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Tort law [2015]

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26. TORT LAW

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Breach of statutory duty

26.1 *Tan Shiang Kok v SCM Services and the Management Corporation Strata Title Plan No 2811 and Exceltec Property Management Pte Ltd* [2015] SGDC 88 ("*Tan Shiang Kok*") concerns a claim for breach of statutory duty pursuant to s 29 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) which provides for the duty of a Management Corporation:

> … to control, manage and administer the common property for the benefit of all the subsidiary proprietors … and to properly maintain and keep in good state and serviceable repair the common property.

(The claim in negligence is discussed below at para 26.70.) The plaintiff, who occupied one ground floor unit in a commercial building, claimed for serious injuries suffered when he slipped and fell inside a wet toilet located within the commercial building. The second defendant was the Management Corporation of the commercial building and the first defendant was the cleaning company engaged by the second defendant. Based on the evidence, the District Court concluded (at [16]) that the second defendant had breached its statutory duty.

26.2 It should be noted that one of the legal requirements for an action in breach of statutory duty is that Parliament had intended via the statute to confer on such an occupier of the premises a private right of action to sue in tort. Under the law, the plaintiff had to show that he was part of a limited class which the statute intended to protect: see *Loh Luan Choo Betsy v Foo Wah Jek* [2005] 1 SLR(R) 64 at [25] and *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788. The District Court seemed to have assumed that this was the case without any discussion. In this regard, one relevant provision was s 88(1) which states that:

> If a management corporation … commits a breach of any provision of this Part, or makes default in complying with any requirement of, or

> duty imposed on it by, any provision of this Part, … *occupier of a lot* shall be entitled to apply to the court … to recover damages for any loss or injury to the … occupier … arising out of the breach of any such provision from the management corporation … [emphasis added]

From the wording of the provision, it is likely that Parliament intended to protect occupiers of a unit within the commercial building such as the plaintiff from the statutory breaches of the management corporation (for a discussion of the scope of s 88, see *Diora-Ace Ltd v Management Corporation Strata Title Plan No 3661* [2015] 3 SLR 620 and *Management Corporation Strata Title Plan No 2911 v Tham Keng Mun* [2011] 1 SLR 1263).

Confidence

26.3 In the two cases below, a distinction in approach to a scenario involving the stealing of commercial and trade secrets in an employment context and personal and private information of an individual obtained surreptitiously can be seen. In *Tempcool Engineering (S) Pte Ltd v Chong Vincent* [2015] SGHC 100 ("*Tempcool*"), the plaintiff company sued its ex-employees ("Woon" and "Vincent") and the new company ("UBZ") which the ex-employees had joined for stealing the plaintiff's trade secrets and confidential information. The High Court found that the plaintiff's drawings had the necessary quality of confidence as the drawings remained relatively inaccessible to the public. Moreover, they remained confidential as a whole even though certain aspects of the drawings were in the public domain (*Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045). Woon and Vincent were aware that the plaintiff's drawings were confidential, and they were received and imparted in circumstances so as to import an obligation of confidentiality. As UBZ was the corporate vehicle through which Woon intended to use the confidential information, his knowledge was also imputed to UBZ. It should be noted that Woon was both the director and shareholder of UBZ.

26.4 As Woon had solicited Vincent to breach his obligation of confidence by copying the plaintiff's confidential information and sending it to him, the learned judge concluded that Woon had misused the confidential information. The corporate vehicle used by Woon, UBZ, was also liable for the misuse as the drawings and pricing information in the hands of Woon and UBZ were regarded as detrimental to the plaintiff. The High Court noted that Woon used the drawings to help the plaintiff's customers communicate with suppliers and thereby foster goodwill, and allowed UBZ to serve the plaintiff's customers without any need to return to the plaintiff for post-project

help. The High Court further noted that the pricing information enabled Woon to compare prices quoted by the suppliers to the plaintiff and allowed UBZ to craft better bids in present or future project tenders. To the extent that the evidence showed that the defendants had exploited the plaintiff's confidential information for their own benefit (see *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 255, *per* Lord Keith), it may be argued that the requirement of detriment to the plaintiff was satisfied.

26.5 In comparison, *ANB v ANC* [2015] 5 SLR 522 involved divorce proceedings between the appellant (husband) and the wife (first respondent). The wife had obtained information from the husband's personal notebook computer in the matrimonial home. The information was passed to the second respondent (a law firm) for use in the divorce proceedings. The husband commenced proceedings claiming breach of confidence and applied for an interim injunction. The issue, with respect to interim injunction, was whether there was a serious question to be tried as to the existence of a breach of confidence by the respondents. The Court of Appeal held that the balance of convenience lay in favour of granting an injunction to preserve the confidential (or private) quality of the information.

26.6 The elements in a breach of confidence case outlined in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco v A N Clark*") are as follows: (a) the information to be protected must have the necessary quality of confidence about it; (b) that information must have been imparted in circumstances importing an obligation of confidence; and (c) there must be an unauthorised use of the information to the detriment of the party who originally communicated it. The present case involved "surreptitious taking of personal information": *ANB v ANC* at [18]. Instead of the elements in *Coco v A N Clark*, the relevant question to ask, according to the Court of Appeal, was whether the plaintiff had a "reasonable expectation of privacy" in relation to that information: *Campbell v MGN Ltd* [2004] 2 AC 457 at [21], *per* Lord Nicholls of Birkenhead, and [85], *per* Lord Hope of Craighead. There was also no need to prove that there had been a misuse of the information. This development suggests that Singapore courts are prepared to directly examine the legal elements pertaining to the protection of privacy interests instead of attempting to "shoe-horn" privacy interests within the traditional parameters of the equitable action of breach of confidence. Applying the second requirement in *Coco v A N Clark* above that the information must be imparted in circumstances importing an obligation of confidence, for instance, to a case of surreptitious taking of personal information, would appear quite out of place.

Conspiracy

26.7 There have been numerous claims made under the tort of civil conspiracy, but many of them have been dismissed by the courts in 2015 for want of basic evidence required for establishing the legal elements of the tort. This section begins with two cases in which the claim in conspiracy succeeded followed by the problematic cases. One of the cases below also dealt with an application for mandatory injunction for conspiracy.

Principles on proof and quantification of damages

26.8 *Li Siu Lun v Looi Kok Poh* [2015] 4 SLR 667 ("*Li Siu Lun*") discusses important principles for the assessment of damages in a civil conspiracy case. The plaintiff, a patient at the defendant hospital, suffered injury to his right hand. Upon surgery performed by the doctor, the condition of his hand worsened. It was later discovered that the form on which the plaintiff had given his consent to surgical procedure for the right hand had been altered by a nurse who was employed by the defendant hospital. The plaintiff had only given consent to one surgical procedure performed by the doctor, but the form was altered to indicate that he had consented to an additional surgical procedure. Further, the hospital had concealed the alteration from him. The plaintiff took out an action in trespass and negligence against the doctor which claims were eventually settled. There was a separate action against the hospital (which included a claim in conspiracy) that proceeded till the third day of trial. Consent judgment was entered against the hospital in respect of the alteration and damages were assessed by the assistant registrar. On appeal against the assistant registrar's assessment, the High Court outlined the following principles:

> (a) Where there is sufficient evidence of the existence of pecuniary loss, damages will be awarded even if the plaintiff cannot prove the precise quantum of its losses. Such damages are said to be at large. In order to compute the quantum of damages, the court should refer to "the yardstick of the reasonable man": at [45], citing *Dootson Investment Corp v Highway Video Pte Ltd* [1997] 3 SLR(R) 823 at [7], *per* G P Selvam J. Belinda Ang Saw Ean J also stated that this approach was consistent with "common sense to achieve justice, not only to the plaintiff but the defendant, and, if applicable, among the defendants": at [61], citing *Holtby v Brigham & Cowan (Hull) Ltd* [2000] EWCA Civ J0406-11; [2000] 3 All ER 421 at [20], *per* Stuart-Smith LJ.
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> (b) There is, however, no need to have recourse to the "yardstick of the reasonable man" where there is evidence of the

precise quantum of loss. In the present case, the investigatory expenses incurred by the plaintiff to uncover the conspiracy (that is, the travel costs of the plaintiff's visits to the hospital in Singapore from Hong Kong where he resided and the costs of applying for interrogatories) were recoverable (*British Motor Trade Association v Salvadori* [1949] Ch 556; *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489; and *R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm)). The plaintiff had to serve interrogatories on the nurse and it was in the interrogatories that she admitted that she had altered the consent form at the request of the doctor. It is also important to note that in its defence and at the stage of the plaintiff's application to serve interrogatories, the hospital had explicitly denied amending the consent form. When the concealed alteration was uncovered, the claim in conspiracy was added to the action against the hospital.

(c) Aggravated damages may be awarded for conspiracy based on the "exceptional" conduct of the defendant: *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513. The damage is "parasitic" on compensatory damages being recoverable.

(d) There exists a proportionality principle in assessing aggravated damages relative to the amount of general damages recoverable (see *Koh Sin Chong Freddie v Chan Cheng Wah Bernard* [2013] 4 SLR 629 in the context of defamation). The assistant registrar had awarded $240,000 as aggravated damages. In the present case, Ang J took the view that the sum of $42,000 awarded as aggravated damages, being twice the amount of the general damages ($21,000), would not be disproportionate.

(e) No punitive damages were awarded as the present case did not fall into the categories in *Rookes v Barnard* [1964] AC 1129 (namely (a) the oppressive, arbitrary or unconstitutional actions by the servants of the government; (b) where there is wrongful conduct which has been calculated by the defendant to make a profit for himself which may exceed the compensation payable to the plaintiff; and (c) where punitive awards are expressly authorised by statute). Even if the facts of the case fell within one of the *Rookes v Barnard* categories, the court was entitled to exercise its discretion against awarding punitive damages, highlighting the limited scope for the award of punitive damages in tort law.

Combination and intention to injure the plaintiff

26.9 The claim in conspiracy succeeded in *Tempcool* (facts described in paras 26.3–26.4 above). Edmund Leow JC held that a combination amongst the ex-employees and the corporate vehicle may be inferred from the circumstances. There was an agreement by Vincent to obtain the confidential information from the plaintiff company and pass them on to Woon and/or UBZ for their use. First, Leow JC stated that "the damage to Tempcool was not incidental to [the defendants'] goals". Here both the plaintiff and UBZ were direct competitors. The learned judge also noted (at [65]) that the "agreement for Vincent to extract Tempcool's information for Woon's uses was inextricably bound up with an intention to hurt Tempcool's business interests". The above observations suggest that the intention to damage the plaintiff's business was connected in some way to the defendants' goals and agreement to obtain the confidential information. However, what was essential for the establishment of the tort of conspiracy was that the defendant's conspiratorial acts were undertaken with the intention to injure the plaintiff *as a means to an end or as an end in itself*: see *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*Marinteknik*") at [101]).

26.10 Under conspiracy, pecuniary loss must be proved though strict proof of specific pecuniary damage is not necessary: *Li Siu Lun* at [43]. The High Court only referred to the likelihood that the information could be used to compete with the plaintiff for similar jobs. Whether such evidence would be sufficient to assess the quantum of pecuniary loss should be based on the "yardstick of the reasonable man" (see para 26.8 above). There was no need to determine this as yet for the learned judge decided only on liability, with assessment of damages to be made at a later date.

