26. TORT LAW

Kumaralingam **AMIRTHALINGAM**
LLB (Hons), PhD (Australian National University);
Professor, Faculty of Law;
Chair, NUS Teaching Academy,
National University of Singapore.

Gary **CHAN** Kok Yew
LLB (Hons), MA (National University of Singapore), MA (Birmingham), LLM, BA (University of London);
Professor, School of Law;
Director, Juris Doctor Programme,
Singapore Management University.

Breach of statutory duty

26.1 The plaintiff in *Tan Bee Hock v F G Builders Pte Ltd*[1] was riding a motorbike when he skidded on a metal plate placed by the defendant at the entrance to a condominium. The plaintiff sued for his injuries in negligence, nuisance, and breach of statutory duty. On the facts, Kannan Ramesh JC (as his Honour then was) found that there was nothing unsafe about the metal plate and dismissed the claims in nuisance and negligence. Having found that the defendants had not done anything unsafe, Ramesh JC also dismissed the breach of statutory duty action, and in doing so, observed that even if the defendant had breached the Code of Practice for Traffic Control at Work Zone (2006 Ed), this code was not intended to give rise to a private cause of action, being designed only to offer practical guidance on traffic safety rather than to impose legal obligations.

Conspiracy

26.2 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*[2] concerns the vexed question of the attributability to a company of the knowledge of an officer or director of the company in the context of a conspiracy claim. The plaintiff bank made claims in conspiracy against all eight defendants involved and deceit against two of the defendants. The first defendant was a developer, the second and third defendants were real estate agents, and the fourth to eight defendants were the second and third defendants' relatives. The allegations were that:

1 [2016] 2 SLR 940.
2 [2016] 2 SLR 597.

(a) the eight defendants had conspired to obtain financing from the bank in contravention of cooling-off measures implemented by the Monetary Authority of Singapore; and

(b) the second and third defendants misled the bank into granting the loans based on inflated purchase prices.

The second and third defendants, in turn, alleged that the plaintiff's vice-president of home loans had knowledge of the matters in connection with the loans and had suggested the transfer of moneys between bank accounts (the very acts alleged by the plaintiff to be fraudulent). The second and third defendants, therefore, argued that such knowledge and acts of the employee or officer would be attributed to the plaintiff bank; and, as a result, the plaintiff should be estopped from making those claims against them.

26.3 The High Court applied the *Re Hampshire Land*[3] principle to preclude the defendants from relying on the rules of attribution in order to attribute the knowledge and acts of the officer to the plaintiff so as to defeat the plaintiff's claims. In *Re Hampshire Land Co*[4] ("*Re Hampshire Land*"), the issue was whether a building society which had lent money to a company should be imputed with the knowledge of its secretary regarding a defect in the resolution passed by the company's shareholders. The secretary's knowledge of the defect was acquired whilst he was acting as a secretary of the company. Vaughan Williams J held that the secretary's knowledge could not be imputed to the building society unless he owed the society a duty to disclose the information.[5]

26.4 In England, the attribution principle has been applied to prevent imputation of wrongdoing, or knowledge of such wrongdoing, by directors of a company that is a victim of such wrongdoing.[6] In a related vein, the directors will not be entitled to raise the defence of *ex turpi causa* based on the attribution of knowledge to the company.[7] This may be contrasted with the recent Hong Kong Court of Final Appeal decision of *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*,[8] in which knowledge of the directors as to their fraudulent inflation of profits was attributed to the company in respect of the liquidator's claim against the Commissioner of Inland Revenue to reclaim the taxes which were paid.

3 *Re Hampshire Land Co* [1896] 2 Ch 743.
4 [1896] 2 Ch 743.
5 *Re Hampshire Land Co* [1896] 2 Ch 743 at 749.
6 See *Bilta (UK) Ltd v Nazir* [2015] 2 All ER 1083.
7 See *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329.
8 [2014] 3 HKC 323.

26.5 Ultimately, attribution rules should be applied in a manner sensitive to the context of the statutory rule in question and its underlying purpose. One public policy rationale is that a company should not be denied redress against a defaulting director by virtue of the attribution of the wrongdoer's culpability to the company.[9] Seen in this light, the *Re Hampshire Land* principle should also be applied to the present case where the plaintiff bank was seeking to show that it was a victim of fraud in which the defendants were complicit.[10] As a result, the defendants could not rely on the officer's knowledge to argue estoppel or lack of inducement on the part of the plaintiff.

26.6 The High Court also struck out the defence; 12 of the 15 averments in the defence were barred by the *Re Hampshire Land* principle. The remaining three averments raised contributory negligence, which, according to the learned judicial commissioner, were not viable defences to the torts of deceit and conspiracy.[11]

26.7 In *Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied*,[12] the plaintiffs sought a declaration that they were entitled to certain leasehold interests in three properties. They alleged that in 1994, the fourth to seventh defendants purportedly conveyed the reversionary and leasehold interests in the properties to the third defendant and, subsequently, the same parties entered into a deed of rectification and confirmation. In addition, the plaintiffs claimed that the conveyance and deed were executed either in fraud and/or conspiracy. Whilst the claim relating to the leasehold interests succeeded, the latter claims were dismissed.

26.8 With respect to the fraud claim, the plaintiffs failed to plead the elements of a specific cause of action. Aedit Abdullah JC held that it was not sufficient merely to plead fraud *simpliciter*. More specifically, the pleadings did not allege any representation by the defendants, nor any inducement or reliance by any party, both of which are necessary elements to establish the tort of deceit or fraudulent misrepresentation.

26.9 As for the conspiracy claim, the actions of the fourth to seventh defendants in making an *ex parte* application to have themselves appointed as trustees of certain trusts did not involve the other defendants or any common design amongst them. Thus, the plaintiffs

9 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2016] 2 SLR 597 at [52]; see also Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 07.044.

10 *Bilta (UK) Ltd v Nazir* [2015] 2 All ER 1083 at [84], *per* Lord Sumption.

11 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [92], citing *Standard Chartered Bank v Pakistan National Shipping Corp* [2003] 1 AC 959.

12 [2017] 3 SLR 386.

failed to prove a combination or an agreement amongst the defendants in pursuit of a common design, which is a requirement in conspiracy whether by lawful or unlawful means. With respect to lawful means conspiracy, the learned judge observed that there was a lack of evidence pertaining to any predominant purpose on the part of the defendants to injure the plaintiffs. Moreover, Abdullah JC noted that "a wrong assertion of property rights is not in itself necessarily a tort" and will not give rise to unlawful means conspiracy.[13]

26.10 In *Beyonics Technology Ltd v Goh Chan Peng*,[14] the first plaintiff, Beyonics Technology Ltd, a company incorporated in Singapore, and the second plaintiff, a subsidiary company of the first plaintiff, were part of the "Beyonics Group". The first plaintiff claimed that the first defendant, the former director and chief executive officer of the plaintiffs, the third defendant, and another party conspired to make payments under certain agreements, divert work from the Beyonics Group to a competitor of the Beyonics Group, and ultimately hollow out the Beyonics Group's baseplate business with its customers. There was an agreement between the parties to divert baseplates from the Beyonics Group to the competitor for the work to be done by the latter. It was clearly agreed that payments would accrue to the first defendant through the third defendant.

26.11 Hoo Sheau Peng JC denied the claim in unlawful conspiracy due to a lack of evidence of an "obvious agreement" between the alleged conspirators to do acts which would hollow out the baseplate business of the Beyonics Group entirely. Strictly speaking, there was no requirement for an "obvious agreement" to commit the acts. What was required, however, was a combination between the alleged conspirators; in fact, the agreement, if any, might be tacit in nature or inferred from the parties' acts.[15]

26.12 The learned judge also found that the predominant intention of the first and third defendants was to benefit the first defendant and the competitor *and* that "the necessary corollary of the benefit to the [competitor] was loss to the First Plaintiff"[16] due to the direct diversion of the baseplates. The learned judge concluded that if the first and third defendants intended to benefit the competitor, they must also have intended to injure the first plaintiff, even if this intention was not

13 *Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied* [2017] 3 SLR 386 at [68].

14 [2016] 4 SLR 472.

15 See *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [113].

16 *Beyonics Technology Ltd v Goh Chan Peng* [2016] 4 SLR 472; [2016] SGHC 120 at [162].

predominant. Hoo JC was correct to highlight that for unlawful means conspiracy, the intention of the conspirators to injure the plaintiff needs not be a "predominant" intention. This technique of treating the benefit to the competitor as a corollary to the loss to the first plaintiff has also been applied in Singapore in the context of a lawful means conspiracy claim.[17]

26.13 In *Simgood Pte Ltd v MLC Barging Pte Ltd*,[18] the appellant, Simgood Pte Ltd ("Simgood"), had entered into a shipbuilding contract with MLC Shipbuilding Sdn Bhd ("MLC Shipbuilding") in which the latter was to construct and deliver a vessel with a specific hull number to Simgood. MLC Shipbuilding failed to deliver the vessel. Simgood alleged that the respondents (comprising shareholders or directors of MLC Shipbuilding or its affiliate companies) had conspired to switch the hull number of the vessel with that of another vessel that had a later completion date.

26.14 The Court of Appeal agreed with the trial judge's finding in *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd*[19] that the respondents wanted to postpone the repayment of a loan facility extended by a bank. There was, therefore, no unlawful means conspiracy as the respondents' acts of switching the hull numbers were not carried out to injure Simgood. Referencing the prior Court of Appeal decision in *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd*[20] ("*EFT*"), it is clear that the respondents' actions in the present case were not targeted or directed at Simgood; for the action in conspiracy to succeed, the injury to the claimant must have been intended as a means to an end or as an end in itself.

26.15 Furthermore, Simgood's claim in inducement of breach of contract against the respondents could not be established. There was no causal connection between the respondents' actions in switching the hull numbers and the breach of contract by MLC Shipbuilding in failing to deliver the vessel.

26.16 The case of *Max-Sun Trading Ltd v Tang Mun Kit*[21] concerned the intentional state of mind for the tort of conspiracy and inducing breach of contract respectively. The first plaintiff was a fabric manufacturer and the second plaintiff was a buying house which entered

17 See *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 at [66]–[67], citing *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174.
18 [2016] SGCA 46.
19 [2016] 1 SLR 1129.
20 [2014] 1 SLR 860 at [101].
21 [2016] 5 SLR 815.

into contracts to supply garments to clothing companies and subcontracted actual manufacturing to other companies. The defendants, who were married to each other, ran a garment business. The defendants and the Tans (comprising Peter Tan, an undischarged bankrupt, and his wife) were shareholders and directors of Elda Instinct Garments Pte Ltd, a Singapore-incorporated company ("Elda Singapore"). Elda Singapore loaned money from the plaintiffs for use as working capital for a new factory in Vietnam. Elda Instinct Garments Vietnam Co Ltd ("Elda Vietnam") was incorporated as a subsidiary company to Elda Singapore.

26.17 Subsequently, conflicts arose between the first defendant and Peter Tan over the alleged mismanagement of the Elda companies. Upon persuasion by a third party, the first defendant agreed to Peter Tan being appointed as legal representative and general director of Elda Vietnam and authorised representative of Elda Singapore, positions originally held by the first defendant. Later in November 2008, the defendants voted in a meeting to remove Peter Tan from his positions and to reappoint the first defendant. They used the resolution to obtain an amended investment certificate from the Vietnamese authority. This led to the tussle for and eventual confiscation of the investment certificate by the police, the freezing of Elda Vietnam's bank accounts to which Peter Tan had access, and the unavailability of the company seal for affixing to the certificate of origin in respect of the goods. The events resulted in significant delays to the exports of garments by the second plaintiff. Subsequent court proceedings in Vietnam resulted in the cessation of orders placed with the second plaintiff and the winding-up of both the Elda companies. The plaintiffs commenced actions in tort, breach of contract, breach of fiduciary duty, and relief under s 340(1) of the Companies Act[22] against the defendants, all of which failed.

26.18 In particular, the claim in unlawful means conspiracy was denied. The first defendant had intentionally misstated the minutes of a meeting to give the impression to the Vietnamese authority that the removal of Peter Tan had been approved with a proper quorum. However, there was no evidence that the second defendant agreed to pursue the same course of conduct or shared the same objectives as the first defendant. Hence, the first element of a combination amongst conspirators was missing. Moreover, applying the test in *EFT*,[23] the defendants did not intend to injure the second plaintiff. According to Judith Prakash JA, the fraud was aimed at forcing Peter Tan out of power so that the first defendant would have control of Elda Vietnam. Here, the learned judge made an important distinction between recklessness

22 Cap 50, 2006 Rev Ed.

23 *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [101].

as to "the loss which would probably or inevitably be caused to the plaintiffs" and the loss being "a means to an end or an end in itself" which was required under the test for conspiracy.[24]

26.19 Similarly, for the claim in inducing breach of contract, the defendants, though they were aware of the existence of the loan and supply contracts between Elda Singapore and the plaintiffs, did not intend for them to be breached. The breach of contract must have been intended either as a means to an end or the end itself,[25] a requirement which was not satisfied on the facts.

26.20 *The Wellness Group Pte Ltd v OSIM International Ltd*[26] ("*The Wellness Group*") discussed the requirement of the acts and predominant motive to injure the plaintiffs as well as the meaning and scope of unlawful means in conspiracy. There was also a separate claim in defamation, which will be examined in paras 26.39–26.49 below. There were two conspiracy actions: the first plaintiff, TWG, against the first to sixth defendants comprising OSIM, Paris (OSIM's subsidiary), and the directors, in conspiracy to injure; and the second plaintiff, the chairman of TWG, against the first to third defendants in conspiracy to injure.

