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27. TORT LAW

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I. Introduction

27.1 There were over 40 torts cases in 2019, of which just over half involved the tort of negligence. Unlike previous years, this year's review will deal only with the ten most significant judgments. A full list of torts cases is included at the end of this chapter for the convenience of readers. Of the ten cases, not surprisingly, five of them are claims in negligence. Of these, three involve medical negligence and two involve negligent misrepresentation causing economic loss. The remaining cases relate to claims under the tort of conspiracy, defamation, fraud (or deceit), malicious falsehood as well as nuisance and the rule in *John Rylands v Thomas Fletcher*[1] ("*Rylands v Fletcher*").

II. Negligence

A. Medical negligence

(1) Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd

27.2 The year 2019 was significant for medical negligence, with two Court of Appeal decisions and one High Court decision. In *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd*[2] ("*Noor Azlin*"), the appellant had visited Changi General Hospital's ("CGH's") accident and emergency ("A&E") department in 2007, 2010 and 2011 complaining of chest pain and breathlessness. On each occasion, X-rays were taken. In 2007, the A&E doctor, noting an opacity in the right region of her chest, referred her to the hospital's respiratory physician for follow-up.

1 (1868) LR 3 HL 330.
2 [2019] 1 SLR 834.

The physician, after reviewing further X-rays, noted that the opacity "appeared to be resolving or had resolved on its own". He discharged her with an open date instead of ordering a follow-up to confirm that the opacity had resolved. In 2010, the A&E doctor who saw the appellant noted the opacity in the X-ray, but discharged her without any follow-up as he was not aware of the appellant's history. In 2011, the appellant presented at the A&E complaining of pain in the left side of her chest. The A&E doctor, focusing on the X-ray image on the left side of the chest, failed to notice the opacity. The appellant's cancer went undiagnosed until 2012 when she visited another hospital where further investigations were ordered, leading to her being diagnosed with Stage IIA cancer.

27.3 The appellant sued CGH and its doctors, alleging that their negligence had delayed her diagnosis of cancer, resulting in an adverse medical outcome. The High Court judge found CGH negligent for failing to provide the appellant with the X-ray reports or its findings to enable her to determine for herself whether she needed a follow-up or to have a second opinion. The judge found the physician negligent for failing to schedule a follow-up to ensure that the opacity had cleared. The A&E doctors were not found to have acted negligently. Despite finding that CGH and the physician had acted negligently, the judge dismissed the claim, holding that the appellant had failed to prove that the negligence had caused the damage. The Court of Appeal reversed the judge's decision with respect to CGH, finding that its negligence had caused the loss. The decisions with respect to the three doctors were upheld.

27.4 *Noor Azlin* is significant for its application of the *Bolam* test to individual doctors and its analysis of the liability of hospitals for systemic failures. Relying on *Penney v East Kent Health Authority*[3] ("*Penney*") and *Muller v King's College Hospital NHS Foundation Trust*[4] ("*Muller*"), the appellant advanced a bold argument that the *Bolam/Bolitho* test should not necessarily apply to questions of pure diagnosis. Both *Penney* and *Muller* concerned negligent misreading of samples on a slide: in *Penney* it was a cervical smear test that was wrongly reported as negative, and in *Muller* it was a biopsy that was wrongly reported as non-malignant.

27.5 The Court of Appeal in *Penney* treated the question of what was to be seen on the slides as a question to which *Bolam v Friern Hospital Management Committee*[5] ("*Bolam*") and *Bolitho v City and Hackney Health Authority*[6] ("*Bolitho*") had no application, but held that *Bolam/*

3 [2000] PNLR 323.
4 [2017] QB 987.
5 [1957] 1 WLR 582.
6 [1998] AC 232; [1997] 3 WLR 1151.

Bolitho applied to diagnosis. Kerr J in *Muller* argued that *Bolam/Bolitho* should not apply in some cases involving questions of pure diagnosis, pointing to the trial judge's comments in *Penney*:[7]

> All the experts agree that the cytoscreener was wrong. No question of *acceptable* practice was involved. The issue here to which the experts' evidence was directed was whether the cytoscreeners conduct though wrong, was *excusable*. This seems to me to fall outside the *Bolam* Principle. [emphasis in original]

27.6 What is important to highlight is that even though the Court of Appeal in *Penney* did not go as far as the trial judge, it did endorse the "absolute confidence" test in screening. Under this test, it would be negligent of a screener to report a slide as negative if he or she did not have absolute confidence in the result. For example, the High Court in *Manning v King's College Hospital NHS Trust*[8] ("*Manning*") held that unless there was a confidence level of at least 90%, it would be negligent for a pathologist to report a result as negative, even if another pathologist would have reported it as negative. The absolute confidence test allows for a more robust application of *Bolitho* as a constraint on *Bolam*.

27.7 Andrew Phang Boon Leong JA rightly held that the Court of Appeal in *Penney*[9] had not rejected the application of *Bolam/Bolitho* to pure diagnosis cases.[10] However, it should be noted that the facts in *Noor Azlin*[11] are distinguishable from *Penney* and *Muller*,[12] both of which involved pathological screening.[13] Regardless of the niceties of the law, doctors should be reassured by the Singapore Court of Appeal's reaffirmation that in the areas of diagnosis, treatment and care, judges will defer to medical opinion in resolving the standard of care in cases involving "genuine medical controversy" unless the opinion is logically indefensible. In short, judges will not second-guess doctors. The court also emphasised that in determining the standard of care, it would take into account the specialisation of the doctor and the surrounding context; this is particularly relevant to emergency medicine.

27.8 The court further held that the standard of care expected of A&E doctors must account for the realities of A&E departments with

7 *Muller v King's College Hospital NHS Foundation Trust* [2017] QB 987 at [36].
8 [2008] EWHC 1838.
9 See para 27.4 above.
10 Recently, the Irish Supreme Court reaffirmed that the absolute confidence test was not incompatible with the *Bolam* test: *Morrissey v Health Service Executive* [2020] IESC 6.
11 See para 27.2 above.
12 See para 27.4 above.
13 This was an issue in the other Court of Appeal decision of 2019: *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* [2020] 1 SLR 133.

high volumes of patients where doctors have to make quick decisions. A&E doctors are expected to take a "targeted approach", focusing on the patient's emergency and giving less attention to incidental findings. A&E is not a department that provides comprehensive screening. Thus, the A&E doctor who saw the appellant in 2010 was not negligent for failing to order a follow-up as he did not have access to the patient's history; as an A&E doctor, he was not obliged to take the patient's history and was entitled to rely on the patient's account of the physician's assessment of her health. The court held that doctors had to exercise independent clinical judgment and not rely blindly on patients' personal accounts of their health. Notwithstanding, the court did not find the doctor negligent as it recognised that the fault lay with the hospital's system of managing records and information.

27.9 The A&E doctor who saw the appellant in 2011 was not negligent for failing to notice the opacity on the right side as the patient had complained of pain in the left side, justifying his targeted approach of focusing on the area subject to the emergency. However, this does not mean that an A&E doctor can simply ignore incidental findings. Depending on the urgency surrounding the incidental finding and the patient's history, the doctor may discharge his or her duty simply by advising the patient to follow up independently or by ordering further tests and referring the patient to an appropriate specialist.

27.10 The physician was held to a higher standard than the A&E doctors due to his specialist knowledge and the fact that he was not working under the pressures of an A&E department. The court did not find the physician negligent for being unsure whether the opacity had resolved or for failing to order a computed tomography ("CT") scan at the time. The court recognised that medical diagnosis was not an exact science and respected the judgment of doctors in determining appropriate medical interventions. However, the court found the physician negligent in discharging the appellant without ordering a follow-up to confirm that the opacity had resolved.

27.11 Having considered the allegations against the individual doctors, the court then turned to the hospital, focusing on its system. It found CGH's system of routing radiological reports back to the A&E department to be unsafe as A&E doctors might be too busy with emergencies to review reports carefully. The court was of the view that radiologists should send their reports directly to the appropriate specialist outpatient clinic for a specialist to review, except for cases where the radiologist was unable to discern which specialist department should receive the report. In such cases, the radiologist should send the report to A&E, marking it for urgent action by the senior consultant.