Failure to prove the basic elements of conspiracy

26.11 In the following cases, there were problems in adducing evidence to prove the basic elements of the tort whether in respect of the existence of conspiratorial acts, unlawful means, the state of mind of the conspirators and damage. In *ARS v ART* [2015] SGHC 78, the plaintiff alleged that the first defendant had conspired with two other parties to injure the plaintiff through the breach of two agreements. This claim failed due to the non-existence of the two agreements. Moreover, there was no agreement or a combination to breach the two agreements. Finally, the plaintiff's claim that the first defendant conspired with two other parties to maliciously publish false words about the plaintiff's design or business by way of three letters was dismissed as the words were not false and the letters were written by another party whose act

could not be attributed to the first defendant. In *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686, Gimpex Ltd ("Gimpex") entered into a contract to purchase coal from Unity Holdings Business Ltd ("Unity"). The second defendant held 25% of the shares in Unity. The third defendant was the sole shareholder and director of the second defendant. Gimpex failed to prove its case of unlawful conspiracy as there was no evidence of fraud committed against Gimpex. As for Gimpex's lawful means conspiracy claim, there was also insufficient evidence to suggest that the defendants had caused the first defendant to enter into a contract with Gimpex with the predominant purpose of harming Gimpex.

26.12 In *Tanaka Lumber Pte Ltd v Datuk Haji Mohammad Tufail bin Mahmud* [2015] SGHC 276, Tanaka Lumber Pte Ltd ("Tanaka"), a Singapore company, claimed that two of its shareholders, Tufail and Ting, committed breach of trust in respect of certain sums of money for investments in two Malaysian companies as well as breach of fiduciary duties owed to Tanaka. Whilst Ting admitted to being a trustee, Tufail denied it. Tufail further counterclaimed that Tanaka, Ting and/or Ling (another shareholder in Tanaka) had engaged in a conspiracy against him in causing Tanaka to commence the legal action against him. This counterclaim in unlawful means conspiracy failed on three grounds. First, commencing an action is not itself an unlawful act. Moreover, Tufail's assertion that there was an agreement to fabricate evidence in order to commence the action had not been proven. Secondly, if the intention of the alleged conspirators to commence the action were to wrest control of Tanaka and obtain beneficial ownership of the shares, that would not have amounted to an intention to injure Tufail, a requirement for a claim in conspiracy. Thirdly, any legal costs that might be incurred by Tufail in defending the action *per se* would not constitute damage under conspiracy as the "cost that would have been incurred regardless of whether Tanaka's claim against them was well-founded or not": at [55], citing *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562. Tanaka's claims in breaches of trust and fiduciary duty also failed and the learned judge exercised his discretion not to award costs to the parties for the claims and counterclaim.

Mandatory injunction

26.13 *Viknesh Dairy Farm Pte Ltd v Balakrishnan s/o P S Maniam* [2015] SGHC 27 is a case where the proof of alleged conspiratorial acts and common design were absent. The plaintiff dairy farm – a lessee of farmland from the Singapore Land Authority ("SLA") – sought a mandatory injunction against the defendants to remove truckloads of earth dumped on the farm. The first defendant had fraudulently

represented to the plaintiff that he was a professional engineer who could help the plaintiff obtain the certificate of statutory completion. The first defendant also testified that all the defendants had colluded to defraud the plaintiff. The second and third defendants were specialised construction earthwork companies. The testimony was, however, rejected by the High Court. The High Court found instead that the first defendant, purportedly acting as the plaintiff's agent, had entered into separate agreements with the second and third defendants to allow them to dump earth on the farm upon the payment of an agreed fee to the first defendant. The second and third defendants were not aware that the land belonged to SLA or that it was illegal to dump the earth on the farm. The High Court did not specifically connect the above-mentioned facts to the legal requirements in conspiracy, but it could be surmised that the acts by the second and third defendants in dumping the earth on the farm were not done in furtherance of a common design under the tort of conspiracy. As the claim in conspiracy failed, the High Court granted a mandatory injunction against the first defendant solely for him to remove the dumped earth from the plaintiff's land.

Conversion and detinue

26.14 *Marco Polo Shipping Co Pte Ltd v Fairmacs Shipping & Transport Services Pte Ltd* [2015] 5 SLR 541 ("*Marco Polo*") concerns the assessment of damages arising from the conversion of goods (in this case, river sand) purchased by the respondent. The appellant was the owner of the vessels which transported the river sand. The proper method to be used in this case, according to the Court of Appeal, was to assess damages based on the cost replacement method, that is, the amount paid by the respondent for the sand. The normal method of computing damages based on market value at the date of conversion depended on the existence of a market which in turn required the presence of willing buyers and sellers and the ability of the parties to negotiate: *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010.

26.15 This method could not be adopted as there was no relevant market from which the court could properly derive the market value. Thus, the Court of Appeal differed from the High Court's approach in *Fairmacs Shipping & Transport Services Pte Ltd v Harikutai Engineering Pte Ltd* [2015] 1 SLR 904 in which damages were assessed based on the market value of the river sand at the relevant time and deductions made to take account of freight, customs and landing costs. One point of contention was that the learned judge had made reference to the sales figures of a related company at the relevant time. The Court of Appeal observed that those figures did not constitute sufficient evidence of the existence of the market value. The market in which the respondent was

involved in ("wholesale market") was "*very different*" [emphasis in original] from that in which the related company participated ("retail market") where the goods may be sold at significantly marked-up prices (see the analogous case of *Furness v Adrium Industries Pty Ltd* [1996] 1 VR 668): *Marco Polo* at [27].

26.16 The plaintiff was in the business of engineering, supply and design of refrigeration and air-conditioning systems in *Tempcool* (above, para 26.3). One legal issue which arose was whether the tort of conversion would apply to the confidential information obtained by the defendants or whether the tort was confined to chattels. The High Court allowed the plaintiff's claims in breach of confidence and conspiracy (see paras 26.3–26.4 and 26.9 above) and did not have to decide on this specific point on conversion. Note that the majority in *OBG Ltd v Allan* [2008] 1 AC 1 (Lord Nicholls and Baroness Hale dissenting) had decided that intangibles cannot be the subject of conversion since they cannot be subject to the fiction of a loss and are not amenable to possession: see, however, a critique of the decision in Sarah Green, "To Have and to Hold? Conversion and Intangible Property" (2008) 71(1) MLR 114 at 114–131 (that intangibles can be the subject of conversion if they meet the criteria of "exclusivity" in terms of control over the asset in question and "exhaustivity" in depriving the rightful owners substantially of the value of the assets); and Lee Pey Woan, "Inducing Breach of Contract, Conversion and Contract As Property" (2009) 29(3) OxJLS 511 at 530. It should also be highlighted that in *OBG Ltd v Allan*, the House of Lords was not specifically dealing with the conversion of confidential information which may be regarded as *sui generis*.

26.17 The High Court in *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd* [2016] 1 SLR 1129 ("*Simgood*") considered that a contractual right to immediate possession of a vessel can give rise to a standing to sue in conversion against the defendants who had changed the vessel hull number. This was based on the case of *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 at [30] in which Lord Phillips stated:

> Where the owner of goods with an immediate right to possession of them by contract transfers the latter right to another, so that he no longer has an immediate right to possession, but retains ownership, it would seem right in principle that the transferee should be entitled to sue in conversion.

In so holding, Vinodh Coomaraswamy J doubted the decision in *Jarvis v Williams* [1955] 1 WLR 71 to the extent that it has been taken to stand for the proposition that a mere contractual right to possession cannot amount to a right to sue in conversion. However, under the contract, the plaintiff could only exercise a right to delivery and to take possession of

the vessel when it was completed and the plaintiff had fulfilled all its payment obligations. As the plaintiff had not completed its instalment payments at the time of the alleged act of conversion, the plaintiff could not sue in conversion.

26.18 With respect to the claim in detinue, a demand made by the plaintiff for the goods in the wrongful possession of the defendant is a prerequisite to establish the tort: see *Clayton v Le Roy* [1911] 2 KB 1031 and *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 648–649. In *Simgood*, it was held that a letter of *demand* for the delivery of the vessel, served by the plaintiff on a *shareholder of the defendant* in possession of the vessel, constitutes sufficient notice to the *defendant* if the latter would thereby be put on notice that the vessel in its possession was the subject matter of the demand by the plaintiff. Given the rationales of the notice requirement which were to determine the point at which the claim in detinue arose and fairness to the defendant so as to give the latter reasonable time to make the goods ready for delivery (*Simgood* at [163]), the fact that the demand was communicated to a third party instead of the defendant should not automatically preclude satisfaction of the notice requirement. Further, there was evidence in the present case that the defendant had issued a letter in response to the above-mentioned letter of demand from the plaintiff. Notwithstanding the notice, the defendant failed to deliver the vessel to the plaintiff and was thus liable for damages for the wrongful retention of the vessel.

Deceit

26.19 The interesting question of whether market manipulation conduct can amount to a claim in deceit was explored in *TMT Asia Ltd v BHP Billiton Marketing AG (Singapore Branch)* [2015] 2 SLR 540 ("*TMT Asia*"). This case concerned forward freight agreements ("FFAs") which were traded over the counter. The plaintiff company, which purchased various FFAs based on an index, alleged that it suffered losses due to the conduct of the defendants, a group of companies, in manipulating the market for FFAs by procuring contracts for fixtures of certain vessels, thereby causing freight rates on the above-mentioned index to rise sharply. Given the defendants' application to strike out the claim and the plaintiff's subsequent application to amend the statement of claim to clarify the claim in the tort of deceit and market manipulation, Judith Prakash J noted that the threshold was a low one as to whether the plaintiff's amended claim in deceit raised some issue to be decided at trial: at [41], citing *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649. The learned judge was of the view that the elements of deceit (namely, representation of fact; intention that the representation would be acted upon by the plaintiff; the plaintiff acted upon the false

statement; the plaintiff suffered damage as a result; and the representation was made with knowledge that it was false, was wilfully false or at least made in the absence of any genuine belief that it was true: see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14]) were present in this case.

26.20 Two elements of deceit, namely, representation of fact and reliance, were specifically mentioned by Prakash J. First, *Salaman v Warner* (1891) 65 LT 132 – which involved the defendants' alleged purchase of certain shares as a step in the conspiracy rather than as part of the claim in deceit – did not show that market manipulation conduct could never amount to a representation of fact. The artificially inflated prices could amount to a representation of fact that the price was naturally high. The question whether the defendant intended, by procuring the contracts for fixtures of the vessels, for the artificially high prices to be reported or whether the high prices were incidental to their conduct was a matter to be decided at the trial. It is true that generally speaking, the defendant's conduct can constitute a representation and the representation need not be communicated directly to the plaintiff. Whether the artificially inflated prices constituted a misrepresentation was less straightforward. An alternative argument, depending on the facts to be adduced at trial, could be that the artificially inflated prices were a *consequence* of the defendants' alleged market manipulation conduct rather than a representation in itself.