26.21 TWG, OSIM, and Paris entered into a shareholders' agreement upon which OSIM purchased a stake in TWG Tea from TWG and Paris. One clause provided for the dilution of the shareholding of TWG and Paris in favour of OSIM, based on a specified event. TWG, TWG Tea, OSIM, and Paris also signed a shareholders' agreement to set up joint venture companies. A dispute arose concerning the price that TWG Tea was to charge one joint venture company for its products.

26.22 The first plaintiff claimed that the first, second, fifth, and sixth defendants acted to damage the profitability of TWG by:

> (a) obstructing the efforts of TWG Tea, a subsidiary company of TWG, in obtaining financing from a bank;
>
> (b) acting in concert to procure TWG Tea to supply products to the joint venture company at a price substantially lower than the price TWG charged other franchisees; and
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> (c) reneging on assurances, representations, or understandings that OSIM would assist TWG Tea to expand

24 *Max-Sun Trading Ltd v Tang Mun Kit* [2016] 5 SLR 815 at [81].
25 See *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 at [90]–[91].
26 [2016] 3 SLR 729.

locally and internationally, and that OSIM would provide shareholder's loans to TWG Tea for such expansion.

The first plaintiff also alleged that the first to sixth defendants acted wrongfully to enable OSIM to take control of TWG Tea by, amongst others, the following acts:

(a) OSIM wrongfully exercising its rights under the clause in the shareholders' agreement to obtain an additional 10% of TWG Tea shares from TWG and Paris;

(b) the second defendant proposing the rights issue of new shares in TWG Tea ("Rights Issue"); and

(c) OSIM and Paris approving the Rights Issue and attempts by the second defendant to further dilute TWG's shareholding in TWG Tea.

26.23 The claims were dismissed. TWG Tea's financing efforts were not in fact obstructed. OSIM eventually agreed to the subordination required by the bank. Though the second, fifth, and sixth defendants attempted to procure a price substantially lower than the franchise price, they honestly held the view that it was unreasonable to expect the joint venture company to pay the franchise price. Moreover, there was no commercial unfairness in respect of the Rights Issue. There was a valid commercial reason for the Rights Issue and the dilution of TWG's shareholding, though contemplated by the defendants, was not their dominant purpose.

26.24 With respect to the suit by the second plaintiff, the chairman of TWG, against the first to third defendants for conspiracy to injure, it was alleged that the defendants conspired to injure him by unlawful means with the predominant intention of injuring him. The second plaintiff pleaded the loss of his salary as chief executive officer ("CEO") of TWG Tea following his resignation.

26.25 The alleged unlawful means was that the conspirators sought to remove the second plaintiff as CEO of TWG Tea in breach of the implied term of a shareholders' agreement. However, as the second plaintiff was not a party to the contract, he could not have sued for breach of the contract against TWG Tea. The Singapore High Court agreed with the second plaintiff that, on the basis of the holding in

Beckkett Pte Ltd v Deutsche Bank AG,[27] it was irrelevant whether he was entitled to sue on the unlawful means used.

26.26 In *Revenue and Customs Commissioners v Total Network SL*[28] ("*Total Network*") the House of Lords held that the "unlawful means" need not be independently actionable by the plaintiff against the conspirators in a two-party tort scenario. The criminal offence *per se* committed by the conspirators did not confer a private right of action on any person. Notwithstanding that the criminal offence was *not* independently *actionable* by the plaintiff, the action in unlawful means conspiracy succeeded.

26.27 *Unlike* the criminal wrong committed by the conspirators in *Total Network*, the present case concerned a *civil* wrong that was not actionable by the plaintiff. Nonetheless, the basis for non-actionability of the unlawful means appears to be substantially similar. In the case of a criminal wrong, the plaintiff would not be entitled to sue in a civil action because he did not fall within the specific class of persons to be protected under the criminal statute. That is, the plaintiff's status did not entitle him to a private right of action under the statute. In a similar fashion, the plaintiff in the present case, due to his status as a non-contracting party, was disentitled to sue in breach of contract.

26.28 *Further*, it is clear that an unlawful means conspiracy can arise in connection with a breach of contract.[29] By not requiring actionability of the unlawful means, the law of conspiracy is not treated as a species of joint torts. One implication flowing from this analysis is that the tort of conspiracy, with this dispensation of the actionability requirement, takes on a more expanded role in protecting the plaintiff's economic interests.

Conversion

26.29 *The* three cases on conversion concerned, among other things, the plaintiff's right to immediate possession. Two of the cases were in respect of the possession of shares and one was with respect to bunkers. In *AAHG LLC v Hong Hin Kay Albert*,[30] the plaintiff company alleged that the defendant, Hong Hin Kay Albert, had wrongfully transferred

27 [2009] 3 SLR(R) 452 at [120], citing *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174; see also *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [91].

28 [2008] 1 AC 1174.

29 See, *eg*, *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [23]; *Monarch Beverage Company (Europe) Ltd v Kickapoo (Malaysia) Sdn Bhd* [2009] SGHC 55 at [73] and [107].

30 [2017] 3 SLR 636.

shares in a company, Universal Medicare Pte Ltd ("Universal"), from another company, DVI, Inc ("DVI"), to himself and, thereafter, transferred shares to a third company, Columbia Asia Healthcare Sdn Bhd ("Columbia Asia"). The court observed that the plaintiff was the successor to DVI's rights against the defendant.

26.30 *The* defendant argued that he had transferred the shares pursuant to his right of pre-emption under the memorandum and articles of association of Universal. However, Art 30 required the person intending to transfer shares to give a "transfer notice" to the company. When DVI filed for reorganisation under ch 11 of the US Bankruptcy Code, the Delaware Bankruptcy Court authorised it to sell certain assets. There was a Notice of Sale issued by DVI that the sale of the shares was to Goldman Sachs (Asia) Finance (that is, GS Asia) pursuant to the order made by the Delaware Bankruptcy Court. Columbia Asia, subsequently, purchased the shares. Chua Lee Ming JC noted that this Notice of Sale did not constitute a "transfer notice" required under the Articles. Hence, the defendant had wrongfully procured the transfer of the shares.

26.31 The next issue related to whether DVI had the right to immediate possession of the shares. As DVI was the registered holder of shares at the material time, it was *prima facie* entitled to immediate possession of the shares. The defendant, however, contended that the plaintiff had lost the right to immediate possession on the ground that the shares were pledged to other entities. According to Chua JC, the burden of proof was, therefore, on the defendant to show that the plaintiff had lost the right to immediate possession due to the pledge of shares. As the burden was not discharged by the defendant, the plaintiff was entitled to sue in conversion in respect of the shares.

26.32 On the quantification of damages, the judge decided that the sale to Columbia Asia constituted the best available evidence of the value of shares since it was an arms-length negotiated transaction which took place at the time of the conversion.

26.33 Even if the plaintiff did not have the right to sue in conversion, the learned judge concluded that the plaintiff suffered injury as the defendant's wrongful act had deprived the plaintiff either temporarily or permanently of the benefit of his reversionary interest in the shares. The judge noted that the chances of recovering the shares from a third party, a company which was a *bona fide* purchaser for value without notice, was significantly reduced. Though the claim for reversionary damages

was a distinct cause of action from the tort of conversion,[31] it was sufficiently pleaded.

26.34 The case of *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd*,[32] involving conspiracy, conversion, breach of contract, and breach of fiduciary obligations was decided by Patricia Bergin, International Judge of the Singapore International Commercial Court. As part of a commercial joint venture, the defendant company agreed to advance loans to a special purpose vehicle, secured by shares. The defendant company also agreed to pledge shares provided by the plaintiff company as security for loans advanced to it. These loans were to be deposited into the accounts of the special purpose vehicle in order to fund the joint investments.

26.35 The plaintiffs alleged that the defendants conspired to defraud them and to conceal such fraud and the proceeds from them. The claim in conspiracy by unlawful means failed as the plaintiffs could not prove that the unlawful means – the express misrepresentations allegedly made to the plaintiff – were made.

26.36 With respect to the claim for conversion of shares, the recovery of damages depended on whether the shares in question were pledged against a loan. For one set of shares, the shares were transferred to the defendant company which had provided a loan that was secured by pledged shares. Hence, the defendant company was entitled at its discretion to sell the shares and/or to re-deliver a cash equivalent to the plaintiffs on maturity. As the plaintiffs did not have immediate right to possession, their claim in conversion in respect of those shares failed. On the other hand, the plaintiffs' claim in conversion in respect of another set of shares that were not pledged against a loan succeeded, for which they recovered damages.

26.37 The case of *The "Star Quest"*[33] reaffirmed that, for a claim based on conversion, one central issue was whether the plaintiffs (that is, appellants), who sold marine fuel oil ("bunkers") to two buyers pursuant to contracts of sale, retained the immediate right to possession of the bunkers.[34] In its application for summary judgment, the appellants argued that its right to immediate possession of the bunkers was premised on its status as the holder of certain bills of lading. This right,

31 *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR(R) 382 at [30]–[31]; *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [34].

32 [2016] 5 SLR 1.

33 [2016] 3 SLR 1280.

34 *The Cherry* [2003] 1 SLR(R) 471 at [62]; *East West Corp v DKBS 1912* [2003] 1 Lloyd's Rep 239 at [69].

according to the court, depended on the intentions of the parties to the underlying sale contracts which were to be objectively ascertained from their terms. In this case, the possessory interest had passed under the contracts to the buyers upon loading. The defendants (respondents), as the owners and/or demise charterers of the vessels on which the bunkers were loaded were, thus, held unconditionally entitled to defend the appellant's claim for conversion.

Defamation

26.38 Several interesting issues on the tort of defamation have arisen during the period of review including the following:

(a) whether an allegation concerning lawsuits initiated against the plaintiff but which have not been determined by the court is defamatory;

(b) whether an allegation about the plaintiff's sexual orientation is defamatory;

(c) the factors for ascertaining the foreign corporate plaintiff's reputation within the jurisdiction;

(d) whether a pre-emptive response to a verbal attack may be protected by privilege;

(e) whether police reports and complaints to statutory bodies may be protected by absolute or, alternatively, qualified privilege; and

(f) verifiable facts and what qualifies as a comment for the purpose of the defence of fair comment.

26.39 The background facts in *The Wellness Group* relating to conspiracy were described in paras 26.20–26.25 above. The OSIM Board published an announcement about the suit in conspiracy by the first and second plaintiffs ("OSIM Announcement"), stating its view that the suit was unmeritorious and groundless. TWG and Manoj sued OSIM in defamation in respect of the OSIM Announcement.

26.40 Later, The *Straits Times* published an article about the case which contained the following two paragraphs ("ST Offending Words"):[35]

> [TWG] said in a separate statement on Monday that 'the other shareholders and directors of TWG Tea have conspired to injure the interests of [TWG] by diluting its shareholdings in TWG Tea and enabling OSIM to take control over TWG Tea'

35 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [221].

> …
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> [Manoj] also alleges that OSIM, [Ron Sim] and [Taha] conspired to remove him as TWG Tea chief executive, even as a shareholders' agreement implied that he would stay in the position for five years from March 24, 2011.

The Straits Times article was based on a press statement by TWG, the writ of summons and statement of claim in the conspiracy action ("Original Publication"). OSIM counterclaimed against TWG and Manoj for the ST Offending words.

26.41 Both the claim and counterclaim in defamation were dismissed. With respect to the counterclaim, the question was whether TWG and Manoj were responsible for the republication by *The Straits Times*. TWG and Manoj argued that the second paragraph in the ST Offending Words was not a repetition of the relevant part of the Original Publication but were *The Straits Times*' own words. In response, Chua JC stated that where the republisher uses language that is his own, the defendant who can be said to have authorised the republication will remain liable so long as the republication adheres to the sense and substance of the statement given by the defendant.

26.42 With respect to the requirement of defamatory meaning, the learned judge held that the ST Offending Words were not defamatory. Read in the context of the whole article, an ordinary reasonable reader of the *Straits Times* article, not unduly suspicious or avid for scandal, using his general knowledge and common sense, would understand the ST Offending Words to refer to a dispute before the court between the parties. A reasonable reader would understand that the allegations in the dispute remain to be proved in court. In this regard, Chua JC cited two cases[36] for the proposition that a publication understood to mean that a dispute is before the court and that the allegations in the dispute remain to be determined is not defamatory. In *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd*,[37] the letter sent by the plaintiff company stating that it was commencing a legal action for breach of confidence against the defendant and that the defendant had made a product for a third party that contained the confidential information was held, on the whole, not defamatory. In *Ross McConnel Kitchen & Co Pty Ltd v John Fairfax & Sons Ltd*,[38] the allegations contained in the pleadings, which concerned a

36 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [240], citing *Ross McConnel Kitchen & Co Pty Ltd v John Fairfax & Sons Ltd* [1980] 2 NSWLR 845 at [25]; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 at [230].

37 [2014] 2 SLR 1045.

38 [1980] 2 NSWLR 845.

conspiracy to cheat and defraud that had not been determined by the court, were also not defamatory.

26.43 A comparison may be made with allegations involving criminal offences that have not been determined by the court in light of the English cases in *Rubber Improvement v Daily Telegraph Ltd*[39] and *Chase v News Group Newspapers Ltd*.[40] Allegations imputing: reasonable grounds to suspect that the plaintiff committed a serious offence such as murder; or grounds for investigating whether the plaintiff was responsible for the act were held to be defamatory. It appears that the courts are generally more circumspect in imputing defamatory meaning in respect of allegations concerning civil as compared to criminal wrongdoings though the precise facts and contexts in which the allegations were made will have to be examined.