27.12 The court also found that CGH did not have a mechanism to consolidate all the patient's information to ensure an uninterrupted flow of information to all professionals dealing with the patient. Had the A&E doctor who saw the appellant in 2010 the necessary information, he might have ordered further investigations that could have detected the cancer. Finally, the court was critical of the fact that there was no system to record the decisions made by A&E doctors who decided not to order any follow-up. This created an information gap for doctors down the line and an accountability deficit. This deficiency, plus the fact that the hospital bears the evidentiary burden to show that it has an effective system in place, behoves hospitals to keep proper records to enhance patient safety, ensure accountability, and provide evidence of proper processes should there be a complaint or litigation.

27.13 Having found the physician and the hospital negligent, the court then turned to causation. The court accepted the trial judge's finding that the nodule was likely to be benign in 2007. Therefore, even if the physician had ordered a follow-up, no further action would have been taken as no malignancy was present. Thus, the action against the physician failed on causation. The court, however, disagreed with the trial judge on causation with respect to the hospital, taking the view that the appellant had proved on a balance of probabilities that she was suffering from lung cancer by July 2011. This was based on the size of the nodule and the pace of its growth in size between 2010 and 2011 as well as the diagnosis of Stage IIA cancer in March 2012. Thus, the hospital was found liable as its negligence led to a delay in diagnosis and likely cure.

(2) Armstrong, Carol Ann v Quest Laboratories Pte Ltd

27.14 The second Court of Appeal decision on medical negligence was *Armstrong, Carol Ann v Quest Laboratories Pte Ltd*[14] ("*Armstrong*"). The plaintiff was the wife of the deceased, a middle-aged man who had consulted his general practitioner about a mole on his back in 2009. A biopsy was done and the specimen sent to the respondents (the laboratory and its pathologist). The respondents' pathology report was unequivocal, stating that there was no malignancy.

27.15 In 2011, the deceased noted a lump under his right armpit. A biopsy of the lymph nodes in 2012 revealed metastatic melanoma. As a result, the original slides from 2009 were recalled and re-examined. A new report by a different pathologist concluded that the 2009 slides indicated a malignant melanoma. The respondent pathologist then re-examined a deeper level of the 2009 specimen and concurred that the specimen

14 [2020] 1 SLR 133.

indicated a melanoma. The plaintiff succeeded in the High Court where the judge, by way of *obiter* comments, supported recoverability for loss of chance in medical negligence.

27.16 The two key issues on appeal were whether the pathologist had been negligent and whether the negligence had caused the damage. Phang JA reiterated his observations in *Noor Azlin*[15] on the application of *Bolam* to diagnosis before upholding the trial judge's decision that the pathologist had been negligent in reporting the slide categorically as not malignant without further testing. Implicitly, Phang JA endorsed the *Penney*[16] "absolute confidence" test. Thus, while accepting that *Bolam/Bolitho* applied to diagnosis, in line with the reasoning in *Penney* and *Manning*,[17] Phang JA held that it would nonetheless be negligent to report a slide unequivocally as negative if the pathologist did not have absolute confidence.

27.17 Phang JA observed:

> [L]ives depend upon accurate diagnoses by pathologists, and diagnoses had therefore to be undertaken with due diligence. This does not mean that pathologists are expected to get it right all the time, but, *at a minimum* (a point which [the respondent's expert] also accepted), *if a pathologist could not rule out the worst-case scenario, they should have stated so in their report*. [emphasis added]

27.18 The absolute confidence test and the *Bolam/Bolitho/Penney* approach were recently applied in the Supreme Court of Ireland decision of *Morrissey v Health Service Executive*[18] ("*Morissey*"). Recall that the Court of Appeal in *Penney* had set out three questions and held that *Bolam/Bolitho* did not apply to the first question:[19]

> (i) What was to be seen in the slides?
>
> (ii) At the relevant time could a screener exercising reasonable care fail to see what was on the slide?
>
> (iii) Could a reasonably competent screener, aware of what a screener exercising reasonable care would observe on the slide, treat the slide as negative?

27.19 *Morrissey* has clarified that the subsequent two questions are to be determined according to the absolute confidence test. As the court put

15 See para 27.2 above.
16 See para 27.4 above.
17 See para 27.6 above.
18 [2019] IEHC 268. *Morrissey v Health Service Executive* has been appealed to the Supreme Court of Ireland.
19 *Penney v East Kent Health Authority* [2000] PNLR 323 at [27].

it: "Questions (ii) and (iii) above and any issues as to adequacy are to be decided in the light of the 'absolute confidence' test and thereafter, the test for negligence is as stated in *Dunne*."[20] The court went on to distinguish diagnostic testing from other aspects of medical negligence, highlighting the danger of leaving the determination of negligence to the defendants' experts:[21]

> In other words, if there is any room for doubt that the slide was normal and the screener ascribes a normal result to the slide then the screener is in breach of the *Dunne* principles as he has been guilty of such failure that no professional scanner of equally specialist or general status and skill would have been guilty of if acting with ordinary care. A screening programme cannot operate safely if screeners are left to judge the slides and whether they are safe merely on the balance of probabilities. … It should be noted that the fear of false positives together with a fear of not properly '*balancing*' the need of costs with safety seemed to be to the fore in the minds of a number of the defendant's experts. If the screeners must '*balance*' these requirements when reporting, as stated by a number of the defendant's experts, there is a clear danger that the screener will not apply the standard of '*absolute confidence*'. [emphasis in original]

27.20 Having affirmed that the defendant had been negligent, Phang JA turned to causation. The question was whether the cancer had spread beyond the lymph nodes under the deceased's armpit by 2009 when the first biopsy was done, and if not, whether the spread could have been arrested by timely surgery and/or treatment. The respondents argued that the cancer had spread by 2009 and that statistically the deceased had a less than even chance of survival for ten years. The appellant's experts put the statistics of survival at least at 68%.

27.21 The trial judge analysed causation as a matter of lost chance. However, Phang JA found that the appellant had proven on a balance of probabilities that the cancer had not spread in 2009, and that surgery and treatment would have completely cured the deceased, who would therefore have been expected to live out his natural life, predicted to be until age 82. Full compensation was ordered. The court did not deal with loss of chance and left it for resolution in a more appropriate case.

(3) Goh Guan Sin v Yeo Tseng Tsai

27.22 The authors will now examine the third and final case on medical negligence. The plaintiff in *Goh Guan Sin v Yeo Tseng Tsai*[22] ("*Goh Guan*

20 *Morrissey v Health Service Executive* [2020] IESC 6 at [74]. *Dunne v National Maternity Hospital* [1989] IR 91 is the Irish equivalent of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

21 *Morrissey v Health Service Executive* [2020] IESC 6 at [72].

22 [2019] SGHC 274.

Sing") was a 70-year-old woman who had been diagnosed with a tumour that had to be removed. The first defendant was the surgeon against whom the allegations of negligence were made and the second defendant was the hospital employing the surgeon. The tumour was removed during the first surgery by another surgeon, following which complications set in during post-surgical recovery. An urgent CT brain scan was ordered. Based on his interpretation of the scan, the first defendant decided to insert an external ventricular drain ("EVD") to relieve the pressure building up in the brain due to accumulation of fluid. The first defendant supervised the surgery to insert the EVD. A second CT scan was performed, which showed haemorrhage in the brainstem. The plaintiff ended up in a permanent vegetative state ("PVS"). The plaintiff sued the defendants, alleging pre- and post-operative negligence.

27.23 The particulars with respect to the alleged pre-operative negligence were that the first defendant had negligently failed to inform the plaintiff of the following: (a) the relevant risks of the procedure; (b) the alternative options that were available; and (c) the management plans that were in place. It was further alleged that the first defendant had failed personally to take consent or see the plaintiff before the surgery and had failed to inform the plaintiff that he would be leaving the country immediately after the surgery.