26.21 With respect to the reliance requirement, the plaintiff pleaded that the defendants' market manipulation conduct compelled it to close out and/or change its positions on the FFAs it held. As such, there was no specific reliance on the defendants' market manipulation conduct pleaded by the plaintiff. Notwithstanding this, the learned judge refused to strike out the claim. Prakash J appeared to have suggested that specific reliance on the defendants' market manipulation conduct might not be necessary under the tort though her Honour also indicated that the plaintiff would have an "uphill task" at trial: *TMT Asia* at [54]. Thus, this decision in itself does not indicate, by any means, that market manipulation conduct is likely to constitute a tortious act. In this regard, it should also be noted that Prakash J had rejected an argument by the plaintiff that there should be a tort of market manipulation given the current regulatory framework under the Securities and Futures Act (Cap 289, 2006 Rev Ed) and economic policy in this area.

26.22 The case of *Tembusu Growth Fund Ltd v ACTAtek, Inc* [2015] SGHC 206 briefly discusses the plaintiff's claims in fraudulent misrepresentation (including the element of representation of fact based on the defendants' statements of current intention in *Edgington v Fitzmaurice* (1885) 29 Ch D 459) and inducement of breach of contract (in particular, the principle in *Said v Butt* [1920] 3 KB 497 on a

director's liability in inducing a breach of contract by the company). The defendant's counterclaims in negligence and conspiracy by unlawful means failed. *Haneda Construction & Machinery Pte Ltd v Huttons Asia Pte Ltd* [2015] SGHC 294 concerned certain alleged representations by a property agent (second defendant) to the purchasers of warehouse units (plaintiffs) in a commercial warehouse development that there were ready sub-purchasers for the units. The claim in deceit failed as there was no proof that the second defendant had made those alleged representations. In any event, as there was no evidence of an employer-employee relationship between the first and second defendants, the first defendant could not be vicariously liable.

Defamation

Defamatory meaning, identification of plaintiff and corporation's claim for damages

26.23 In *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 ("*Golden Season*"), the third plaintiff was the director of both the first and second plaintiff companies. The second defendant was the director of the first defendant, a company which provided, amongst others, inflatable boats and marine products for flood disaster relief work. The first plaintiff purchased inflatable boats and other related equipment from the first defendant for the purpose of donations in aid of the floods in Thailand in 2011. The defendants also donated boats and related equipment, which were sent to and acknowledged by Mercy Relief, but the plaintiffs did not inform the defendants about this. The defendants made various statements via Facebook, e-mails and Short Message Service ("SMS") messages imputing that the plaintiffs were dishonest for selling the inflatable boats to Mercy Relief at a profit, overcharging and improper use of donors' moneys. This case involved the legal requirements of establishing defamatory meaning, reference to the plaintiff, defences, and the corporations' entitlement to awards of general and special damages. However, the High Court ruled that no aggravated damages should be awarded to corporate plaintiffs.

26.24 On the issue of defamatory meaning, a statement that alleges that a complaint or report has been made against the plaintiff to the police is not necessarily defamatory. The SMS text messages sent by the second defendant to a third party stated that a police report had been made against the third plaintiff, and that a defamation suit had been brought by the third plaintiff followed by the request that the recipient of the SMS texts "be truthful and not be afraid" and that "come what may, the truth will be out abt [*sic*] [the third plaintiff] and the way he do [*sic*] his business": at [82]. According to George Wei JC, the statement only conveyed to the reasonable reader that a serious legal dispute

between the plaintiff and defendant had arisen out of business dealings and did not impute that the third plaintiff was "guilty of an offence or that there are good grounds to think that an offence had been committed": at [82]. These gradations of meaning were referred to in *Chase v Newsgroup Newspapers Ltd* [2003] EMLR 2178 at [45] (applied in *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 and *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 ("*Low Tuck Kwong*") as levels 1 and 3 meanings respectively). The High Court decision serves as a reminder that defamatory meaning is assessed from the view of an ordinary reasonable reader and not one who is prejudiced in coming to a conclusion that reflects adversely on the plaintiff: *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 300–301.

26.25 Moving on to the next legal element, the High Court decided that the plaintiff's act in identifying himself as the person being referred to in the defendants' defamatory posting could not, on its own, satisfy the requirement of reference to the plaintiff. Logically, the source of identification of the plaintiff should be the defendants' publication rather than the plaintiff himself. In this case, however, the second defendant, when he responded to the third plaintiff's comment on Facebook, had confirmed the plaintiff's identity. This response of the defendant was sufficient to satisfy the requirement of reference to plaintiff. The High Court reached this conclusion based on a novel interpretation of the Facebook postings and threads of comments in the context of Singapore defamation law. Here the content of the postings changes as threads of comments were added. The Facebook posting and the accompanying thread of comments were akin to a "conversation" building upon previous threads: see *Smith v ADVFN plc* [2008] EWHC 1797 at [14] and *Baglow v Smith* 2011 ONSC 5131 at [59] and [60]. As such, this "conversation" constituted a "single publication" in so far as the subsequent comments belong to a single thread of comments originating from the same post: see *McGrath v Dawkins* [2012] EWHC B3 at [53].

26.26 Nonetheless, there is a general rule in *Grappelli v Derek Block (Holdings) Pte Ltd* [1981] 1 WLR 822 ("*Grappelli*") at 825, *per* Lord Denning, against using inferences placed upon statements *after* the publication by facts subsequently learnt. The High Court in *Golden Season* ruled, relying on *Grappelli*, that there was no reference to the plaintiff in the first Facebook posting by recourse to a subsequent posting.

26.27 The e-mail communications were defamatory in imputing that the plaintiffs were dishonest, cheats and in a position of conflict of interests. Wei JC awarded the first plaintiff $15,000 for the injury done to its business reputation and, for the third plaintiff, $30,000 by way of

general damages for the injury to his reputation and the consequential injury to his feelings and dignity. No special damages were awarded as the plaintiff could not prove that the decrease in the first plaintiff's sales was attributable to the defamatory e-mails. Instead, Mercy Relief and Singapore Red Cross had chosen to stop ordering from the plaintiffs because of complications arising from the litigation and the deterioration of ties between the plaintiffs and the defendants: see *Low Tuck Kwong* (above, para 26.24). As mentioned above, one question is whether corporations should be awarded aggravated damages. This issue was earlier raised in *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 but not fully determined. Wei JC explained that *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293 ("*Messenger Newspapers Group*"), which purportedly awarded aggravated damages to a corporate plaintiff, can be distinguished as it was based on the need to punish the defendant for his deliberate wrongdoing instead of compensating for injury to feelings. This legal position was subsequently echoed by Lee Seiu Kin J in *ATU v ATY* [2015] 4 SLR 1159 which followed foreign decisions from Hong Kong (*Oriental Daily Publisher Ltd; Ma Ching Kwan v (1) Ming Pao Holdings; (2) Ming Pao Newspaper Ltd; and (3) Cheung Kin Bor* [2013] EMLR 7) and England (*Collins Stewart Ltd v The Financial Times Ltd* [2006] EMLR 5; *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2014] HLR 4 ("*Eaton Mansions*")). The last case had specifically stated that *Messenger Newspapers Group* was "wrongly decided": *Eaton Mansions* at [30].

Examining factors in assessment of damages

26.28 Lee J in *ATU v ATY* also examined the relevant factors for assessing damages in defamation including the nature and gravity of the defamatory statement, the mode and extent of publication, the standing of the parties and the deterrent effect of a damages award. The allegations by the defendant were certainly grave as they concerned the sexual abuse and assaults of young children under the care of the plaintiffs, an international school, and its principal, school administrator and one of the teachers' aides, as well as the systemic abuse of trust. The first three plaintiffs enjoyed a high standing in the international school community. There was also extensive republication of the allegations via media outlets as the defendant had intentionally communicated the statements to the press which the public had great interest in knowing and the press were "almost bound to repeat" them (at [41]). Liability for republication will arise where the publisher had intended it or when it was a foreseeable consequence: *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 3 SLR(R) 46 at [129]–[130], *per* Rajendran J; *McManus v Beckham* [2002] 1 WLR 2982. There is a subtle (but nonetheless, important) difference between the "natural and

probable consequence" test in *Low Tuck Kwong v Sukamto Sia* [2013] 1 SLR 1016 and that of "foreseeable consequence" in *ATU v ATY*. The latter test, which is to be assessed by putting the reasonable man in the shoes of the *defendant*, is arguably a more fitting response to the question of whether the *defendant* should be regarded in law as the party responsible for the act of republication by another person. Save for the first plaintiff, a corporate entity, the second to fourth plaintiffs were awarded aggravated damages for the defendant's recklessness as to the truth of the allegations and her failure to apologise or retract her defamatory statements. Special damages were, however, not recoverable as the loss allegedly suffered by the plaintiffs was not referable to the damage to reputation: *Low Tuck Kwong* (above, para 26.24).

26.29 *Lee Hsien Loong v Roy Ngerng Yi Ling* [2016] 1 SLR 1321 concerned assessment of damages after the defendant had been found liable for defaming the plaintiff in an article published on the defendant's blog: see *Lee Hsien Loong v Roy Ngerng Yi Ling* [2014] SGHC 230 and discussion in (2014) 15 SAL Ann Rev 502 at 505–506, paras 25.13–25.15. With specific regard to the assessment of damages, Lee Seiu Kin J in *Lee Hsien Loong v Roy Ngerng Yi Ling* awarded the plaintiff $100,000 in general damages and $50,000 in aggravated damages. His Honour referred to the common factors relating to the gravity of the accusation, the high standing of the plaintiff and the mode and extent of publication as well as one factor which has hitherto not been comprehensively examined in Singapore, namely the credibility of the defamatory material and the defendant. With respect to the credibility issue, the type of Internet platform in which the defamatory material was communicated was relevant (*eg*, bulletin board posts in *Nigel Smith v ADVFN plc* [2008] EWHC 1797). In this regard, Lee J noted that the blog was fairly credible as it was written in a well-structured and grammatical manner supported by charts and statistics from verifiable sources.

26.30 Whether the defamer was credible was also relevant to the assessment of damages (see *Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd* [2012] HKCFA 59 and the Canadian cases of *Randall v Weich* 1982 CarswellBC 2254 and *Kohuch v Wilson* 71 Sask R 33). With respect to what the judge regarded as an insincere apology by the defendant for the defamatory postings, his Honour followed the position in *Adelson v Associated Newspapers Ltd (No 2)* [2009] EMLR 10 at [72]–[74] that "an apology that is not full or frank does not appease the feelings of the person defamed and does not undo the harm to the claimant's reputation". The malice of the defendant based on his knowledge of the reach of the defamatory material and the likelihood of its republication constituted aggravating factors. An important point to note is that although the High Court was prepared to consider the proposal made in *Review Publishing Co Ltd v Lee Hsien Loong* [2010]

1 SLR 52 that the quantum of damages payable could be adjusted in proportion to the degree of care which the defendant had taken with respect to the publication, there was no concrete evidence to support such an adjustment in this case.

Defamatory meaning, defence of consent and qualified privilege

26.31 The next case discusses two developments in respect of the defence of consent and qualified privilege. *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 ("*Ramesh*") was a suit against an insurance company, AXA Life Insurance Singapore Pte Ltd ("AXA"), for statements made in employment references about an ex-agent, Ramesh, who, having resigned due to a dispute with AXA, was seeking employment with two other insurance companies. There was in place an industry reference check system to facilitate compliance with certain guidelines prescribed by the Monetary Authority of Singapore ("MAS"). A duty was imposed on financial institutions ("FIs") such as the insurance companies to respond to queries by MAS and reference check requests by other FIs in respect of its ex-representatives. Under this industry reference check system, FIs were obliged to conduct reference checks on applicants (such as the plaintiff) for jobs. He sued in defamation for two statements made by AXA to these insurance companies and the MAS under the section on "Optional Information", one on persistency ratios, and the other, for compliance. The claims were eventually dismissed.

