SECTION 1 INTRODUCTION

20.1.1 In the more than eighty years since its inception as a distinct cause of action in *Donoghue v Stevenson* [1932] AC 562 (*Donoghue*), negligence has developed to become the pre-eminent tort, eclipsing older actions such as trespass, nuisance and breach of statutory duty.

20.1.2 The law of negligence in Singapore is based largely on English law, although there are areas in which the Singapore courts have chosen to depart from the principles espoused by the UK courts. While the law referred to here will, wherever possible, be that applied by the courts in Singapore (and occasionally Malaysia), reference will also be made to the jurisprudence of other jurisdictions – notably the UK and Australia – which have influenced, or are influencing, the development of the law of negligence in Singapore.

A. Requirements of a tort: claimant must have suffered recoverable damage arising from a breach of legal duty owed by defendant

20.1.3 Negligence as a tort requires more than mere lack of care. A claimant who wishes to sue in negligence must show:

- that the defendant owed him a legal duty to take care;
- that there was a breach of this legal duty by the defendant; and
- that the breach caused him recoverable damage.

SECTION 2 DUTY OF CARE: TESTS FOR ESTABLISHING DUTY

A. Duty of care

(1) Duty distinguishes situations in which a claim may be entertained from those where no action is possible

20.2.1 Duty is an artificial conceptual barrier which the claimant must overcome before his action can even be considered. Its role is to keep the tort of negligence within manageable proportions by distinguishing situations in which a claim may, in principle, be entertained from those in which no action is possible.

(2) Factors influencing the existence of a duty

20.2.2 The question of whether or not a duty exists is influenced by a number of factors, such as:

- the type of claimant (eg, socially sympathetic claimants such as rescuers are generally owed a duty of care in a wider range of situations than are less sympathetic ones such as trespassers);
- the type of defendant (eg, defendants with public functions owe a duty of care in more limited circumstances than do individual defendants);
- the nature of the damage caused (eg, a defendant almost always owes a duty of care not to cause physical damage to person or property through his negligent act, but the duty owed with respect to psychiatric harm and pure economic loss is more restricted); and
- the nature of the conduct (eg, active conduct is more likely to give rise to a duty of care on the part of a defendant than is a mere omission).

Donoghue v Stevenson – The Neighbour Principle

20.2.3 In Donoghue Lord Atkin laid down the foundation for the duty of care. Under his 'neighbour principle,' a defendant must avoid acts or omissions which will foreseeably harm persons who are so closely and directly affected by his acts or omissions that he ought to have them in mind as being so affected. The neighbour principle remains the backbone of duty, but in the ensuing years the courts have developed more complex tests. These tests, while generally built around the key element of foreseeability, have attempted to reflect more accurately some of the other factors inherent in establishing duty.

The Anns Two-stage Test

(1) Two stages: proximity based on foreseeability of harm and considering of policy factors

20.2.4 In *Anns v Merton London Borough Council* [1978] AC 728 (Anns), Lord Wilberforce concluded that duty effectively comprised two stages. The first stage, derived from the neighbour principle, was a relationship of proximity or neighbourhood based on foreseeability of harm. The second was the consideration of policy factors which might negative, reduce or limit the scope of the duty, or the class of persons to whom it was owed, or the damages to which it might give rise.

(2) Difficulties arising from the two-stage test

20.2.5 The two-stage test led to expansionary decisions. This was partly because the notion of duty based on foreseeability without overt consideration of precedents at the first stage was inherently suited to developing, rather than restricting, the law. But it was also due to the fact that many judges were uncomfortable with the open articulation of policy, which led to the second stage of the test being under-used.

The Caparo Three-part Test

(1) Three stages: foreseeability, proximity and for imposing a duty to be fair, just and reasonable in the circumstances

20.2.6 Fear that the *Anns* test would lead to exponential development of the duty of care led the courts to favour an alternative test. This test, first developed by Deane J. in the High Court of Australia, initially consisted of foreseeability and proximity. To these elements, the requirement that it must be fair, just and reasonable in the circumstances to impose a duty of care was added in the case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 (Caparo; see Section 20.3.9 below). The introduction of the three-part test reflected a more conservative approach to duty, and it coincided with a return to incremental development, also spearheaded by the Australian High Court (see, eg, *Sutherland Shire Council v Heyman* (1985) 60 ALR 1).

(2) Difficulties arising from the three-part test

20.2.7 The three-part test remains – at least in theory – applicable in the UK, but it has been abandoned in Australia (see Sullivan v Moody [2001] HCA 59; (2001) 207 CLR 562), which now favours a 'salient features' approach to the determination of duty, due in large part to concern about the unsatisfactory nature of the proximity requirement. Although introduced as a tool for filtering out claims which lack the requisite closeness, proximity has always been a notoriously vague concept and its role has been undermined by its nebulous and indefinable nature. Canada has adopted a modified version of the *Anns* test, incorporating aspects of the *Caparo* test (see *Cooper v Hobart* [2001] SCJ No 76; [2001] 3 SCR 537). At the first stage, there must be reasonable foreseeability of harm and sufficient proximity between the parties for it to be fair and just to impose a duty of care. At the second stage, the court examines whether there are residual public policy considerations to justify denying liability.

20.2.8 In recent years, the courts have moved away from the somewhat reactionary approach which marked their response to *Anns*. As a result, even in jurisdictions where *Caparo* still applies, negligence has been allowed more scope for development, although still in a largely incremental manner.

E. Approach in Singapore: the Spandeck test

(1) Establishing duty in Singapore prior to the Spandeck test

20.2.9 In the pure economic loss case of *RSP Architects, Planners & Engineers v Ocean Front Pte Ltd [1995] 3 SLR (R) 653* (Ocean Front; see Section 20.3.12 below), the Court of Appeal, while not specifically espousing Lord Wilberforce's broad proposition, used a two-stage process to determine duty. Their Honours also applied *Junior Books v Veitchi Co Ltd [1983] 1 AC 520 (Junior Books), a rarely followed decision of the House of Lords, under which the Anns two-stage test had been applied to allow recovery in tort for pure economic loss arising from a defective chattel in near-contractual circumstances. However, the Court in Ocean Front ultimately based its decision on the notion of proximity, and indicated that there was no single rule or set of rules for determining whether a duty of care should be held to exist in a particular circumstance. In the subsequent case of RSP Architects, Planners & Engineers v Management Corporation Strata Title Plan No 1075 and another [1999] 2 SLR(R) 134 (Eastern Lagoon) the Court of Appeal notionally rejected the Anns test, while adopting a substantively similar two-stage 'process.'*

20.2.10 In *PT Bumi Tankers v Man B&W Diesel SE Asia Ltd [2003] 3 SLR (R) 239*; [2003] SGHC 152, Judith Prakash J in the High Court also favoured a two-stage approach to economic loss – an approach which appeared to survive the Court of Appeal's reversal of her judgement on the question of whether a duty existed on the facts: *Man B&W Diesel S E Asia Pte Ltd & anor v PT Bumi International Tankers & anor [2004] 2 SLR (R) 300; [2004] SGCA 8* (P T Bumi; see Section 20.3.13 below). In reaching its decision, in *PT Bumi*, the Court of Appeal recognised that the Anns test had been qualified and that Junior Books had been the subject of considerable controversy.