26.44 It is clear that the publication by a party of allegedly defamatory statements in order to repel an attack by another will be protected by the defence of qualified privilege if the publication: is relevant and made *bona fide*;[41] is necessary for protecting the first party's interests; constitutes a proportionate response to the attack;[42] and is made to the audience with an interest to receive the communication in question.[43] In the present case, TWG and Manoj argued that the same privilege should extend to "a pre-emptive press release in response to an anticipated attack", citing *Bhatt v Chelsea and Westminster NHS Trust*.[44]

26.45 Chua JC agreed, stating that a pre-emptive reply ought to be protected by qualified privilege provided the reply is in reasonable anticipation of an imminent attack and is a proportionate rebuttal.[45] This extension of the law comes with qualifications that are largely consistent with the approach for assessing the defendant's responses to *actual* attacks by the plaintiff. It also accords with the general objective of qualified privilege in protecting the defendant's interests. The learned judge opined that "[i]f the purpose of the privilege is to protect a person's legitimate interest in defending his reputation, it seems unrealistic to require that person to wait until his character is actually attacked before making the rebuttal". On the facts, however, his Honour

39 [1964] AC 234.

40 [2003] EMLR 218, applied in *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860.

41 *Lee Kuan Yew v Davies Derek Gwyn* [1989] 2 SLR(R) 544.

42 *Tan Chor Chuan v Tan Yeow Hiang Kenneth* [2006] 1 SLR(R) 16.

43 *Oei Hong Leong v Ban Song Long David* [2005] 3 SLR(R) 608.

44 16 October 1997 at p 7, cited in *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [247].

45 See *dicta* in *Bento v The Chief Constable of Bedfordshire Police* [2012] EWHC 1525 (QB) at [104].

found that the press statement by TWG exceeded all proportionality necessary for the defence of qualified privilege.

26.46 With regard to the main claim in defamation by TWG and Manoj against OSIM, this was based on the OSIM Announcement ("OSIM Offending Words"):[46]

> … The Board believes that the allegations [in S187/2014] are unmeritorious and groundless, and hence, [OSIM] intends to vigorously defend the Claim and is currently seeking legal advice to refute the Claim as well as to file Counterclaim against [TWG] and Manoj.

The plaintiffs alleged that the words in the OSIM Announcement meant that the plaintiffs' case was so bad that the plaintiffs must have acted dishonestly and in bad faith, and/or for an improper/ulterior purpose in commencing the suit. Chua JC was, however, of the view that an ordinary reasonable person would understand the OSIM Offending Words to mean nothing more than that the OSIM Board believed:[47]

> … the plaintiffs in [the suit] did not have a good case or that the plaintiffs' case was unfounded, [and] OSIM, therefore, intended to defend the claim vigorously; … the OSIM Board believed OSIM may have a counterclaim against the plaintiffs; and … it was seeking legal advice on its defence and counterclaim.

26.47 With respect to the defence of fair comment, the plaintiffs argued, citing *Hamilton v Clifford*[48] ("*Hamilton*") that "one is not permitted to seek shelter behind a defence of fair comment when the defamatory sting is one of verifiable fact." The English High Court held that the statement that there are "grounds to suspect" is one of fact rather than comment.[49] However, Chua JC distinguished *Hamilton*, stating that until the plaintiffs' allegations have been finally determined by a court, any view expressed on the merits of those allegations must necessarily be an expression of an opinion. Hence, at the time that the OSIM Announcement was made, it was not objectively verifiable whether the allegations were unmeritorious and groundless. Chua JC, therefore, held that the statement in question qualified as a comment.

26.48 Given the words "the Board believes" and the qualitative nature of the phrase "unmeritorious and groundless" without reference to

46 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [254].
47 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [259].
48 [2004] EWHC 1542 (QB) at [60], cited in *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [281].
49 *Hamilton v Clifford* [2004] EWHC 1542 (QB) at [62], cited in *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [283].

further facts, we agree that the OSIM Offending Words would amount to a comment. That said, Chua JC's statement – *any* view expressed on the merits of allegations before they have been finally determined by a court must necessarily be an expression of an opinion – is arguably too broad. It is quite conceivable for an allegation, which remains to be determined by the court, to be objectively *verifiable* in nature. The allegation that a suit is unmeritorious and groundless may be proven false by, for instance, the presence of relevant facts satisfying the specific elements of the cause of action (for example, conspiracy). Conversely, the allegations will be verified should there be no facts that go towards satisfying the elements of the cause of action.

26.49 Ultimately, the defence of comment failed. Though the OSIM Offending Words were comments touching on a matter of public interest, the defendants failed to prove that the comments were based on facts. There was no reference in the allegations to any facts that might suggest the allegations were unmeritorious and groundless. Neither were the comments fair. An honest fair-minded person could not honestly hold an opinion that the plaintiffs' allegations in the suit were unmeritorious and groundless, based on the supporting facts pleaded by the defendants.

26.50 The question of privilege to be extended to protect defamatory statements contained in police reports and complaints to statutory bodies was addressed in *Isabel Redrup Agency Pte Ltd v A L Dakshnamoorthy*.[50] The defendant was the representative of the owners of certain properties who had appointed Isabel Redrup Agency Pte Ltd ("Redrup"), the plaintiff company, as their property agent. There was a dispute over the commissions between Susan, Redrup's managing director, and the defendant. The defamation suit arose from the defendant's actions in lodging a police report as well as a complaint with the Council of Estate Agencies ("CEA Complaint") concerning the possibility that its property agent Susan had forged a draft option agreement. The police report and CEA Complaint were later sent to a member of the press. Redrup and Susan claimed in defamation. Susan alleged that the contents of the police report, the CEA Complaint and the letter to the press were defamatory as follows:[51]

> (a) Susan had behaved unethically in her capacity as a property agent and/or as the key executive officer of Isabel Redrup by committing forgery ("Allegation 1").

50 [2016] 2 SLR 634.
51 *Isabel Redrup Agency Pte Ltd v A L Dakshnamoorthy* [2016] 2 SLR 634 at [32].

> (b) Isabel Redrup is dishonest and/or unfit to carry out the business of real estate agency because it improperly allowed or is vicariously liable for the alleged forgery ("Allegation 2").

According to the court, the defamatory sting of the police report and the CEA Complaint was that there were reasonable grounds to suspect that the property agent forged a draft option rather than an imputation of unethical and dishonest behaviour. But the statements were not defamatory of Redrup, which was an entity separate from the individual agent. As there were no reasonable grounds to suspect that Susan had forged a draft option agreement with a dishonest or fraudulent intent, the defence of justification was not made out.

26.51 One controversial issue was whether the Police Report and the CEA Complaint should be protected by absolute privilege. Lee Seiu Kin J decided in the negative. His Honour reasoned that the aim of facilitating the effective discharge of the shared public duty in court proceedings – to ascertain the truth of the matter – is distinct from the public duty that is exercised by investigators, which is to decide whether the circumstances warrant the institution of proceedings to ascertain the truth of the matter.

26.52 Hence, the police report and the CEA Complaint were made on occasions of *qualified*, not absolute privilege. People who come forward to assist in addressing a wrong are under a civic duty and the police are under a corresponding duty to investigate such leads. Complaints to a statutory board governing the licensing and registration of estate agents are sufficiently analogous to statements made to the police to warrant the protection of qualified privilege. The defendant was not, however, entitled to the defence of qualified privilege in relation to the publication of the Police Report and the CEA Complaint to the member of the press.

26.53 The defendant defamed the property agent with the knowledge that those allegations were untrue, and probably with the motive of depriving her of her commission. This amounted to malice, which defeated the defence of qualified privilege. But this did not extend to the acts of the owners in authorising the defendant to act for them in the property transaction. The property agent recovered damages in the sum of S$30,000 in respect of the complaint and the police report. As for the publication of these materials to a member of the press, damages in the sum of S$10,000 were awarded.

26.54 On 10 February 2017, the Court of Appeal in *Goh Lay Khim v Isabel Redrup Agency Pte Ltd*[52] dismissed the appeal against the High Court's decision.

26.55 *Randall Savio Anthony D'Souza v Pius Chai*[53] concerned actions in both defamation and harassment. The plaintiff and the defendant were ex-colleagues at a company. The plaintiff sued the defendant for the latter's statements to his superiors that he had been sexually harassed and bullied by the plaintiff at the workplace. In particular, the plaintiff alleged that the offending words, in their natural and ordinary meanings, meant and were understood to mean that: "the Plaintiff [was] gay or a bisexual or [had] sexual inclinations or predispositions towards the Defendant"; and "the Plaintiff had behaved inappropriately and improperly towards the Defendant at the workplace".[54] The learned judge held that the offending words "with their sexual connotations and calling into question the Plaintiff's professionalism" were defamatory as they tended to lower the plaintiff's reputation in the estimation of right-thinking members of society.

26.56 It is important to note that cases in Australia,[55] Scotland,[56] and New York state in the US[57] have held that allegations that the plaintiff is a homosexual are not defamatory. These decisions are arguably influenced by the more liberal legislation and attitudes relating to homosexuality, anti-discrimination law relating to sexual orientation, and the recognition of civil partnerships (for example, the UK Civil Partnership Act 2004).

26.57 Other courts in Australia, for instance, have taken a contrary view.[58] For the view that the "Singapore position presents a unique model in transition" based on the existing s 377A of the Penal Code,[59] which criminalises homosexuality between consenting males.[60] This observation was premised on official government policy *not* to enforce the provision and associated statements *proactively* as well as two pending judicial review cases as at 2013 on the constitutionality of

52 [2017] 1 SLR 546.
53 [2016] SGDC 257.
54 *Randall Savio Anthony D'Souza v Pius Chai* [2016] SGDC 257.
55 See, *eg*, *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432, *per* Bell J, *Obermann v ACP Publishing Pty Ltd* [2001] NSWSC 1022.
56 See, *eg*, *Quilty v Windsor* [1999] SLT 346; *Cowan v Bennett* [2012] ScotSC 101, *per* Sheriff McGowan.
57 See, *eg*, *Yonaty v Mincolla* 945 NYS 2d 774 (App Div, 2012).
58 See, *eg*, *John Fairfax Publications Pty Ltd v Rivkin* [2003] 201 ALR 77 at [140], *per* Kirby J; *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586.
59 Cap 224, 2008 Rev Ed.
60 See Gary K Y Chan, "Defamatory Meaning, Community Perspectives and Standards" (2014) 19 MALR 47 at 77.

s 377A and public surveys. Since then, the Singapore Court of Appeal has in the two judicial review cases, held that the constitutionality of s 377A should be preserved.[61] This may have tilted the balance slightly in favour of the position that such allegations on homosexuality will likely be regarded as defamatory in Singapore.

26.58 Though the offending words were held defamatory of the plaintiff, the defendant *was entitled* to rely on the defence of qualified privilege. The defendant claimed that he only informed his superiors of the incidents when he requested for an inter-office transfer, and was asked by his superiors to provide the reasons for his request. Qualified privilege existed based on the "common interest" and/or "duty interest" analysis. First, the employee had an interest in raising concerns regarding sexual harassment, and the employee's supervisor also had an interest in receiving such communications. Secondly, when asked for his reasons for the transfer, the defendant was clearly under at least a social or moral *duty* to communicate his reasons, and the company had an *interest* in hearing these reasons to evaluate the request. Moreover, the defendant's main motive in telling the company's management about the incidents was merely to justify his request for a transfer, and not to injure the plaintiff, or for any improper purpose. The defendant was likely to have honestly believed that the plaintiff's alleged words and act did in fact occur, though the plaintiff might only have been joking with him.

26.59 On justification, the court noted that the plaintiff had on a number of occasions tried to *joke* with the defendant by making references to the defendant's butt, and had further on one occasion "crutched his crotch" in front of the defendant as part of a Michael Jackson impersonation, and this series of events had made the defendant very distressed and upset. According to the learned judge, those facts were insufficient to justify the *imputation* of the offending words, namely that the plaintiff was gay or bisexual and had committed sexual harassment and workplace bullying against the defendant. Whilst it is true that those facts could not justify the allegations relating to the plaintiff's sexual orientation, they are arguably sufficient to justify the allegations relating to workplace bullying.

26.60 The defendant counterclaimed against the plaintiff under the common law on tort of harassment. This was because the alleged actions of the plaintiff took place before the enactment of the Protection from Harassment Act.[62] The common law tort of harassment in *Malcomson*

61 See *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26.
62 Cap 256A, 2015 Rev Ed.

Nicholas Hugh Bertram v Mehta Naresh Kumar[63] and *Tee Yok Kiat v Pang Min Seng*[64] has since been abolished under the statute. In any event, the elements of the tort were not made out on the facts of the case.

26.61 *Qingdao Bohai Construction Group Co Ltd v Goh Teck Beng*[65] concerned the alleged dissemination of an online article and print news articles. The plaintiffs did not rely on electronic evidence to trace the publication of the online articles to the defendants but instead relied on inferences from circumstantial evidence. The defendants were not responsible for making the defamatory material available to a third party in a comprehensible form. The defamation action was dismissed as there was no real and substantial tort under the abuse of process doctrine established in *Jameel (Yousef) v Dow Jones & Co Inc*.[66] Belinda Ang Saw Ean J stated that there was no presumption of law that material appearing on the Internet had been published and it was, therefore, insufficient to simply allege that the defamatory material was posted on the Internet and was accessible in Singapore.