27.24 With respect to post-operative negligence, it was alleged that the first defendant had (a) misinterpreted the CT scan, resulting in a misdiagnosis; (b) failed to evacuate the plaintiff's haematoma; and (c) failed to obtain the plaintiff's informed consent for the second procedure involving the insertion of an EVD. Further, it was alleged that the second defendant had negligently failed to (d) monitor the patient post-operatively; (e) carry out a CT scan urgently; and (f) have a proper system to record information so it could easily be accessible to the different doctors seeing the patient.

27.25 Although the plaintiff dropped the pre-operative negligence claims at the close of the trial, Tan Siong Thye J nevertheless addressed them in his judgment. In dealing with the first allegation of negligent failure to disclose relevant risks of the first surgery, Tan J referred to *Singapore Medical Council v Lim Lian Arn*[23] ("*Lim Lian Arn*") and *Hii Chii Kok v Ooi Peng Jin London Lucien*[24] ("*Hii Chii Kok*") as the relevant authorities. It is perhaps unfortunate that *Lim Lian Arn* was referred to as that case involved professional misconduct and not medical negligence. Indeed, there are recurring references to professional misconduct cases,

23 [2019] 5 SLR 739.
24 [2017] 2 SLR 492.

resulting in a shift of focus from the doctor's common law duty to the patient to the doctor's professional and ethical duties.

27.26 Tan J found that the risk of brain haemorrhage was material but held that the defendant had adequately informed the patient of this risk. This is a factual finding that a judge is best placed to make. However, Tan J then went on to consider a related matter, namely "whether there was a higher-than-usual risk of post-operative haemorrhage in the Plaintiff's case?"[25] Experts from both sides agreed that there was, and Tan J accepted this as a matter of fact. The question then was whether the plaintiff should have been informed of this elevated risk. Tan J held that the defendant had discharged his duty by informing the plaintiff of the normal risk of haemorrhage, which was "adequate for the purposes of seeking informed consent".[26] The experts had decided that the tumour was life-threatening and the plaintiff would have died if she were not operated on. The elevated risk was thus treated as not relevant and material.

27.27 The above reasoning raises two issues of concern. First, it runs counter to the express authority of *Hii Chii Kok* on the duty to inform and patient autonomy. It seems clear that a heightened risk of haemorrhage due to the particular circumstances of the patient would be a risk that is material and relevant to any reasonable patient in the position of the plaintiff. However, the doctors and the court took the view that the decision whether to take the risk of haemorrhage was one that was for the doctor to take in the best interest of the patient. Secondly (and relatedly), the reasoning conflates issues of professionalism and consent-taking with medical negligence. By relying on *Lim Lian Arn*, the court erroneously focused on whether the consent-taking process was adequate, not whether the *Hii Chii Kok* standard for the duty to inform – and its underlying emphasis on autonomy – were respected.

27.28 Turning to the allegations of post-operative negligence, Tan J began with a detailed restatement of the *Bolam/Bolitho* test before applying it to each allegation. For ease of reading, the key allegations are noted under separate subheadings.

(a) Defendant's failure to record all neurological parameters in the neurological observation chart.

27.29 The plaintiff's expert argued that the failure to record all the neurological parameters in one place (the neurological observation chart ("NOC")) was negligent as crucial information was not readily

25 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [56].
26 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [56].

accessible to doctors. This risk of harm was exacerbated in team-based care situations as different doctors might miss important matters if they were not all readily accessible in the NOC. This would be an example of systemic negligence, as explained in *Noor Azlin*[27] by the Court of Appeal. Tan J accepted that it would have been good practice to record the information on the NOC, but held that it was not negligent not to do so because the information was available in various documents in the patient's file. Tan J distinguished this case from *Noor Azlin* on the facts, holding that in *Noor Azlin* the doctors' involvement was spread over time whereas here, everything happened within a matter of hours; it was just that the information was spread across several documents.

(b) Inadequate post-surgical monitoring

27.30 Tan J held that the first defendant had discharged his duty to monitor and had demonstrated that the frequency of monitoring was adequate. A crucial question was whether the first defendant was negligent in failing to order an urgent CT scan at 4.55pm when the plaintiff's condition deteriorated. All the experts, including the first defendant himself, agreed that a new CT scan should have been ordered. Only one defence expert argued against this.

27.31 Tan J observed that it was irrelevant whether a CT scan should have been ordered at 4.55pm because a CT scan could only be ordered by a doctor, and there was none present. The nurse monitoring the patient did call for a doctor who arrived at 5.30pm. At that time the plaintiff's condition appeared to improve and the decision was made not to order a CT scan. The experts were split on whether the right decision was made at 5.30pm. Applying *Bolam/Bolitho*, Tan J found for the first defendant as there was a reasonable body of medical opinion that supported his decision. An argument that the failure to have a doctor available to deal with such an emergency suggested negligence at the systemic level was dismissed by Tan J, who express the view that there were many reasons why a doctor may not be readily available in a busy public hospital. Thus, the delay was not unreasonable. Unfortunately, the plaintiff's condition deteriorated by 6.05pm, and the first CT scan was ordered at 6.29pm.

(c) Interpretation of the first CT scan

27.32 The crux of the issue was whether the CT scan showed an intra-axial haemorrhage (defendant's position) or an extra-axial haemorrhage (plaintiff's position). Tan J found that the first defendant's diagnosis of intra-axial haemorrhage was not negligent according to the *Bolam/Bolitho*

27 See para 27.2 above.

test. The plaintiff argued that it was negligent to rule out the possibility of an extra-axial haematoma unless the first defendant was "absolutely certain". Tan J held that the absolute certainty test in this context was not appropriate as it would place an undue burden on the defendant. It was not disputed that on the facts, there was extra-axial haematoma.

27.33 A related issue was whether it was negligent to insert an EVD without also evacuating the extra-axial haematoma. The plaintiff argued that even if there was some intra-axial haematoma, evacuating the extra-axial haematoma would have mitigated the plaintiff's loss of functions. The defence experts were divided on this, with the split reflecting the tension between medical paternalism and patient autonomy. One expert said the decision whether to evacuate the haematoma would depend on the *surgeon's* risk appetite and personal views on which risk was preferable – death or the risk of being in a PVS. Another defence expert testified that he would have evacuated the haematoma, recognising that the decision and the risk "had a 'philosophical element' and was not a 'pure medical decision'".[28] Referring to the Physician's Pledge of the Medical Council, Tan J held that the doctor was entitled to decide for the patient whether she should face the risk of death or the risk of being in a PVS.[29]

(d) Allegations in relation to the second surgery

27.34 The plaintiff alleged that the first defendant had negligently failed to inform and advise the plaintiff's family about the risks of the surgery and available alternatives. Tan J noted that since the plaintiff was comatose at the time, she was not competent to give consent and the family was not legally authorised to give consent. Thus, there was no need to inform the family about the option of evacuating the haematoma and the inherent risks. The doctor was entitled to proceed in the best interest of the patient. There was an underlying assumption that saving the patient's life was an overriding consideration and that "the operating surgeon's philosophy" was relevant, if not conclusive.[30] Citing professional misconduct cases, Tan J expressed the view that a patient cannot demand a doctor administer treatment that the doctor considers is not warranted or is "averse to the patient's clinical needs".[31]

27.35 *Goh Guan Sin*[32] will bring welcome relief to doctors who have, rightly or wrongly, felt that the law in Singapore had in recent years

28 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [256].
29 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [258].
30 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [287].
31 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [287].
32 See para 27.22 above.

shifted away from a doctor-centric approach in according greater respect to patient autonomy. *Goh Guan Sin* reverses this. The extract below is illuminating – while laudable for its commitment to the sanctity of life, it raises fundamental questions about the doctor-patient relationship, patient autonomy and human dignity:[33]

> If the choice is between: (a) risking the Plaintiff's life with a high chance of death to evacuate the extra-axial haematoma, without any certainty of this surgical manoeuvre improving her prognosis of PVS; and (b) inserting an EVD to alleviate her symptoms of Cushing reflex to save her life, though she would remain in a PVS albeit without having to face the additional high risk of death through the evacuation of the haematoma, then the First Defendant cannot be faulted for having chosen the latter. Miracles, although rare, do happen. There are cases in which patients in deep coma woke up from their long slumber. It was reported in the Straits Times on 25 April 2019 that a '[w]oman in coma wakes up 27 years after protecting son in accident' in the United Arab Emirates ('UAE') when the vehicle collided into a school bus.

