence but argued that the plaintiff who was cycling ahead of him was contributorily negligent as he had swerved to the right and into his path. The decision turned on an interpretation of the facts, and Vinodh Coomaraswamy J, finding that the plaintiff had not been contributorily negligent, held the defendant fully liable.

Remedies

Limitation periods

26.150 *Ong Teck Soon v Ong Teck Seng* concerned the scope of s 29 of the Limitation Act[158] in relation to limitation periods in cases of fraud and mistake. The term "fraudulent concealment" includes "unconscionability in the form of a deliberate act of concealment of a

155 [2017] SGHC 63.
156 [2017] SGDC 80.
157 [2017] SGHC 229.
158 Cap 163, 1996 Rev Ed.

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right of action by the wrongdoer or if he or she had knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party".[159] The claim was filed on 23 June 2016. The unauthorised cheques were withdrawn in May 2010. The plaintiff learnt of the withdrawals in May 2011. There was no evidence from the defendant that the plaintiff could have discovered the fraud before May 2011. The claim was therefore within the limitation period of six years.

Trespass to land

26.151 In *Lee Tat*,[160] Lee Tat alleged that the Grange Heights residents had used the Servient Tenement to access Lot 561 until 1 December 2008, which was the date of release of the Court of Appeal judgment in the Third Action. The MCST countered that (a) the use of the Servient Tenement was not unlawful between December 2006 and December 2008 as the court had upheld the MCST's right of way in the First, Second and Fourth Actions and at first instance in the Third Action, and (b) the Court of Appeal's decision in the Third Action that the MCST should not be entitled to the right of way cannot be applied retrospectively.

26.152 Ramesh J decided there was no trespass. The doctrine of *res judicata* is based on the finality of litigation and that parties should not be allowed to relitigate the same question. Hence, the claim in trespass was dismissed. The learned judge also ruled that the MCST had the capacity to be sued in trespass as the representative of the subsidiary proprietors of Grange Heights under s 85 of the Building Maintenance and Strata Management Act.[161]

Vicarious liability and non-delegable duty

26.153 The respondents and appellants in *Ng Huat Seng v Munib Mohammad Madni*[162] ("*Ng Huat Seng*") were neighbours, owning adjoining landed property. The respondents' property was on land that was two metres higher than the appellants'. An independent contractor, engaged by the respondents to demolish and rebuild their house, negligently caused debris to fall onto and damage the appellants' property. The appellants sued the respondents, alleging (a) negligence in selecting and supervising the independent contractor, (b) vicarious

159 *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 at [27], cited in *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819.

160 See the facts of the case in paras 26.58–26.69 above.

161 Cap 30C, 2008 Rev Ed.

162 [2017] 2 SLR 1074.

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liability for the negligence of the independent contractor, and (c) liability for breach of a non-delegable duty, on the basis that the activity was ultra-hazardous. The district judge found against the appellant on all allegations. On appeal to the High Court, See J upheld the district court's judgment.

26.154 The appellants appealed to the Court of Appeal, which dismissed their appeal, rejecting their arguments on all three grounds. Menon CJ, in delivering the court's judgment, accepted the UK Supreme Court's views in *Various Claimants v Catholic Child Welfare Society*[163] ("*CCWS*") and *Cox v Ministry of Justice*[164] ("*Cox*"), which extended vicarious liability beyond the "traditional test of employment" to include relationships that were "akin to employment". In *CCWS*, Lord Phillips explained that it would be fair, just and reasonable to impose vicarious liability in the absence of a formal relationship of employment, as long as the key criteria justifying vicarious liability for employees were present. These criteria included the following:

> (a) the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insured itself against that liability;
>
> (b) the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer;
>
> (c) the employee's activity would likely be part of the business activity of the employer;
>
> (d) the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter; and
>
> (e) the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

26.155 In Menon CJ's view, *CCWS* and *Cox* had not radically altered the law, but merely provided a more nuanced way to determine "the types of relationships within which it would be fair, just and reasonable to impose [vicarious] liability".[165] Thus, the two-stage approach remained, that is, it would first have to be established that there was a relationship that could give rise to vicarious liability and, secondly, that the tort was closely connected with that relationship. The *CCWS* criteria above were directed mainly at the first question, but because the court was extending vicarious liability beyond formal employment relationships, it merged the two questions to some degree

163 [2013] 2 AC 1.

164 [2016] AC 660.

165 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [62].

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by inquiring whether the defendant had, through its relationship with the tortfeasor, increased the risk of the tort being committed.