26.32 The statements on persistency were not defamatory. Referring to the test of *Sim v Stretch* (1936) 52 TLR 669, *per* Lord Atkin, that defamatory meaning be assessed from the perspective of right-thinking members of society generally, the High Court held that the statements on low persistency ratios would require special knowledge of the computation method and industry norms which the ordinary reasonable person lacks. An alternative would have been for the plaintiff to plead innuendo which was, for reasons unknown, not done. On the other hand, the statements on compliance were held to be defamatory for they imputed that Ramesh had been investigated in respect of a complaint in his work, profession, trade, business and/or services provided, and that he was an incompetent manager and supervisor.

26.33 One defence – not often relied upon – is that of consent. Did the plaintiff consent to the defamatory statements made? The standard industry reference check form indicated that the plaintiff had given written authorisation to AXA to conduct the inquiry into his or her previous employment. Drawing upon relevant English and Australian precedents, the High Court made important clarifications concerning the legal position in Singapore. First and foremost, consent must be

clearly and unequivocally given with regard to the *fact of publication* and to the *content of the publication*: see *Carter-Ruck on Libel and Privacy* (Alastair Mullis & Cameron Doley gen eds) (LexisNexis, 6th Ed, 2010) at para 14.56. Under the defence of consent, there is no requirement for consent to the *specific* words in the defamatory statements: *Michael James Austen v Ansett Transport Industries (Operations) Pty Ltd and Civil Aviation Authority* [1993] FCA 403 ("*Michael James*"). In terms of the *scope* of consent, it was found that Ramesh had consented to AXA's publication to the other insurance companies of all information *relevant* to Ramesh's reference checks. In addition to the relevance and scope of consent, the information must have been *honestly and properly kept* by the defendant: see *Michael James*; *Chapman v Lord Ellesmere* [1932] 2 KB 431; and *Friend v Civil Aviation Authority* [1998] IRLR 253. This last requirement can, as a matter of logic and common sense, be supported by the plaintiff's (reasonable) expectations that the records were to be honestly and properly kept at the relevant time when he signed the written authorisation, and that due care would be exercised by the defendant in responding to reference checks.

26.34 Apart from the defence of justification, the High Court opined that the defence of qualified privilege would apply in such a case to protect the communications made by an ex-employer to a prospective employer. This was consonant with the need for the ex-employer's full and frank assessment of its ex-employee: see also the English case of *Spring v Guardian Assurance plc* [1995] 2 AC 296 ("*Spring*"). In addition, AXA shared a common interest with the other insurance companies under the industry reference check system with reference to the communication of Ramesh's persistency ratios and compliance record. The defence of qualified privilege protected the communication to MAS as AXA was under a duty to report to the regulator as expressly set out in a MAS notification. There was also no malice based on the "dominant motive" test as set out by the Court of Appeal in *Chan Cheng Wah Bernard v Koh Sin Chong Freddie* [2012] 1 SLR 506. Since the defamation claim failed due to the defence of qualified privilege, this raises the interesting issue of whether the plaintiff would be able to avail itself of a suit in negligence (see paras 26.67–26.69 below).

Harassment

26.35 The Protection from Harassment Act (Cap 256A, 2015 Rev Ed) was enacted to deal with social scourges such as harassing conduct, stalking, cyberbullying and harassment at the workplaces. Section 15 deals with publication of false statements of fact about a "person". Upon the application of the "person" (or subject) of such false statements, the District Court is empowered to require the publisher to put up a notification to "bring attention to the falsehood and the true facts",

provided the court is satisfied that the fact complained of is false in any particular about the subject, and it is just and equitable to make the order.

26.36 A dispute had arisen between the Ministry of Defence ("MINDEF") and a Dr Ting about a patent developed by Dr Ting's company ("MobileStats"). This led to a law suit by MobileStats against MINDEF for infringement of patent. MINDEF had earlier entered into a contract with another company, Syntech, to purchase the medical military vehicles. The law suit by MobileStats was discontinued midway through trial. Dr Ting subsequently made statements that a MINDEF high-ranking officer knew that MINDEF was infringing the patent and was attempting to "get around" the patent, and that MINDEF had dragged out the litigation to increase MobileStats's costs. These statements were published online by The Online Citizen. MINDEF alleged that the statements meant that MINDEF had knowingly infringed upon the patent and had deliberately delayed court proceedings as a "war of attrition" against MobileStats, which it claimed were false. The District Court allowed the s 15 application by the Attorney-General: see *Attorney-General v Lee Kwai Hou Howard, Xu Yuen Chen, Loh Hong Puey Andrew, Choo Zheng Xi, Lee Song Kwang and Ting Choon Meng* [2015] SGDC 114.

26.37 This decision was overruled by the High Court in *Ting Choon Meng v Attorney-General* [2016] 1 SLR 1248. In essence, See Kee Oon JC decided that the Government did not have the right to make a s 15 application as it was not a "person" under the provision. In any event, the statement that MINDEF had knowingly infringed the patent had not been shown to be false. (Note: the other statement that MINDEF had deliberately delayed court proceedings was false as MINDEF was not in fact in charge of the litigation; Syntech had taken over the litigation pursuant to the contract terms agreed with MINDEF.) Moreover, it was not just and equitable to grant a s 15 order. MINDEF had already published online its version of the story; the false statement that MINDEF had delayed court proceedings did not seriously impugn MINDEF's identity; and The Online Citizen had already published MINDEF's statement on the matter.

26.38 Returning to the point that the Government did not have a right to apply for the court order under s 15, the thrust of the Protection from Harassment Act, according to the learned See JC, was to protect persons from the emotional or psychological impact of the words or conduct of others. The statute provided for both criminal and civil remedies under ss 3, 4 and 7 to victims who have been subject to harassment. This interpretation was based on the court's reading of parliamentary debates leading to the enactment of the statute. In the Minister for Law's speech in Parliament, the s 15 remedy was variously described as a "lower tier

of remedy", a form of "self-help" and a "lesser remedy" without the need for recourse to criminal and civil law. Hence, the learned judge determined that s 15 was to be limited to false statements which are capable of affecting the subject emotionally and psychologically which meant that the subject had to be a human being. This was notwithstanding the fact that s 15 does not refer to "harassment" at all. With respect to false statements ostensibly targeted against corporations, however, See JC noted it was possible for a human being who managed the corporation to make a s 15 application if the allegation was, in substance, one against the human being. In so far as the present application was concerned, this exception did not apply as it was the Government, rather than a Government officer, that sought the court order.

26.39 The upshot of the court's position is that a corporation cannot sue for harassment under the statute. This runs counter to the definition of a "person" in s 2 of the Interpretation Act (Cap 1, 1997 Rev Ed) as including "any company or association or body of persons, corporate or unincorporate". The *prima facie* interpretation must be that a corporation, and not merely a human being, should be allowed to apply for a s 15 order to correct any false statements concerning the corporation. However, the High Court also noted that the meaning referred to in the Interpretation Act applies unless "there is something in the subject or context inconsistent with such construction" or unless it is therein "otherwise expressly provided". It cited the case of *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 562 at [67] in which V K Rajah J (as he then was) stated that, in relation to the predecessor provisions to the Protection from Harassment Act (namely the Miscellaneous Offence (Public Order and Nuisance Act) (Cap 184, 1997 Rev Ed), the offences may:

> … when directed against a body (corporate or unincorporated), be viewed as constituting harassment and/or causing alarm or distress to those responsible for running that body. … [the offences] … can be committed, if not against corporate or incorporated bodies as persons, then certainly against the persons responsible for operating or managing such bodies.

Inducement of breach of contract

26.40 In *Likpin International Ltd v Swiber Holdings Ltd* [2015] 5 SLR 962, the plaintiff claimed against the first defendant for breach of contract and against the second defendant for inducing the breach of contract. Both claims were denied. This was because the alleged contract between the plaintiff and the first defendant for the charter of a vessel was not legally enforceable due to uncertainty in the material terms (the date of conclusion of the contract and the agreed consideration). This

absence of a properly concluded contract – a basic prerequisite for finding inducement of breach of contract – meant that the claim must fail. The above decision adds to the existing cases where the tort could not be established as the underlying contract had not been formed (*Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR(R) 989) or was otherwise void (*Stratech Systems Ltd v Nyam Chiu Shin* [2005] 2 SLR(R) 579). Where there is no valid contract or legally enforceable contract, there would not be any interference with the contractual rights of the plaintiff to begin with.

26.41 The requirement of finding an intention on the part of the defendants regarding the breach of contract was examined in *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 ("*M+W Singapore*"). Jurong Data Centre Development Pte Ltd ("JDD") engaged the plaintiff construction company to build a data centre. As JDD was defaulting on its payments, JDD executed a debenture to provide security to the plaintiff. It was agreed in the debenture that all monetary claims would be charged to the plaintiff by way of a first charge and deposited into an account for the plaintiff. Subsequently, investors withdrew from the project and JDD could not make repayments. Receivers and managers, who were appointed for JDD, found that there were insufficient assets belonging to JDD for repayment of the debts owed to the plaintiff. It also transpired that the defendants – two directors of JDD and joint signatories of the account – had authorised payments of a sum of money to third parties from the above-mentioned account. The defendants clearly knew of the existence and terms of the debenture. The legal issue was whether the defendants intended the breach of contract as an end in itself or as a means to an end (*OBG Ltd v Allan* (above, para 26.16)). Here, the High Court took the view that the defendants intended to interfere with the plaintiff's contractual rights knowingly: at [90], citing *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*"). The High Court had earlier found that, with regard to the plaintiff's separate claim, the defendants had dishonestly assisted in breach of trust. With their knowledge of the terms of the debenture, the defendants had participated in the payment of money to third parties in a manner that would offend ordinary standards of honest conduct. The defendants could have notified the plaintiff and obtained approval before making the unauthorised payments to third parties but did not do so. Moreover, an objective person would have realised that those payments would be contrary to the plaintiff's interest in the preservation of the security.

26.42 Prakash J also decided, albeit "reluctantly", that the defendants did not act *bona fide* as directors in the interests of JDD. This was a case, according to the learned judge, where the directors "act[ed] wrongly within the scope of their authority" (as opposed to acting beyond their scope of authority): *M+W Singapore* at [97]. There was also the element

of "dishonesty" present in the present case. Hence, the defendants could not be protected under the rule in *Said v Butt* (above, para 26.22).

26.43 The authors discussed *ARS v ART* in the context of a conspiracy claim (see para 26.11 above). The plaintiff had also claimed that the first defendant induced and/or procured two other parties to breach the first and second agreements respectively. The High Court stated (at [29]) that the plaintiff must show, apart from the act of inducement and the breach of the contract, that: (a) the defendant acted with the requisite knowledge of the existence of the contract; and (b) the defendant intended to interfere with the performance of the contract (as set out by the Court of Appeal in *Tribune Investment* at [17]). The plaintiff could not prove that the two agreements existed or, even if they did exist, that they were breached. Neither did the first defendant induce the breach with the knowledge of the agreements and with the intention to interfere with their performance. The plaintiff alleged that certain parties who had induced the breach were representatives and/or acting for and on behalf of the first defendant. However, those parties were neither the employees nor directors of the first defendant but merely individuals in the group of companies of which the first defendant was the holding company. According to Quentin Loh J, the acts or knowledge of those parties could not be attributed to the first defendant.