27.36 Separately, the plaintiff had suffered a fracture above the right knee during her hospitalisation which the plaintiff's relative claimed was due to the hospital staff's negligence in moving the plaintiff. The plaintiff argued that *res ipsa loquitur* should apply. The court affirmed that *res ipsa loquitur* could apply to medical negligence claims, but held that as the fracture could have been caused by the plaintiff's relatives when they moved her, *res ipsa loquitur* could not apply on the facts. The court held that the plaintiff had not discharged the burden of proving negligence with respect to the fracture.

III. Misrepresentation

27.37 The appellant in *Sim Tee Meng v Haw Wan Sin David*[34] ("*Sim Tee Meng*") was the director and key executive officer ("KEO") of Faber Property Pte Ltd ("Faber"), a limited liability company that was an estate agency. The respondents were a married couple who had agreed to purchase units in a residential project in New Zealand after attending a property investment marketing event conducted by Faber. Representations about the project were made by the appellant and another individual, an associate director of Faber. The general thrust of the representations was that the developer was reliable, the project was underway and moneys would be held in trusts. The respondents were led to understand that Faber had undertaken appropriate due diligence and complied with regulatory standards requirements. These representations turned out to be negligently made. The New Zealand developer subsequently went

33 *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274 at [258].
34 [2020] 1 SLR 82.

into insolvent liquidation and the plaintiffs suffered economic loss. The respondents brought actions for negligent or fraudulent representation against Faber, the appellant and the associate director.

27.38 The District Judge dismissed the claim against the appellant and the associate director, holding that neither owed a duty to the respondents. Only Faber was found to owe a duty, which it had breached. The High Court upheld the District Judge's decision with respect to Faber, and reversed the decision with respect to the appellant, holding that the appellant owed a duty and had breached it. The High Court also did not disturb the District Judge's finding that the associate director was not liable, but it did so for different reasons. It found that the associate director did owe a duty under *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[35] ("*Spandeck*"), but that she had not breached that duty. The appellant appealed to the Court of Appeal, which dismissed the appeal.

27.39 The issues before the Court of Appeal were whether the High Court had erred in rejecting the District Judge's factual findings about what representations were made and whether, if those representations were made, the appellant owed a duty to the respondents. Referring to *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd*[36] ("*Sandz*"), Judith Prakash JA noted that appellate courts should be slow to disturb factual findings by trial judges. However, where inferences from facts are to be drawn, an appellate court may be as competent as a trial judge and is entitled to conduct a *de novo* review. Prakash JA, agreeing with the High Court's interpretation of the facts, accepted that the appellant had made the representations.

27.40 On whether there was a duty of care, Prakash JA applied the *Spandeck* two-stage test of proximity and policy. The appellant argued that he was simply making representations on behalf of Faber and the relationship of proximity was between the respondents and Faber. Prakash JA held that as the appellant was the KEO of Faber, his representations carried significant weight. He had voluntarily assumed responsibility for his statements by reassuring the respondents on specific matters and confirming the representations made by the associate director. He knew that the respondents were relying on him, and Prakash JA found that there was reasonable reliance on the facts. Prakash JA went on to caution that whether a KEO of an estate agency company or a director of a company owes a personal duty would depend

35 [2007] 4 SLR(R) 100.
36 [2014] 3 SLR 562.

on the particular facts, including the size of the company, the role of the director and the relationship between the director and potential plaintiff.

27.41 An interesting aspect of *Sim Tee Meng*[37] was the intersection between personal and corporate liability for torts. Relying on *obiter* remarks in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[38] ("*Sandipala*") and an academic article,[39] the appellant argued that he should not be liable in tort if he had acted properly in the discharge of his duty to the company. Prakash JA clarified that the tension between the personal liability of a director and the liability of the company arose when the company had committed a tort; in such cases, there could be questions of whether the director should also be personally liable. The present case, however, was different as it was not a question of holding the director personally liable for the company's tort but holding the director liable for a personal tort. *Animal Concerns Research & Education Society v Tan Boon Kwee*[40] ("*Animal Concerns*") was authority for the proposition that a director of a company may be liable for personal torts while acting as a director of a company. In any case, Prakash JA held that it could not be said that the appellant had acted properly in making the impugned representations.

27.42 *Saimee bin Jumaat v IPP Financial Advisers Pte Ltd*[41] ("*Saimee*") involved a plaintiff who suffered financial loss by making investments on the advice of his financial advisers. The defendants were the insurance company and its two agents who advised the plaintiff to invest in foreign exchange trades through a service offered by SMLG Inc ("SMLG"). The two agents represented that (a) the investment was safe and capital guaranteed; (b) it would pay a return of 40% within a year; and (c) they had recommended this investment to all their clients. The plaintiff invested a total of US$620,900, which was never repaid.

27.43 When the due date for payment came up in May 2012, the two agents informed the plaintiff that SMLG was unable to pay due to a trading glitch and persuaded the plaintiff to loan SMLG US$200,000 to fix the glitch. The plaintiff did so, and signed an agreement that the loan and his investment would be repaid by 24 June 2012. No moneys were paid despite constant requests until 17 September 2012 when the two agents advised the plaintiff to enter into a settlement agreement under which all his dues would be paid by 20 September 2012. The deadline

37 See para 27.36 above.
38 [2018] 1 SLR 818.
39 Tan Cheng Han, "Tortious Acts and Directors" (2011) 23 SAcLJ 816.
40 [2011] 2 SLR 146.
41 [2019] SGHC 159.

passed without any payment. The plaintiff eventually recovered his loan a year later and sued for the return of his investment money, including profits.

27.44 The High Court identified three issues: (a) whether the two agents were liable for negligent misrepresentation; (b) whether the claim was time-barred; and (c) whether the insurance company was vicariously liable. On the first issue, Choo Han Teck J applied *Spandeck*,[42] holding that it was reasonably foreseeable that the plaintiff would suffer economic loss and that there was a relationship of proximity based on the classic proximity factors of voluntary assumption of responsibility and reasonable reliance. The two agents were the plaintiff's financial advisers who had held themselves out as having special skills and who had assumed responsibility for their investment advice. They did not qualify their advice and intended the plaintiff to rely on it.

27.45 Choo J found that they had breached their duty by failing to carry out due diligence checks and failing to alert the plaintiff to the potential risks involved in such an investment. On the facts, the two agents, who were experienced and qualified financial advisers, should have been "wary of an investment which allegedly offered 40% annual returns with a capital guarantee".[43] An alternative argument based on fraudulent misrepresentation was dismissed. Choo J pointed out that the two agents had themselves invested in the scheme and did not know that the investment was not capital guaranteed or incapable of producing 40% returns.

27.46 On the limitation period, Choo J held that the time only started running when the plaintiff had suffered an actual, not potential or prospective loss. The plaintiff had filed his writ on 21 July 2018. The defendants argued that the plaintiff had suffered the loss on 24 June 2012 when he was not repaid and was thus time-barred as more than six years had passed. Choo J held that the plaintiff had not suffered actual loss on 24 June as he had entered into a settlement agreement on 17 September. He suffered actual loss only on 21 September. Thus, he was not time barred.