26.62 The second reason for the dismissal of action was that the requirement that the corporate plaintiff had to prove it had a trading or business reputation within the jurisdiction at the material time of the alleged publication was not satisfied. A corporate plaintiff in defamation actions cannot be injured in its feelings, but only "injured in its pocket".[67] Unlike an individual, a corporate plaintiff is *not* presumed to have a reputation; instead, it must prove that it has a reputation that is capable of being injured by the alleged libel.

26.63 The relevant factors for determining whether the corporate plaintiff had a trading or business reputation within the jurisdiction at the material time of the publication, to entitle it to an award of damages for libel, include:

> (a) … evidence of actual or intended clients, investors or competitors ([*Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SPA* [2008] EWHC 1323 (QB)] at [49]);
>
> (b) knowledge of the existence of the foreign corporate plaintiff in the jurisdiction ([*Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28 ("*Multigroup*")] at [37]);

63 [2001] 3 SLR(R) 379.
64 [2013] SGCA 9.
65 [2016] 4 SLR 977.
66 [2005] QB 946.
67 *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [65]; *ATU v ATY* [2015] 4 SLR 1159 at [28], both citing *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 262.

(c) presence of international brand recognition in the jurisdiction ([*Helen Marie Steel and David Morris v McDonald's Corporation and McDonald's Restaurants Ltd* (31 March 1999) (CA) (Eng) ("*McDonald's*"), *per* Pill and May LJJ and Keene J]);

(d) similarity of commercial activity and trading identity with [a] related company in the jurisdiction (*Multigroup* at [40], [but see *McDonald's* and *Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd* [2012] NSWSC 1136] at [36]–[37]); and

(e) the extent of management role by the foreign corporate plaintiff in the related company in the jurisdiction, as opposed to merely owning shares in them, for the alleged publication to be able to have damaged the plaintiff in the eyes of investors in the jurisdiction (*Multigroup* at [31]–[32]).

26.64 On the facts, the first plaintiff was unable to show that it had a trading or business reputation within the jurisdiction at the time of publication. The conspiracy claim also failed as they were premised on the defendants having published the online articles and/or the news articles. As the court had found that the defendants were not responsible for the publication of both the online articles and the news articles, the claim in conspiracy also failed.

26.65 In *Ng Bee Choo @ Ng Catherine v Mary Hoe-Tan*,[68] the plaintiff was employed as a property manager responsible for all the strata titles managed by the employer company. The company was owned and managed by the first defendant. The second defendant was the office manager of the company and a licensed estate agent. There were three letters published by the first and/or second defendants which the District Court held to be defamatory.

26.66 The first letter which was published by the first defendant on the company's letterhead imputed that the plaintiff conducted herself unprofessionally and dishonestly and was not trustworthy. The second letter suggested that the plaintiff was a liar and was not trustworthy or reliable in that she had no integrity, no honesty, and no professionalism. Finally, the third letter imputed that there were reasonable grounds to suspect that the plaintiff was involved in the commission of an offence.[69]

26.67 Though the second and third letters on the face of them were purportedly signed by the second defendant, the second defendant denied signing the letters. Instead, the first defendant admitted that she wrote the letters. The statement of claim was made against both the first and second defendants. The district judge noted that the second

68 [2016] SGDC 260.
69 *Chase v News Group Newspapers Ltd* [2003] EMLR 11.

defendant agreed to a system that was put in place by the first defendant in sending out letters bearing the second defendant's name. In so doing, the learned judge opined, relying on the case of *Lee Kuan Yew v Davies Derek Gwyn*,[70] that the second defendant had "relinquished all control" over the contents of the letters sent by the first defendant. The second defendant was "indifferent to the truth" or "reckless".[71]

26.68 The court awarded damages of S$15,000 against the first defendant and damages of S$8,000 against the second defendant. The district judge noted the principle laid down by the Court of Appeal in *Goh Chok Tong v Jeyaretnam Joshua Benjamin*[72] that "*courts should award one single lump sum as damages*" [emphasis in original] compensating the plaintiff for the "*collective actions of the defendant, from the date of publication to the end of trial*" [emphasis in original] and that "an award for aggravated damages should not be separated from an award for general compensatory damages." It should, however, be noted that:

> (a) the principle of awarding lump sum as damages from two or more defendants is subject to s 18 of the Defamation Act,[73] which allows for separate assessment of damages for each defendant in circumstances where there is evidence of malice or any other matter of aggravation in respect of one defendant and not the other; and
>
> (b) the subsequent decisions in *Basil Anthony Herman v Premier Security Co-operative Ltd*[74] and *Lim Eng Hock Peter v Lin Jian Wei*[75] have advocated that courts should separate the basic amounts awarded for the defamation and the additional damages for the aggravation.

26.69 The learned judge took the view that there were no aggravating factors to justify the award of aggravated damages despite the lack of remorse shown by the first defendant in the course of the trial and the intentional nature in the publication of the defamatory letters. Neither were the first defendant's actions regarded as malicious on the ground that her dominant purpose in sending the letters was not to cause the plaintiff to lose the business. Apart from the question of the defendant's dominant purpose, an enquiry into whether the first defendant lacked

70 [1989] 2 SLR(R) 544.
71 *Ng Bee Choo @ Ng Catherine v Mary Hoe-Tan* [2016] SGDC 260 at [86].
72 [1998] 2 SLR(R) 971 at [51], cited in *Ng Bee Choo @ Ng Catherine v Mary Hoe-Tan* [2016] SGDC 260 at [105].
73 Cap 75, 2014 Rev Ed.
74 [2010] 3 SLR 110 at [65].
75 [2010] 4 SLR 357 at [40].

belief in or was reckless as to the truth of the statement could have been undertaken to determine whether there was malice.[76]

Malicious falsehood

26.70 The decision in *Allergan Inc v Ferlandz Nutra Pte Ltd*[77] raised the interesting issue of whether a statement made concerning the plaintiff should be interpreted as pertaining to its past (mis)conduct, thereby rendering the statement false, or whether it should be construed as part of continuing (mis)conduct.

26.71 The plaintiffs, comprising an American company and its wholly-owned subsidiary company incorporated in Singapore, claimed against the defendant, a Singapore company that imported and distributed certain products, in trademark infringement, passing off, and malicious falsehood. The claim in malicious falsehood related to the distribution of a copy of a letter by the US Food & Drug Administration ("FDA Letter") to the staff of Temasek Medical Center ("TMC"), a customer of the second plaintiff, in May 2012. The FDA Letter, dated 10 September 2009, set out the FDA's view that the first plaintiff's promotional materials and website in relation to a specific product were misleading, and it requested remedial action.

26.72 The first plaintiff had complied with the FDA's request. In order to establish falsehood, it alleged that the distribution constituted a statement that the first plaintiff's promotional materials *continued* to be misleading. On the other hand, the defendant argued that the distribution only meant that the first plaintiff's promotional materials were misleading at the date of the FDA Letter. George Wei J stated that "the proper inquiry is: what would a reasonable person in the position of TMC understand to be the meaning arising from the disclosure of the FDA Letter?"[78]

26.73 Based on the evidence, the learned judge took the view that the reasonable person would only interpret the FDA Letter as "a record of the First Plaintiff's past brush with US law on misleading advertising, and not that the First Plaintiff is in continuing breach of the law".[79] Hence, the FDA Letter did not give rise to a falsehood. The FDA Letter was dated more than two years before the distribution. The FDA Letter indicated that the first plaintiff's webpages were last accessed in

76 *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 331.
77 [2016] 4 SLR 919.
78 *Allergan Inc v Ferlandz Nutra Pte Ltd* [2016] 4 SLR 919 at [226].
79 *Allergan Inc v Ferlandz Nutra Pte Ltd* [2016] 4 SLR 919 at [230].

June 2009. The FDA Letter called for an immediate stop to the dissemination of the material. The first plaintiff, as a major pharmaceutical company with a US presence, was likely to treat an FDA request seriously, and it continued to market the product.

Misrepresentation

26.74 The respondent in *ACTAtek Inc v Tembusu Growth Fund Ltd*[80] had entered into two convertible loan agreements ("CLAs") with the appellant, first in 2007 and then again in 2012 to lend money that would be repaid by the issuance of shares. Subsequently, the respondent declared an event of default under the 2012 CLA, alleging that the appellant had misused the moneys; this triggered an automatic cross-default under the 2007 CLA. The respondent sued for recovery of the loans and brought an action in deceit, while the appellant countersued for wrongful declaration of default. The High Court found in favour of the respondent. The Court of Appeal allowed the appellant's appeal, overturning the High Court's finding on both deceit and the contractual claim. The court also allowed the appeal with respect to the counterclaim. The discussion here is limited to the deceit claim.

26.75 Sundaresh Menon CJ, delivering the judgment of the court, began by applying the elements of the tort of deceit set out in *Panatron Pte Ltd v Lee Cheow Lee*[81] to the facts:

> (a) The Appellants must have made a representation of fact by words or conduct.
>
> (b) The Appellants must have made the representation with the intention that Tembusu should act upon it.
>
> (c) Tembusu must have acted upon the representation.
>
> (d) The Appellants must have made the representation:
>
> (i) knowing that it is false;
>
> (ii) without any belief in its truth; or
>
> (iii) recklessly, without regard to whether it is true or not.
>
> (e) Tembusu must have suffered damage by acting upon the misrepresentation.

80 [2016] 5 SLR 335.
81 [2001] 2 SLR(R) 435 at [14].

26.76 There were two statements alleged to give rise to the tort. The first statement, made in October 2011, was that ACTAtek "required funds to invest in 'inventory' and 'sales/marketing' in order to take full advantage of the opportunity to work with [a target company]". Menon CJ held that this statement could not be construed as a representation of fact as to the appellant's intention as it was made even before negotiations had commenced. The second statement, made in December 2011, represented that the funds would be used for certain purposes only. The respondents alleged that the funds were used for a different purpose. Menon CJ held that this statement was a representation of fact as to the intention of the parties and could be the basis of an action in deceit, if it were made fraudulently. On the evidence, the appellant had made this statement believing that payment of salaries was one of the legitimate purposes of the funds. As such, the representation was not made with the knowledge or belief that it was false, and hence the action failed.

26.77 *Heinrich Pte Ltd v Lau Kim Huat*[82] involved a lawsuit between two former business partners who had a falling out. The defendant was the director of the second plaintiff (Heinrich Pte Ltd) in which the first plaintiff had a controlling interest. The defendant left the plaintiffs to establish his own business, following which the plaintiffs sued him for breach of a joint venture agreement, breach of duty of care, and misrepresentation. Abdullah JC dismissed all the claims for lack of evidence. The case did not raise any novel or controversial legal point.

26.78 The plaintiff in *Ong Ghee Soon Kevin v Ho Yong Chong*[83] was a Malaysian citizen who was a banking customer of a Singaporean branch of a Swiss bank. The defendant was an employee of the bank. The plaintiff lost US$655,000 purchasing shares in a company that eventually became worthless. He sued the defendant, alleging negligent misrepresentation. There was an issue of private international law pertaining to Swiss law, which will not be dealt with here. Ang J dismissed the plaintiff's claim on the basis that he had failed to prove that the alleged representation even took place.

Negligence

26.79 The plaintiff and defendant in *Te Deum Engineering Pte Ltd v Grace Electrical Engineering Pte Ltd*[84] occupied adjoining units in a single-storey terrace block. A fire broke out, damaging both properties.

82 [2016] SGHC 116.
83 [2017] 3 SLR 711.
84 [2016] SGHC 232.

The plaintiff sued, alleged that the fire had started in the defendant's unit and spread to the plaintiff's unit. The defendant denied this and countersued, alleging that the fire had started in the plaintiff's unit. Prior to this action, the defendant had pleaded guilty to charges under the Fire Safety Act[85] and accepted that the fire had started on its premises, contrary to its subsequent denial in the civil action.

26.80 Ang J found on the evidence that the fire had started in the defendant's premises. Having made that determination, Ang J applied the *res ipsa loquitur* maxim to find the defendant negligent as the premises were in the defendant's control, there was no explanation for the cause of the fire and it would not have occurred but for some negligence.

26.81 *Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal*[86] was a tragic case involving the death of a National Serviceman during training. The deceased, who was asthmatic, suffered breathing problems during an exercise in which smoke canisters were discharged. He, subsequently, died due to an acute allergic reaction to a particular chemical in the smoke. The deceased's estate (plaintiff) sued the platoon commander (first defendant) and the chief safety officer (second defendant) in negligence as well as the attorney-general ("AG") for alleged breach of contract.

26.82 The particulars of negligence alleged against the first defendant included: failure to comply with the Training Safety Regulations ("TSR"); failure to consider the deceased's asthmatic condition, and detonation of six smoke grenades rather than two as stated in the TSR. Similar allegations were made against the second defendant in addition to allegations of failure to prepare for adequate and timely medical intervention. A committee of inquiry ("COI") convened by the Armed Forces Council found the first defendant negligent in using more than two smoke grenades and further opined that the increased amount of smoke had increased the risk of the adverse reaction that resulted in death.

26.83 The two defendants and the AG applied to strike out the action. Ramesh JC granted the application by the two defendants on the ground that s 14 of the Government Proceedings Act[87] ("GPA") provided immunity against suit. The AG's application was granted on the ground that there was no contract of service between the deceased and the Singapore Armed Forces ("SAF"). This section deals only with the tort

85 Cap 109A, 2000 Rev Ed.
86 [2016] 4 SLR 438.
87 Cap 121, 1985 Rev Ed.

claim. The COI findings suggested that the first defendant had been negligent and that his negligence had caused the death of the deceased. The issue for the High Court was whether the GPA provided immunity both for the Government and for the two defendants.

