BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of ors *v* National University of Singapore and anor
[2014] SGHC 5

Case Number	: Suit No 954 of 2009
Decision Date	: 09 January 2014
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Beh Eng Siew (Lee Bon Leong & Co) for the plaintiff; Anparasan s/o Kamachi (KhattarWong) for the first defendant; K P Allagarsamy (Allagarsamy & Co) for the second defendant and third party in issue; Yuen Simon (Legal Clinic) for the fourth party in issue
Parties	: BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of ors — National University of Singapore and anor

Tort – Negligence

9 January 2014 Judgment reserved.

Quentin Loh J:

1 On 6 June 2007, B, ("the Deceased"), an IT network manager employed by the first defendant, the National University of Singapore ("NUS"), drowned whilst swimming at a swimming pool owned by NUS. His widow, BNM, brings this action in tort on behalf of her two young children, aged 3 and 6 in June 2007, as administratrix of the Estate of the Deceased and on her own behalf. I will refer to her as "the Plaintiff". The children are now aged 9 and 12.

2 NUS decided to outsource the supply of lifeguards and cleaning of the swimming pool in late 2006. The second defendant, Hydro Aquatic Swimming School ("Hydro Aquatic"), was the only tenderer and was accordingly awarded the contract to supply lifeguards and clean the swimming pool for the period of one year from 1 April 2007 under a written contract. Hydro Aquatic was therefore providing lifeguard services at the relevant time. NUS brought a third party action seeking contribution or an indemnity from Hydro Aquatic in the event that it was found liable to the Plaintiff and the Plaintiff added Hydro Aquatic as a second defendant. Hydro Aquatic brought fourth party proceedings against its insurer, Overseas Assurance Corporation Limited ("OAC"), under a public liability insurance policy which, Hydro Aquatic contends, would cover any liability found against it in the present suit. OAC took the position that the insurance policy does not cover the liability arising out of Hydro Aquatic's alleged negligence.

3 The trial, which was solely on liability, took place over 17 days in three tranches and at the end I reserved judgment which I now give. This has been a tragic and difficult case.

The respective cases

4 The Plaintiff makes the following allegations of negligence (and in occupier's liability) against the Defendants:

(a) NUS as owner and occupier of the swimming pool owed a duty of care to all visitors or

users of the swimming pool and this duty of care extended to the engagement of Hydro Aquatic as their subcontractor for the provision of lifeguards;

(b) NUS failed to adequately or properly supervise Hydro Aquatic and with due care and attention;

(c) NUS and Hydro Aquatics failed to exercise their duty to ensure that they had competent and well-trained lifeguards to observe and respond expeditiously to the Deceased when he was in distress in the water;

(d) NUS and Hydro Aquatic did not have an effective emergency response system/plan which consisted of trained and qualified lifeguards to provide timely, relevant and proper emergency medical assistance to any swimmers in the swimming pool who were in distress, including but not limited to the use of an Oxyviva resuscitator machine ("Oxyviva") and an automated external defibrillator ("AED") for the purposes of resuscitation;

(e) The standard of care given to the Deceased after he was pulled out of the water was not what should reasonably have been expected of a lifesaver acting in a closed and controlled environment, as:

(i) The lifeguards were not attentive and did not notice the struggles and distress of the Deceased in the water;

(ii) The lifeguards were not stationed so as to be able to observe and react expeditiously to those patrons who were in distress;

(iii) The lifeguards were not aware where the lifesaving equipment, namely, the Oxyviva and AED were placed or kept;

(iv) The lifeguards were not competent in resuscitating drowning victims such as the Deceased and furthermore were not trained to use the Oxyviva and the AED;

(v) The AED was not brought expeditiously to the scene and was not used within a reasonable time;

(f) Hydro Aquatic also owed the above duties to the Deceased and breached those duties resulting in the death of the Deceased; and

(g) As a result of NUS's and/or Hydro Aquatic's negligence and breach of the above duties owed to the Deceased, the Deceased drowned.