Malicious prosecution

26.44 In *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2015] SGHC 44, the plaintiff alleged that the defendants had committed the tort of malicious prosecution, amongst others. The defendants sought to strike out the claim. Choo Han Teck J refused to do so, pointing out that the tort of malicious prosecution in respect of civil proceedings was not settled law. This issue had been dealt with in a recent Privy Council decision in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] 3 WLR 927 wherein the majority (Lords Sumption JSC and Neuberger PSJ dissenting) took the position that the tort existed due to the need to provide remedies for harm done to the plaintiff and it was consistent with case precedents: see also Tom K C Ng, "The Torts of Malicious Prosecution and Abuse of Legal Process" (2014) 130 LQR 43 at 43–47. Conflicting *dicta* from three Singapore High Court decisions – *Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd* [2013] 4 SLR 662 at [93]; *Lim Kok Lian v Lee Patricia* [2015] 1 SLR 1184 at [13]; and *Bhagwan Singh v Chand Singh* [1968–1970] SLR(R) 50 at [28] – suggest that this issue is yet to be resolved.

26.45 It should be noted that there is a pending appeal to the UK Supreme Court against the decision of the High Court in *Willers v Joyce*

[2015] EWHC 1315 that the claim for malicious prosecution of civil proceedings should be struck out. Tipples QC stated that she was bound to follow *Gregory v Portsmouth City Council* [2000] 1 AC 419 ("*Gregory*") in that the tort of malicious prosecution did not extend beyond the abuse of criminal proceedings. Tipples QC also granted a leapfrog certificate to appeal to the Supreme Court. The Singapore courts are clearly not bound by *Gregory*. In any event, it is open to a plaintiff to argue that the *ratio* in *Gregory* be confined to the principle that the tort of malicious prosecution should not apply to disciplinary proceedings by a local authority which is quite distinct from extending the tort to civil proceedings generally.

Negligence

Wrongful birth and upkeep expenses

26.46 *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 ("*ACB*") was probably one of the most-discussed cases in Singapore last year. Due to the negligence of the defendants, a couple who underwent in-vitro fertilisation ("IVF") treatment had a child that was not biologically the offspring of the plaintiff's husband. The defendants had negligently used the sperm of a third party to fertilise the plaintiff's egg. The couple sued the defendants to recover the upkeep costs of raising the child. There were four defendants. The first defendant was Thomson Medical Pte Ltd (the hospital); the second defendant was Thomson Fertility Centre Pte Ltd (a clinic owned by the first defendant); and the third and fourth defendants respectively were the senior embryologist and chief embryologist of the second defendant. All four defendants were sued in tort, and the third defendant additionally was sued for breach of contract.

26.47 Choo Han Teck J considered the leading wrongful conception cases from the UK, namely *McFarlane v Tayside Health Board* [2000] 2 AC 59 ("*McFarlane*") and from Australia, namely *Cattanach v Melchior* (2003) 215 CLR 1 ("*Cattanach*"). The House of Lords in *McFarlane* by 4:1 majority denied the claim largely on moral grounds, whereas the High Court of Australia in *Cattanach* allowed it. Choo J expressed a preference for the *McFarlane* approach, arguing that it would be immoral and repugnant to award such damages as it would make the child believe that he or she had been unwanted at birth.

26.48 Choo J also recognised that the facts of *ACB* were unique. Unlike *McFarlane* and *Cattanach*, where the parents had not wanted another child and therefore may not have been prepared for the upkeep expenses, the parents in *ACB* had wanted a child and had prepared for the upkeep expenses. Thus, on conventional tort principles, there was

no loss. Choo J, however, did not go on to consider whether a claim in contract should have been allowed. This case was appealed and heard by a bench of five judges in the Court of Appeal, whose decision is pending. For a full discussion of the High Court decision, see Margaret Fordham, "An IVF Baby and a Catastrophic Error – Actions for Wrongful Conception and Wrongful Birth Revisited in Singapore" [2015] Sing JLS 232.

No duty to prevent bullying?

26.49 *AYW v AYX* [2016] 1 SLR 1183 involved a striking out application in an action by a student victim of bullying against her school for failing to prevent the bullying by other students. George Wei J noted that schools clearly owed a duty of care to their students to provide a safe and secure environment for learning. However, he struck out the claim on the ground that it was factually and legally unsustainable. The facts briefly were that the plaintiff was a member of the school's Chinese orchestra, including being on its executive committee. Disputes arose amongst the students, resulting in the other students ostracising the plaintiff. The plaintiff's parents intervened and after a period of unsatisfactory interactions with the school, the plaintiff withdrew from the school and went to the UK to complete her studies.

26.50 Wei J, noting that the case raised some novel questions of law, cautioned that novel questions of law should ordinarily not be resolved at the striking out stage. However, he also noted that there was no rule preventing a court striking out an action despite the presence of novel questions of law if the facts do not support even a remote likelihood of success were the claim to proceed. Wei J then undertook an in-depth analysis of the duty of care concept, in particular the coterminous area of duty and breach, often described as the scope of duty question.

26.51 Focusing on the scope of duty question, Wei J held that while the school clearly owed a general duty to its students, that duty did not extend to policing all students' activities that could harm other students. On the facts, the scope of duty contended for by the plaintiff was unsupported. While Wei J's duty of care analysis is detailed and sophisticated, it is questionable whether the claim should have been struck out given that it did raise novel legal questions, and it required fairly detailed analysis to determine the scope of duty. Wei J's interpretation of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") also reopens the hoary question of what is meant by foreseeability. Factually, it is foreseeable that bullying could cause the victim physical or psychiatric harm. Whether it was *reasonably foreseeable* is a normative question which should have been left to be determined at trial.

Representations and proportionate liability

26.52 The facts in *Cheng William v Allister Lim & Thrumurgan* [2015] 1 SLR 201 were that a businessman, Su, paid $900,000 for a shophouse believing it had a remaining lease of 62 years, when in fact it had only 17 years left. Cheng, the vendor, had fraudulently represented the remaining lease, resulting in Su's property agent, Ng, making a negligent representation to Su. Su brought an action against Cheng for fraudulent misrepresentation, against Ng for negligent misrepresentation and against Su's solicitor in negligence for failing to inform Su of the actual remaining lease. The High Court found in favour of Su against all the defendants and apportioned liability as follows: Cheng to bear 50%; the solicitor to bear 45%; and Ng to bear 5%. Cheng and the solicitor appealed to the Court of Appeal.

26.53 The Court of Appeal held that the High Court had rightly found in favour of Su against the three parties, but varied the proportion of damages. The court apportioned 65% of the blame to Cheng, 30% to the solicitor and 5% to Ng. The greater proportion attributed to Cheng was to reflect his greater culpability by way of fraud compared to the solicitor's liability in negligence. The Court of Appeal also found Su contributorily negligent in failing to inform his solicitor that he was acting under the impression that there were 62 years left on the lease. While it would be unusual for a client to be contributorily negligent, in cases where the information was pertinent, as it was here, a finding of contributory negligence could be made. The court apportioned Su's blame at 15%.

Duties of occupier and employer

26.54 *Kang See Wha v Pledge Protection (Asia) Pte Ltd* [2015] SGDC 50 ("*Kang See Wha*") concerned an explosion at a condominium which caused injuries to several individuals, three of whom initiated legal action relying on the torts of negligence and breach of statutory duty. The first plaintiff was Kang, a security guard deployed to work at the condominium. He sued the first defendant, his employer Pledge Protection Asia ("PPA"); the second defendant, the management corporation of the condominium ("the MCST"); and the third defendant, Property Facility Services Pte Ltd ("PFS"), a property management firm appointed to manage the condominium. The second plaintiff was Goh, a property officer, who sued his employer (PFS) and the MCST. The third plaintiff, Chung, was delivering some equipment to the condominium, and he sued the MCST.

26.55 The explosion was caused by a gas leak. In the days leading up to it, residents had complained about the smell, but Kang did not take

action initially. He then informed Goh, and finally on the day of the explosion the duo went down to the main distribution frame room ("MDF room") on the ground floor of the car park to investigate the smell. As the room smelt strongly of gas, they decided to leave immediately. Goh's act of switching off the lights caused a small electrical spark which ignited the gas.

26.56 The actions in negligence by Kang and Goh against the MCST were dismissed as the threshold requirement of foreseeability was not met. The MCST was not informed about the gas smell and had no knowledge of the gas leak until the explosion occurred. Thus, it could not have foreseen any risk relating to the explosion. Chung's claim against the MCST was in negligence, alleging that the MCST as occupier had breached its duty to lawful entrants by failing to have in place a system of inspection to discover gas leaks; by failing to have clear protocols for gas leak complaints; and for failing to prevent entry when the MCST knew or ought to have known of the gas leak.

26.57 District Judge Tan May Tee noted that the law on occupiers' liability in Singapore had been subsumed within the general principles of negligence in the landmark case of *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 ("*See Toh*"). District Judge Tan noted the diverse opinions in *See Toh* on the application of the *Spandeck* test to lawful and unlawful entrants. District Judge Tan further noted that V K Rajah JA's view that a *prima facie* duty would be owed to lawful entrants was strictly *obiter* as the plaintiff in *See Toh* was a trespasser. As this case involved a lawful entrant, District Judge Tan held that he had to determine whether to follow Rajah JA's *dictum* or Sundaresh Menon CJ's, the latter suggesting that *Spandeck* should be applied to all entrants. Preferring Menon CJ's view, District Judge Tan decided to apply *Spandeck* to determine whether a duty was owed.

26.58 In doing so, District Judge Tan referred extensively to *Chu Said Thong v Vision Law LLC* [2014] SGHC 160 where Vinodh Coomaraswamy J reinterpreted *Spandeck* to reintroduce a normative, reasonable foreseeability test to the threshold stage. District Judge Tan's conclusion in denying a duty is worth quoting (*Kang See Wha* at [84]):

> A property owner with a reasonable attitude to risk and a reasonable capacity for foresight could not have foreseen a gas accident taking place at such a location. To determine otherwise would be tantamount to making provision for risks which would be regarded as beyond reasonable contemplation and might even be consider as fanciful.

On Kang's negligence claim against his employer, PPA, District Judge Tan held that a duty was clearly owed by an employer to its employee to maintain a safe place of work. However, District Judge Tan held that PPA had not breached its duty as the

explosion was caused by an underground gas leak that was wholly out of its management and control. Kang also sued PFS alleging that it was vicariously liable for the actions of Goh and that it had breached its duty owed to Kang by failing to give Goh proper training on how to handle emergencies such as gas leaks. District Judge Tan found in favour of Kang on both claims, holding that PFS owed a duty which it had breached by failing to have proper protocols, and that it was vicariously liable for the tort of its employee, Goh (discussed at para 26.59 below). District Judge Tan found Kang to be 50% contributorily negligent in failing to act with greater responsiveness to residents' complaints about the smell of gas and in failing to take reasonable care by blindly following Goh to the MDF room.