26.84 Ramesh JC noted that s 14 of the GPA has its roots in s 10 of the UK Crown Proceedings Act 1947[88] ("1947 UK Act"). The 1947 UK Act abolished the immunity of the Crown but, by s 10, retained the immunity for the armed forces to enable the armed forces to carry out their duties and training without fear of litigation. This was the same justification offered for s 14 of the GPA when it was debated in the Parliament. Section 10 of the 1947 UK Act was, however, repealed by the UK Crown Proceedings (Armed Forces) Act 1987[89] and replaced with a much more limited immunity, which Ramesh JC noted is not the case in Singapore. Thus, while the 1947 UK Act is relevant to the interpretation of the Singapore legislation, it bears noting that the UK has moved away from its own earlier position and provided greater protection for its servicemen by restricting Crown immunity.

26.85 A proviso to s 14(1) stated that the immunity will not apply to acts or omissions that are not connected with the execution of duties as a member of SAF. The plaintiff argued that the first defendant's flagrant breach of the TSR by detonating six, instead of two, canisters meant that his actions were not in connection with the execution of his duties. Ramesh JC rejected this argument on the ground that the first defendant's actions were not intentional but merely negligent, and the point of the immunity was to protect individuals and the Government from liability for tortious conduct. Holding that the immunity applied, Ramesh JC struck out the claim.

Professional negligence

26.86 The appellant in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*[90] was a senior financial services director with AXA Life Insurance, the respondent. His relationship with the group soured and he left, following which he applied to join Prudential Assurance Company Singapore Pte Ltd ("Prudential"), failing which, he applied to join Tokio Marine Life Insurance Singapore Limited ("Tokio Marine"). The regulatory framework of the financial advisory and insurance industry required a reference to be provided by the previous employer. Prudential sought a reference, which the respondent provided, in which it highlighted the appellant's apparent poor record in terms of

88 c 44.
89 c 25.
90 [2016] 4 SLR 1124.

persistency ratios and ethical conduct. Prudential eventually decided not to hire the appellant. The appellant's application to Tokio Marine met the same fate. The appellant sued the respondent for defamation, malicious falsehood, and negligence.

26.87 All three claims failed in the High Court. For the negligence action, the High Court held that a duty was owed, but not breached and that, in any case, it was not shown that the respondent's reference had caused the appellant's loss of employment. The appellant appealed against the decision with respect to negligence. The Court of Appeal allowed the appeal and gave detailed guidance on how to determine the standard of care and breach thereof in negligence.

26.88 The Court of Appeal noted that the appellant was hired by the respondent and promoted, indicating that he was a good performer. At some point, the appellant was assured that his performance would be evaluated on his persistency ratio for regular premiums and not for single premiums. As a result, the appellant focused his energies on selling regular premium products. Following a management change, the appellant was informed that his, and his team's, performance would be evaluated on the basis of both types of premiums. This caused unhappiness and led to a breakdown in the relationship, culminating in the appellant leaving the respondent.

26.89 Menon CJ, delivering the judgment of the court, affirmed that a duty of care exists in this type of cases, applying *Spring v Guardian Assurance plc*[91] ("*Spring*") and *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[92] ("*Spandeck*"). Menon CJ then gave a detailed analysis of the standard of care applicable to employers providing references for their former employees. Following a comprehensive review of the English authorities, Menon CJ set out the applicable principles in Singapore, reproduced below for convenience:[93]

> (a) The employer must exercise reasonable care to ensure that: (i) the facts stated in the reference are true; and (ii) any opinions expressed there are based on, and supported by, facts which are true …
>
> (b) The employer must also exercise reasonable care to ensure that the reference does not give an unfair or misleading overall impression of the employee, even if the discrete pieces of information which it contains are factually correct. In other words, due care must

91 [1995] 2 AC 296.
92 [2007] 4 SLR(R) 100.
93 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [102].

> be taken to ensure that the reference is not only *true*, but also *accurate* in the sense of not being misleading or unfair …
>
> (c) The employer is required to exercise reasonable care to disclose any information that relates to information which has already been provided, where to withhold such further information would render the information that has been disclosed incomplete, inaccurate or unfair …
>
> (d) Subject to the foregoing qualifications, the employer is *not* required to give a full and comprehensive reference or to include *all* material facts about the employee in the reference …
>
> (e) In general, the employer should not include in the reference, whether explicitly or implicitly, complaints or other allegations against the employee that the latter had no knowledge of and had not been given an opportunity to explain or defend himself against …
>
> (f) In assessing what constitutes reasonable care, regard will be had to the gravity of any adverse suggestion or inference contained in the reference …
>
> [emphasis in original]

26.90 Menon CJ justified the standard of care on the basis that the employee was at risk of significant harm; there was an inherent risk that an employer might wish to discredit an employee who sought to join a rival; and the employee was typically unable to protect his own interest. Turning to the facts, Menon CJ noted that there were three particulars of negligence, respectively pertaining to the persistency ratios, compliance issues, and ethical violations. On the first, Menon CJ found that the respondent was negligent in using a 13-month period to determine the persistency ratio instead of the standard 19-month period. The 13-month period, although factually accurate, provided a misleading picture of the appellant's persistency ratio, suggesting he was less successful. The respondent's negligence was compounded by its failure to respond to repeated inquiries from Prudential for clarification, as the appellant separately had provided Prudential with the 19-month figures.

26.91 Similarly, Menon CJ found that the respondent had misled Prudential in its statements on compliance issues, suggesting that there were serious problems when in fact it was only some members of the appellant's team that had been investigated and found guilty of compliance breaches. Finally, the information on alleged ethical violations was also inaccurate and, indeed, the tone of the communication suggested that the respondent had deliberately exaggerated some of the facts and made unfair insinuations.

26.92 On causation, Menon CJ reiterated that the approach was a commonsensical one. Referring to Lord Lowry in *Spring*,[94] Menon CJ held that in cases of negligent references, all the plaintiff has to show is that the defendant's negligent reference caused him to lose a reasonable chance of employment, not that the plaintiff would have been employed but for the defendant's negligence. Causation was made out as Prudential had refused to hire the appellant due to the delays caused by the respondent.

26.93 The defendants in *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC*,[95] were a law firm (first defendant) and its senior director (second defendant), who were sued by their client, the plaintiff, for professional negligence. Briefly, the case involved transnational investment, and the alleged negligence, which was the sole issue in the Court of Appeal, was the failure of the second defendant to check with the Indonesian lawyers as to the enforceability of an oral undertaking made by the counterparty on which the plaintiff relied.[96]

26.94 Menon CJ, delivering an *ex tempore* judgment, found the defendants not negligent, holding that the precise duty in question had to be identified, and that it was not sufficient to assert a broad duty to advise. This approach may be contrasted with the Court of Appeal's approach in *Go Dante Yap v Bank Austria Creditanstalt AG*,[97] where Andrew Phang Boon Leong JA argued that tortious duties should not be too specific. Instead of describing the duty in Go Dante Yap as one to advise, Phang JA described it as "a broad duty to take such care as [was] reasonable in the circumstances",[98] leaving the more specific issue of what the defendant should have done to be discussed under the rubric of breach of duty.

Medical negligence

26.95 *Koo Quay Keong v Ooi Peng Jin London Lucien*[99] was a medical negligence case in which a patient who underwent Whipple surgery passed away following post-operative complications. The estate (plaintiff) brought an action in negligence against the defendant surgeon, alleging that the defendant failed to provide timely and

94 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 327.
95 [2016] 2 SLR 928.
96 See (2015) 16 SAL Ann Rev 632 at 657–658, paras 26.60–26.62 for the full facts discussed in *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC* [2015] SGHC 146.
97 [2011] 4 SLR 559.
98 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [19].
99 [2016] 5 SLR 130.

appropriate care between the Whipple surgery and two subsequent surgeries. Initially, the plaintiff had also alleged negligent failure to inform and negligent performance of the surgery, but dropped these two allegations as the trial commenced.

26.96 Reduced to its essentials, the particulars of negligence were that the defendant had failed to order CT scans to detect any possible anastomotic leaks and had been negligent in ordering liquid feeds, which potentially exacerbated the situation. Woo Bih Li J reaffirmed the *Bolam*/*Bolitho*[100] test for medical negligence in Singapore as stated in *Khoo James v Gunapathy d/o Muniandy*[101] ("*Gunapathy*") and reiterated two key propositions. A doctor could endorse a practice as proper even if he would have adopted a different approach[102] and diagnostic tests need not be ordered unless the plaintiff could prove a medical basis for them.[103]

26.97 Applying the law to the facts, Woo J found that the defendant had not been negligent in failing to order the CT scans or in permitting oral feeds. Even if there had been negligence in failing to order a scan, the plaintiff would have failed to prove causation as there was no evidence to suggest that the proposed intervention (percutaneous drainage) to remove the fluids could have been performed in light of the plaintiff's condition. On the oral feeds, Woo J preferred the defendant's expert view that this course of action was not negligent.

26.98 *Hii Chii Kok v Ooi Peng Jin London Lucien*[104] ("*Hii Chii Kok*") is an important decision on medical negligence as it was the first local decision on medical negligence to consider two landmark decisions of the UK Supreme Court: *Woodland v Swimming Teachers Association*[105] ("*Woodland*") on non-delegable duties and *Montgomery v Lanarkshire Health Board*[106] ("*Montgomery*"), which overruled *Sidaway v Board of Governors of the Bethlem Royal Hospital*[107] ("*Sidaway*") on the duty to inform. *Hii Chii Kok* has been appealed to the Court of Appeal.

100 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City and Hackney Health Authority* [1998] AC 232.
101 [2002] 1 SLR(R) 1024.
102 *Koo Quay Keong v Ooi Peng Jin London Lucien* [2016] 5 SLR 130, citing *D'Conceicao Jeanie Doris v Tong Ming Chuan* [2011] SGHC 193.
103 *Koo Quay Keong v Ooi Peng Jin London Lucien* [2016] 5 SLR 130, citing *Chua Thong Jiang Andrew v Yue Wai Mun* [2015] SGHC 119.
104 [2016] 2 SLR 544.
105 [2014] AC 537.
106 [2015] AC 1430.
107 [1985] AC 871.

26.99 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, 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.

26.100 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.
>
> (d) The first defendant was negligent in the post-operative care.

26.101 Chan Seng Onn J, in a detailed judgment found against the plaintiff on all the allegations. Referring to the *Woodland* principles, set out below at paras 26.162–26.163 and the English Court of Appeal decision of *Farraj v King's Healthcare NHS Trust*,[108] Chan J held that a hospital can be held to owe a non-delegable duty to its patients. On the facts of the particular case, Chan J held that the plaintiff was not in the care, custody, or control of NCCS nor did NCCS assume responsibility for the surgery or post-operative care, both of which were undertaken by the first defendant at SGH. Further, the plaintiff had control over who would perform the surgery, and was not obliged to select the first

108 [2010] 1 WLR 2139.

defendant. As such, the *Woodland* requirements were not satisfied. Further, Chan J noted that it would not be fair and just to hold NCCS liable for the outcome of a surgery performed at another institution simply because it was performed by a surgeon it had recommended.

26.102 NCCS's responsibility was limited to the pre-operative diagnosis and advice. Interestingly, as an aside, Chan J held that NCCS could be held vicariously liable for the first defendant's negligence in so far as it pertained to any service provided on behalf of NCCS during the pre-operative period. This raises some fairly important questions as to when an institution may be held vicariously for the torts of an independent contractor. Presumably, the first defendant was not an employee of NCCS as, otherwise, NCCS would have been vicariously liable for the surgery and post-operative care. The extent of a hospital's vicarious liability in a complex healthcare system is a matter that deserves attention.

26.103 Chan J reiterated that the test for medical negligence had been authoritatively stated in *Gunapathy*, endorsing the *Bolam*/*Bolitho* approach. Noting that the evidence of the defendant's expert witness was logical and defensible, Chan J found the first defendant not negligent in his post-operative care. On the duty to advise, Chan J considered the recent UK Supreme Court decision of *Montgomery*, which had overruled *Sidaway* and rejected the *Bolam* test with respect to the duty to inform on the ground that the doctor–patient relationship has evolved with patient autonomy assuming a more significant role. Under the *Gunapathy* test, a doctor is required to disclose risks that a reasonable doctor considers material; under the *Montgomery* test, a doctor is required to disclose risks that a reasonable patient considers material, or risks which the doctor knows or ought to know that the particular patient will consider material.

26.104 Referring to earlier High Court decisions applying *Gunapathy* to the duty to inform, Chan J noted that whether Singapore should follow *Montgomery* is a matter to be determined by the Court of Appeal. Applying *Gunapathy*, Chan J found that the defendants had not been negligent in discharging their duty to inform and advise. Chan J went on to say that the defendants would not have been negligent even under the test enunciated in *Montgomery*, noting that both defendants had been comprehensive in their discussions with the plaintiff and commending them for ensuring that the plaintiff understood all the risks.

