

CHAPTER 20 THE LAW OF NEGLIGENCE

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SECTION 1 INTRODUCTION

20.1.1 In the seventy-five years or so 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.

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.

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SECTION 2 DUTY OF CARE: TESTS FOR ESTABLISHING DUTY

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.

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

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.

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

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).

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). This is in large part because of 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.

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.

The Approach in Singapore

20.2.9 In the pure economic loss case of *RSP Architects v Ocean Front Pte Ltd* [1996] 1 SLR 113 (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.

20.2.10 In *PT Bumi Tankers v Man B&W Diesel SE Asia Ltd* [2003] 3 SLR 239, 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 300 (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 715, 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 other 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 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 853 (HC) and [2007] 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.

20.2.13 The question of the test to be used to determine the duty of care in Singapore was resolved in [Spandek Engineering \(S\) Pte Ltd v Defence Science & Technology Agency \[2007\] SGCA 37](#) (Spandek; see Section 20.3.13 below), 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 approach might be preferable in cases of pure economic loss). The Court of Appeal held that the test should be applied incrementally with reference to the facts of decided cases, although 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.

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SECTION 3 DUTY OF CARE: SPECIAL SITUATIONS

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 116](#) (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).

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 where a disabled child claims his mother should have been advised to abort him, as in [Re JU \[2005\] 4 SLR 96](#) (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);
- 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.

Psychiatric Harm

20.3.4 Historically, the courts were unwilling to allow recovery for negligently inflicted psychiatric harm (also referred to as ‘nervous shock’). 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 in which claims for nervous shock were allowed involved primary victims (ie, those who feared for their own safety: *Dulieu v White* [1901] 2 KB 669). 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 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] SGCA 23 (Ngiam; see Section 20.3.6 below) recently rejected Page, holding that even in primary victim cases medically diagnosed psychiatric harm must be foreseeable.

20.3.6 Claims may also succeed when brought by secondary victims (ie, those who have witnessed damage-causing events without themselves being in the sphere of physical danger), although such claims succeed in more limited circumstances. Under the decision of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (Alcock) the English courts allow secondary victim claims only by persons in a spousal or parent/child relationship (or, if specifically proved, a relationship of equivalent closeness) with the victims of physical harm who are able to establish that they suffered sudden shock through witnessing the damage-causing events or their immediate aftermath with their own unaided senses. However, the harshness of Alcock is being mitigated elsewhere, particularly in Australia, where the shock requirement was abandoned in *Tame v New South Wales*; *Annetts v Australian Services Pty Ltd* [2002] HCA 35, and the requirements of physical proximity, direct perception and suddenness were rejected in *Glifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33. Some Australian states even allow claims outside the spousal and parents/child categories. In addition, a number of English decisions, including *Galli-Atkinson v Seghal* [2003] EWCA 697, where the physical proximity requirement was relaxed, also point to a partial easing of the Alcock proximities. 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] 3 SLR 317. Following a detailed examination of the rules on psychiatric harm, the Court of Appeal in Ngiam (see Section 20.3.5 above) recently confirmed the application of the Alcock proximities in Singapore, while recognizing arguments for comprehensive legislative reform. In *Man Mohan Singh & Anor v Zurich Insurance (Singapore) Pte Ltd* (now known as QBE Insurance (Singapore) Pte Ltd & Anor & Anor appeal [2008] SGCA 24 (Man Mohan Singh; see Section 20.6.3), decided just after Ngiam, the Alcock proximities were applied in refusing a claim to parents who had neither been at the scene of the accidents 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.

Pure Economic Loss

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

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* [1992] 2 SLR 890 and *Standard Chartered Bank & Anor v Coopers & Lybrand* [1993] 3 SLR 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 a recent 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* [2008] SGHC 161).

Professional Responsibility

20.3.10 The *Hedley Byrne* principle has also been extended in most jurisdictions to cover professional responsibility (eg, the negligent drafting of wills and other documents by solicitors: *White v Jones* [1995] 2 AC 207). 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 recent case on professional responsibility in Singapore, and one which indicates the overlap between professional responsibility and negligent statements, see *Plan Assure PA (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] SGCA 41.) For further discussion of the liability of professionals, see Section 20.4.6 below).

Acts

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 449](#). 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. The House of Lords, on the other hand, unequivocally rejected the possibility of recovering for such losses in *Murphy v Brentwood District Council* [1991] AC 398 (which overruled *Anns* on the economic loss point), and has shown no sign of relaxing this attitude.

20.3.13 In *P T Bumi* (see Section 20.2.10 above) 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 are fundamentally contractual. The decision in that case (which involved an unsuccessful claim for pure economic loss with respect to a defective chattel) suggests that where a claimant has limited its redress under contract to a particular party, the courts will be unlikely to infer that other parties, with whom the claimant has no contractual relationship, owe the claimant a duty of care in negligence. In [United Project Consultants Pte Ltd v Leong Kwok Onn \[2005\] 4 SLR 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. More recently, in *Spandek* (see Section 20.2.13 above), the Court of Appeal, while holding that the same two-stage test of proximity and policy should be used with respect to all categories of claim, recognised that a more restrictive approach might be appropriate in cases of economic loss, and held that the action in that case (which again involved a contractual matrix) must fail.

20.3.14 Where a claimant suffers pure economic loss through damage not to his own property, but through damage to someone else's property, 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.

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.

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; or
- where the defendant has assumed responsibility for the claimant or his property.

Statutory Authorities

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, most recently, 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.