5 NUS's case, in the main, is that:

(a) The management and maintenance of the swimming pool were delegated to Hydro Aquatic through a properly carried out tender process and NUS were not negligent in doing so;

(b) Hydro Aquatic was engaged as an independent contractor to provide lifeguard and pool cleaning services at the swimming pool from 1 January to 31 December 2007;

(c) NUS was not negligent in appointing Hydro Aquatic as an independent contractor as Hydro Aquatic had met the tender requirements, which, *inter alia*, required it to provide lifeguards who were properly trained in the use of the Oxyviva and AED equipment;

(d) Because it was Hydro Aquatic rather than NUS that was the occupier of the swimming pool, NUS did not owe any duty to the Deceased either as occupier of the swimming pool or in negligence; instead, it was Hydro Aquatic who owed a duty of care as an occupier;

(e) Hydro Aquatic also had to ensure that properly trained lifeguards were stationed at the swimming pool and NUS was not vicariously liable for any breaches of duty of care and/or negligence on the part of Hydro Aquatic, its servants and/or agents;

(f) In any case, NUS denies that it had a duty to provide lifeguards with training in the use of the Oxyviva and AEDs and denies that the lifeguards were negligent in their rescue efforts;

(g) Further and in any case the Deceased had a severe and pre-existing heart condition which would have made the likelihood of his survival very small no matter what was done; so that even if there was any negligence, it did not cause the death of the Deceased or the Plaintiff's loss and damage;

(h) In the event that NUS is held liable to the Plaintiff, then NUS claims to be indemnified by Hydro Aquatic on the following grounds:

(i) NUS engaged Hydro Aquatic as an independent contractor to provide lifeguard and pool cleaning services and that under the agreement, Hydro Aquatic had to:

(A) Provide lifeguards who were at least current holders of a "Bronze Medallion" from the Singapore Life Saving Society ("SLSS") or its equivalent;

(B) Provide lifeguards trained in spinal injury management and in the use of the Oxyviva and AED;

(C) Provide lifeguards who had to be vigilant and alert while on duty, so as to be able to prevent any accident in the swimming pool, to rescue persons having difficulties in the swimming pool, and to apply resuscitation and administer first aid and summon the ambulance if necessary;

(D) Provide first aid equipment, including the Oxyviva and an approved AED;

(ii) Hydro Aquatic had a duty to take reasonable care to see that visitors and users of the swimming pool were reasonably safe in using the premises for the purposes for which they were permitted to be present; and

(iii) Hydro Aquatic failed to discharge its duty to take reasonable care to see that the Deceased would be reasonably safe in using the swimming pool and was in breach of its duty of care in tort.

6 Hydro Aquatic denies the claims against it and the allegations of negligence, want or care and/or breach of contract. It claims that its lifeguards responded promptly, rushed to the aid of the Deceased on noticing that he was in difficulty or distress, applied continuous cardio pulmonary resuscitation ("CPR"), and provided aid using the Oxyviva and AED. The AED was used to apply an electrical charge to the Deceased. Hydro Aquatic had done all it could reasonably be expected to do. Hydro Aquatic advances the defence that in any case, the cause of death of the Deceased was due to his ischaemic heart disease as recorded in the Deceased's autopsy report. In so far as Hydro

Aquatic is held liable to the Plaintiff or NUS, it claims an indemnity under their public liability policy taken out with OAC.

7 OAC denies that its policy covers Hydro Aquatic in the circumstances and relies on its policy terms and conditions. I heard oral submissions on this as a preliminary issue at the start of the trial, and ruled that in the circumstances of this case, if there is any liability on the part of Hydro Aquatic to the Plaintiff or NUS, Hydro Aquatic was entitled to an indemnity from OAC under its policy. The reasons for this decision are set out below at [127] to [137].

8 The evidence led in the trial covered four broad issues:

(a) What standards, if any, were the owners of public swimming pools expected to apply in June 2007 with regard to the provision of lifeguards and the provision of safety equipment such as the Oxyviva and the AED;

(b) Whether NUS properly supervised the services provided by Hydro Aquatic and whether it noticed any shortfall in performance by Hydro Aquatic and if so whether it did anything about it;

(c) Whether the lifeguards provided by Hydro Aquatic on 6 June 2007 were negligent in the performance of their duties at the NUS swimming pool; and germane to this were the factual issues of the positions taken up by the lifeguards at the relevant times, their watchfulness over the swimmers, their actions after they became aware of the Deceased's predicament, and whether they knew where the Oxyviva and the AED were kept and how to use them;

(d) What was the medical condition of the Deceased prior to his drowning, what was the cause of his drowning, and whether he had a heart attack that led to him getting into difficulties in the pool.