27.47 On vicarious liability, Choo J referred to *Ong Han Ling v American International Assurance Co Ltd*[44] ("*Ong Han Ling*") and *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries*

42 See para 27.37 above.
43 [2019] SGHC 159 at [20].
44 [2018] 5 SLR 549.

(Singapore) Pte Ltd[45] ("*Skandinaviska*") to set out the two requirements of a qualifying relationship and close connection between the tortious act and the relationship. On the first requirement, even though there was no employment relationship, Choo J found that the relationship between the insurance company and the agents was sufficient to give rise to vicarious liability as the insurance company had control over the agents, paid them and provided the premises for them to work. Further, it was clear that the agents were not independent contractors.

27.48 Choo J rejected the defendant's argument that it was not fair and just to impose vicarious liability. To the contrary, Choo J held that the plaintiff was vulnerable and deserving of compensation and that vicarious liability was necessary for its deterrent effect.

IV. Conspiracy

27.49 The proof of damage is an essential aspect of the claim under the tort of conspiracy whether based on lawful or unlawful means. The question as to the nature and type of damage that would (or would not) qualify as actionable damage for the purpose of a conspiracy claim was examined in *Singapore Shooting Association v Singapore Rifle Association*.[46] The Council of the Singapore Shooting Association ("SSA"), the national sports association for shooting, passed a resolution purporting to suspend the privileges of the Singapore Rifle Association ("SRA"), one of SSA's members, at the National Shooting Centre. SRA applied to the High Court for a declaration that the resolution was *ultra vires* and that the second to fourth appellants ("the individual defendants") had committed unlawful means conspiracy to procure the passage of the resolution. The High Court held that the resolution was *ultra vires* SSA's constitution and that the individual defendants had conspired to cause SRA damage by procuring the *ultra vires* resolution.

27.50 Before the Court of Appeal, one central issue was whether the fees incurred by solicitors for the purposes of investigating a conspiracy can amount to actionable loss or damage in conspiracy. The Court of Appeal held that such fees would not generally constitute actionable loss or damage in conspiracy if "they are in substance the sort of expenses that would be incurred in preparation for litigation, and so would be recoverable as costs in any action that may be brought".[47] On the facts, as the legal fees would have been recoverable as costs in the action, SRA's

45 [2011] 3 SLR 540.
46 [2020] 1 SLR 395.
47 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [92].

claim in unlawful means conspiracy failed as the element of actionable loss or damage was not satisfied. (The Court of Appeal also held that SRA's application for declaratory relief in respect of the resolution failed in the absence of a real controversy.)[48]

27.51 Three reasons were given for the general rule. First, if such legal fees were recoverable as actionable loss or damage in conspiracy, it would give rise to the situation where this element of the tort would be satisfied in "virtually every case where the litigant pleading conspiracy engages a lawyer".[49] Second, allowing solicitors' fees to be recovered as damages instead of costs would "subvert the costs regime put in place to regulate the recoverability of such fees".[50] Third, there is an absence of authorities that support the recovery of such fees as actionable loss or damage in conspiracy. Whilst there are local[51] and foreign[52] case authorities that the costs of investigating, detecting and unravelling a conspiracy can constitute a head of loss or damage in a conspiracy claim provided the costs were attributable to the tort, they did not specifically cover legal fees. The sole case cited by the Court of Appeal that dealt with solicitor's costs – the English High Court decision in *Rustem Magdeev v Dmitry Tsevetkov*[53] – held that costs incurred by solicitors in preparation for litigation could not be recovered as damages in a conspiracy claim.

27.52 The Court of Appeal added a qualification that "such fees *may* constitute actionable loss or damage, *if*, for some reason, they cannot be recovered as costs instead" [emphasis in original].[54]

27.53 Based on the abovementioned reasons, the rule against allowing legal fees to be recoverable as damages in unlawful means conspiracy should likely be applicable to lawful means conspiracy as well though this issue would be left for determination in an appropriate future case.[55] The rule would also apply to the legal costs of defending an action. In this regard, the Court of Appeal[56] took the same position as the High Court

48 The SSA had already lost the power to grant the privileges in the resolution before SRA's lawsuit was commenced: *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [125].
49 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [93].
50 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [94].
51 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549; *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163.
52 *British Motor Trade Association v Salvadori* [1949] Ch 556; *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42.
53 [2019] EWHC 1557.
54 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [97].
55 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [99].
56 *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395 at [101].

in *Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd*[57] notwithstanding other contrary authorities.[58]

27.54 One practical implication of the decision is that if investigations into or detection works are to be undertaken in respect of a suspected conspiracy, they should be carried out by the potential litigants rather than by their lawyers in preparation for litigation unless there is other evidence of actionable loss or damage for a claim in conspiracy. The reasonable costs incurred by the potential litigant to undertake such investigations and detection (including wasted staff and managerial time) that relate to the tort of conspiracy would be relevant for the purpose of establishing the element of actionable loss or damage should the party decide to proceed with a conspiracy claim.

V. Defamation

27.55 This part now discusses a case dealing with defamation. In this regard, the focus of the next case is on determining the governing law based on the assumed facts that the defamatory statements were published outside Singapore. In *Bachmeer Capital Ltd v Ong Chih Ching*,[59] the plaintiff and the fourth defendant ("KOPSG") formed a joint venture ("KOPHK"), which in turn owned the eighth defendant ("Bodi"). KOPSG was controlled by Ong and another party. The plaintiff and Bodi were controlled by Wang and Hu who were based in China. Disputes relating to the joint venture to develop an integrated winter resort in China arose. The joint venture failed and was terminated in 2015 and the defendants started to pursue another project with a partner in Shanghai ("SLJZ"). KOPSG also signed an agreement with another partner ("SHCD"). The plaintiff alleged that the defendants had breached their duty to act in good faith by engineering the termination of the joint venture for a collateral purpose or motive. This claim, however, failed.

27.56 The main issue here concerns the counterclaim in defamation by Ong and KOPSG against the plaintiff, Wang and Hu, in respect of four letters to various parties after the termination of the joint venture. The letters contained allegations of dishonesty and misappropriation of intellectual property. The first three letters were written in China by Bodi to IE Singapore in Singapore as well as to SLJZ and SHCD in China. The letters to SLJZ and SHCD were also shown as being copied to the mayor of the Peoples' Government of the Shanghai Pudong New Area and the

57 [2013] 4 SLR 662.
58 *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374; *Lim Kok Lian v Lee Patricia* [2015] 1 SLR 1184.
59 [2019] 4 SLR 254.

People's Government of Shanghai Municipal as well as to the Director of Shanghai Municipal Commission of Commerce. The fourth letter was written by Bodi's lawyers in China addressed to the Singapore Minister for Trade and Industry.

27.57 The counterclaim in defamation was eventually dismissed by the Singapore International Commercial Court. With respect to the issue of governing law, the place of commission of the tort was the place where the letters were published under Singapore law.[60] Ramsey IJ noted that there was no evidence as to the actual place of publication of the letters (whether Singapore or China). The learned judge nonetheless proceeded to discuss the legal issues on the assumption that the letters were published in China.[61]

27.58 Applying the double actionability rule in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*[62] – that the alleged wrong must be actionable under the law of the forum (*lex fori*) as well as the law of the place where the wrong was committed (*lex loci delicti*) – the claim in question had to be shown to be actionable both in China and Singapore.[63] The learned judge also observed that the double actionability rule was subject to the exception[64] that the tort might be actionable in Singapore even if one of the limbs in the double actionability rule was not satisfied, with a view to avoid injustice and unfairness. This exception was not ultimately applied to the facts.

27.59 Based on the expert evidence adduced, the judge noted that under Chinese law, there are four elements required to prove defamation: (a) the defendant committed illegal actions by publicly defaming the plaintiff (in this regard, there are two features to illegal actions, namely, (i) the infringing statement lacks factual basis; and (ii) the infringing statement is published to unspecified third parties); (b) the plaintiff's reputation as conceived by others must have been damaged; (c) there is causation between the defendant's illegal defamatory actions and the consequence of the plaintiff's reputation being damaged; and (d) the defendant must have intentionally sought to damage the plaintiff's reputation when it committed the actions.[65]

60 *Low Tuck Kwong v Sukamto Sia* [2013] 1 SLR 1016 at [15].
61 *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254 at [492].
62 [2007] 1 SLR(R) 377 at [53].
63 *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254 at [493]–[494].
64 See also *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, cited in *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 at [36].
65 *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254 at [499].