20.2.11 Shortly thereafter, in *The Owners of the Sunrise Crane v Cipta Marine Pte Ltd [2004] 4 SLR (R) 715; [2004] SGCA 42*, the majority of the Court of Appeal held that the two-stage approach to duty, which had been favoured in *Ocean Front* and developed in *PT Bumi*, applied only to pure economic loss cases, and that in situations where physical damage was involved the *Caparo* three-part test remained applicable (see, eg, the decision of the Court of Appeal in *TV Media Pte Ltd v Andrea De Cruz [2004] 3 SLR (R) 543 (Andrea De Cruz*; see Sections 20.3.18 and 20.5.13 below), where duty was based on the requirements of foreseeability, proximity and fairness).

20.2.12 Subsequently, in another pure economic loss case, *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] 1 SLR (R) 853 (HC) and [2007] 3 SLR (R) 782; SGCA 36* (*Sunny Metal*; see Sections 20.3.13, 20.5.1 and 20.5.2 below), Phang J (as he then was) attempted in the High Court to reconcile *Anns* and *Caparo* through a two-stage process based on proximity and policy factors. The Court of Appeal in that case left open the question of the appropriate test for establishing duty of care.

(2) The Spandeck test: duty in all situations determined by two-stage test comprising proximity and policy considerations

20.2.13 The question of the test to be used to determine the duty of care in Singapore was resolved in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] 4 SLR (R) 100; [2007] SGCA 37* (*Spandeck*), where the Court of Appeal (Chan Sek Keong CJ, Phang JA and VK Rajah JA) held that a single two-stage test of the kind proposed by Phang J in *Sunny Metal* – comprising first proximity and then policy considerations – should be used to determine the existence of a duty of care in all situations, regardless of whether the damage complained of was physical or purely economic, although a more restricted application might be preferable in cases of pure economic loss. The test, developed in the context of a pure economic loss case (see Section 20.3.13 below), initially focused in terms of proximity on the twin elements of assumption of responsibility and reliance, although other proximity factors have since been recognised: see, eg, Anwar Patrick Adrian & Anor v Ng Chong & Hue LLC & Anor [2014] SGCA 14 (Anwar Patrick Adrian), in which the Court of Appeal referred, inter alia, to factors such as control, vulnerability and knowledge. In Spandeck, the Court of Appeal held that while the test was to be applied incrementally with reference to the facts of decided cases, absence of such cases would not be an absolute bar to a finding of duty. It also held that while the threshold of factual foreseeability would remain, it would not be necessary to include it as part of the legal test for duty. For an application of Spandeck in relation to the duty of care owed by a clerk of works, see the judgment of *Phang J A in Animal Concerns Research & Education Society v Tan Boon Kwee [2011] 2 SLR 146; SGCA 2* (Animal Concerns; see Section 20.3.13 below), which also contains discussion of the

potential for overlap between proximity and public policy considerations. Other Court of Appeal decisions applying the Spandeck test for duty of care include *Skandinaviska Enskilda Banken AB (Publ)* , *Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal [2011] 3 SLR 540; SGCA 22* – which also discusses the parallels between the 'close connection test' for determining vicarious liability and the Spandeck test – and *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] SGCA 17 (Kimly; see Secton 20.3.13 below).

SECTION 3 DUTY OF CARE: SPECIAL SITUATIONS

A. Duty of care normally held to exist in straightforward cases involving physical damage to person or property

20.3.1 A duty of care will normally be held to exist in straightforward cases involving physical damage to person or property: see, eg, *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd [2006] 3 SLR (R) 116; [2006] SGHC 73* (*Tesa Tape*; see Section 20.4.2 below). However, in exceptional cases, where it would not be fair in the circumstances to impose a duty of care, the courts may hold there to be no duty even where physical damage is involved: *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] 1 AC 211).

B. Situations where courts do not recognise duty because of public policy reasons

20.3.2 In less typical circumstances, the courts are often more circumspect. They have, at various times, and in various jurisdictions, refused – largely for reasons of public policy – to recognize the existence of a duty of care in a range of situations, such as:

- where moral issues are involved (eg, the cost of raising a healthy child following a failed sterilization, as in *McFarlane v Tayside Health Board* [2000] 2 AC 59, or the cost of raising a healthy child following a negligently-performed IVF procedure resulting in implantation of an embryo fertilized by the wrong sperm, as in ACB v Thomson Medical Pte Ltd and others [2015] SGHC 9, or where a disabled child claims his mother should have been advised to abort him, as in *Re JU [2005] 4 SLR (R) 96; [2005] SGHC 140* (see Section 20.4.10 below) and *Harriton v Stephens (2006) 226 ALR 391*);
- where there is a conflict between negligence and other torts (eg, damage caused by a negligent act or statement which would be protected under the defence of qualified privilege in defamation – although note that no such conflict is held to arise in relation to employee-references: see Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd [2015] SGHC 125);
- where it is considered necessary to accord immunity to certain classes of defendants (eg, damage caused as a result of judicial negligence).

20.3.3 In addition, there are a number of broad categories in which particular rules have been established to restrict the situations in which a duty is owed. These categories are examined below.

C. Psychiatric harm: recovery possible when "three proximities" are fulfilled

Psychiatric Harm

20.3.4 Historically, the courts were unwilling to allow recovery for negligently inflicted psychiatric illness. This unwillingness stemmed from an incomplete understanding of mental illness, and from fears that allowing recovery for mental, as opposed to physical, harm would give rise to fraudulent claims and lead to a potential flood of litigation.

20.3.5 The first cases to allow claims for psychiatric illness - also known as claims for "nervous shock", due to the requirement that the condition must be caused be a sudden shock to the system - involved primary victims (i.e., those who feared for their own safety: *Dulieu v White* [1901] 2 KB 669). Technically, under current English law, a primary victim who suffers medically diagnosed psychiatric

harm due to a defendant's negligence need not even show that such damage was reasonably foreseeable, as long as some physical damage could reasonably have been foreseen: *Page v Smith* [1995] 2 All ER 736 (Page; see Section 20.6.5 below). However, Page has been the subject of considerable criticism and is regularly distinguished by the English courts: see, eg, *Rothwell v Chemical Engineering & Insulating Co Ltd & Anor* [2007] UKHL 39 (a case which also confirmed that risk and anxiety do not constitute actionable damage in negligence). Moreover, the Singapore Court of Appeal in *Ngiam Kong Seng & Anor [2008] 3 SLR (R) 674; [2008] SGCA 23* (*Ngaim; see Section 20.3.6 below) rejected Page, holding that even in primary victim cases medically diagnosed psychiatric harm must be foreseeable.*