26.59 Goh sued his employer in negligence and breach of statutory duty. District Judge Tan, referring to the employer's duty of care in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 ("*Chandran*") found that as it was not foreseeable that the gas pipes presented any danger, PSF had not breached its duty to provide a safe place of work. However, PSF was found negligent in failing to have in place proper protocols to deal with emergency situations, and as such had failed to provide a safe system of work. Goh was found 50% contributorily negligent. The breach of statutory duty claim also failed.

Duties of lawyers

26.60 The judgment in *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC* [2015] SGHC 146 ("*Nava Bharat*"), running to a massive 573 paragraphs, involved a lawsuit by the plaintiff company against its lawyer ("Rajaram"); a law firm, Straits Law Practice LLC ("SLP"); a businessman ("Dicky Tan"); and his lawyer ("Chandra"). The facts were that the plaintiff attempted to acquire an interest in an Indonesian coal mine. According to Indonesian law, the plaintiff had to work through an Indonesian company. Dicky Tan was the majority shareholder of an Indonesian company, PT Indoasia Cemerlang ("PTIC"), which had a mining concession. Lengthy negotiations ensued, resulting in complex corporate arrangements to facilitate the investment. Nava Bharat (Singapore) Pte Ltd ("Nava Bharat"), Dicky Tan and PTIC incorporated a holding company in which Nava Bharat had a 15% interest and the right to acquire up to 90% of the equity. The holding company would operate the mine with PTIC.

26.61 During this process, Indonesia's mining law changed, which had an impact on the proposed transaction as it required a new type of licence. Nava Bharat was concerned about this but accepted Dicky Tan's assurance that he would obtain the licence if it was required. There were several delays with default notices issued by Nava Bharat and variations

made to the agreement to keep the deal alive. At some point, Nava Bharat was informed that due to legal complications in Indonesia, Dicky Tan had lost his interest in PTIC shares, which had been transferred to other parties. It also emerged that Dicky Tan had dealings with other companies that were potentially in conflict with his dealing with Nava Bharat, or at least which ought to have been disclosed.

26.62 The claim against Rajaram and SLP was both in contract and the tort of negligence. Lee Seiu Kin J, referring to *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 ("*Anwar*"), began by noting that a solicitor could owe concurrent duties in contract and tort, and that the scope of the duty would be determined by the retainer and the work undertaken by the solicitor. Lee J went on to recognise that the scope of the duty was also shaped by the expertise of the client – a greater duty would generally be owed to a more sophisticated business client than an uninformed layperson. Here, the client was found to be a sophisticated business; thus, the scope of duty was narrower than that owed to a layperson.

26.63 The crux of the plaintiff's claim was Rajaram's alleged failure to advise on the effect of the changes in Indonesian law, but Lee J held that such advice was not within the scope of Rajaram's duty as he was not an expert on Indonesian law and had not purported to advise on Indonesian law. Lee J also observed that there was no general rule that a lawyer engaging in transnational work was obliged to advise on foreign law in all cases, especially where foreign legal experts could be engaged and relied upon. Similarly, relying on *Su Ah Tee v Allister Lim and Thrumurgan* [2014] SGHC 159, Lee J noted that a solicitor was only obliged to advise on legal matters and not on commercial matters. On the facts, Lee J found that Rajaram had discharged his legal duties in advising the plaintiff, and that the plaintiff's decision to go ahead and take the risk in proceeding with the investment was a commercial decision of the plaintiff. Lee J went on to note that even if Rajaram had been negligent, the plaintiff had failed to prove that the negligence was causative of the loss as there was no evidence that it would not have proceeded as it did but for Rajaram's alleged failure to advise.

26.64 The plaintiff's claim against Chandra was in unlawful means conspiracy (discussed para 26.66 below) and negligence. The negligence issue raised an interesting point of whether a solicitor could be found to owe a duty of care to a counterparty in a transaction. This was unlike *Anwar* or *Cheo Yeoh & Associates LLC v AEL* [2015] 4 SLR 325 ("*AEL*"), where the third party to whom a duty was owed was not a counterparty; hence, these cases were inapplicable. In these cases, there was a commonality of interest between the solicitor's client and the third party, unlike the counterparty cases where the interests of the client and the

third party are diametrically opposed. Referring to relevant English and Singapore jurisprudence, Lee J held (*Nava Bharat* at [521]):

> Having considered the above authorities, and bearing in mind the universal two-stage test laid down by the Court of Appeal in *Spandeck*, I am of the view that the commonality of interests between the client of the lawyer and the third party in question is not *per se* a determinative factor as to whether there is sufficient proximity between the lawyer to the third party for the imposition of a duty of care. However, the fact that there is a conflict of interest between the client and the third party, especially in cases where they are on opposite sides of a transaction, would generally indicate a lack of proximity. This is because in cases where the client and the third party are on opposite sides of the transaction (in the sense that their interest may conflict), it would ordinarily be difficult to find that there has been voluntarily [*sic*] assumption of responsibility and reliance or control and vulnerability such as to satisfy the proximity limb of the *Spandeck* test.

26.65 On the facts, there was clearly insufficient proximity between Chandra and the plaintiff to establish a duty of care. Chandra had not assumed responsibility, nor was he in control of the source of the risk; the plaintiff neither relied on Chandra nor was particularly vulnerable. It was a well-resourced entity that had its own legal advisers, and Chandra was entitled to expect the plaintiff to rely on its own legal advisers to protect its interest in the transaction. Interestingly, Lee J distinguished between policy considerations, which constituted the second limb of the *Spandeck* test, and consideration of fairness and justice, which belonged to the first limb of the test, namely proximity. The main policy consideration here was the risk of indeterminate liability if the duty of the solicitor were to extend to any third party that had an interest in the transaction.

26.66 On the unlawful conspiracy claim, Lee J began by setting out the requirements affirmed by the Court of Appeal in *Marinteknik* (above, para 26.9). On the first element of a combination between two or more parties, Lee J held that mere knowledge of the commission of an unlawful act was not sufficient to show an agreement or combination. On the facts, there was no evidence of an agreement to defraud, and Lee J found that Chandra was not aware of the fraud pertaining to the PTIC shares.

Duty of care and employment references

26.67 *Ramesh* (above, para 26.31) is a significant case as it represents the first instance of an employee suing an ex-employer for a negligently prepared reference. Such a claim was first recognised in the English decision of *Spring* (above, para 26.34). The defendant, AXA, provided a

reference for the plaintiff as required under the MAS's regulatory regime for representatives of financial institutions (see facts in para 26.31 above). As mentioned, the reference was negative and the plaintiff brought actions in defamation, malicious falsehood and negligence. This part deals with the negligence action.

26.68 Wei J began by stating that *Spring*, while not applicable as an authority, was useful in terms of guiding the court as to the relevant considerations in this area. The approach that was binding was that of *Spandeck*. Applying the *Spandeck* test, Wei J found that a duty of care was established. It was clearly foreseeable that the plaintiff could suffer loss as a result of the defendant's actions. There was a relationship of proximity, based on the classic factors of special knowledge, assumption of responsibility and reasonable reliance. There was no actual reliance in this case, but merely general reliance, or perhaps more accurately as Wei J noted, there was an expectation that the defendant would exercise reasonable care with respect to the plaintiff: for an expectation-based theory of negligence, see Kumaralingam Amirthalingam "The Shifting Sands of Negligence: Reasonable Reliance to Legitimate Expectation?" (2003) 3 OUCLJ 81.

26.69 The main policy considerations included the potential conflict between liability in negligence and the law of defamation and malicious falsehood, as well as the need for full and frank disclosure by ex-employers in employment references. Neither of these considerations, in Wei J's view, militated against finding a duty of care. Although there was a duty of care on the facts, Wei J found that it had not been breached; thus, the negligence action failed.

Others

26.70 In *Tan Shiang Kok* (facts set out at para 26.1 above under the "Breach of statutory duty" heading), District Judge Koh Juay Kherng found the first defendant to have breached its duty of care as the cleaner had failed to clean the floor properly and place a warning sign. The second defendant was negligent in failing to supervise the first defendant and ensure that the cleaning was done properly. District Judge Koh also found that the second defendant had breached the statutory duty but there was no discussion as to whether the tort of breach of statutory duty was made out (see para 26.2 above); liability appeared to be on the basis of negligence only. The plaintiff was held to be 70% contributorily negligent as he was familiar with the toilet and had himself been an experienced toilet cleaner. The first defendant was held 20% liable and the second defendant 10%.

26.71 In *Union Concept Manfacturers Pte Ltd v Rhythme Technology Pte Ltd* [2015] SGHC 121, a lit cigarette fell on packing material outside a warehouse, igniting the material which damaged the warehouse. The defendant was a company engaged by the Housing and Development Board to service and maintain the fire protection and ventilation system, including the fire hose reel. The plaintiff alleged that the defendant was negligent in failing to ensure that there was sufficient water in the fire hose reel system, as a result of which the fire could not be contained. Choo Han Teck J found that the defendant owed the plaintiff a duty of care but on the facts found that the defendant had not breached its duty. Further, Choo J held that even if the defendant had been negligent, the plaintiff would have failed on causation. The fire had spread so rapidly and fiercely that even if there had been sufficient water in the hose reel, the fire would not have been contained.

26.72 *Arnold William v Tanoto Shipyard Pte Ltd* [2015] SGDC 221 involved an accident at work when a diver was injured by a floater due to the negligence of the defendant. The case was purely factual with the defendant found liable in negligence and the plaintiff found to be contributorily negligent in equal measure.

Road traffic accidents

No estoppel on denial of liability

26.73 *Soh Lay Lian Cherlyn v Kok Mui Eng* [2015] 5 SLR 53 involved a collision between two vehicles at a traffic intersection. The defendant had earlier sued the plaintiff and settled on the basis of 90% liability on the plaintiff and 10% liability on the defendant for the accident. The plaintiff then instituted this action against the defendant and the District Judge felt bound by the ruling in *Jaidin bin Jaiman v Loganathan a/l Karpaya* [2013] 1 SLR 318, holding that the consent final judgment bound the defendant and therefore had to be held 10% liable. On appeal, Lai Siu Chiu SJ held that the defendant was not estopped from denying liability as there had not been a judgment on the merits but merely a consent settlement entered into on a "without prejudice" basis and without any admission of liability. On the facts, Lai SJ found the defendant not liable, holding that the plaintiff was 100% to blame.

Assessing damages for personal injuries

26.74 *Mark Amaraganthan Selvaganthan v Cheung Man Wai* [2015] SGHC 253 involved a motor collision between two cars. The plaintiff had stopped his car at a traffic junction waiting for an opportunity to turn when the defendant collided with the rear of his car. The defendant,

noting that the traffic was clear, had assumed that the plaintiff would have moved. The defendant also alleged that the plaintiff had actually moved and stopped suddenly, which had contributed to the accident. Judith Prakash J did not accept this contention and found the defendant 100% liable.

26.75 The plaintiff claimed that he suffered a flexion-extension injury to his neck which resulted in cervical prolapse. Based on the evidence, Prakash J found that the accident had not caused the spinal injury as alleged by the plaintiff. The plaintiff claimed significant damages for pain and suffering, loss of future earnings, lost earning capacity, medical expenses and transportation costs. In particular, the claim for lost earning capacity was $150,000 and loss of earnings as a result of loss of promotion opportunities and bonuses was $471,466.65. This head of claim was dismissed as the evidence was speculative and indeed, there was evidence that the plaintiff had continued to receive bonuses. In the end, the plaintiff was awarded $7,000 for pain and suffering, and $4,950 for medical expenses.