27.60 With respect to the four letters, they were sent to specified persons.[66] Hence, the requirement that there be proof of publication to an unspecified group in China was not satisfied. Moreover, accusations or complaints to legitimate authorities of illegal acts or wrongdoing did not amount to actionable defamation under Chinese law. The judge also found that the letters were not written with the intention to sabotage Ong's and KOPSG's reputation.[67] In the final analysis, the counterclaim was dismissed by the Singapore International Commercial Court.

VI. Fraud (or deceit)

27.61 The dispute in *AKRO Group DMCC v Discovery Drilling Pte Ltd*[68] arose from an agreement in which the plaintiff ("AKRO") agreed to supply certain project management services to the defendant ("DDPL") in respect of the refurbishment, repair and installation of equipment in a rig purchased by DDPL. The main claim by AKRO was for the payment of outstanding project management fees from DDPL. DDPL counterclaimed for damages for late delivery of the rig by AKRO as well as for inflated charges for the supply of goods and services for the project. The counterclaim was subsequently amended to include claims in deceit (fraud) and conspiracy against AKRO, two AKRO directors, a company related to AKRO ("AYBI") and two former representatives of DDPL. After the amended pleadings were filed by DDPL, none of the abovementioned parties ("the cross-defendants") participated in the court proceedings and judgement was entered in favour of DDPL with respect to AKRO's claims.

27.62 This review focuses on the amended counterclaim that was based on the allegedly fraudulent and/or fabricated invoices from third-party suppliers. Though there was no appearance by the cross-defendants nor any defences raised by them, DDPL was required to call evidence to substantiate the alleged fabrications and forgeries given the "seriousness of the claims".[69]

27.63 Based on the evidence adduced, certain invoices had stated prices that were higher than those actually quoted or invoiced by the suppliers; in other cases, invoices were created when no such invoices were obtained from the suppliers. As a result, AKRO was able to submit quotes that were purportedly lower than those from the third suppliers to enable AKRO to be selected as the lowest bidder.

66 *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254 at [519].
67 *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254 at [538].
68 [2019] 4 SLR 222.
69 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [85].

27.64 All the cross-defendants were involved in the conspiracy to defraud DDPL. Evidence was adduced from one of the AKRO directors concerning the bribery of the two DDPL representatives by the AKRO directors in order to commit forgery of the documents submitted to DDPL.[70] There was other evidence of AKRO directors making unauthorised changes to the documents from suppliers that were submitted to the DDPL representatives.[71] Furthermore, evidence from a partner of a firm of chartered accountants pointed to discrepancies in the invoices and the lack of substantiating documents produced by AKRO or AYBI to DDPL.[72]

27.65 The counterclaim in unlawful means conspiracy was based on (a) AKRO's breach of fiduciary duties in forging the invoices so as to be selected as the lowest bidder; and (b) AKRO's breach of contractual duties owed to DDPL with respect to the management of the project. Similarly, the two DDPL representatives also breached their fiduciary duties to DDPL.[73] Bergin IJ found that AKRO and AYBI had acted with the intention to harm DDPL and obtain benefits for themselves,[74] and that the two DDPL representatives had acted with the intention to harm DDPL and to make secret profits for themselves.[75]

27.66 In conspiracy cases, it is sometimes argued that the primary intention of the alleged conspirators is to achieve their own personal interests and gains. Nevertheless, the proof of the defendant's intention to obtain the benefits can in certain circumstances translate into an intention to cause harm to the plaintiff. The Singapore Court of Appeal in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter*,[76] ("*Raffles Town Club*") – which was not specifically mentioned by Bergin IJ – had referred to the House of Lords' decision in *OBG Ltd v Allan*[77] ("*OBG*") for the proposition that "loss to the claimant is the obverse side of the coin from gain to the defendant" and concluded that the current directors of the Raffles Town Club had intended to harm the former directors. The circumstances must be such that the "defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other".[78] Applying to

70 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [97].
71 *Eg*, *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [104]–[105], [108]–[110] and [114]–[116].
72 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [143].
73 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [153]–[155].
74 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [156]–[157].
75 *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [158]–[159].
76 [2013] 1 SLR 374 at [63].
77 [2008] 1 AC 1 at [167], *per* Lord Nicholls.
78 *OBG Ltd v Allan* [2008] 1 AC 1 at [167], *per* Lord Nicholls.

the present case, it is quite clear, consistent with Bergin IJ's view, that the requisite intention to cause economic harm to DDPL can be established. In *Raffles Town Club*, the legal proposition was also extended on the facts to a lawful means conspiracy on the basis that the predominant purpose of the current directors of the club to cause financial harm to the former directors was just as much as to profit themselves.[79]

27.67 As DDPL did not make any claim for punitive damages, it was not necessary for Bergin JJ to consider such an award. Nonetheless, punitive damages would be available in exceptional circumstances where the defendant's conduct was so outrageous that it would warrant punishment, deterrence and condemnation.[80]

VII. Malicious falsehood

27.68 In *TWG Tea Co Pte Ltd v Murjani Manoj Mohan*,[81] the plaintiff company ("*TWG Tea*") claimed that the defendant (Manoj) held the domain name of a website[82] on trust for the plaintiff. Manoj in turn counterclaimed against TWG Tea, Taha and Maranda under the tort of malicious falsehood. Taha was TWG Tea's CEO and president, and Maranda, was the plaintiff's director of corporate communications and business development. With respect to the counterclaim in malicious falsehood, the court had to consider seven statements allegedly made by TWG Tea, Taha and Maranda:

(a) excerpts from TWG's website ("the Website Statement");

(b) five interviews by various media outlets with Taha and/or Maranda known as "the Montecristo article", "the Nomss article", the Niche article", "the Forbes article" and "the Vogue article"; and

(c) Maranda's statements at an event ("the CRIB summit statements").

27.69 Manoj argued that the statements were false with regard to his role as TWG Tea's founder. In the tort of malicious falsehood, the plaintiff has to prove that (a) the defendant had published a false statement to third parties; (b) the statement referred to the plaintiff, his property or

79 *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 at [66]–[67], citing Lord Neuberger in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174.

80 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [176].

81 [2019] 5 SLR 366.

82 www.twgtea.com.

his business; (c) the statement was published maliciously; and (d) special damage was the natural and direct result of the publication.[83]

27.70 First, Audrey Lim JC found that the Website Statement was clearly false based on the natural and ordinary meaning of the words (which imputed that Taha, Maranda and another party were the founders of TWG Tea). As Manoj was excluded from the Website Statement, it would have meant that he is not a founder. The meaning of the Montecristo and Forbes articles was that Taha and Maranda were the only founders of TWG Tea and the articles were therefore also false.

27.71 As for the statements in the Nomss article, the Niche article, the Vogue article, and the CRIB summit statements, they did not convey the natural and ordinary meaning that Taha and Maranda were the only two founders of TWG Tea. As such, they were not false. As the statements (for example, the CRIB summit Statements) had initially referred to Taha and Maranda and another partner who acted as an "investor", and had subsequently mentioned Manoj as a "partner" who invested in the company in a latter part of the interviews, her Honour was of the view that they would not be regarded as false even though there was no mention of Manoj being a "founder".[84] Analogising from deceit case authorities,[85] one question which arises here is whether the withholding of information concerning Manoj's role as founder is sufficiently material such that the CRIB summit statements would amount to partial statements that rendered the entire statement false. However, as the statements also referred to Maranda, Taha and their "other partner" starting an office or starting the company[86] as alluded to by the learned judge, it is plausible that the investor or partner referred to in the statements might well also be a founder, in which case the statements as a whole may not be regarded as false.