20.3.6 Claims may also be brought by secondary victims (ie, those who have witnessed damage-causing events without themselves being in the sphere of physical danger). However, such claims succeed in more limited circumstances. In McLoughlin v O'Brian [1983] 1 AC 410 (McLoughlin), a case in which the House of Lords allowed a claim by a mother who saw the immediate aftermath of an accident involving her husband and children, Lord Wilberforce introduced the now famous requirement of the "three proximities." Under the three proximities, secondary victims must have close ties of love and affection with the victims of physical harm and be able to establish that they suffered shock-induced psychiatric illness through witnessing the damage-causing events or their immediate aftermath with their own unaided senses. Although the decision in McLoughlin left open the precise range of situations in which such claims might be brought, its scope was subsequently narrowed by their Lordships in Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 (Alcock), a decision which, inter alia, restricted secondary victim claims to persons in a spousal or parent/child relationship (or, if specifically proved, a relationship of equivalent closeness) whose psychiatric illness was attributable to sudden shock. The strictness of Alcock has been mitigated elsewhere, particularly in Australia, which has abandoned both the sudden shock requirement (in Tame v New South Wales; Annetts v Australian Stations Pty Ltd [2002] HCA 35) and the requirements of physical proximity and direct perception (in Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33). Some Australian states even allow claims outside the spousal and parent/child categories. In addition, while most English decisions (such as Sion v Hampstead Health Authority [1994] 5 Med LR 170) confirm a rigid application of the need for a secondary victim to be at the actual scene of an accident and to suffer sudden shock, some, like Galli-Atkinson v Seghal [2003] EWCA 697, where the physical proximity requirement was relaxed, seemed to point to a partial easing of Alcock, However, in Taylor v A Novo (UK) Ltd [2013] 3 WLR 989, the English Court of Appeal held, when refusing a woman's claim for post-traumatic stress suffered after she witnessed her mother collapse and die following a workplace accident which had occurred three weeks previously, that any extension of the boundaries in secondary victim claims must be left to Parliament. In Singapore, a secondary victim's claim for psychiatric harm without proof that the claimant had witnessed a sudden, shock-inducing event was allowed on special facts in the medical negligence case of *Pang Koi Fa v Lim Djoe Phing [1993] 2 SLR (R) 366; [1993] SGHC 153*. Following a detailed examination of the rules on psychiatric harm, the Court of Appeal in Ngiam (see Section 20.3.5 above), while recognizing arguments for comprehensive legislative reform, confirmed the applicability of the McLoughlin proximities in Singapore. In *Man Mohan Singh & Anor v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd & Anor & Anor appeal [2008] 3 SLR (R) 735; [2008] SGCA 24* (Man Mohan Singh; see Section 20.6.3 below), decided just after Ngiam, the McLoughlin proximities were applied in refusing a claim by parents who had neither been at the scene of the accident in which their children were fatally injured nor had witnessed the immediate aftermath, and whose action had not been definitively shown to relate to psychiatric harm rather than pathological grief.

D. Pure economic loss not linked to physical damage

20.3.7 The courts have always allowed recovery for economic loss which flows from physical damage: Spartan Steel and Alloys Ltd v Martin & Co [1972] QB 27.

20.3.8 It was, however, historically impossible to recover for 'pure' economic loss – ie, loss which could not be linked to physical damage. The refusal to allow such claims was attributable to a number of concerns, the most significant of which was the perceived danger of a possible flood of litigation due to the knock-on effect of economic damage.

Statements

(1) Negligent statements: recovery possible when there is voluntary assumption of responsibility and reasonable reliance

20.3.9 In Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465 (Hedley Byrne) the House of Lords first recognized the possibility of recovering for pure economic loss caused by negligent statements. The Hedley Byrne principle, based on reasonable reliance by a claimant in circumstances where a defendant voluntarily assumes responsibility for his statement, has since been applied in numerous cases in all major jurisdictions. The decision by the House of Lords in Caparo (see Section 20.2.6 above), which confined the principle to situations where the statement was given by the maker to a known recipient for a specific purpose of which the maker was aware, led for some years to a more cautious approach to imposing liability for negligent misstatements, particularly with respect to the liability of auditors when preparing company accounts: see, eg, *Ikumene Singapore Pte Ltd & Anor v Leong Chee Leng [1993] 2 SLR (R) 480; [1993] SGCA 50* and *Public Prosecutor v Tan Cheng Yew and another appeal [2013] 1 SLR 1095*Standard Chartered Bank & Anor v Coopers & Lybrand [1993] 3 SLR (R) 712. However, in recent years the courts have shown a renewed willingness to allow claims for negligent misstatements: see, eg, Law Society v KPMG Peat Marwick [2004] 4 All ER 540. For an application of Hedley Byrne in the context of an architect's duty to advise of the risks inherent in a building contract, see *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd & Anor [2009] 1 SLR (R) 385; [2008] SGHC 161*. Note that the courts remain cautious about allowing claims in negligence where the relationship is governed by contract – although in *Go Dante Yap v Bank Austria Creditanstalt AG [2011] 4 SLR 559; [2011] SGCA 39* (Go Dante Yap; see Section 20.3.13 below), the Court of Appeal recognised both an implied contractual duty of care on the part of a bank in carrying out its client's instructions, as well as a duty of care in negligence to give advice of a kind which could reasonably have been expected of it when providing the client with financial services. (On the facts, however, there was no breach of either the contractual or the tortious duty).

Professional Responsibility

(2) Professional responsibility: recovery possible for negligent performance

20.3.10 The Hedley Byrne principle has also been extended in most jurisdictions to cover professional responsibility (eg, the negligent drafting or execution of wills and other documents by solicitors: White v Jones [1995] 2 AC 207; AEL and Ors v Cheo Yeoh & Associates LLC & Anor [2014] SGHC 129). In such situations, a duty of care is held to exist even when the negligence complained of takes the form of an act rather than a statement, and even in the absence of active reliance by the claimant. For a decision of the Court of Appeal finding that a solicitor who negligently caused loss to non-contracting parties owed those parties a duty of care, see Anwar Patrick Adrian (Section 20.2.13 above). With respect to the overlap between professional responsibility and negligent statements, see too *Plan Assure PA (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR (R) 513; [2007] SGCA 41*, and for further discussion of the liability of professionals, see Section 20.4.6 below.

Acts

(3) Negligent acts causing pure economic loss: recoverable under the Spandeck test

20.3.11 The position with respect to negligent acts which cause pure economic loss varies from jurisdiction to jurisdiction. In Singapore, Australia and other jurisdictions, it is – in some circumstances – possible to sue for pure economic loss caused by negligent acts. However, English law still takes an extremely restrictive approach to such claims.

20.3.12 In Singapore, the Court of Appeal has imposed a duty of care for pure economic loss in actions brought by management corporations for the negligent design and defective construction of condominiums in Ocean Front (see Section 20.2.9 above) and *RSP Architects v MCST Plan No 1075 (Eastern Lagoon) [1999] 2 SLR (R) 134*. The position in Singapore is similar to that in Bryan v Maloney (1995) 182 CLR 609, where the Australian High Court, in a decision based largely on the economic vulnerability of individuals when purchasing their homes, imposed on the builder of a house a duty of care towards a subsequent purchaser. (Indeed, the decision of the High Court of Singapore in *Management Corporation Strata Title Plan No 2757 v Lee Mow Woo [2011] SGHC 112* suggests that the courts in Singapore might even be willing to extend this principle to commercial properties. If this is in fact the case, it will be consistent with the decision of the Supreme Court of New Zealand in Body Corporate 207624 v North Shore City

Council [2012] NZSC 83, but not that of the High Court of Australia in Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515.) The House of Lords, on the other hand, unequivocally rejected the possibility of recovering for pure economic loss associated with any category of defective premises in Murphy v Brentwood District Council [1991] AC 398 (which overruled Anns on the economic loss point), and the English courts have shown no sign of relaxing this attitude.