Cases on contributory negligence

26.76 *Li Gaiyun suing as the administrator of the estate of Ma Dewu, deceased v Chan Wei Lun Allan* [2015] SGDC 53 was a claim by the widow of the deceased who was riding a bicycle when negligently struck by the defendant's car. Briefly, the defendant was driving along a main road when the deceased rode out from a side road in front of him. District Judge Seah Chi Ling found the defendant negligent for failing to keep a proper lookout and reduced the damages by 15% to account for the deceased's contributory negligence.

26.77 *Chai Yew Cian v Yeoh Teow Yee* [2015] SGHC 124 involved a road traffic accident between a bus, driven by the second defendant, and a motorcycle ridden by the first defendant, whose wife was a pillion rider and plaintiff in the case. Judith Prakash J found on the facts that the first defendant was 85% to blame and the second defendant was 15% to blame.

26.78 *Joo Yong Co (Pte) Ltd v Gajentheran Marimuthu* [2015] SGCA 38 involved a road traffic accident between a lorry driven by the defendant and a motorcycle. The issues involved factual inferences to determine negligence and contributory negligence. The Court of Appeal concluded that the defendant was 85% negligent and the plaintiff 15% contributorily negligent, thus varying the trial judge's finding of 100% liability.

26.79 In *Lyu Yongqiang v Yu Mau Hing* [2015] SGHC 200, the plaintiff was riding a bicycle when he was side-swiped by a bus driven by the defendant. On the facts, Lai Siu Chiu SJ found the defendant 90% liable in negligence and the plaintiff 10% contributorily negligent.

Trespass to person

26.80 The plaintiff in *Goel Adesh Kumar v Resorts World at Sentosa Pte Ltd* [2015] SGHC 289 was gambling at the defendant's casino when he was removed to a side room by employees of the defendant. The plaintiff alleged that he was assaulted and falsely imprisoned by the employees of the casino and the auxiliary police provided by SATS Security Services Pte Ltd ("SATS"). He sued the defendant, alleging it was vicariously liable for the torts of their employees and the auxiliary police. The defendant joined SATS as third parties seeking an indemnity for any wrongs attributable to SATS employees.

26.81 On the false imprisonment claim, although the plaintiff voluntarily entered the room with the casino staff, Choo Han Teck J found that the plaintiff had been falsely imprisoned in the room from the moment he asked to leave and was prevented from doing so. The defendant's argument that it was willing to release the plaintiff on condition that he left the premises immediately did not alter the fact of false imprisonment as the defendant had no lawful authority to detain the plaintiff. Choo J referred with approval to the Australian decision of *Walter Vignoli v Syndey Harbour Casino* [1999] NSWSC 1113 ("*Walter*"), a case with similar facts. The defendant casino had detained a patron and had argued that it was prepared to release the patron as long as the patron returned a sum of money that was paid to him by mistake. These cases suggest that the classic decision of *Robinson v Balmain New Ferry* [1910] AC 295 may no longer be followed as contemporary norms place a higher premium on personal liberty.

26.82 Further, it was held that the detention power under s 180(1) of the Casino Control Act (Cap 33A, 2007 Rev Ed) was limited in its scope and applied only where the patron had committed, or was likely to commit, a specified crime. In addition, the patron had to be informed of the reasons for detention and the authorities had to be immediately informed. Choo J also found that the assault and battery claims were made out when the plaintiff was physically prevented from leaving and was involved in minor scuffles with the defendant's and SATS's employees.

26.83 The vicarious liability claim against the defendant for the intentional torts committed by the auxiliary police failed. As the auxiliary police were employees of SATS, Choo J held that it was SATS

and not the defendant that was vicariously liable. The defendant could only be liable for the torts of its employees. On determining the extent of liability of the respective groups of employees, Choo J found that the casino employees were wholly liable for the false imprisonment and SATS's employees were mainly responsible for the assault and battery. On a global view, Choo J found the defendant's employees were 80% to blame.

26.84 In assessing the damages for false imprisonment, Choo J awarded $4,000, noting that the detention was for a relatively short period (less than 50 minutes) in a comfortable room intended for patrons, unlike the plaintiff in *Walter* who was detained for six hours, following which he received A$30,000. The plaintiff claimed for various physical injuries which were assessed on conventional principles by Choo J, resulting in damages of $25,000 for pain and suffering, and just over $16,000 for pretrial medical expenses and transportation costs.

26.85 The plaintiff also claimed over $400,000 in loss of earnings alleging that his injuries had caused him to lose a major client. This claim was dismissed by Choo J on the ground that the plaintiff had not discharged his burden of proof. The claims for aggravated and exemplary damages as well as for loss of the plaintiff's membership privileges were also dismissed.

Remedies

Personal injuries

26.86 The appellant in *Chua Ser Kenon v Karuppiah Jai Sankar* [2015] SGHC 127 was a doctor who suffered, amongst other things, hip injury as a result of being knocked down by a lorry driven by the defendant. The defendant was found 75% liable and the assistant registrar awarded the plaintiff $39,384.24 (at 75%), which included $22,000 in general damages and $1,000 in nominal damages for lost earning capacity. No award was made for loss of future earnings. The appellant appealed against the assessment of damages, arguing that he should have been awarded significant amounts for loss of future earnings and lost earning capacity.

26.87 Choo Han Teck J dismissed the appeal, holding that there was no evidence to suggest that the appellant's injury would diminish his future earnings. Indeed, the appellant had been successful in applying for a place on the residency programme under SingHealth to qualify as an orthopaedic surgeon, and the supervisors at the department which accepted him were aware of his injuries, suggesting that they deemed him fit to practise as an orthopaedic surgeon upon qualification.

26.88 *Mykytowych, Pamela Jane v VIP Hotel* [2015] SGHC 113 involved a plaintiff who slipped and fell at the lobby of the defendant's hotel. The hotel was found 50% liable and this case involved the assessment of damages. The plaintiff claimed over $6m in total or just over $3m after the 50% reduction for contributory negligence, mainly for loss of earnings. Considering all the evidence, Choo Han Teck J did not accept the plaintiff's claims about the seriousness of the injury and its impact on her. He awarded a modest sum of $12,000 for pain and suffering, and about $6,000 for medical and transportation expenses.

Trespass to land and loss of market value

26.89 *Paul Patrick Baragwanath v Republic of Singapore Yacht Club* [2016] 1 SLR 1295 involved a trespass to land action by the plaintiff, a yacht club, against the defendant, the owner of a vessel that was berthed at the plaintiff's marina without permission. The District Judge found in favour of the plaintiff and awarded damages totalling $51,870.38, calculated on the basis of the length of the berth used by the plaintiff and varying rates for different periods of the stay. For the first period, the vessel shared a berth and paid half the visitors' rate. For the second period, at which point the trespass began, a higher rate was used. For the third period, the vessel was berthed at a much longer berth, resulting in higher daily charges.

26.90 The plaintiff appealed against the calculation of damages, arguing that the rate should have been based on the market value of the use of the berth. Choo Han Teck J analysed the legal basis for calculation of damages in trespass to land cases, referring to the Court of Appeal's decision of *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1417 ("*Yenty Lily*") where the court considered the user principle, noting that it consisted of both compensatory and restitutionary elements. Choo J observed that the Court of Appeal in *Yenty Lily* had preferred the view that the user principle should be grounded in restitution rather than compensation. The Court of Appeal further held that tort claims should ordinarily be resolved under the ordinary compensation approach. On that basis, Choo J held that the loss was the market value that the plaintiff would have charged for the use of its berth. That market value was to be determined by the daily rate for visitors, which according to the plaintiff's rules on berthing charges was calculated on the basis of the length of the vessel. On that basis, Choo J varied the damages awarded to $17,372.52.

No interim injunction for claim in deceit

26.91 Interim (mandatory) injunctions are not to be granted in an action in the tort of deceit according to the decision in *Tiananmen KTV*

(2013) Pte Ltd v Furama Pte Ltd [2015] 3 SLR 433. The owner (lessor) of premises stated to the plaintiff (lessee) that the lease would continue as long as the defendant did not redevelop the premises into a hotel. The plaintiff sued for deceit and applied for an interim injunction to restrain the defendant from repossessing the premises and to compel the defendant to reinstate the premises by restoring the electricity supply and removing blockades placed by the defendant. Though the defendant's statement of intention could in law amount to a false representation (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483), the remedy of a mandatory injunction was not appropriate, according to Lee Seiu Kin J. A mandatory injunction, which is akin to an order for specific performance, was regarded as incompatible with the objective in deceit which was to restore the plaintiff back in the position as if the misrepresentation had not been made (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28]). In any event, the potential loss of business, erosion of customer base and reinstatement of premises alleged by the plaintiff could be adequately compensated for by damages.

Loss of chance

26.92 *Sports Connection Pte Ltd v Asia Law Corp* [2015] 5 SLR 453 is the continuation of a legal saga that began in 1991. The plaintiff, a business dealing with sporting goods and equipment, was the registered proprietor of a trade mark in Singapore. It engaged a law firm, M/s Swami & Narayanan ("S&N"), to register the trade mark in Malaysia in 1991, but that registration was defective due to the law firm's failure to comply with certain formalities. The plaintiff subsequently discovered other parties selling products under its trade mark in Malaysia. It sued S&N in Singapore in the tort of negligence, claiming for loss of profits of sales and the legal costs of litigation in Malaysia. The plaintiff also commenced actions in Malaysia against various parties.

26.93 Following the outcome of some of the Malaysian litigation in favour of the plaintiff, S&N consented to liability and the focus turned to assessment of damages. During this period, the plaintiff commenced solicitor and client taxation in Malaysia with respect to the Malaysian actions. The defendant then came into the picture as the plaintiff's lawyers, taking over from the previous firm. A lawyer from the defendant's firm advised the plaintiff to commission expert reports for the loss of profits and legal costs claims. In 2008, S&N offered to settle for a sum of $200,000 against which the defendant's lawyer advised. Later that year, the assessment of damages in the Singapore claim was heard by the assistant registrar who decided that no loss of profits should be ordered on the ground of insufficient evidence and that

only 30% of the Malaysian legal costs should be awarded, with the remaining 70% to be claimed against the Malaysian parties, instead of S&N.

26.94 The plaintiff sued the defendant in negligence with respect to its advice on the loss of profits claim, the legal costs claim and the decision not to settle based on the offer by S&N. The plaintiff argued that the defendant should have advised it to stay the Singapore assessment until the Malaysian judgment of 2012, which awarded the plaintiff RM6,975,754 against the Malaysian parties, as this would have provided evidence of loss of profits. Further, it was argued that the defendant should have obtained further and better evidence from the Malaysian parties to support the Singapore assessment. The plaintiff alleged that it had lost a chance of:

(a) a better outcome in the Singapore assessment;

(b) recovering the full solicitor and client costs; and

(c) accepting the settlement offer.