27.72 On the requirement of publication, Lim JC found that the statements were authorised or caused to be published by Taha and Maranda. The decision to put up the Website Statement was made by Taha. Maranda was in the management team that made the same decision. Both of them had therefore authorised the publication of the

83 *Lee Tat Development Pte Ltd v Management Committee Strata Title Plan No 301* [2018] 2 SLR 866 at [169].

84 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [130]–[131].

85 See *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 at [66]–[67], citing Lord Cairns in *Peek v Gurney* [1861–73] All ER Rep 116 at 129) ("such a partial and fragmentary statement of fact that the withholding of that which is not stated makes that which is stated absolutely false"; applied in *Su Ah Tee v Allister Lim* [2014] SGHC 159 at [193]–[194].

86 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [131] and [132].

Website Statement. With respect to the online articles, the press releases were prepared under Maranda's instructions in her role as director of corporate communications and business development. Further, the materials to the press were provided with TWG Tea's permission. As for the CRIB summit statement, Lim JC stated that it was made by Maranda with respect to her "personal experiences" and could not be attributed to Taha or TWG Tea.[87]

27.73 One important note is that the mere fact that a webpage is accessible does not by itself constitute publication. The extent of publication can be proved either by direct proof or by establishing a "platform of facts" from which an inference can be made of substantial publication.[88] On the facts, Lim JC was satisfied that there was an inference of publication for the Website Statement. This was because the Website was accessed by significant numbers of people and generally accessible to Internet users without charge, the website generated significant income from online customers, and its dominant purpose was for widespread commerciality. Certain online articles (Montecristo and Nomss articles) were written for the purpose of publicising TWG Tea's tea salon in a foreign country (Vancouver, Canada). Where the article in question (Forbes) was published in the online version of a well-known magazine, the learned judge opined that an inference of publication to third parties was drawn,[89] citing the Australian defamation case of *Zafar Ahmed v John Fairfax Publications Pty Ltd*.[90]

27.74 The malice requirement refers to the proof that the defendant, in publishing the false statement, was motivated by a dominant and improper intention to injure the plaintiff *or* where the defendant did not have an honest belief that the statement was true or had acted with reckless disregard as to the truth of the statement.[91] In this respect, there was evidence showing that both Maranda and Taha were aware that any statement indicating that they were the only founders of TWG Tea would be untrue.[92] Hence, the statements were made maliciously (that is, without honest belief or in reckless disregard of the truth).

87 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [129].
88 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [91].
89 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [126].
90 [2006] NSWSC 11 at [9]. See also *dicta* in *Zhu Yong Zhen v AIA Singapore Pte Ltd* [2013] 2 SLR 478 at [48], *per* Chan Seng Onn J ("defamatory material that has been placed on the front page of a mass media outlet such as an online newspaper are analogous to articles in a traditional newspaper, and the inference that it has been published to the readers of that outlet can reasonably be drawn.")
91 *Lee Tat Development Pte Ltd v Management Committee Strata Title Plan No 301* [2018] 2 SLR 866 at [182].
92 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [96]–[100].

27.75 With regard to the proof of special damage, s 6(1) of the Defamation Act[93] dispenses with the need for proof if the words complained of were "calculated to cause pecuniary damage" to the plaintiff or in respect of his office, profession, calling, trade or business. The word "calculated" means "likely to produce the result".[94] Lim JC noted that that Manoj had not produced any evidence as to the nature and extent of pecuniary damage for the purpose of the statutory provision. As Manoj could not show special damage, the counterclaims in relation to the Website Statement, Montecristo article and Forbes article were dismissed. This may be contrasted with the case of *Low Tuck Kwong v Sukamto Sia*,[95] in which there was no need to prove special damage (that is, the loss of opportunity to use and/or to invest certain moneys) as the publication in question was likely to produce the result of pecuniary loss.

27.76 A corporation may be vicariously liable for the malicious falsehood of an employee. Taha and Maranda's knowledge was attributed to TWG Tea. Lim JC opined, citing *Webster v British Gas Services Ltd*,[96] that vicarious liability arose where the employee was found to be responsible for the words complained of and had the state of mind required to constitute malice.[97]

27.77 Finally, with respect to Manoj's claim in conspiracy, Lim JC stated that there was no evidence of intention or predominant purpose to cause Manoj's damage on the part of Taha, Maranda and/or TWG Tea. The statements, according to the learned judge, were to benefit Taha's and Maranda's public profiles with regard to the founding of TWG Tea. However, it might be argued that Taha and Maranda, by doing so, were intending to deprive Manoj of any public credit for his role in founding TWG Tea. In this regard, the proposition in *OBG*[98] that "loss to the claimant is the obverse side of the coin from gain to the defendant" might be applicable here provided it can be shown that the gains to Taha and Maranda and Manoj's losses are "inseparably linked".

93 Cap 75, 2014 Rev Ed.
94 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [137].
95 [2014] 1 SLR 639 at [114].
96 [2003] EWHC 1188 at [30].
97 *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366 at [111]. See also *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd* [2008] 4 SLR(R) 727 at [85] (company's vicarious liability for malicious statements of employees).
98 See para 27.65 above.

VIII. Nuisance and rule in *Rylands v Fletcher*

27.78 The concept and scope of foreseeability of harm was the main focus in *PEX International Pte Ltd v Lim Seng Chye*[99] ("*PEX International*") in which construction involving hot works at the defendant's premises was carried out by a contractor engaged by the defendant. The defendant's premises were used as a warehouse for the storage of metal conduits and metal fittings. The adjoining property which was owned by the plaintiff was burnt by the fire. The contractor was found to be negligent in the performance of the construction work.

27.79 The plaintiff sued the defendant in negligence, nuisance and the rule in *Rylands v Fletcher*[100] with respect to the damage to his property and the goods within (insured losses) as well as for personal injuries. The High Court[101] dismissed the claim in negligence but allowed the claim in nuisance and under the rule in *Rylands v Fletcher*. With respect to nuisance, the learned judge found that the hot works on PEX's land "made such works foreseeably unsafe".[102] Her Honour relied on a passage in *OTF Aquarium Farm v Lian Shing Construction Co Pte Ltd*[103] ("*OTF Aquarium Farm*") which stated that:[104]

> It is clearly not a reasonable use of land to create or to continue a hazard which the owner or occupier knows or should know carries a *foreseeable risk of damage* to one's neighbour. [emphasis added by the Court of Appeal]

27.80 The Court of Appeal in *PEX International* discerned two approaches in the judicial authorities, respectively illustrated by the two House of Lords' decisions of *Cambridge Water Co v Eastern Counties Leather plc*[105] ("*Cambridge Water*") and *Transco plc v Stockport Metropolitan Borough Council*[106] ("*Transco*"). Under the first approach, the foreseeability of the risk of harm was relevant to determining liability

99 [2020] 1 SLR 373.
100 See para 27.1 above.
101 *Lim Seng Chye v PEX International Pte Ltd* [2019] SGHC 28.
102 *Lim Seng Chye v PEX International Pte Ltd* [2019] SGHC 28 at [121].
103 [2007] SGHC 122 at [23].
104 Emphasis added by the Court of Appeal: [2020] 1 SLR 373 at [4].
105 [1994] 2 AC 264 at 300–301, *per* Lord Goff.
106 [2004] 2 AC 1.

in nuisance (*per* Lords Hoffmann[107] and Hobhouse[108] in *Transco*).[109] According to the Singapore Court of Appeal in *PEX International*,[110] this position had been adopted by Singapore courts not only in *OTF Aquarium Farm* but also *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd*.[111] For the second approach, foreseeability of the risk of harm was not relevant to determining liability in nuisance. The legal requirement was the unreasonable use of land. However, foreseeability of the type of harm was relevant to determining whether the type of loss was too remote (as in *Cambridge Water*).[112]

27.81 The Court of Appeal preferred the second approach on three grounds:[113]

> (a) The second approach preserves the historical distinction between the tort of negligence (focused on the conduct of the defendant) and the tort of private nuisance (for the purpose of vindicating the plaintiff's interest and rights over his land).[114] This accounts for the different emphasis on foreseeability.
>
> (b) The second approach would be "more consistent with the original scope of nuisance" in the older cases such as *Spicer v Smee*[115] where Atkinson J stated that liability in nuisance could arise independent of negligence. On the facts, though there was no indication that the defendant was aware of the negligent performance of the independent contractor or the extent of her involvement in authorising the independent contractor to do the works, she was nonetheless held liable in nuisance.
>
> (c) A strict duty to support adjacent property so as not to injure another's property in land-scarce Singapore had been imposed on the landowner in *Xpress Print Pte Ltd v Monocrafts*

107 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [26]–[27] ("… liable in damages only for damage caused by a discharge which was intended or foreseeable. Indeed, that is the general rule of liability for nuisance today"). See also *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685 at [18] (that "the defendant is not liable for damage caused by an isolated escape, i.e., one that is not intended or reasonably foreseeable").