(4) More restrictive approach adopted when imposing a duty of care for pure economic loss in comparison to that applied in cases of physical damage

20.3.13 In P T Bumi (see Section 20.2.10 above), a case which involved an unsuccessful claim for a defective chattel, the Singapore Court of Appeal expressed the need for extreme caution in allowing claims outside the arena of actions by management corporations with respect to residential property, particularly where the circumstances were fundamentally contractual. In *United Project Consultants Pte Ltd v Leong Kwok Onn [2005] 4 SLR (R) 214* (United Project Consultants; see Section 20.7.3 below) the Court of Appeal confirmed that in deciding whether to impose a duty of care for pure economic loss the courts would adopt a more restrictive approach than that applied in cases of physical damage, and a similarly cautious approach prevailed in the Court of Appeal in Sunny Metal (see Sections 20.2.12 above and 20.5.1 and 20.5.2 below), a contractual matrix case which raised issues of both tort and contract. In Spandeck (see Section 20.2.13 above), the Court of Appeal held that the same two-stage test of proximity – based on assumption of responsibility and reliance – and policy should be used with respect to all categories of claim. However, it recognised that a more restrictive application might be appropriate in cases of economic loss, and held that the action in that case, which again involved a contractual matrix, must fail. The existence of a contractual matrix will not, however, necessarily prove fatal to an action in negligence. In Animal Concerns (see Section 20.2.13 above) the Court of Appeal held that both assumption of responsibility and reliance were satisfied in an action brought by the claimant, which had commissioned a construction project, against the project's clerk of works – notwithstanding the existence of a contract between the claimant and the project's contractor. Similarly, in Go Dante Yap (see Section 20.3.9 above), it was held that, in addition to an implied contractual duty, a bank owed its client a duty of care in negligence when providing financial services (although neither duty was breached on the facts). For an economic loss case involving different issues, see Kimly (Section 20.2.13 above) in which the Court of Appeal held that a certifying engineer ought not to have to act as insurer for a contractor's statutory obligations to ensure worker safety.

20.3.14 Where a claimant suffers pure economic loss through damage not to his own property but to property belonging to someone else, actions have been allowed in Australia, again based on the specific economic vulnerability to which the defendant's negligence has exposed the claimant: Perre & ors v Apand Pty Ltd (1999) 198 CLR 180. However, English law does not allow such actions in any circumstances: Candlewood Navigation v Mitsui OSK Lines [1986] AC 1.

C. No general duty for pure omissions

(1) Reasons for not imposing duty with respect to pure omissions

20.3.15 Generally, no duty is imposed with respect to pure omissions – ie, situations in which a defendant who has created no danger to the claimant merely fails to prevent him from sustaining harm. There are a number of reasons for this. One is the large number of potential defendants in situations of failure to act. Another is society's focus on the more modest aim of discouraging wrongdoing rather than on the more ambitious one of encouraging good deeds. For these and other reasons, there is, for example, ordinarily no duty to rescue – even when such an act could be carried out without personal risk.

(2) Situations where there is a duty to act to prevent harm

20.3.16 However, there will be a duty to act to prevent harm in certain situations, eg:

- where the defendant and the claimant are in a special relationship of dependence (such as guardian/child, carrier/passenger, employer/employee);

- where the defendant has control over something which, or someone who, poses a threat to the claimant (in which respect, note that the responsibility of an occupier of premises to persons entering those premises – which was formerly determined by the application of special rules relating to occupiers' liability – is now broadly governed by the Spandeck test for duty of care: *Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd [2013] SGCA 29)*; or
- where the defendant has assumed responsibility for the claimant or his property.

F. Statutory authorities owe a duty only in restricted circumstances

(1) Duty of care unlikely to arise where conduct involves policy, discretionary elements or the balancing of resources

20.3.17 A statutory authority owes a duty of care to members of the public for a failure to exercise its statutory powers – or for the improper exercise of those powers – only in restricted circumstances. This is because statutory authorities invariably have limited resources and are unlikely when allocating those resources to be able to act in a way which satisfies all those affected by their decisions. The courts, faced with turning what is effectively a public duty in to a private one, have attempted to delimit the duty of care in negligence by developing various tests. These tests include the operational/policy test (Anns, see Section 20.2.4 to 20.2.5 above), the 'irrationality' test (Stovin v Wise [1996] AC 293), and the 'justiciability' test (Barrett v Enfield London Borough Council [1999] 3 WLR 628). It is generally more likely that an act rather than an omission will be regarded as justiciable, and it is unlikely that conduct which involves policy or discretionary elements or the balancing of resources or competing functions will be held to give rise to a duty of care.

(2) Developments in the United Kingdom

20.3.18 For several years, the UK courts were extremely cautious in their attitude to claims against statutory authorities: X (Minors) v Bedfordshire County Council [1995] 2 AC 633. However, later cases suggest a slight relaxation in this respect, particularly where there is a direct relationship between the statutory authority and the claimant: Phelps v Hillingdon London Borough Council [2001] 2 AC 619. In Singapore, observations by the Court of Appeal in Andrea De Cruz (see Section 20.2.10 above and 20.5.13 below) indicate the possibility of regulatory bodies being held responsible for the negligent 'rubber stamping' of commercial products.

20.3.19 A number of cases relate to the duty owed by the emergency services in the exercise of their statutory functions. The majority of these cases concern the police, whose duty to protect the public at large does not extend to a duty to protect individual members of the public during the conduct of an investigation: Hill v Chief Constable of West Yorkshire Police [1989] AC 53, or even in response to an emergency call: Michael v Chief Constable of South Wales Police [2015] UKSC 2. The rationale for this seemingly harsh approach is that a private law duty by the police to protect individuals from criminal acts committed by third parties would not only be difficult to confine within rational parameters, but would also be contrary to the ordinary principles of common law. The fire services owe no duty to individual members of the public either, even when they have undertaken to deal with a fire, unless they actually make matters worse through their positive intervention: Capital and Counties v Hampshire County Council [1997] QB 1004. However, the ambulance services have been held to owe a duty of care to individual members of the public whom they have undertaken to assist: Kent v London Ambulance Services [1999] Lloyd's Rep Med 58.

SECTION 4 BREACH OF DUTY

20.4.1 Before a court can determine whether the defendant has breached his duty to the claimant, it is first necessary to establish the standard of care to which he will be held.

The Standard of Care

A. Establishing the due standard of care: whether reasonable care has been taken to avoid reasonably foreseeable harm

20.4.2 The basic question in every case is whether reasonable care has been taken to avoid reasonably foreseeable harm: Government of Malaysia v Jumal b Mahmud [1977] 2 MLJ 103. Factors which are relevant in this determination include:

- the likelihood or probability of the risk eventuating;
- the seriousness or gravity of the foreseeable risk;
- the practicability of avoiding or minimising the risk;
- the justifiability of taking the risk;
- the time for assessing the risk;
- the relevant characteristics of the foreseeable plaintiff

For an application of these factors, see the judgement of Choo Han Teck J in Tesa Tape (see Section 20.3.1 above). The test used is that of the reasonable person in the circumstances. It is an objective test, under which a defendant is judged not by his own characteristics and attributes but by the nature of the task he is performing and the circumstances in which he is performing it. For a clear illustration of the balancing of factors – including the magnitude of the risk inherent in an activity, the social utility of that activity, the seriousness of the harm should the risk eventuate, and the cost of taking precautions against the risk, see too the judgment of *Coomaraswamy J in BNJ v SMRT Trains Ltd and another [2014] 2 SLR 7; [2013] SGHC 286* (BNJ; see too Section 20.4.13 below).

20.4.3 Note that in certain areas – such as industrial safety – there is considerable interplay between duty and standard of care. For a Court of Appeal decision recognising the extensive, non-delegable, nature of an employer's obligations to its employees, and the standard of care to which the employer will consequently be held, see *Chandran a/l Subbiah v Dockers Marine Pte Ltd [2010] 1 SLR 786; [2009] SGCA 58*. Although the standard of care applicable to independent contractors is less onerous than that for employees, in appropriate cases employers are held accountable: see, eg, *Arnold William v Tanoto Shipyard Pte Ltd [2016] SGHC 89* (where on appeal the lower court's finding that an independent contractor had been 50% contributorily negligent was overturned, and the employer was held fully liable). For confirmation that industry standards should be taken into account in assessing the standard of care, see too *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others [2014] SGCA 6*.