Employers' liability

26.105 In *Wang Baoshun v B19 Technologies Pte Ltd*,[109] the plaintiff, a construction worker was injured when a nail he was hammering broke and a shrapnel struck him in the eye. The injury was superficial and he made a full recovery before returning to work. The plaintiff, who had a pre-existing condition in the same eye, asked the doctor, during his medical review, to implant a secondary lens to treat his problem, which the doctor did. Subsequently, the plaintiff quit work and left Singapore for his native China before commencing an action against his employer alleging a failure to provide protective gear. On the evidence, District Judge Chiah Kok Khun found that the plaintiff had been provided safety gear but had chosen not to wear the eye goggles. The claim was dismissed.

26.106 *ECK Engineering & Construction v TTJ Design and Engineering Pte Ltd*[110] was a case which involved the liability of a temporary employer (defendant) to reimburse the main employer (plaintiff) for the costs of medical expenses incurred by the plaintiff to compensate the employee, who was injured while working for the defendant. The case proceeded on an unconventional route with the plaintiff, alleging that the defendant owed it a duty directly, rather than seeking contribution as a joint tortfeasor. Briefly, the plaintiff and defendant were companies in the construction industry. The defendant had engaged the plaintiff as its labour subcontractor on several occasions and, each time, a work order setting out the terms and conditions would be issued by the plaintiff. On the occasion giving rise to the incident, the defendant did not sign the work order, but instead sent a "cross-deployment of construction worker" letter setting out the terms and conditions. The plaintiff signed the letter and attached a copy of its Work Injury Compensation Act[111] ("WICA") certificate of insurance.

26.107 The employee was injured at work and a dispute arose as to whether the plaintiff or defendant was liable for the employee's medical costs. The plaintiff argued that the standard work order terms, which obliged the defendant to be liable for medical costs, applied. The defendant argued that the cross-deployment letter applied, under which the plaintiff was solely liable. District Judge Lorraine Ho determined that the cross-deployment letter set out the relevant contractual terms between the parties. That should have disposed of the matter, but District Judge Ho then went on to consider the plaintiff's argument that

109 [2016] SGDC 170.
110 [2016] SGDC 165.
111 Cap 354, 2009 Rev Ed.

the defendant owed the plaintiff a duty not to cause it economic loss by failing to take care of its employee.

26.108 This is a novel claim for economic loss, with the closest analogy being a claim for loss of service. Looking more closely at the facts, the employee made a claim under the WICA for injuries sustained at work when scaffold pipes, tied together for removal, came loose and fell on the employee. The quantum of damages under the statutory WICA claim was capped at S$25,000, so the plaintiff claimed the balance (S$83,849.07) from the defendant, presumably on the basis of a negligence claim. On the facts, it would appear that the real issues were whether the employee was owed a non-delegable duty by the plaintiff, thus making the plaintiff and defendant concurrently liable, and whether the contract specifically dealt with such liability.

26.109 The claim by the plaintiff, however, was pitched differently, arguing for a direct duty owed by the defendant to the plaintiff not to cause it economic loss. District Judge Ho applied *Spandeck*. On factual foreseeability, the defendant argued that it was not foreseeable that the plaintiff would suffer damage as it was covered by WICA insurance as required under the contract between the plaintiff and defendant. This argument ignores the critical point that the insurance would only be payable if the plaintiff were to be held accountable and, that is to say, the plaintiff would be obliged to compensate the employee, the very loss in this case. District Judge Ho's application of the foreseeability test is unclear as she distinguished between duty and remoteness without making clear what exactly had to be foreseen. Surely, in an economic loss case, some economic loss has to be foreseeable.[112]

26.110 Moving to proximity, District Judge Ho considered the plaintiff's argument based on *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*[113] and rightly distinguished that case as one in which the court was concerned with determining whether an independent contractor of the main employer could be treated as the employer of the main employer's employee for the purpose of establishing an employer's duty. This is the very question that needed to be determined in this case – was the defendant the employer for the purposes of establishing a duty to the employee to provide a safe working environment? District Judge Ho indeed held that the defendant was the common law employer of the employee and hence owed a duty to the employee to provide a safe working environment.

112 See *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735.

113 [1997] 2 SLR(R) 746.

26.111 The defendant then raised two arguments to deny this duty. First, it argued that under the contract, the plaintiff was under a duty to pay for the employee's expenses. However, this did not negate the common law duty owed by the defendant; it simply created a contractual indemnity. Secondly, relying on *Chandran a/l Subbiah v Dockers Marine Pte Ltd*,[114] the defendant argued that the plaintiff, as employer, owed a non-delegable duty to its employees and, therefore, the defendant did not owe a duty to the employee. District Judge Ho, holding that under a non-delegable duty the task could be delegated but not the duty, found that there was no proximity between the defendant and plaintiff for a duty to arise.

26.112 With respect, the discussion on non-delegable duties is confusing. Put simply, the plaintiff as employer owes a duty to the employee. The defendant, also as employer, owes a duty to the employee. The duty of an employer to an employee is generally non-delegable; thus, if the employer delegates performance of a task pertaining to employee safety to an independent contractor who is negligent, the employer will remain liable, jointly with the independent contractor. Here, the plaintiff had supplied an employee to work for another company, wholly under that company's control and supervision. It is doubtful if a non-delegable duty attaches in such a case.[115]

26.113 This case was unnecessarily complicated by considering a direct duty owed by the defendant to avoid economic loss to the plaintiff and by conflating the alleged non-delegable duty of the plaintiff to the employee with the separate common law duty of the defendant to the employee. District Judge Ho was correct in her conclusion that the defendant was not liable to the plaintiff as the contract clearly allocated the liabilities of the parties.

Road traffic

26.114 *Mohamed Rafin Bin Kadim v Chia Sze Kim Justin Mark*[116] involved a motor vehicle accident between the plaintiff's and the defendant's cars. The defendant and plaintiff gave contradictory versions of the accident. Based on the evidence, the judge preferred the plaintiff's version, finding the defendant negligent and the plaintiff 20% contributorily negligent.

114 [2010] 1 SLR 786.

115 See *Woodland v Swimming Teachers Association* [2014] AC 537 at [30]–[31] and *A (A Child) v Ministry of Defence* [2005] QB 183.

116 [2016] SGMC 14.

26.115 *Hazwani Binte Amin v Chia Heok Meng*[117] was a motor vehicle accident case in which the plaintiff, riding a motorcycle, was injured in a collision with the defendant's car at a traffic intersection. The dispute was on who had the right of way. It was a purely factual decision with District Judge Kenneth Choo finding that the plaintiff had the right of way and that the plaintiff had not been contributorily negligent.

Nuisance

26.116 The case of *Nasraf Lucas Muzayyin v Shi Ka Yee*,[118] as District Judge Chiah sitting in the Magistrates' Court observed, "centred round a tree" and "[f]rom it sprouted claims in nuisance, trespass and assault". The plaintiffs and defendant were adjoining owners and occupiers of adjacent properties. The rain tree on the defendant's property grew and its large and thick branches started to overhang the plaintiffs' property. The plaintiffs sought the consent of the defendant via a letter to engage an arborist and a contractor to trim the tree but there was no response from the defendant. The plaintiffs proceeded to engage the arborist and contractor. During the trimming process, the defendant entered into the plaintiffs' property and shouted profanities at the first plaintiff, and left when she was told to leave by the first plaintiff. However, she re-entered the property and removed the ignition keys of the truck belonging to the contractor, thereby shutting down the cherry-picker, leaving the contractor's worker stranded in the tree. When told by the first plaintiff to return the keys, she revved her car engines and drove her car towards the first plaintiff.

26.117 All three claims succeeded. The overhanging tree constituted an unreasonable interference with the plaintiff's use and enjoyment of the property and, hence, a nuisance. In addition, the falling of dead branches from the tree posed a hazard. The first plaintiff was entitled to recover damages in respect of the expenditures he incurred to abate the nuisance and the amounts paid to the arborist and contractor to trim the rain tree. As the nuisance was a continuing one, the learned district judge ordered the defendant to trim the branches of the tree to fully abate the nuisance, failing which the plaintiff was at liberty to engage its own arborist and contractor to trim the branches with the expenses to be borne by the defendant.

26.118 Further, the defendant, having trespassed on the plaintiffs' property without permission, was liable for aggravated damages of S$4,000 due to her "high-handed, insulting and oppressive conduct" and

117 [2016] SGDC 8.
118 [2016] SGMC 26.

the fact that she was "clearly unrepentant".[119] The objective was to compensate the plaintiff for the additional distress and injury to his feelings.[120] Finally, for the claim in assault, the action of the defendant in revving her car and driving towards the first plaintiff would have caused the first plaintiff reasonably to apprehend the infliction of immediate and unlawful force, justifying an award of S$1,500 in damages.

26.119 On appeal, the High Court in *Shi Ka Yee v Nasrat Lucas Muzayyin*[121] affirmed the decision of the Magistrates' Court. Counsel for the appellant (defendant) argued that the tree in question was protected under s 14(1) of the Parks and Trees Act[122] and could not be cut. However, s 14(6) stated that a protected tree may be cut "where the condition of the tree constitutes an immediate threat to life or property". In this regard, the High Court noted the Magistrates' Court's finding that the tree with dead branches posed a hazard and held that the plaintiffs were, therefore, entitled to cut the branches of the tree.

Remedies

26.120 The deceased in *Zhu Xiu Chun v Rockwills Trustee Ltd*[123] died following a negligently performed liposuction. The estate and dependents were awarded a total of S$5,260,653.58. The defendants appealed to reduce the sum and the plaintiff (the administrator acting for the estate and dependants) appealed to increase it. The dependants were the deceased's mother, his ex-wife (Ms Quek) and his two children. The defendants accepted liability but challenged the assessment of damages with respect to the coroner's fees, dependency award to Ms Quek and the children, and the quantum for loss of inheritance.

26.121 Chao Hick Tin JA, delivering the judgment of the court, referred to Singaporean and English authorities allowing awards for the cost of coroner's inquiries and held that the coroner's inquiry fees were claimable as long as they were reasonable. On the dependency claim by Ms Quek, evidence was accepted that the deceased was paying her S$9,000 a month in maintenance, of which S$7,000 was used for the children. The trial judge, thus, used S$2,000 as the multiplicand. On the assumption that the deceased had 21 years of working life left, the trial judge used a multiplier of 12.6 derived by applying a 40% discount to the number of working years to reflect the accelerated benefits and vicissitudes of life.

119 *Nasraf Lucas Muzayyin v Shi Ka Yee* [2016] SGMC 26 at [24].
120 *Joseph W Horsford v Lester B Bird* [2006] UKPC 3 at [14].
121 [2016] 4 SLR 972.
122 Cap 216, 2006 Rev Ed.
123 [2016] 5 SLR 412.

26.122 Pointing to precedents, the defendant argued for a higher discount. Chao JA held that the multiplier of 12.6 was not out of sync with existing precedents and did not change it. The defendant argued that as Ms Quek had divorced the deceased, she should only be entitled to support for a short period, on the assumption that the deceased would not continue supporting her. Chao JA rejected this argument, pointing out that reforms to the Civil Law Act[124] are to ensure that former wives are able to be treated as dependants. The key question was whether there was a reasonable expectation of pecuniary benefit, not the status of the dependant as a spouse or ex-spouse. On the facts, it was clear that the deceased intended to provide ongoing maintenance and, thus, Ms Quek had a reasonable expectation of this pecuniary benefit. The trial judge's award was, thus, not varied.

26.123 The defendants challenged the quantum of dependency damages for the younger child, arguing that the Ms Quek, who was earning well could provide for the child and that the multiplier should be reduced. Chao JA rejected both arguments, holding that the fact that Ms Quek was earning was irrelevant as the deceased had independently provided for the child. That was a pecuniary benefit that the child continued to expect separately from any resources provided by the mother. The multiplier was held to be reasonably arrived at. Chao JA increased the award to the children to account for annual vacation costs which the deceased would have provided, but which the trial judge did not award. This was assessed at S$7,000 per annum per child. Similarly, a one-off amount for driving lessons was added. The trial judge had awarded an additional S$500 per month to account for the university years. Chao JA held that this was inadequate and varied it to an additional S$1,000 per month for the university years.

26.124 In calculating the loss of inheritance, Chao JA held that the conventional multiplier–multiplicand approach should be used to determine the quantum that would have been saved by the deceased and been available to the dependants as their inheritance. The plaintiff argued that the sum should be enhanced by factoring in compound interest on the assumption that the deceased would have invested his savings and thus grown the nest egg. Chao JA rejected this argument as too speculative, although he held that if there was clear evidence that the deceased had been generating a consistent rate of return, then that would be taken into account. Here, there was no such evidence. Chao JA also held that the post-retirement costs of the deceased should be taken into account.

124 Cap 43, 1999 Rev Ed.

26.125 Chao JA held that the trial judge had not erred in determining the multiplicand, but held that the trial judge had erred in applying the same 40% discount used to determine Ms Quek's dependency claim to derive the multiplier for the children's inheritance claim. This was because the discount was in part to reflect the value of the accelerated benefit, which in the case of the dependency claim was 21 years, based on the notional retirement age of 65. The inheritance, however, would only be triggered on the deceased's notional death at 80, 15 years later. Thus, there was a greater accelerated benefit with the inheritance (36 years as opposed to 21 years) which necessitated a greater discount. Taking this factor as well as the diminishment of the deceased's wealth due to the post-retirement personal expenses, Chao JA applied a 70% discount, which resulted in a net figure of S$3,698,100. Based on the deceased's last known will, the trial judge decided that 52.56% of that amount would constitute the children's inheritance.

26.126 The defendants' argument that the children would no longer be dependants at the time of inheritance was rightly treated as irrelevant by Chao JA. The inheritance was a pecuniary benefit that they reasonably expected regardless of whether they were dependants at the time.