108 *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at [64].

109 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [52].

110 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [50].

111 [2006] 3 SLR(R) 116 at [6] and [16]–[20] (for both negligence and nuisance).

112 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [53].

113 *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373 at [56]–[58].

114 The Court of Appeal cited Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at paras 10.094-10.097; Kenneth Cheong & Kenneth Yap, "An Overhaul of Nuisance" (1998) 19 Sing L Rev 309 at 317–318.

115 [1946] 1 All ER 489.

> *Pte Ltd*[116] even though it was the independent contractor engaged by the defendant landowner who had committed the wrongful act. The action for the withdrawal of a right of support was described in *Xpress Print* as "equivalent or akin to an action under the tort of nuisance".[117]

27.82 One qualification to the above is that the foreseeability of the risk of harm may be relevant in nuisance where the wrongful acts were committed by a third party (such as a trespasser), which were not authorised by the defendant, as in *Sedleigh-Denfield v O'Callaghan*.[118]

27.83 Based on the facts, as the defendant had authorised the works by the independent contractor, the foreseeability of the risk of harm was irrelevant to determining liability in nuisance. Nevertheless, there was unreasonable use of the land due to the use of hot works at the perimeter of the two adjoining properties in the presence of strong winds and in close proximity to flammable mattresses stored in the plaintiff's premises without proper supervision of the workers. Further, the damage due to fire was a type of harm that was reasonably foreseeable. (The claim for personal injuries was to be left to the hearing for the assessment of damages.)

27.84 The Court of Appeal in *PEX International* decided not to make any definitive pronouncements on the High Court's opinion that the rule in *Rylands v Fletcher* is a sub-species of the tort of nuisance and the question of whether it should be subsumed entirely within the tort of nuisance. Reference was made, however, to journal articles which have essentially argued for a distinction to be drawn between the rule in *Rylands v Fletcher* and nuisance. Murphy has, for example, argued for the distinction based on a few grounds: (a) the requirement for the claimant's proprietary interests in nuisance but not for the rule in *Rylands v Fletcher*;[119] (b) that nuisance is concerned with the "interference with the amenity of land" whilst the rule in *Rylands v Fletcher* is limited to "physical harm caused by one-off escapes";[120] and (c) that the concept of "reasonable user" in nuisance is different from that of "non-natural user" in the rule of *Rylands v Fletcher*.[121] On this last point, Prof Nolan had commented that the non-natural user concept is focused on the defendant's activity

116 [2000] 2 SLR(R) 614.
117 *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 2 SLR(R) 614 at [52].
118 [1940] AC 880.
119 John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) OxJLS 643 at 646–648.
120 John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) OxJLS 643 at 651.
121 John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) OxJLS 643 at 655.

but unreasonable interference in nuisance concerns the balance between the plaintiff's enjoyment of his land and the defendant's activities. [122]

27.85 Furthermore, the rule should not be subsumed under nuisance since they served different purposes as mentioned above and have arisen and been developed in different contexts. The rule in *Rylands v Fletcher* has been developed against the background of industrial expansion and nuisance cases have generally concerned private house-dwelling neighbours.[123]

27.86 Notwithstanding the debates on this issue, what was clear to the Court of Appeal is that foreseeability of the risk of harm is not relevant for the rule in *Rylands v Fletcher*. It also decided that the claim based on the rule in *Rylands v Fletcher* should be allowed as there was a non-natural use of the land, an escape of dangerous object onto the plaintiff's land and the loss was not too remote.

IX. Alphabetical list of torts cases in 2019

1. *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222

2. *Angela Lim Seok Im v Tampines Town Council* [2019] SGDC 164

3. *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* [2020] 1 SLR 133

4. *Bachmeer Capital Ltd v Ong Chih Ching* [2019] 4 SLR 254

5. *Btech Engineering Pte Ltd v Novellers Pte Ltd* [2019] SGHC 171

6. *Chua Tommy v SMRT Buses Ltd and Ismadi bin Abdul Rahim* [2019] SGMC 59

7. *Danial Syafiq bin Mahbob v Amin Juman bin Abdul Jabbar* [2019] SGHC 282

8. *Goh Guan Sin v Yeo Tseng Tsai* [2019] SGHC 274

9. *HE & SF Properties LP v Rising Dragon Singapore Pte Ltd* [2019] 4 SLR 149

122 Donal Nolan, "The Distinctiveness of Rylands v Fletcher" (2005) 121 LQR 421.
123 John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) OxJLS 643 at 658–659.

10. *Huan Jong Ming v Khoo Khim Chin* [2019] SGDC 83

11. *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 3 SLR 615

12. *Jasmin Nisban v Chan Boon Siang* [2019] SGDC 61

13. *JWR Pte Ltd v Edmond Pereira Law Corp* [2019] SGHC 266

14. *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2019] SGHC 82

15. *Lau Teng Giap v Lim Wee Leng* [2019] SGDC 17

16. *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28

17. *Liu Yanzhe v Tan Eu Jin* [2019] SGHC 67

18. *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61

19. *MCH International Pte Ltd v YG Group Pte Ltd* [2019] SGHC 43

20. *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2019] 1 SLR 834

21. *Palraj Duraiarasan v Chia Lip Seng t/a Mong Seng Construction* [2019] SGDC 156

22. *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47

23. *PEX International Pte Ltd v Lim Seng Chye* [2020] 1 SLR 373

24. *Pradeepto Kumar Biswas v East India Capital Management Pte Ltd* [2019] SGHC 183

25. *Quantum Automation Pte Ltd v Saravanan Apparsamy* [2019] 3 SLR 1383

26. *Ram Niranjan v Navin Jatia* [2020] 3 SLR 982

27. *Red Star Marine Consultants Pte Ltd v Personal Representatives of the Estate of Satwant Kaur d/o Sardara Singh, deceased* [2019] SGHC 22

28. *Saimee bin Jumaat v IPP Financial Advisers Pte Ltd* [2019] SGHC 159

29. *Sheila Kazzaz v Standard Chartered Bank* [2020] 3 SLR 1

30. *Sim Miew Fee v Pau Tong Lye* [2019] SGMC 29

31. *Sim Tee Meng v Haw Wan Sin David* [2020] 1 SLR 82

32. *Singapore Rifle Association v Singapore Shooting Association* [2019] SGHC 13

33. *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395

34. *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51

35. *Syahirah binte Sa'ad v Tay Chin Seng* [2019] SGDC 14

36. *Tuitiongenius Pte Ltd v Toh Yew Keat* [2019] SGHC 264

37. *TWG Tea Co Pte Ltd v Murjani Manoj Mohan* [2019] 5 SLR 366

38. *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143

39. *Zailaini bin Abdullah Tan v K Jayakumar Naidu trading as Jay Associates* [2019] SGDC 192

40. *Zhai Fumin v Wendyng International (Pte) Ltd and Woh Hup (Pte) Ltd* [2019] SGDC 110

41. *Zillion Global Ltd v Deutsche Bank AG, Singapore Branch* [2019] SGHC 165