B. Special standards of care

(1) Standard of care not normally lowered to take account of a defendant's inexperience

20.4.4 The standard of care is not normally lowered to take account of a defendant's inexperience, since that would be unfair to those whom he injures: Nettleship v Weston [1971] 2 QB 581. For much the same reason, an amateur is judged according to objective standards of acceptability for the task in which he is engaged, not according to his personal level of expertise.

(2) Lower standard applied to children

20.4.5 A lower standard is applied to children: Mullin v Richards [1998] 1 WLR 1304 and, it seems, to conduct in the heat of competition during sporting events: Wooldridge v Sumner [1963] 2 QB 43 (see too Section 20.7.8 below). A higher standard is applicable where the defendant knows or can foresee that a claimant is particularly vulnerable: Paris v Stepney Borough Council [1951] AC 367.

(3) Professional negligence: standard of care is that of "the ordinary skilled man exercising and professing to have that special skill"

20.4.6 The duty owed by professionals extends equally to acts and statements and is nowadays encompassed by the notion of 'professional responsibility' (see Section 20.3.10 above). The applicable standard of care, as laid down by McNair J. in Bolam v

Friern Hospital Management Committee [1957] 1 WLR 582 (Bolam) at 586, is that of "the ordinary skilled man exercising and professing to have that special skill." Under the Bolam test, a professional will not be negligent as long as he meets the standard of an ordinary competent exponent of his profession. (For an application of the Bolam test with respect to auditors, see *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (A Firm) [2007] 4 SLR (R) 460; [2007] SGCA 40* (JSI Shipping; see Sections 20.4.8 and 20.4.10 below)).

20.4.7 In the conduct of trades and professions, the law allows for a variety of levels of qualification, and thus a variety of standards, as long as the level of expertise which can be expected from any given professional is readily apparent from his particular qualification (eg, that he is a general practitioner rather than a specialist). However, every professional must achieve an acceptable level of basic competence: Ang Tiong Seng v Goh Huan Chir [1970] 2 MLJ 271.

20.4.8 When assessing whether or not a professional has been negligent, the courts will normally use as their benchmark the common practice within the relevant profession. However, where they consider that a profession adopts an unjustifiably lax practice, they may condemn the common standard as negligent: Edward Wong Finance Co Ltd v Johnson, Stokes and Master [1984] AC 296 and JSI Shipping (see Sections 20.4.6 above and 20.4.10 below).

Medical Negligence

(4) Medical negligence: different applications of the Bolam test in various jurisdictions

20.4.9 In his decision in Bolam (see Section 20.4.6 above) McNair J. laid down a specific test for determining the standard of care applicable to the medical profession. Under this test, a doctor "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

20.4.10 The Bolam test forms the basis for assessing medical negligence in Singapore and in the UK, although in the latter its application is now confined to negligent treatment and diagnosis (see Section 20.4.11 below). Even though the court reserves the right to find a doctor negligent if he fails to meet a threshold test of logic and consistency (Bolitho v City and Hackney Health Authority [1998] AC 232), the significance which the courts place on the opinions of fellow doctors when determining the issue of negligence tends – particularly in Singapore – to make it more difficult for claimants to succeed in medical actions than might be the case in actions against other professions: *Dr Khoo James and anor v Gunapathy d/o Muniandy [2002] 2 SLR 414*. For an application of Gunapathy, see Re JU (Section 20.3.2 above), a decision which also raises issues relating to the difficult and somewhat controversial areas of wrongful life and wrongful birth. (Note, however, that the decision of the Court of Appeal in JSI Shipping (see Sections 20.4.6 and 20.4.8 above) *could* be interpreted as favouring a common professional standard.)

20.4.11 In Rogers v Whitaker (1992) 175 CLR 479, which concerned failure to disclose a risk involved in medical treatment, the Bolam test was rejected in Australia in favour of a test based on the duty to disclose a risk which a reasonable patient would consider material. This followed the approach already adopted in Canada under Reibl v Hughes (1980) 114 DLR (3d). Although under the decision in Sidaway v Bethlem Royal Hospital [1985] AC 871 (Sidaway) the English courts traditionally applied the Bolam test to cases of negligent non-disclosure of risks, the decision of the House of Lords in Chester v Afshar [2004] UKHL 41 (Chester; see Section 20.5.11 below), while focusing primarily on the issue of causation, effectively favoured a reasonable patient approach to failure to disclose a risk of treatment. Application of the reasonable patient approach in the UK has now been confirmed by the Supreme Court in Montgomery v Lanarkshire Health Board [2015] UKSC 11 (Montgomery), which overruled Sidaway and held that a doctor must disclose risks which a reasonable person in the position of the patient would consider to be material. Interestingly, although in most jurisdictions the rejection of the Bolam test has been largely confined to cases involving non-disclosure of medical risks, the Federal Court of Malaysia implied in Foo Fia Na v Dr Soo Fook Mun [2007] 1 MLJ 593 that the reasonable patient test should be used in Malaysia to assess *all* forms of medical negligence (although the decision itself related only to the disclosure of risks). In Singapore, however, the High Court has continued to treat itself bound under Gunapathy (see Section 20.4.10 above) to apply the Bolam/Bolitho approach not only to negligent diagnosis and treatment, but also to negligent non-disclosure of risks: see, eg,

Hii Chii Kok v Ooi Peng Jin London Lucien and another [2016] SGHC 21 (in which, however, it was held that even under the Montgomery approach the action would have failed).

Proof of Breach

C. Proving breach of duty is a question of fact determined by specific circumstances of each case

20.4.12 Whether or not a duty has been breached is a question of fact to be determined according to the specific circumstances of each case. For this reason, precedents are of value only in terms of the general principles which they establish: Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743.

(1) Shifting of burden to the defendant: where exact cause of incident is unknown, defendant had control over the agent of harm, and that relevant damage would not normally have occurred in the absence of negligence

20.4.13 In some circumstances, the claimant may lack sufficient knowledge to prove negligence on the part of the defendant. In such circumstances, the defendant will clearly choose to remain silent unless the normal rules for establishing negligence are varied. The courts will vary the rules and infer negligence if the claimant can show that the exact cause of the incident is unknown, that the defendant had control over the agent of harm, and that the relevant damage would not normally have occurred in the absence of negligence. On occasion the effect of this inference (sometimes referred to under the Latin maxim res ipsa loquitur) has been to shift the legal burden of proof onto the defendant, but it more frequently results only in the evidentiary burden being shifted. This requires the defendant to adduce evidence in rebuttal, failing which the claimant's case will succeed: *Awang b Dollah v Shun Shing Construction [1996] SGHC 296*. Note, however, that in BNJ (see section 20.4.2 above) the High Court of Singapore confirmed that res ipsa loquitur will not apply where the circumstances are clear and there is no evidentiary gap.

SECTION 5 CAUSATION OF DAMAGE

A. Causation: the physical link between the defendant's negligence and the claimant's damage

20.5.1 Causation relates to the physical link between the defendant's negligence and the claimant's damage. Even if it can be shown both that the defendant breached his duty of care to the claimant and that the claimant sustained damage, the claim will not succeed unless the damage is shown to have resulted from the breach. For a detailed analysis of the rules on causation as applied in Singapore (albeit with little discussion of recent developments elsewhere), see the decision of the Court of Appeal in Sunny Metal (Sections 20.2.12 and 20.3.13 above and 20.5.2 below).