Facts

9 Apart from the medical condition of the Deceased, which I shall deal with later, some of the background facts and facts leading up to the incident are not very contentious. What was disputed was what happened in those few fraught minutes from the time when the Deceased was first seen to be in trouble at or near the bottom of the pool to the time when he was recovered from the water and unsuccessful attempts were made to resuscitate him. The following constitute my findings of fact.

10 The Deceased was at the time of his death aged 40 and employed as an IT network manager in the NUS computer centre. It was part of his routine to swim together with a friend, Er Chee Teck ("Er"), once a week during lunchtime at the NUS swimming pool.

11 The swimming pool was a standard Olympic sized pool, 50m long and 25m wide, with a separate smaller "instructional" pool to one side. It was a separately fenced off part of the sports and recreation complex sited within the university grounds in Clementi. Viewed from the entrance, the 50m lengths of the pool lay horizontally and in front and the 25m widths ran vertically with the deeper end, which was 1.8m in depth, to the left and the shallower end, which was 1.2m deep, to the right; the centre was slightly deeper at 1.9m. There were nine swimming lanes marked out which I will call Lane 1 to Lane 9. Lane 1 was closest to the entrance and lay along the nearer 50m length and Lane 9 was along the upper or farther 50m length of the swimming pool. There was a corridor of approximately 5m in width between the lower 50m length of the swimming pool and a spectator gallery of four raised "steps" to seat spectators. The spectator gallery ended in a platform where there was a turnstile at

the entrance to the pool; the turnstile was set-off about one-third from the right 25m edge of the pool and about two-thirds from the deeper left 25m edge of the pool. On the day in question, both lifeguards were sitting next to the turnstile. They were therefore seated relatively closer to one corner of the pool (Lane 1 at the shallower 25m width), when the Deceased got into difficulties at the corner of the pool almost diagonally opposite to them (Lane 9 at the deeper 25m width).

12 On 6 June 2007 at about 12.49 pm, the Deceased went with Er for their regular swim. They took about five to 10 minutes to change and warm up and then both began swimming in Lane 9, the lane farthest from the lifeguard post. There were no other swimmers in that lane at the time. The lifeguards estimated that there were only around 10 to 15 swimmers in the pool at the time.

13 Er said that while he was swimming on his seventh lap he saw the Deceased struggling in Lane 9. The Deceased was submerged in the water and waving his hands, his legs were touching the floor of the pool which was about 1.8m deep at that point and he appeared to be trying unsuccessfully to get to the surface. As noted above, the Deceased was then at the deeper end of the pool and near the ladder at the far left corner of the pool viewed from the entrance. Er swam as fast as he could to the Deceased who was then about 20m from him. [note: 1] Er estimated that it took him about 10 seconds. He reached the Deceased, grabbed him under the arms, and pulled him to the surface and then to the side of the pool, which was about 1m away. The Deceased was still struggling in the water and Er said it took some effort, and therefore time, to get him to the side of the pool.

14 When Er reached the side of the pool with the Deceased, he shouted for help. At the time, the two Hydro Aquatic lifeguards on duty were Cheong Juan Meng ("Cheong") and Chua Li Qi ("Chua"). Cheong, alerted by the shout, ran down the gallery steps towards the Deceased and Er while Chua remained where she was; upon seeing Cheong waving his arm at her as he ran towards the Deceased and Er and hearing him shout at her, she called for an ambulance and then went to the lifeguards' office to get the safety equipment. This was approximately 1.10pm. When the Deceased was pulled out of the water with the help of Cheong, it seemed as if he was still conscious. He appeared to be trying to expel water. However he did not respond to questions and his eyes were only half-open. Cheong noticed weak breathing and a cut on the centre of the Deceased's tongue. He started to perform CPR. I note that the autopsy report, which I take to be accurate, did not record any cut on the Deceased's tongue. Dr Gilbert Lau Kwang Fatt ("Dr Gilbert Lau"), a forensic pathologist who had supervised the post mortem examination of the Deceased and gave evidence at trial, confirmed the absence of any cut on the tongue.