26.156 Importantly, Menon CJ emphasised that the *CCWS/Cox* approach could not be relied on to impose vicarious liability for the tort of an independent contractor, who by definition was "engaged in his own enterprise".[166]

26.157 Moving on to the non-delegable duty ground, Menon CJ referred to *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd*[167] ("*Tiong Aik*"), applying *Woodland v Swimming Teachers Association*[168] ("*Woodland*"). Under *Woodland* or *Tiong Aik*, a non-delegable duty could be found when the independent contractor had been hired to perform an ultra-hazardous activity or when the defendant and plaintiff were in a special relationship characterised by five defining features. These features were set out by Menon CJ:[169]

> (i) The claimant was a patient or a child, or, for some other reason, was especially vulnerable or dependent on the protection of the defendant to avoid the risk of injury. Prisoners and residents in care homes were also mentioned in Woodland as likely examples in this regard.
>
> (ii) There was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the defendant's actual custody, charge or care, and from which it was possible to *impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not merely a duty to refrain from conduct which would foreseeably harm or injure the claimant*. In this regard, Lord Sumption JSC noted in Woodland that it was characteristic of such relationships that they involved an element of control by the defendant over the claimant, which would vary in intensity in different situations, but would 'clearly [be] very substantial in the case of schoolchildren' (see *Woodland* at [23]).
>
> (iii) The claimant had no control over how the defendant chose to perform the obligations arising from the positive duty which it had assumed towards the claimant, that is to say, whether personally or through employees or third parties.
>
> (iv) The defendant had delegated to a third party some function that was an integral part of the positive duty which it had assumed towards the claimant; and at the time of the tortious conduct, the third

166 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [64].
167 [2016] 4 SLR 521.
168 [2014] AC 537.
169 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [82].

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> party was exercising, for the purposes of the function thus delegated to him, the defendant's custody, charge or care of the claimant and the element of control that went with it.
>
> (v) The third party had been negligent not in some collateral respect, but in the performance of the very function assumed by the defendant and delegated by the defendant to him.
>
> [emphasis in original]

26.158 As Menon CJ highlighted, these relationships typically involved situations where the plaintiff was vulnerable and dependant on the defendant, and the defendant had care, custody and control of the plaintiff. On the facts, the parties were clearly not in such a relationship as the defendant had no control over the plaintiff that imposed an affirmative duty to take care.[170]

26.159 On whether the ultra-hazardous rule should apply in Singapore, Menon CJ held that the question need not be determined as it did not arise on the facts; normal demolition and renovation works could not be seen as ultra-hazardous. Nonetheless, Menon CJ did make some observations by way of *obiter*, noting that the rule had been subject to considerable criticism as it was difficult to determine when a hazardous activity, subject to the normal rules of negligence, became so hazardous as to attract the non-delegable duty.

26.160 Were Singapore to adopt the rule in the future, Menon CJ expressed a preference for the test articulated in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*.[171] Ultra-hazardous activities would be confined to acts "which were exceptionally dangerous whatever precautions [were] taken".[172] To use Menon CJ's words:[173]

> In this regard, we observe that there are some activities which carry material risks of causing exceptionally serious harm that are unpredictable and that might materialise even *if there is no negligence in the way these activities are carried out* … [emphasis in original]

26.161 Immediately after this statement, Menon CJ clarified that liability was, nonetheless, based on negligence, that is, the independent contractor would have to be liable in negligence before the defendant could be liable under the non-delegable duty. *Ng Huat Seng* provides the clearest statement that the non-delegable duty is a device to attribute strict liability to the defendant for the torts of its independent

170 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [103].
171 [2009] 3 WLR 324.
172 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [94].
173 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [107].

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contractor.[174] One potential difficulty with the proposed approach to ultra-hazardous activities may be in proving causation. If "ultra-hazardous" activities are those that may result in harm *regardless* of the negligence of the tortfeasor, then will the claim not fail on causation? The but-for test surely cannot be satisfied if the harm would have occurred regardless of negligence. The only solution would either be to treat the standard of care of negligence with respect to ultra-hazardous activities as imposing strict liability, which would be contrary to negligence, or to accept a modified test of causation, along the lines of *Chester v Afshar*.[175]

26.162 Finally, on the point about whether the respondents had breached their duty to take care in appointing the independent contractor, Menon CJ agreed with the High Court judge. There was nothing wrong in adopting a turnkey approach in this case; indeed, it was industry practice to do so. Further, the respondents had checked to ensure that independent contractors were properly licensed and qualified to undertake the task.

26.163 The plaintiff in *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin*[176] ("*Rohini*") had given four blank cheques to the first defendant, a real estate agent, who represented the second defendant, a real estate company. The cheques were in relation to some property transactions. The first defendant, instead of applying the cheques for their proper purposes, used them to make payments to himself or for his benefit. The plaintiff sued the second defendant alleging that it owed her a duty, which it breached, or alternatively, that it was liable for the first defendant's act either as employer or principal.

26.164 On vicarious liability, Chua J did not have to decide whether the first defendant was an employee or independent contractor of the second defendant as the second defendant apparently conceded that the relationship was "akin to employment" and "capable of giving rise to vicarious liability".[177] Chua J had earlier accepted that vicarious liability extended beyond the employment relationship, citing *CCWS* and *Ng Huat Seng v Munib Mohammad Madni*.[178]

26.165 Chua J affirmed that a defendant could be vicariously liable for the intentional torts of the tortfeasor, but for policy reasons held that it would not be fair and just to impose liability in the present case. Citing

174 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [108].
175 [2005] 1 AC 134.
176 [2017] SGHC 149.
177 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [27].
178 [2016] 4 SLR 373.