Simple Issues of Causation

B. The 'but-for' test: dealing with simple issues of causation

20.5.2 The basic test for establishing causation is the 'but-for' test, under which the defendant will be liable only if the claimant's damage would not have occurred but for his negligence – or, looked at the other way round, the defendant will not be liable if the damage would, or could, have happened anyway, regardless of his negligence: *Yeo Peng Hock v Pai Lily [2001] 3 SLR (R) 555*. (In Sunny Metal (Sections 20.2.12, 20.3.13 and 20.5.1 above) the Court of Appeal held that the but-for test could also be extended to determine the issue of causation in fact in contract cases).

C. Multiple consecutive causes: involvement of either a second tortfeasor or a natural event

20.5.3 The 'but-for' test works well in straightforward situations where it is easy to establish that the damage has been caused by the defendant's negligent act: see dicta in *F v Chan Tanny [2003] 4 SLR (R) 231*, but it proves inadequate in establishing causation in more complex situations where a number of actual or potential causes operate either consecutively or concurrently.

Multiple Consecutive Causes

20.5.4 When there are two discrete torts, one following the other, but no additional damage is caused by the second tort, only the first tortfeasor is liable. Where additional damage is caused by the second tort, each tortfeasor is liable for the damage he has caused. The first tortfeasor's liability remains what it would have been had the second tort not occurred, even if the physical manifestations of the second tort appear to wipe out the damage caused by the first tort: Baker v Willoughby [1970] AC 467 (Baker). This avoids the claimant being under-compensated or the second tortfeasor compensating for more harm than he has actually caused. (Note that in *Salcon Ltd v United Cement Pte Ltd [2004] 4 SLR(R) 353*, the Court of Appeal held that – even assuming Baker to be applicable in Singapore – it must be confined to personal injuries, and cannot extend to commercial disputes).

20.5.5 However, when a tort is followed by a natural event which wipes out the physical effects of the tort, the tortfeasor's liability ceases at the date when the supervening condition manifests itself: Jobling v Associated Dairies [1982] AC 794. If this were not so, the defendant would be liable for damage which would have occurred naturally anyway due to the 'vicissitudes of life.'

D. Multiple potential causes: claimant can succeed only if he proves on the balance of probabilities that the damage is attributable to the tort

20.5.6 Where there are several discrete potential causes of harm, some of which are tortious and some of which are natural, the basic rule is that the claimant can succeed only if he proves on the balance of probabilities that the damage is attributable to the tortious conduct: Wilsher v Essex Area Health Authority [1988] AC 1074 (Wilsher).

20.5.7 In circumstances where a defendant has exclusive control over a damage-causing agent, he may be held liable even if his negligence cannot be shown to be the sole cause of the damage, as long as it can be proved to have made a material contribution: Bonnington Castings v Wardlaw [1956] AC 613 (Wardlaw). The Wardlaw principle was extended in McGhee v National Coal Board [1973] 1 WLR 1 (McGhee) to provide for liability even where a claimant can establish only that the defendant negligently increased the risk of harm. Although McGhee was implicitly criticised in Wilsher (see Section 20.5.6 above), its fortunes were revived in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 (Fairchild), where it was held that several defendants who consecutively exposed claimants to the same risk (of mesothelioma), involving the same damage-causing agent (asbestos fibres), could all be treated as having materially contributed to the disease, and could thus be held jointly liable, even though it was impossible to determine which of them was actually responsible for triggering the condition. The subsequent decision in Barker v Corus UK Ltd [2006] 2 WLR 1027 re-interpreted Fairchild as having been based on increased risk, and favoured apportioned liability, but the effect of this decision was reversed by legislation which reinstated joint liability, at least in mesothelioma cases. The application of Fairchild to all mesothelioma cases – even those where exposure to the damage-causing agent is both tortious and environmental – was confirmed by the Supreme Court in Sienkiewicz v Greif (UK) Limited [2011] UKSC 10. However, as the judgments in Zurich Insurance PLC UK Branch v International Energy Group Limited [2015] UKSC 33 demonstrate, departure from the 'but-for' test in the UK under Fairchild and its satellite cases has given rise to some judicial disquiet. (Fairchild has yet to be accepted as good law in Australia, and in Amaca v Booth [2011] HAC 53 the High Court of Australia accepted evidence that mesothelioma could in fact develop as a result of cumulative exposure to asbestos fibres, rather than being triggered at a single moment.)

20.5.8 Note that while the Wardlaw, McGhee and Fairchild principles were developed in the context of industrial diseases contracted through exposure to dangerous dusts and fibres, several decisions in recent years have applied the principles in other circumstances – and most notably in medical negligence situations. For an application of McGhee in Singapore with respect to a hospital's liability for negligent failure to monitor a post-operative patient, see *Surender Singh s/o Jagdish Singh and another v Li Man Kay [2010] 1 SLR 428; [2009] SGHC 168.* And for an application of Wardlaw (in the wake of McGhee and, in particular, Fairchild) in the UK with

respect to a hospital's liability for a patient's brain damage, see Bailey v Ministry of Defence [2008] EWCA Civ 883; [2009] 1 WLR 1052.

Loss of a Chance

20.5.9 The standard requirement that in civil actions a claimant must establish his case on the balance of probabilities applies equally to actions based on loss of a chance. Under English law, if there is a less than 51% chance that the thing which might have happened would actually have happened had it not been for the defendant's negligence, the claimant will fail, even if he seeks to recover not for the whole of his damage but only for the chance which the defendant caused him to lose. This analysis has been applied primarily in medical cases, where actions by claimants whose chances of recovery from illness or injury have been reduced due to the negligence of their doctors have failed when they could not establish that, with proper treatment, their chances of recovery would have exceeded 50%: Gregg v Scott [2005] UKHL 2; [2005] 2 WLR 268. Although in the past claims for loss of chance succeeded in medical negligence cases in some Australian states (see, eg, Rufo v Hosking [2004] NSWCA 391), the decision of the High Court of Australia in Tabet v Gett [2010] HCA 12 established that Australian law does not recognise the concept of loss of chance in medical negligence proceedings.

20.5.10 The rule that a claimant cannot normally recover for a lost chance is modified in cases where a defendant negligently deprives the claimant of the opportunity to gain financial benefit or to avoid financial risk. In such cases, damages are assessed not on the outcome which the claimant would have sought, but on the economic opportunity which he has lost. The claimant must prove on the balance of probabilities that he would have taken action to obtain the relevant benefit or avoid the relevant risk. Once this has been established, he need then only show that the chance which he has lost was real or substantial: *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd & Anor [2005] 1 SLR (R) 661* (which, although a contract case, made reference to, and for the most part approved, the test applied in the tort decision of Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1002).

F. Loss of a right: recovery possible if it can be shown that defendant's failure to advise claimant of risks inherent in treatment has deprived him of the right to choose a more experienced doctor or defer treatment

20.5.11 Founded on the notion of patient autonomy, medical negligence cases from both Australia and the UK suggest tacit recognition of a more rights-based approach to damage. Under this approach, a claimant who cannot establish causation using the traditional rules may nevertheless recover if he can show that in failing to advise him of the risks inherent in treatment a defendant has deprived him of the right either to choose a more experienced doctor: Chappel v Hart [1998] 195 CLR 232 or to defer the date of the treatment: Chester (see Section 20.4.11 above). However, the concept of patient autonomy has yet to find favour in Singapore: see the judgment of Ang J in Tong Seok May Joanne v Yau Hok Mun Gordon [2012] SGHC 252.