15 The Coroner's report indicated that Chua's call for an ambulance was made at 1.13pm. Chua could not locate the AED and only managed to find the Oxyviva, which she then brought to the poolside where Cheong was attending to the Deceased. An AED is a portable electronic device that automatically diagnoses potentially life threatening cardiac rhythms and applies an electric shock to restore an effective rhythm. An Oxyviva machine is a mechanical device that pumps air into the victim's airway and delivers a higher concentration of oxygen at 21% compared to that delivered through CPR. I was told that Oxyviva was originally a brand name but it has now passed into generic use. The Oxyviva was of no use in this type of case; it is mentioned only to underscore the fact that Chua was unable to locate the AED at her first attempt but located only the Oxyviva which she brought to the Deceased. She then opened it but did not use it as she was surprised to find it still in its plastic packing and unassembled. In any case both Cheong and Chua had not been trained in its use and did not in fact use it.

16 Chua then returned to the lifeguards' office to try and locate the AED. She was successful in her second attempt and returned to the scene with the AED, she said, in two or three minutes. On my assessment of the evidence, I find it more likely that the time taken for that exercise – for her to

run back to the office, to look for the AED, find it and then return to the Deceased – took some four to five minutes. But neither Cheong nor Chua used the AED on the Deceased as they were also not trained in its operation. After this, Chua said she left the scene to go to the car park where she waited for the ambulance to arrive so that she could guide them to the poolside.

17 Sim Lye Hock ("Sim"), who was at the time the facilities officer and an employee of NUS, arrived shortly after. He said that he saw Cheong performing CPR on the Deceased. When he came to the poolside, Chua had by then brought the AED as well. On Sim's instructions, the Deceased was carried away from the swimming pool edge to a dry spot so that the AED could be used. Sim attached the leads and, upon being prompted by the AED to do so, applied one shock to the Deceased. The AED timed this shock as occurring at 1.26pm. Hydro Aquatic's main director and shareholder, Lim Kay Seng, who was attending a meeting nearby, claims that he had also, by this time, arrived on the scene and together with Cheong continued to perform CPR on the Deceased. I note however this fact was not recorded in the Coroner's report. Whether Lim Kay Seng was there and helped to perform CPR on the Deceased is not material except perhaps to impinge on the reliability of his evidence.

18 Dr Tan Tong Nam ("Dr Patrick Tan"), a doctor at the University Health, Wellness and Counseling Centre, then arrived at the scene. He was the first medical professional on the scene. He said that he was having lunch when he received a call to attend to the Deceased. He said that when he arrived at the scene at around 1.20pm [note: 2] he saw two lifeguards as well as Sim performing CPR on the Deceased. He took over the CPR and did external chest compressions at 30 compressions to two ventilations. He noticed that the Deceased had no pulse. Dr Patrick Tan said that he tried to deliver a shock to the Deceased but the AED indicated that the Deceased could not be administered another a shock.

19 The ambulance then arrived; its time of arrival was clocked at 1.25pm. The paramedic who responded was told that the AED had been applied once. He then tried using a defibrillator on the Deceased to no effect: the Deceased had by then gone into asystole which meant there was no longer any heartbeat. The Deceased was rushed to the National University Hospital and arrived at the Accident and Emergency department there at 1.39pm. The doctor on duty noted that on arrival, the Deceased was unresponsive, without pulse and was not breathing. His vital signs could not be recorded. An electrocardiogram ("ECG") monitor showed he was still in asystole. At 2.27pm, the Deceased was pronounced dead.

20 The autopsy report recorded the cause of death as consistent with drowning with ischaemic heart disease. On 17 June 2008, a Coroner's inquiry recorded a verdict of misadventure.