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, more recent 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, who have been held to owe no duty to the public at large, eg, during the conduct of an investigation: *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53. However, the police may owe a duty where they have assumed an obligation to, or have increased the risk to, a specific individual. The fire services owe no duty to individual members of the public, 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, but 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.

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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

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).

20.4.3 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.

Special Standards of Care

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.

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.

Professional Negligence

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 a recent application of the *Bolam* test with respect to auditors, see *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (A Firm)* [2007] SGCA 40 (*JSI Shipping*: see Section 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.

Medical Negligence

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 now appears confined to negligent treatment and diagnosis (see Section 20.4.11 below). Even though the question of whether or not a doctor has been negligent is ultimately for the court to decide (*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 - particularly in Singapore - tends 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* [2005] 4 SLR 96 (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 recent decision of the Court of Appeal in *JSI Shipping* (see Section 20.4.6 above) could be interpreted as having merged the professional standards of medical practitioners and other professionals.)

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. Although the English courts traditionally applied the *Bolam* test to cases of negligent non-disclosure of risks (see, eg, *Sidaway b Bethlem royal Hospital* [1985] AC 871), the decision of the house of Lords in *Chester v Afshar* [2004] UKHL 41 (Chester; see Section 20.5.11 below), while primarily focused on the issue of causation, effectively also favoured a reasonable patient approach to failure to disclose a risk of treatment. Interestingly, although even in Australia, the rejection of the *Bolam* test has been largely confined to cases involving non-disclosure of medical risks, and a modified form of the test has been adopted in several Australian states to cover both medical treatment and other forms of professional negligence, the Federal Court of Malaysia held in *Foo Fia Na v Dr Soo Fook Mun* [2007] 1 MLJ 593 that the *Rogers* test should be used in Malaysia to assess *all* forms of medical negligence. In Singapore, however, under *Gunapathy* (see Section 20.4.10 above) the *Bolam*

test continues to apply not only to negligent diagnosis and treatment, but also to negligent non-disclosure of risks.

Proof of Breach

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.

20.4.13 In some circumstances, the claimant may lack sufficient knowledge of what happened 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](#) [1997] 3 SLR 677.

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SECTION 5 CAUSATION OF 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

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 Peck Hock v Pai Lily](#) [2001] 4 SLR 571. (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).

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 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 two torts follow one another 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 which 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. This avoids the claimant being under-compensated or the second tortfeasor compensating for more harm than he has actually caused.

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.'

Multiple Potential Causes

20.5.6 Where there are several 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 tort: *Wilsher v Essex Area Health Authority* [1988] AC 1074.

20.5.7 In circumstances where a defendant has sole control over the agent of harm, he may be liable even if the claimant can establish only that he negligently increased the risk of harm: *McGhee v National Coal Board* [1973] 1 WLR 1.

20.5.8 Where several defendants consecutively expose the claimant to the same risk involving the same agent of harm, all can be treated as having materially contributed to the harm and can be held jointly liable, even when it is impossible to determine which of them actually caused the claimant's damage: see the decision of the House of Lords with respect to mesothelioma in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (Fairchild). Although a subsequent House of Lords in *Barker v Corus UK Ltd* [2006] 2 WLR 1027 reinterpreted Fairchild as a decision based on increased risk, and favoured apportioned liability, the effect of this decision was reversed by s 3 of the Compensation Act 2006, which re-instated joint liability (at least with respect to claims for mesothelioma).

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. However, in some Australian

states, claims for loss of chance have been succeeded in medical negligence cases: see, eg, *Rufo v Hosking* [2004] NSWCA 391.

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 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).

Loss of a Right

20.5.11 Recent 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).

Breaking the Chain of Causation

20.5.12 Even if the defendant has acted negligently, the chain of causation between that negligence and the claimant's damage 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 769. To break the chain of causation, the act must be something ultraneous which disturbs the sequence of events.

Acts of the Claimant

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.

Acts by Third Parties

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 — e.g. 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). Moreover, where the defendant has control over the 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.

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.

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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 181). 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.

The Type of Damage must be Reasonably Foreseeable

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 \[1997\] 2 SLR 297](#).

20.6.3 The Wagon Mound test is generally accepted as being less claimant-friendly than the direct consequence test. In order to ameliorate the harshness of the rule, 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 one 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.

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: (*Ho Soo Fong & Anor v Standard Chartered Bank* [2007] SGCA 4).

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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 relevant defences are illegality, consent and — most importantly — contributory negligence.

Illegality

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, and has on occasion also been regarded as relevant to determining the appropriate standard of care, but it is most commonly treated as a defence.

20.7.3 In theory, the defence of 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 the defence 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. The majority of cases in which it is successfully pleaded successfully involve joint illegal enterprises, although in the UK, the defence has also succeeded in cases involving discrete wrongs by claimant and defendant: see, eg, *Clunis v Camden and Islington Health Authority* [1998] QB 978. In Singapore, the possibility of illegality being pleaded outside joint illegal enterprise cases has also been recognized in *United Project Consultants* (above).

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, the defence of illegality will not succeed. In the latter situation, however, the defence of contributory negligence may be applicable: *Revill v Newbery* [1996]

Consent

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 consent (or *volenti non fit injuria*). However, since, like illegality, consent 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, and it is pleaded successfully only in extreme situations.

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.

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.

20.7.8 Consent may be relevant to the risks assumed when participating in sporting activities, although where the risks to spectators, in particular, are concerned, 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).

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.

Contributory Negligence

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.

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 exemption 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.

20.7.12 A claimant's negligence will result in a reduction of damages only where it is causally relevant to the damage which 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] 2 SLR 336. 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.

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 \(deceased\) v Low Beng Hai and another](#) [1994] SGHC 88. 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.

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