G. Breaking the chain of causation

20.5.12 A defendant is potentially liable for all the foreseeable consequences of his negligence. However, the chain of causation between the defendant's negligence and the damage ultimately sustained by the claimant will be broken by a new intervening act (or *novus actus interveniens*), whether by the claimant himself or by a third party: *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd [2006] 3 SLR (R) 769*. To break the chain of causation, the act must be something ultroneous which disturbs the sequence of events.

(1) Defendant not liable for damage subsequently sustained by claimant's own unreasonable response

20.5.13 A defendant who has already negligently caused damage to a claimant, or who has negligently exposed a claimant to the risk of damage, will not be liable for any damage which the claimant subsequently sustains due to his own unreasonable response to the situation in which the defendant has placed him: McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621. English courts have refused to make a finding that the claimant has acted unreasonably in a number of situations (including that where a

claimant commits suicide following injuries sustained at work: Corr v IBC Vehicles [2008] UKHL 13). Where the claimant's response is not sufficiently unreasonable to break the chain of causation, the defendant will remain liable: Andrea De Cruz (see Sections 20.2.10 and 20.3.18 above). However, if pleaded, the defence of contributory negligence may apply to reduce damages in such circumstances: Sayers v Harlow DC [1958] 1 WLR 623.

20.5.14 Where a defendant has created a situation of danger which requires the claimant to take immediate averting action, the defendant will be liable even if, in the 'agony of the moment,' the claimant makes the wrong decision and suffers damage which could have been avoided had he acted differently.

20.5.15 Where the claimant's act is the very thing against which the defendant is required to offer protection, the defendant will be liable for the consequences of his negligence, however objectively unreasonable the claimant's act may be, although damages may be reduced to take account of the claimant's contributory negligence: Reeves v Metropolitan Police Commissioner [2000] 1 AC 360.

(2) A new intervening act by a third party normally breaks chain of causation between the defendant's negligence and the claimant's damage

20.5.16 A new intervening act by a third party will normally break the chain of causation between the defendant's negligence and the claimant's damage. However, an act will not be regarded as 'new' if it is sufficiently connected with damage which has already resulted from the defendant's negligence – eg, a subsequent accident after a road has been blocked due to the defendant's negligence: Rouse v Squires [1973] QB 889, or medical negligence in the treatment of an injury caused by the defendant's negligence: Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001] EWCA Civ 1141. In such circumstances, the defendant may be held partly responsible for the subsequent damage, and the chain of causation will not be broken (although the subsequent tortfeasor will also be partly – and possibly even primarily – liable). Where the defendant has control over a third party, or where the third party is faced with a dilemma created by the defendant, the chain of causation is unlikely to be broken and the defendant will normally be liable to the claimant for the damage caused: Home Office v Dorset Yacht Co Ltd [1970] AC 1004.

(3) Liability imposed if defendant's negligence makes it very likely that the third party will cause damage to the claimant

20.5.17 In other situations, a defendant will not be liable merely because his negligence makes damage to the claimant by a third party foreseeable. Liability will be imposed only if the defendant's negligence makes it very likely that the third party will cause damage to the claimant: Lamb v Camden LBC [1981] QB 625.

SECTION 6 REMOTENESS OF DAMAGE

20.6.1 Like duty of care, the rules on remoteness of damage effectively place an artificial limit on the number of negligence actions which can succeed. For consideration of the need to limit potentially indeterminate liability, see, eg, *Ho Soo Fong v Standard Chartered Bank [2007] 2 SLR (R) 181; [2007] SGCA 4* (Standard Chartered; see Section 20.6.6 below). The role of remoteness is to filter out situations where – even assuming that duty, breach and causation can all be satisfactorily established – the nature of the damage sustained makes it unfair to make the defendant liable.

A. Type of damage must be reasonably foreseeable

(1) Old approach to remoteness: defendant liable for damage directly resulting from negligence

20.6.2 Under the old approach to remoteness, a defendant was liable for any damage which resulted directly from his negligence, no matter how unusual or unpredictable that damage might be. However, in the Wagon Mound [1961] AC 388 the Privy Council replaced

the direct consequence test with the requirement that, in order to be recoverable, damage must be of a type which is foreseeable in all the circumstances, and this is approach is now universally favoured: *Fong Maun Yee and Another v Yoong Weng Ho Robert [1997] 1 SLR (R) 751*.

(2) New approach to remoteness: defendant liable for type of damage foreseeable in all circumstances

20.6.3 The *Wagon Mound* test is generally accepted as being less claimant-friendly than the direct consequence test. In order to ameliorate its harshness, the courts when deciding whether damage is of a foreseeable type normally take a relatively liberal view, holding that neither the manner nor the extent of the damage is relevant to the determination. Although some courts have on occasion adopted a more restrictive approach, the decision of the House of Lords in Jolley v Sutton London Borough Council [2000] 1 WLR 1082, suggests that the liberal approach is to be preferred. For a novel application of the Wagon Mound test in Singapore, see the decision in Man Mohan Singh (see Section 20.3.6 above), where it was held not only that there was no duty of care with respect to IVF treatment following the deaths of the claimants' only children in a car accident, but also that such treatment did not constitute damage of a foreseeable type.

The Egg-shell Skull Rule

20.6.4 In all tort actions, a defendant must take his victim as he finds him. Under the egg-shell skull rule, which applies to personal injuries, this concept is adapted to allow recovery even for unforeseeable damage. The egg-shell skull rule applies in circumstances where, due to a claimant's innate physical susceptibility to illness or injury, he suffers extreme and unforeseeable damage which is triggered by the initially foreseeable damage caused by the defendant's negligence: Smith v Leech Brain & Co Ltd [1962] 2 QB 405. When applied with respect to damage of an unforeseeable type (as opposed to merely an unforeseeable extent) the egg-shell skull rule operates as an exception to the Wagon Mound test.

B. The egg-shell skull rule: allowing recovery for unforeseeable damage

20.6.5 Under English law, where the claimant has an 'egg-shell personality' and the damage complained of is psychological rather than physical, he need not even show that the initial injury is of a foreseeable type, as long as some injury was foreseeable in the circumstances: Page (see Section 20.3.5 above). However, Page has been the subject of considerable criticism, and was rejected by the Singapore Court of Appeal in Ngiam (see Section 20.3.5 above).

20.6.6 Under variants of the egg-shell skull rule, claimants may also seek compensation for unforeseeable property damage (*Low Siew Keng v Seng Huat Construction Pte Ltd [1998] SGHC 197*) and for unforeseeable additional damage sustained due to extreme impecuniosity (Standard Chartered, see Section 20.6.1 above).

SECTION 7 DEFENCES TO NEGLIGENCE

20.7.1 All the standard tort law defences are available in actions for negligence, but in the vast majority of cases the most relevant defences are illegality, volenti non fit injuria and – most importantly – contributory negligence. For discussion of all three defences, see *Rashid Osman bin Abdul Razak v Abdul Muhaimanin bin Khairuddin and another [2013] SGHC 49*.