In addition, the plaintiff claimed wasted costs of pursuing litigation in Singapore and Malaysia. Belinda Ang Saw Ean J focused on the loss of chance analysis, referring to the leading UK decision of *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 and the Singapore Court of Appeal's decision of *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460. Ang J also relied on the academic work of Sarah Green, distinguishing between two types of loss of chance claims: (a) where the chance exists independently of the defendant's breach; and (b) where the chance and the breach of duty are interdependent: Sarah Green, *Causation in Negligence* (Hart Publishing, 2015). The latter, in Green's view, is not a proper loss of chance case with *Gregg v Scott* [2005] 2 AC 176 being a prime example.

26.95 Applied to the facts, Ang J held that the claim in this case fell within the second category and therefore failed. Even if they were placed in the first category, on the facts the loss of chance was too remote; it was a "chance upon a chance" as there were too many imponderables from what the plaintiff would have done, to what the Singaporean assessors may have done and to what the Malaysian assessors might have done.

Claim for damages by disappointed beneficiaries of will

26.96 *AEL* (above, para 26.64) was an appeal against a High Court decision finding a solicitor, the second appellant (the first appellant being the law firm), liable to the disappointed beneficiaries of a will who suffered loss as a result of the solicitor's negligence in executing the will.

Briefly, the facts were that the second appellant had prepared a will for an Indonesian testator to replace an older will. After the testator died, it was discovered that the new will was not valid as the second appellant had failed to ensure that there were two witnesses. As a result, letters of administration were obtained to distribute the assets in Singapore. The respondent beneficiaries received less than they would have had the new will been valid. They successfully sued the appellants for this loss and the cost of obtaining legal advice in Indonesia.

26.97 On appeal, the appellants argued that the respondents had collaborated with the unintended beneficiaries to manufacture a claim against them and that the respondents had failed to mitigate their loss by failing to persuade the unintended beneficiaries to give up their share under intestacy. Chao Hick Tin JA dismissed the appeal, holding that the trial judge had made no error in finding that there was no collusion and that the respondents had attempted to mitigate the loss by negotiating with the unintended beneficiaries. Chao JA reiterated that the unintended beneficiaries were not legally obliged to give up their lawful inheritance.

Apportionment of losses

26.98 The appellant in *Chong Kim Beng v Lim Ka Poh* [2015] 3 SLR 652, employed by the first and second respondents (who carried on a business under the name of Mysteel Engineering Contractor ("MEC")), was deployed to work for the third respondent, Chee Seng Engineering Works Pte Ltd ("Chee Seng"), where he suffered a workplace injury. The appellant successfully sued all three respondents in negligence although the District Judge reduced damages by 10% for contributory negligence. The District Judge apportioned the damages between MEC and Chee Seng, holding MEC liable for 15% of the total loss and Chee Seng liable for 75%. The District Judge held that liability was not joint; therefore, MEC was liable for only 15% of the appellant's loss and not 90%.

26.99 The appellant appealed, arguing that liability should be joint, such that MEC should be liable for 90% of the loss. Chee Seng did not participate in the appeal and MEC argued that liability was not joint. Even though the pleadings did not specifically refer to joint and several liability, Woo Bih Li J found on the facts that the respondents were jointly liable. Although he found in favour of the appellant on the point under appeal, Woo J dismissed the appeal on the basis that the appellant had not proved that MEC's breach of duty – assuming there was a breach of duty – had caused the damage. The duty in this case was to check whether the fan had a cover, but there was no evidence whether there was or was not a cover at the time when the risk assessment should

have taken place. Hence, it could not be proven that had a risk assessment been undertaken there would have been a different outcome. This case is unusual as the District Judge had made a clear finding on the facts that MEC was liable and MEC had not counter appealed on this point of liability. Woo J noted that his finding "exonerated MEC from any liability whatsoever", but as MEC had not counter appealed, it remained liable for 15% of the appellant's loss.

26.100 Woo J also went on to observe that the Court of Appeal decision in *Chandran* (above, para 26.59) should not be read as laying down a rule that an employer must always carry out a risk assessment of third party sites where its employee is deployed.

Limitation

26.101 *AXF v Koh Cheng Huat* [2015] 5 SLR 819 involved a dependency claim by the husband of the deceased and their children against the first defendant, an obstetrician and gynaecologist, and the second defendant, a private medical centre. This was an appeal against the assistant registrar's decision to strike out the claim on the ground that it was time barred under s 20(5) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"). Section 20(5) of the CLA provides that every dependency action "shall be brought within three years after the death of such deceased person". The plaintiffs contrasted s 20(5) of the CLA with s 24A(2) of the Limitation Act (Cap 163, 1996 Rev Ed) ("LA") which provides as follows:

> An action to which this section applies, where the damages claimed consist of or include damages in respect of personal injuries to the plaintiff or any other person, shall not be brought after the expiration of —
>
> (*a*) 3 years from the date on which the cause of action accrued; or
>
> (*b*) 3 years from the earliest date on which the plaintiff has the knowledge required for bringing an action for damages in respect of the relevant injury, if that period expires later than the period mentioned in paragraph (*a*).

The plaintiffs argued that whereas the LA expressly prohibited claims beyond the three-year limit, the CLA limitation was expressed in a positive manner. Foo Chee Hock JC disagreed, holding that despite the different wording, the effect was the same – the limitation in s 20(5) was absolute. Foo JC supported this view by an extensive review of the relevant UK, Malaysian and Singapore authorities. The plaintiffs further argued that it would be unconscionable for the defendants to rely on the time bar in this case, relying on observations in the High Court of Australia decision of *Hawkins v Clayton* (1988) 164 CLR 539

("*Hawkins*"). Foo JC noted that *Hawkins* was distinguishable, as Deane J had referred to wrongful acts of the defendant that impacted on the ability of the plaintiff to bring its action in a timely manner.

26.102 The plaintiffs also relied on *Lim Siew Bee v Lim Boh Chuan* [2014] SGHC 41 ("*Lim Siew Bee*") where the concept of unconscionable reliance was applied. However, Foo JC held that *Lim Siew Bee*, which concerned the interpretation of s 22 of the LA, was inapplicable to the CLA. It should be noted that this decision has been reversed by the Court of Appeal, which while agreeing with Foo JC's analysis of the law, held that it would not be proper to strike out the claim when it was not clear that there had not been fraudulent concealment, which, if proved, might justify a court preventing the defendants from relying on the limitation argument. The Court of Appeal held that it was a triable issue and allowed the appeal by the plaintiffs (*AXF v Koh Cheng Huat* [2016] SGCA 22.

26.103 In *Suresh s/o Suppiah v Jiang Guoliang* [2015] SGMC 31, the plaintiff filed suit on 7 January 2015 against the defendant for damages as a result of personal injuries suffered in an accident on 7 January 2012. Section 24A(2) of the LA provides for a three-year limitation period for cases of personal injuries. The issue was whether the three-year period included the day of the accident or began after that. Referring to local authorities on the point, District Judge Wong Peck held that it included the day of the accident; therefore, the last day to file suit would have been 6 January 2015.

Vicarious liability and non-delegable duties

26.104 As a general rule, the Singapore government may be vicariously liable for the acts of its public officers: see s 5 of the Government Proceedings Act (Cap 121, 1985 Rev Ed). There are, however, important statutory exceptions to this general position on vicarious liability. One of these exceptions relates to the acts of judges and judicial officers in the course of judicial proceedings. Section 6(3) of the Government Proceedings Act reads:

> No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

26.105 The appellants in *AHQ v Attorney-General* [2015] 4 SLR 760 ("*AHQ*") sued the Government in tort in respect of the court orders made against them by a judge. The suit against the Government was denied. First and foremost, there exists a long-standing common law

principle of judicial immunity with a view to ensuring judicial independence: see *Sirros v Moore* [1975] QB 118. Its purpose is to safeguard the administration of justice and the finality of the judicial process, and not for the personal benefit of the judges. The position of the Government *vis-à-vis* the judges with respect to judicial acts are clearly different from that of the typical employer-employee or principal-agent relationships. Based on the constitutional principle of separation of powers, the Government should not interfere with the judges and judicial process; as such, they should not be vicariously liable for the acts of judges for which they do not have "control or influence": *AHQ* at [35]. The general rule in s 5 of the Government Proceedings Act – which renders the Government liable for the tortious acts of its public officers in the same manner as would have been the case if the Government were an ordinary employer – must therefore give way where judicial acts are concerned. Note that whilst there are specific statutory provisions conferring judicial immunity on District Court judges, Magistrates, registrars and deputy registrars (s 68 of the State Courts Act (Cap 321, 2007 Rev Ed)) and judicial officers in the Supreme Court (s 79 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)), the judges of the Supreme Court (a superior court of record) enjoy immunity for acts done within as well as outside the limits of their jurisdiction.

26.106 *Ng Huat Seng and Kho Sung Chin v Munib Mohammad Madni, Zahrah Ayub and Esthetix Design Pte Ltd* [2015] SGDC 315 involved damage to a neighbouring property as a result of construction work at the defendants' premises. The first and second defendants owned a property which they wished to rebuild. They engaged the third defendant, an independent contractor, to demolish the existing house and build a new one. During the demolition works, the third defendant caused debris to fall from the first two defendants' property on to the plaintiffs' property, causing damage. The first two defendants' property was on ground that was about 2m higher than the ground of the plaintiff's property. The plaintiffs sued the three defendants in negligence. The issues at trial were whether the third defendant was an independent contractor, whether the first two defendants had exercised reasonable care in appointing the third defendant, and whether the work was "so particularly hazardous and/or extra-hazardous" that the first two defendants owed a non-delegable duty to the plaintiffs.

26.107 District Judge Seah Chi Ling found that the third defendant was an independent contractor and that the first and second defendants could not be held vicariously liable for its torts, if any. On the second issue, District Judge Seah held that there was no evidence showing that the first two defendants had been negligent in appointing the third defendant, who was properly qualified and about whom the first defendant had made inquiries and whose credentials the first defendant

had verified. The final argument that a non-delegable duty was owed was also dismissed. Referring to academic writing and judicial authorities, District Judge Seah noted that the extra-hazardous doctrine of liability was narrowly construed, and properly so. On the facts, ordinary demolition works could not be viewed as extra-hazardous such that a non-delegable duty could be imposed on the owners of the property on which such works were carried out. The third defendant did not make an appearance and District Judge Seah, relying on the doctrine of *res ipsa loquitar*, found against the third defendant.

26.108 *Yu Hanjia v Kuah Thiam Seng* [2015] SGDC 277 involved a claim by an employee against his employer following an assault at the work place by his supervisor. The issue was whether the employer should be held vicariously liable for the supervisor's assault. District Judge Seah Chi Ling found that the employer was not in breach of its common law duty to provide a safe work place as there was no indication that the supervisor was prone to violence and there was no known animosity between the plaintiff and the supervisor. District Judge Seah found the defendant vicariously liable for the assault as the tort was closely connected to the employment. Referring to *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540, District Judge Seah held that it was fair and just to hold the employer vicariously liable.

26.109 Some of the factors considered included the fact that (a) the assault took place during work hours at the work place; (b) the supervisor was carrying out his normal duties of instructing workers; (c) the employment afforded the supervisor the opportunity to abuse his power; (d) his wrongful act furthered the employer's aims as he was instructing the employee to store the employer's equipment properly at the time of the assault; (e) the incident was related to friction and confrontation inherent in the enterprise; and (f) the supervisor had power over the employee, who was vulnerable.