26.127 The plaintiff in *Siew Pick Chiang v Hyundai Engineering and Construction Co Ltd*[125] was cycling along a pavement when she was struck by cables falling from the defendant's worksite. The defendant was found 100% liable in negligence; this decision concerned the assessment of damages. Although the physical injuries sustained by the plaintiff were minor, they led to severe psychiatric injury in the form of post-traumatic stress disorder ("PTSD") resulting in the plaintiff being hospitalised for more than two years, including up to the time of the assessment of damages.

26.128 The plaintiff claimed over S$26m in damages. The significant heads were:

(a) medical and hospital expenses (pre-trial: S$2.6m, post-trial: S$11m);

(b) part-time caregivers for the plaintiff and her son (pre-trial: S$940,000, post-trial: S$5.1m);

(c) loss of earnings (pre-trial: S$450,000, post-trial: S$1.7m);

(d) taxi fares (pre-trial: S$53,000, post-trial: S$1.25m); and

(e) pain and suffering: S$261,000.

125 [2016] SGHC 266.

After a detailed assessment, Woo J awarded the plaintiff almost S$8.65m, a record figure in a personal injuries claim. The key heads of damage are noted below.

26.129 The main head under pain and suffering was a claim for S$80,000 for the PTSD. Even though the range for severe PTSD under the *Guidelines for the Assessment of General Damages in Personal Injury Cases*[126] set a range of S$25,000–S$50,000, Woo J held that the severity of PTSD in this case was such that the normal range did not apply and awarded S$80,000. Smaller sums were awarded for, among other things, loss of memory, head-related injuries, vertigo, fibromyalgia, and other muscular degeneration. Woo J also awarded S$6,000 for the plaintiff's loss of marriage prospect, arguably a head of damages that is outdated.

26.130 The main head of damages under special damages related to medical and hospital expenses. Woo J carefully examined the expenses that were necessary, for which reasonable awards were made and disallowed claims for expenses that were deemed unnecessary or unreasonable. One notable example of an unreasonable expense was that plaintiff's claim for hospital stays on the basis of an executive room or suite. These were disallowed, although Woo J held that the plaintiff was entitled to stay in a normal single room. The defendant argued that the plaintiff should have stayed at a restructured hospital where the costs would have been lower. Given the seriousness of the plaintiff's PTSD, Woo J accepted that it would not have been reasonable to move the plaintiff out of the care of the team of doctors treating her at Mount Elizabeth Hospital. The principle here is that the plaintiff was entitled to reasonable medical care, which in her particular case would not be afforded if she were to be transferred to a restructured hospital. Woo J allowed the plaintiff's claim for her hospital bill at 80% of the total claim.

26.131 On the plaintiff's pre-trial claim for taxi fare, Woo J held that reasonable transport expenses should be awarded rather than the claimed S$53,000 for which no receipts had been provided. A reasonable amount was calculated on the basis of S$300 per month for 22 months from April 2014 to February 2016, amounting to S$6,600. The part-time care claim of almost S$940,000 was also not supported by documentary evidence or receipts. Woo J awarded a sum based on the cost of full-time care for the 76 months from the date of the accident to the assessment, which amounted to S$51,680 calculated at S$680 per month. The claim for part-time care for her son was dismissed for lack of evidence. A modest amount was also awarded for equipment.

126 *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010).

26.132 For general damages, Woo J calculated the loss of future earnings using a multiplicand of S$6,000, based on her average monthly income in the three years leading up to the accident. The plaintiff was 42 years old at the time of assessment and was assumed to continue working till 72 years, giving 30 years of lost earning years. Taking into account the benefit of accelerated payment and the vicissitudes of life, Woo J used 15 years as the appropriate multiplier and awarded S$1,080,000.

26.133 For future expenses, Woo J used the life expectancy of 85 years, reduced to 80 years to account for the plaintiff's loss of life expectancy due to her accident, leaving her with 38 years to be compensated. Woo J based the multiplier on half of that, which was 19 years. Appropriate multiplicands were used for the various medical costs, including doctors' fees, treatments, and medication. The multiplicand for future hospital stays was calculated based on the plaintiff's actual costs but adjusted to eliminate the excess costs such as executive room stay, food for visitors and so on. The future hospital stay was calculated on the basis of two distinct periods: from the date of assessment to the end of 2016 on the assumption that the plaintiff would be in hospital for the whole period; and from January 2017 for 17 years on the assumption that the plaintiff would require one months' hospital stay each year.

26.134 The plaintiff's future transport costs were calculated on the basis of S$300 per month for 19 years. Future caregiver costs were calculated on the basis of employing a foreign domestic worker at S$678 per month for 19 years. Further damages were awarded for miscellaneous costs. The damages were awarded with interest at 3% from the date of the writ of summons to the date of judgment and at the statutory rate of 5.33% from the date of judgment to the date of payment.

26.135 *Seow Hwa Chuan v Ong Wah Chuan*[127] involved two law suits arising from personal injuries suffered in two road accidents in 2006 and 2007 respectively. For the first accident, interlocutory judgment was given against the defendant with damages to be assessed. The second suit was settled and consent judgment entered against another party with damages to be assessed. The deputy registrar assessed the damages as follows: pain and suffering (S$30,000); cost of future medical care (S$2,000); and loss of earning capacity (S$40,000). The decision was appealed against by both parties to the District Court, and the plaintiff also argued on appeal that he ought to have been awarded pre-trial loss of earnings.

127 [2016] SGDC 140.

26.136 On appeal, the amount awarded for pain and suffering was increased to S$50,000. The learned judge awarded damages for the personal injuries including the right wrist injury, chest contusion (that is, haematoma) and haematoma on the left elbow and neck strain, exacerbation of pre-existing anterolisthesis, and right traverse process fractures. With respect to the PTSD, the judge noted that this arose from the first accident and that the plaintiff had become better by the time of the second accident. As such, the second accident did not have an impact on the PTSD and the award was limited to the period between the two accidents.

26.137 The award for loss of earning capacity remained at S$40,000. The first accident resulted in the termination of the plaintiff's employment with his then employer. He then looked for a job that would not further aggravate his medical conditions and finally found a job that paid a higher salary than his former job. However, the learned judge noted that if he were to lose the current job, the medical condition caused by the first accident would put him at a disadvantaged position. In arriving at the award, the learned judge also took into consideration the finding that it was unlikely that the plaintiff could have achieved higher qualifications as an engineer and be promoted to a higher position had he remained in the company.

26.138 With regard to the claim for future medical expenses, a nominal sum of S$5,000 was awarded. It was not clear from the evidence whether the injuries (namely the degeneration of the cervical spine and lumbar spine), which required future medical treatment was attributable to the first accident or stemmed from the plaintiff's pre-existing medical conditions.

26.139 Finally, as to the award for the loss of earnings during the four months when the plaintiff was unemployed, there was evidence that the plaintiff expended efforts to sign up for different jobs despite having residual pain and PTSD from the first accident. However, pre-trial loss of earnings *after* the second accident was denied. The second accident caused him to be hospitalised for four days with four months of hospitalisation leave. The District Court treated the second accident as a "supervening event", which discharged the defendant from further liability for pre-trial loss of earnings after the first accident.

26.140 In *Tan Chee Kiang v Huang He Jue*,[128] the plaintiff, a technician, suffered injuries at the workplace and claimed against a co-worker, the first defendant, and the employer, the second defendant. With regard to the spinal injuries, erectile dysfunction and neuropathic bladder, the

128 [2016] SGDC 250.

plaintiff was awarded S$70,000 as a global sum in respect of the past as well as for the future pain, suffering, and loss of amenities caused by the injuries. The learned judge further provided a breakdown of the sums awarded for each of the injuries based on case authorities.

26.141 The court awarded the plaintiff pre-trial loss of income for the period even after he ceased employment with the second defendant. The second defendant had terminated the plaintiff's employment after he notified the employer of his decision to withdraw his statutory claim for work-injury compensation and, instead, pursue a claim at common law in negligence. The plaintiff attempted to find other jobs but was hampered by his physical disabilities and lack of educational qualifications. Hence, the defendants could not prove that the plaintiff had failed to mitigate his loss by looking for alternative employment.

26.142 The court also awarded the plaintiff S$15,000 for loss of earning capacity taking into account the plaintiff's age at the time of the accident, his injuries, the difficulties to be encountered in competition for jobs, as well as the consequences of the stroke and its effects on his earning capacity. Loss of earning capacity is not merely an alternate measure when a plaintiff is unable to prove his claim for loss of future earnings.[129] Further, loss of earning capacity may be awarded even when the plaintiff was unemployed at the time of trial, that is, where the risk had already eventualised.[130]

26.143 In another personal injuries case in *Sun Delong v Teo Poh Soon*[131] ("*Sun Delong*"), a sum of S$45,000 was awarded in respect of the plaintiff's head injuries (applying the case of *Ang Siam Hua v Teo Cheng Hoe*).[132] However, there was no evidence of psychological injury or cognitive impairment and no proof that the plaintiff had a higher risk of developing dementia or epilepsy as a result of the accident. Awards were also made for various other injuries (including ones in the pelvis/lower limb, shoulder, abdomen, and lung, as well as lacerations and abrasions).

26.144 With respect to hospital and medical expenses and nursing home charges, the plaintiff's employer paid the nursing home charges and part of the hospital/medical expenses and the plaintiff paid the remainder. The employer was responsible under the Employment of

129 *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587.
130 See *Smith v Manchester Corp* [1974] 17 KIR 1, which referred to the weakening of the plaintiff's competitive position in the labour market as an "existing loss".
131 [2016] SGHC 129.
132 [2004] SGHC 147 at [7].

Foreign Manpower Act (Work Passes) Regulations 2012[133] to "bear the costs of the foreign employee's upkeep (excluding the provision of food) and maintenance in Singapore" including "the provision of medical treatment". Choo Han Teck J interpreted the words to mean that employers are obliged to provide for the "medical treatment" of their foreign employees but only to the extent that it is necessary for their "upkeep and maintenance". The defendants were, therefore, not absolved from liability to compensate for the plaintiff's loss just because of the employer's statutory obligation.

26.145 Choo J also cited *Donnelly v Joyce*[134] ("*Donnelly*"), which held that the plaintiff, who was injured by the defendant's negligence in a road accident and needed the special care of his mother who gave up her job, was entitled to recover for his mother's loss of wages on the basis that it was the plaintiff's loss.[135] Choo J found the English Court of Appeal's characterisation in *Donnelly* of the loss based on the *need* for the nursing services to be an "awkward characterization of the plaintiff's loss". He also opined that the *Donnelly* principle (that is, the provision of the needs by the third party is *never* deductible from the damages award even if the plaintiff has neither the legal nor moral obligation to repay the provider) to be "too broad".[136]

26.146 His Honour concluded that the plaintiff should not be allowed to claim from the tortfeasor for needs that have already been provided for by a third party if he is under no obligation to repay the provider. In the present case, the learned judge found that the plaintiff was obliged to repay the money claimed to the employer once he had recovered damages from the defendants and, hence, there would not be any double recovery. The learned judge, thus, awarded the plaintiff the entire sum of hospital/medical expenses and nursing home charges.

26.147 The subsequent case of *Minichit Bunhom v Jazali bin Kastari*[137] ("*Minichit Bunhom*") distinguished *Sun Delong*. A foreign worker was injured in a road traffic accident. The accident occurred in the course of employment with an employer and the employer paid for the worker's medical expenses. The worker claimed the medical expenses as special damages from the tortfeasor.

133 Cap 91A, S 569/2012.
134 [1974] QB 454.
135 *Donnelly v Joyce* [1974] QB 454, applied in *Ang Eng Lee v Lim Lye Soon* [1985–1986] SLR(R) 931.
136 See *Hunt v Severs* [1994] 2 AC 350.
137 [2017] 3 SLR 608.

26.148 The claim was rejected by the court. The Employment of Foreign Manpower Act[138] ("EFMA") imposed a duty on the employer to bear the cost of medical treatment arising from the accident. It is a non-delegable statutory duty. Moreover, in such an instance, there is no expectation of repayment to the employer. The employer also has to maintain a minimum medical insurance under Condition 4 of Part IV of the Fourth Schedule of the Regulations to protect itself from potential liability for the medical expenses. It should be noted that Choo J in *Sun Delong* was not referred to Condition 4 of the Regulations or to *Lee Chiang Theng v Public Prosecutor*[139] on the "heavy responsibilities" that employers owe to their foreign workers under the EFMA. In addition, it is possible to limit *Sun Delong* to a case of medical treatment in respect of injuries suffered *outside of* the course of employment unlike the situation in *Minichit Bunhom*.

26.149 The present decision was also premised on the need to avoid double recovery for the worker arising from two possibilities. First, double recovery would arise if the tortfeasor were to pay the worker for those expenses which had already been paid for by his employer. Secondly, the employer was entitled to claim on the insurance policy maintained on behalf of the foreign employee for the same amount.

Defences

Contributory negligence

26.150 The plaintiff in *Arnold William v Tanoto Shipyard Pte Ltd*[140] was a freelance diver who was injured while carrying out work for the defendants. The defendant had placed large floaters under a barge they were moving, after which they called on the plaintiff to remove two floaters that were stuck under the barge. The floaters were large and filled with high-pressure air. The plaintiff successfully removed the first floater. The second floater suddenly shot out from under the barge and struck the plaintiff, who was waiting in the water for a rope to remove the second floater. The District Court found the defendant negligent in failing to assess the risks, overinflating the floaters and using an unsafe method to remove the floaters. The plaintiff was found 50% contributorily negligent, as the district judge held that the plaintiff, who had 30 years' experience, should have appreciated the risks. In particular, the judge held that the plaintiff had released the air from the floaters

138 Cap 91A, 2009 Rev Ed.
139 [2012] 1 SLR 751.
140 [2016] SGHC 89.

carelessly and had failed to keep a safe distance away from the floater while waiting.