A. Illegality: where a claimant is himself a wrongdoer

(1) Illegality may also be considered at the duty stage or when determining appropriate standard of care

20.7.2 Where a claimant is himself a wrongdoer, his action may be defeated on the grounds of his illegality. Illegality is sometimes considered at the duty stage, particularly in Australia: Miller v Miller [2011] HCA 9, and has in the past also been regarded as relevant to determining the appropriate standard of care: Pitts v Hunt [1991] QB 24. In the UK, cases involving joint illegal enterprises – the main circumstance in which illegality is pleaded – are now determined by reference to principles of causation: Joyce v O'Brien & Anor [2013] EWCA Civ 546. However, notwithstanding the various stages at which illegality is considered, it continues to be described in common parlance as a 'defence'.

(2) Defence normally succeeds only in cases where the claimant's conduct was criminal in nature

20.7.3 In theory, illegality (also known as ex turpi causa non oritur actio) extends to both illegal and immoral acts, although in United Project Consultants Pte Ltd (see Section 20.3.13 above), the Singapore Court of Appeal stressed that a plea of illegality would normally succeed only in cases where the claimant's conduct was criminal in nature. Since illegality provides a complete defence to a defendant who is himself, by definition, a wrongdoer, the courts take a cautious approach when holding that it is applicable. Although the majority of cases in which illegality is pleaded successfully involve joint illegal enterprises, in the UK illegality has also defeated claims in cases of discrete wrongs where the claimant has committed a serious criminal offence (such as taking a life): see, eg, Clunis v Camden and Islington Health Authority [1998] QB 978 and Gray v Thames Trains [2009] UKHL 33; [2009] 3 WLR 167. In Singapore, the possibility of illegality being pleaded outside joint illegal enterprise cases has also been recognized in United Project Consultants (see Section 20.3.13 above).

(3) Defence will not succeed where wrong is insufficiently connected with claimant's damage, or where damage defendant causes is disproportionate to the claimant's wrong

20.7.4 Where the claimant's wrong is insufficiently connected with his damage, or where the damage which the defendant causes is disproportionate to the claimant's wrong, an illegality plea is unlikely to succeed. In the latter situation, however, the defence of contributory negligence may be applicable: Revill v Newbery [1996].

B. Consent: where claimant either expressly or implicitly accepts the risk of harm associated with a defendant's conduct

(1) Consent is a full defence pleaded successfully only in extreme situations

20.7.5 Where a claimant either expressly or implicitly accepts the risk of harm associated with a defendant's conduct, his claim may be defeated by the defence of volenti non fit injuria. However, since, like illegality, volenti is a full defence, the courts are generally unwilling to allow it to defeat a claim: *Administrators of the Estate of Tan Ah Hock (deceased) v Low Beng Hai and another [1994] SGHC 88* (Estate of Tan Ah Hock, see Section 20.7.13 below), and it is pleaded successfully only in extreme situations.

(2) Claimant must be shown to have had full knowledge and understanding of the risk involved and freely agreed to assume the very risk that materialized

20.7.6 For the defence to succeed, it must be shown that the claimant had full knowledge and understanding of the risk involved, that he freely agreed to assume that risk, and that the risk to which he consented was the one which materialized. Only rarely does the defence succeed in cases involving employees: ICI v Shatwell [1965] AC 656, and for policy reasons it is never available in actions brought by rescuers.

(3) Defence outlawed by legislation in cases of road traffic accidents

20.7.7 Where road traffic accidents are concerned, the defence has been outlawed by legislation: see the Motor Vehicles (Third Party Risks and Compensation) Act (Cap.189 2000 Rev Ed). It may be pleaded in claims involving other types of vehicles (such as light

aircraft), but it succeeds only in cases where the risks are substantial and the claimant's conduct has been particularly cavalier: Morris v Murray [1991] 2 QB 6.

(4) Consent and risks assumed when participating in sporting activities

20.7.8 Volenti may be relevant to the risks assumed when participating in sporting activities, although in relation to risks faced by spectators a better approach is probably to treat the situation as one in which a lower standard of care is applicable: Wooldridge v Sumner [1963] 2 QB 43 (see Section 20.4.5 above). For the interplay between duty of care and volenti in determining the liability of regulators and referees to participants in sports, see, eg, Watson v British Boxing Board of Control [2001] QB 1134 and Vowles v Evans & The Welsh Rugby Union Ltd [2003] 1 WLR 1607.

(5) Unfair Contract Terms Act applies in a business context where defendant seeks to exclude liability for negligence by express agreement or by notice

20.7.9 In a business context, a defendant who seeks to exclude liability for negligence by an express agreement or by notice is subject to the provisions of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). Under section 2(1) it is impossible to exclude liability for death or personal injury attributable to negligence, and under section 2(2) purported exclusion of liability for negligence in other situations must pass the test of reasonableness.

C. Contributory negligence: where claimant suffers damage as a result partly of his own fault and partly of the fault of another or others

(1) Partial defence where damages are reduced to reflect claimant's share of responsibility for harm sustained.

20.7.10 Historically, contributory negligence was a complete defence, but under the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) a claimant who suffers damage as a result partly of his own fault and partly of the fault of another or others no longer has his claim defeated. Instead, his damages are reduced to reflect his share of the responsibility for the harm which he has sustained.

(2) Contributory negligence established where claimant fails to take reasonable care of himself according to the standards of the reasonable person

20.7.11 The standard of care is objective, so a claimant will be contributorily negligent if he fails to take reasonable care of himself according to the standards of the reasonable person. However, as with actions in the tort of negligence proper, lower standards of care apply in some situations, and less is expected in terms of self-preservation on the part of child claimants: Gough v Thorne [1966] 1 WLR 1387 and by claimants faced with situations of emergency: Jones v Boyce (1816) 1 Stark 493. Where a claimant has not himself been negligent, his damages will not normally be reduced merely because others have failed to take adequate care of him. One exception is where the claimant is an employer suing a defendant for damage caused to his property at a time when that property was in the care and control of his employee. In such circumstances, damages will be reduced to reflect any contributory negligence on the part of the employee.

(3) Claimant's negligence results in reduction of damages only where it is causally relevant to the damage sustained

20.7.12 A claimant's negligence will result in a reduction of damages only where it is causally relevant to the damage he has sustained. Where his negligence contributes to the accident itself (as where he crosses a road without using a pedestrian crossing) his damages may be reduced substantially: *Ng Weng Cheong v Soh Oh Loo & Anor [1993] 1 SLR (R) 532*. But where his negligence contributes only to the extent of his damage (as where he merely fails to wear a seat belt or crash helmet) the reduction in damages is normally small: *Froom v Butcher* [1976] QB 286. As these cases indicate, contributory negligence is commonly pleaded in road accident cases, and particularly cases where pedestrians are injured by drivers: see, eg, Jackson v Murray [2015] UKSC 5. For

an interesting recent example of such a case, see *Asnah Bte Ab Rahman v Li Jianlin [2016] SGCA 16*, where – in a rare split decision – the Court of Appeal (Chief Justice Suresh Menon dissenting) held a pedestrian 15% to blame for an accident in which he was hit by a taxi when crossing a road with the green man symbol in his favour.

(4) Damages reduced by one half where the claimant and the defendant are equally to blame

20.7.13 In situations where the claimant and the defendant are equally to blame, the claimant's damages are reduced by one half: *Administrators of the Estate of Tan Ah Hock* (see Section 20.7.5 above). This is also the case where there are multiple defendants, and the claimant's fault is equal to that of the defendants: Fitzgerald v Lane [1988] 3 WLR 365. It is generally (although not universally) accepted that it would be 'logically unsupportable' to reduce damages by 100% under the Contributory Negligence Act: see, eg, the decision of the Court of Appeal in Pitts v Hunt [1991] QB 24.