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Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd[179] ("*Skandinaviska*"), Chua J stated:[180]

> However, a precondition for the imposition of vicarious liability is that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant; otherwise, the policy of victim compensation as a justification for imposing vicarious liability loses must of its moral force …

26.166 This *dictum* from *Skandinaviska* is difficult to defend as a matter of principle. It has recently been refuted in *Ong Han Ling* by Belinda Ang Saw Ean J who, in expressly rejecting the *Skandinaviska* precondition argument, made the following observation:[181]

> Thus, the relative fault as between the victim and the defendant is not a determinative factor for the imposition of vicarious liability. It can affect the question of whether it would be fair and just to impose vicarious liability on the defendant in a situation where the victim seeking compensation had the capacity to take precautions against risk of fraud by a tortfeasor but did not do so …

26.167 In *Ong Han Ling*, Ang J found that it was fair and just to hold the defendant insurance agency vicariously liable for the fraud perpetrated by its agent even though the plaintiffs were wealthy, experienced investors. However, in *Rohini*, the plaintiff was not involved in sophisticated investments but merely facilitating the sale and purchase of her parents' property. As Chua J noted, the plaintiff was recovering from knee surgery at the time of entrusting the cheques to the first defendant. Chua J's finding that the plaintiff was grossly negligent in trusting the first defendant is irrelevant to the second defendant's vicarious liability. Arguably, it is even irrelevant to the first defendant's fraud as contributory negligence is not a defence to fraud.

26.168 *Skandinaviska*'s emphasis on relative fault led Chua J to highlight that there "was no reason to fault HSR [the second defendant]".[182] This conflated the second defendant's vicarious liability, which is strict, with its personal liability in negligence. These difficulties with *Skandinaviska*, in terms of relative fault and the conflation of vicarious liability with personal liability, were noted and highlighted in a previous review.[183]

179 [2011] 3 SLR 540.
180 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [30].
181 *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327 at [167].
182 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [35].
183 (2011) 12 SAL Ann Rev 436 at pp 465–467, paras 23.102–23.106.

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26.169 On the second defendant's personal liability in negligence, Chua J held that a duty of care was owed but not breached on the facts, rejecting each of the plaintiff's allegation of negligence:[184]

> (a) appointing Kelvin as an agent representing HSR when Kelvin was an undischarged bankrupt between 2 August 2003 and 9 April 2010;
>
> (b) failing to disclose Kelvin's status as a bankrupt;
>
> (c) failing to supervise Kelvin; and
>
> (d) misleading the plaintiff and/or misrepresenting Kelvin's status as a 'Group Director'.

26.170 Finally, Chua J held that even if the second defendant had been negligent with respect to any of the above allegations, the plaintiff failed on causation as the cause of her loss was her own decision to trust the first defendant. With respect, it would appear that too much emphasis was placed on the moral blameworthiness of the plaintiff due to the influence of *Skandinaviska*, and it is arguable that the second defendant should have been held vicariously liable on the facts. The plaintiff may have been contributorily negligent, but it seems unfair to treat her as the author of her own misfortune.

26.171 In *Ong Han Ling*,[185] Ang J referred to the two-stage test in *Ng Huat Seng* that (a) the relationship between the tortfeasor and the defendant must be capable of giving rise to a finding of vicarious liability, and (b) the tortfeasor's conduct must possess a sufficient connection with the relationship between the tortfeasor and the defendant.

26.172 For the first stage, the relationship was not confined strictly to an employment relationship and extended a relationship that was "akin to employment".[186] Ang J noted that the agents were perceived as representatives of the defendants who sent and controlled them and that the agents were extensions of the defendants' enterprise. The insurance industry was also increasingly expected to supervise and be responsible for their agents. Hence, the relationship between the tortfeasor and the defendant, though not one of employment, was capable of giving rise to vicarious liability.

26.173 Under the second stage, the courts would consider whether the defendant had "created or significantly enhanced, by virtue of the relationship, the very risk that materialised" with reference to the factors

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184 *Rohini d/o Balasubramaniam v Yeow Khim Whye Kelvin* [2017] SGHC 149 at [41].

185 See the facts of the case in paras 26.22–26.23 above.

186 See *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319.

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in the Canadian case of *Bazley v Curry*[187] ("*Bazley*"). In addition, as part of an overarching framework, the courts would consider whether it was fair, just and reasonable to impose vicarious liability, having regard to the aims of effective victim compensation, deterrence of future harm, and the concept of enterprise risk.

26.174 Ang J found that a sufficient connection existed between the agent's fraud and her relationship with the defendants based on the *Bazley* factors, namely, (a) the defendant's business model gave the agent the opportunity to abuse her functions as an insurance agent, (b) the agent's conduct deceived the plaintiffs to purchase a non-existent insurance product which fell squarely within the defendant's aims of selling insurance policies via agents, (c) the agent had an incentive and is expected to develop strong personal relationships with policyholders, and agents were effectively remunerated based on the number of policy applications procured and would also be penalised if these policies were prematurely cancelled or surrendered by the policyholders, and (d) the defendant's practice of accepting its agents' instructions without verification, and the pre-allocated policy numbers significantly enhanced the risk of agent fraud.

187 [1999] 2 SCR 534.

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