26.151 Lai Siu Chiu SJ allowed the plaintiff's appeal against the finding of contributory negligence. Lai SJ found that the defendant had been negligent in grossly overinflating the floaters and that the plaintiff was justified in assuming that this was a routine procedure. As the plaintiff did not know that the floaters were overinflated, he could not be held contributorily negligent. Lai SJ noted that an appellate court would be slow to interfere with the factual finding of a lower court, but held that in this case, the trial court's finding on contributory negligence was not supported by the evidence.

26.152 *Asnah bte Ab Rahman v Li Jianlin*[141] ("*Asnah*") was a somewhat controversial decision of the Court of Appeal which split 2:1 in determining whether a pedestrian was contributorily negligent. The facts were that a taxi, driven by the defendant, collided with the plaintiff while he was crossing a dual carriageway road at a signalised pedestrian crossing with the light in his favour. The plaintiff had safely crossed the first lane before he was hit by the taxi as he stepped into the second lane. The defendant conceded negligence, but raised the defence of contributory negligence, which failed at the High Court. On appeal, the Court of Appeal decided by majority that the plaintiff (respondent) had been contributorily negligent and reduced his damages by 15%.

26.153 Chao JA (with Quentin Loh J), delivering the majority judgment, identified the three critical questions for determination; the first two were of general application and the third specific to the case:

> (a) Does a pedestrian owe himself a duty to check for oncoming traffic before entering a signalised pedestrian crossing even with the lights in the pedestrian's favour?
>
> (b) Has a pedestrian a duty to keep a proper lookout before stepping onto the second half of the road?
>
> (c) Did the respondent fail to keep a proper lookout?

On the first question, Chao JA noted that while Singaporeans are generally law-abiding, that does not necessarily mean that pedestrians shall be lulled into a false sense of security and assume that there will be no careless drivers on the roads. Relying on statistics of motorists running red lights, Chao JA held that this is a real risk which reasonable pedestrians have to guard against. It was no defence for the pedestrian to argue that he or she had a lawful right to cross the road when the

141 [2016] 2 SLR 944.

lights were in favour: the point was that there was a foreseeable risk that the respondent should have guarded against. Chao JA referred to r 22 of the Highway Code[142] which requires that a pedestrian wait at signalised pedestrian crossings until the traffic has come to a standstill, implicitly recognising the risk of errant motorist running red lights. It does not matter how long the lights have turned in the pedestrian's favour: the need to keep a proper lookout is ever-present. This is not to say that the duty is meant to be an onerous one; it is simply to say that the duty exists.

26.154 The respondent had relied on the English decision of *Bailey v Geddes*[143] ("*Bailey*"), which suggested that a pedestrian can never be contributorily negligent while lawfully crossing at a pedestrian crossing. Referring to subsequent English decisions, Chao JA held that *Bailey* has to be read in context. In that case, the pedestrian had almost completed the crossing when he was hit; on the facts, it could not be said that he was negligent as it would be unreasonable to expect a pedestrian to continue looking out for traffic throughout the crossing. As long as the pedestrian had checked as he commenced crossing, he would have discharged his obligation.

26.155 Arguably, the respondent in this case was in a similar position as the plaintiff in *Bailey*, as he had crossed more than halfway across the road. However, the fact that this was a dual carriageway was relevant. Referring to r 20 of the Highway Code, Chao JA noted that where there was a central refuge, each half of the crossing should be treated as a separate crossing. Although in this case, there was no central refuge, Chao JA held that the centre divider in this case effectively split the crossing into two and, therefore, the respondent was under a duty to stop at the centre divider of the road and check before proceeding across the second half of the road. This decision was supported by the fact that the topography would have prevented the respondent from checking for oncoming traffic on the second half of the road as his vision would have been obstructed.

26.156 Finally, Chao JA addressed the specific question of whether the respondent was in fact contributorily negligent. Based on the speed of the appellant's vehicle, the ease with which the respondent could have noted its presence and halted before stepping onto the road and the gravity of the potential injury, Chao JA found the respondent to have fallen below the standard of care expected. Referring to other motor accident cases, Chao JA found the respondent to be 15% contributorily negligent.

142 Cap 276, R 11, 1990 Rev Ed.
143 [1938] 1 KB 156.

26.157 Menon CJ delivered a dissenting judgment. While agreeing with the majority that the focus of the contributory negligence inquiry was on the plaintiff and not the defendant's conduct, Menon CJ highlighted that this inquiry could not be totally divorced from the context, including the defendant's conduct. The crucial question was whether it was "reasonable to expect the victim to guard against the particular type of conduct that caused the damage". On the particular facts, Menon CJ differed from the majority who had assessed the respondent's response with respect to a general risk of motorists beating the traffic light. In Menon CJ's view, the appellant's conduct went well beyond general carelessness and was unacceptably dangerous. While it is fair that a pedestrian shall guard against ordinary careless conduct of other road users, it will be unfair to require a pedestrian to guard against conduct that goes "beyond recklessness and [is] downright dangerous".

26.158 Menon CJ went on to disagree with the minority on their application of rr 20 and 22 of the Highway Code, holding that r 22 is limited to situations where the pedestrian crossing light has just turned red, and that r 20 was inapplicable because the centre divider in this case was not comparable to a central refuge, being too narrow to provide a safe waiting area.

26.159 Given the different starting points in terms of the contextual inquiry into contributory negligence, it was not surprising that Menon CJ took a different view of the precedents considered by the majority, concluding that they supported the argument that a pedestrian who has embarked properly on a crossing at a signalised pedestrian crossing shall not ordinarily be found contributorily negligent for failing to keep checking for oncoming traffic. Menon CJ also disagreed with the majority on its finding that the respondent must have been negligent, holding that this conclusion was speculative and that the burden had not been discharged by the appellant.

Non-delegable duty

26.160 The facts in *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd*[144] ("*Tiong Aik*") were that a condominium had been erected with defects in the common property, resulting in economic loss to the appellant, the management corporation, which sued four defendants: Mer Vue Developments Pte Ltd ("developer"); Tiong Aik Construction Pte Ltd ("Main Contractor"); RSP Architects Planners & Engineers (Pte) Ltd ("Architect"); and Squire Mech Private Limited. The actions against the

144 [2016] 4 SLR 521.

developer included claims for breach of contract, breach of duty in the tort of negligence, and breach of statutory duty under the Building Maintenance and Strata Management Act.[145] The actions against the Main Contractor were for negligence and breach of contract; the claims against the remaining two defendants were in negligence only. All the allegations of negligence against the first three defendants were with respect to the acts of their subcontractors and all three pleaded in defence that they were not liable for the torts of their independent contractors.

26.161 The High Court decided that the Main Contractor and the Architect could not be held vicariously liable for the torts of their independent contractors, and that they were not directly liable in negligence as they had exercised reasonable care in appointing the independent contractors. Further, the High Court held that neither the Main Contractor nor the Architect owed a non-delegable common law duty to the appellant and that any non-delegable statutory duty owed under the Building Control Act[146] did not extend beyond compliance with safety regulations. The appellant brought an appeal against the High Court's decision, naming the Main Contractor and the Architect as respondents. The sole issue on appeal was whether the Main Contractor and the Architect owed a non-delegable common law duty to the appellant to build and design the condominium with reasonable care.

26.162 As its effect is to hold the defendant strictly liable, courts are cautious in recognising new categories of non-delegable duties. The UK Supreme Court in *Woodland* set out some general principles with respect to recognising non-delegable duties. It noted two broad categories: one pertaining to ultra-hazardous activities and another pertaining to special relationships between the defendant and plaintiff. Chao JA, delivering the judgment in *Tiong Aik*, endorsed *Woodland* as the approach to be followed in Singapore, subject to the qualification that it must be fair and just to recognise a novel category of non-delegable duties. Chao JA stated:[147]

> In our judgment, moving forward, to demonstrate that a non-delegable duty arises on a particular set of facts, a claimant must *minimally* be able to satisfy the court either that: (a) the facts fall within one of the established categories of non-delegable duties; *or* (b) the facts possess *all* the [five *Woodland*] features … However, we would hasten to add that (a) and (b) above merely lay down *threshold* requirements for satisfying the court that a non-delegable duty exists –

145 Cap 30C, 2008 Rev Ed.

146 Cap 29, 1999 Rev Ed.

147 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [62].

> the court will additionally have to take into account the fairness and reasonableness of imposing a non-delegable duty in the particular circumstance, as well as the relevant policy considerations in our local context. [emphasis in original]

26.163 Chao JA then set out the five *Woodland* features:[148]

> (a) The claimant is a patient or a child, or for some other reason is *especially vulnerable or dependent on the protection of the defendant* against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (b) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual *custody, charge or care* of the defendant, and (ii) from which it is possible to impute to the defendant the *assumption of a positive duty to protect the claimant from harm*, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an *element of control* over the claimant, which varies in intensity from one situation to another …
>
> (c) The *claimant has no control* over how the defendant chooses to perform those obligations, *ie*, whether personally or through employees or through third parties.
>
> (d) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (e) The third party has 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]

26.164 Chao JA noted that the existing categories of non-delegable duties include: the duty of an employer to its employee; the duty of hospitals and health authorities to patients; the duty of schools and school authorities to students; and cases involving extra-hazardous operations. This case raised the question of whether a new category for construction professionals should be recognised. Chao JA held that construction professionals should not be held to owe a non-delegable duty. It is accepted practice in the construction industry to use independent contractors and there are no compelling policy reasons to disturb this practice or to circumvent the "independent contractor

148 *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd* [2016] 4 SLR 521 at [58].

defence". The *Woodland* criteria were not met and it would not be fair and just to hold construction professionals liable for the negligence of their independent contractors.

26.165 The respondents and appellants in *Ng Huat Seng v Munib Mohammad Madni*[149] 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: negligence in selecting and supervising the independent contractor; vicarious liability for the negligence of the independent contractor; and 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, See Kee Oon JC upheld the district court's judgment.

26.166 Counsel for the appellants argued that following the recent decisions of *Various Claimants v Catholic Child Welfare Society*[150] and *Cox v Ministry of Justice*,[151] a broader concept of vicarious liability that goes beyond the "traditional test of employment" should be applied. See JC reaffirmed that, despite the extension of vicarious liability in these two cases to include relationships that are "akin to employment", a defendant who has engaged an independent contractor can still rely on "the independent contractor defence".

26.167 On whether the respondents had been negligent in their selection of the independent contractor, See JC concluded that they had exercised reasonable care in checking that the independent contractors held a valid licence and had a clean record. They had also relied on the recommendation of a firm of professional architects and had sought the views of friends who had previously engaged the independent contractors. As laypersons, after carefully selecting the independent contractor, they were entitled to rely on his expertise. See JC went to consider the appellants' argument as to whether the respondents "owed an additional duty, over and above this duty of care in selection, to 'ensure that reasonable care was taken by [the independent contractor] to avoid harm to the Appellants and to their property'".

26.168 This question conflates two issues: a duty to supervise and a duty *to ensure that care was taken* by the independent contractors. The former is the general duty, giving rise to liability if the respondents had

149 [2016] 4 SLR 373.
150 [2013] 2 AC 1.
151 [2016] AC 660.

been negligent. The latter is in fact the non-delegable duty, giving rise to liability on the part of the respondents if the independent contractor had been negligent. These two questions should have been separated.

26.169 The final question that arose was whether the duty owed by the respondents was non-delegable on the ground that the activity delegated to the independent contractors was ultra-hazardous. See JC referred to the classic case of *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd*[152] ("*Honeywill*"), noting that while the principle had not been applied in Singapore, it had been recognised in several Court of Appeal decisions.[153] See JC then noted the English Court of Appeal's *dictum* in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*[154] ("*Biffa*"), criticising the ultra-hazardous rule and confining *Honeywill* to its facts.

26.170 Agreeing with *Biffa* that the ultra-hazardous rule is problematic because of the fine line dividing what is ultra-hazardous and what is not, See JC emphasised that the rule shall only apply where the activity undertaken is "exceptionally dangerous whatever precautions are taken" or constitutes "a dangerous operation in its intrinsic nature". See JC, thus, confined the rule to its narrowest ambit. On the facts, See JC held that demolition *per se* was not exceptionally dangerous, but was only so because of the particular context, including the proximity of the houses and their relative elevations. While this narrow approach to ultra-hazardous activity may be justifiable for policy reasons, it is interesting to contrast this with Menon CJ's approach to contributory negligence in *Asnah*, where he emphasised the importance of context in determining the responsibility of the plaintiff for his own safety. Arguably, a contextual approach can be applied to determine whether an activity is ultra-hazardous. For example, there is a world of difference between rolling a ten-tonne ball on a flat field and undertaking precisely the same activity at the edge of a precipice at the bottom of which are glass houses.

152 [1934] 1 KB 191.

153 See, *eg*, *Mohd Sainudin bin Ahmad v Consolidated Hotels Ltd* [1990] 2 SLR(R) 787; *The Sunrise Crane* [2004] 4 SLR(R) 715; *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613.

154 [2009] QB 725.