21 Although I have set out the times of certain events, it should be evident that these times were recorded by different devices or were derived from estimates by the various witnesses. They were not synchronised and certainly their accuracy cannot be taken for granted. They cannot be completely relied upon when reconstructing the crucial events of the day. With that caveat, having heard and considered the evidence, my finding is that from the time the Deceased first got into difficulties to the time Er was able to struggle with him to the edge of the pool and shout for help, about three minutes had passed. By the time Cheong, alerted by the shout, had run to the opposite corner of the pool, pulled the Deceased out of the water, assessed the situation and condition of the Deceased – this involved initial assessment of the Deceased by Cheong for responsiveness, opening the Deceased's airway to check for breathing, giving two quick breaths to the Deceased, checking the Deceased's pulse – and then started CPR, another three to four minutes had passed. CPR was only started six to seven minutes after the Deceased got into difficulties. Professor Venkataraman Anantharaman ("Professor Anantharaman") who gave evidence for Hydro Aquatic, estimated that it took another about nine to 10 minutes before the AED was applied to the Deceased, or about 16

minutes after he first got into difficulties. I find this estimate reasonable and accept the same. [note: 3] This means the AED shock was applied to the Deceased about 15 to 17 minutes after the Deceased got into difficulties.

My decision

The Plaintiff's claim in negligence

22 I start with the preliminary observation that I received written closing submissions before the Court of Appeal gave its judgment in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 ("*See Toh Siew Kee*"). That landmark decision had the effect of subsuming the law of occupiers' liability within the tort of negligence on the basis that the principles governing the former are a proper subset of the general principles of the latter: *See Toh Siew Kee* at [76] and [113]. Part of the Plaintiff's originally pleaded case was that NUS and/or Hydro Aquatic had breached duties of care owed to the Deceased in their capacity as occupiers of the swimming pool. But in closing submissions, the Plaintiff appeared to have abandoned the claim in occupier's liability or at any rate did not submit on it although the claim remained one in negligence. In any case, my preliminary view is that the particulars of breach claimed by the Plaintiff had to do with dynamic activities done on property rather than the static condition of the property and therefore would have fallen outside the law on occupier's liability (see *See Toh Siew Kee* at [20]).

23 Accordingly, I did not think it necessary to request further submissions from parties to address the relevance and impact of *See Toh Siew Kee* as I did not think the parties would suffer any prejudice. There is one issue where the law on occupier's liability might have been relevant and that is whether an occupier would, *prima facie*, owe duties of care to lawful entrants (see *See Toh Siew Kee* at [80]) or whether, *per* Sundaresh Menon CJ, this question would be "worked out by reference to the specific facts that will arise on future occasions, rather than by articulating any legal rule or principle to this effect" (see *See Toh Siew Kee* at [130]). In the event, this issue is not of great significance (see below at [30]).

24 I therefore proceed on the basis that the Plaintiff's claim is to be treated as one made solely on the basis of the defendants' alleged negligence. In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), the Court of Appeal at [21] laid out the well-known elements of a claim in negligence:

> [I]n order to succeed in a claim under the tort of negligence, a claimant has to establish that (a) the defendant owes the claimant a duty of care; (b) the defendant has breached that duty of care by acting (or omitting to act) below the standard of care required of it; (c) the defendant's breach has caused the claimant damage; (d) the claimant's losses arising from the defendant's breach are not too remote; and (e) such losses can be adequately proved and quantified.

25 Whether there is a duty of care depends first on the threshold requirement of factual foreseeability, followed by the twin considerations of legal proximity and the presence of any countervailing policy considerations: *Spandeck* at [73]–[86]. Although there are two defendants in the present case, in the initial analysis I treat both NUS and Hydro Aquatic as one compendious party which I hereinafter for convenience refer to as the "Defendants".

Duty of care

26 NUS admits [note: 4], quite correctly in my view, that the fact that a patron of the swimming pool could get into difficulties and drown in it was factually foreseeable. Hydro Aquatic does not say

otherwise. This threshold requirement is, as is often the case, easily crossed and therefore not an issue here.

27 I next consider the issue of legal proximity as laid down by the Court of Appeal in *Spandeck* to which the following principles are relevant:

(a) Legal proximity (at [78]–[79]) is a "composite idea, importing the whole concept of the necessary relationship between the claimant and the defendant";

(b) As *per* Deane J's observations in the Australian High Court decision of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55–56, the requirement of proximity embraces the notions of physical proximity, circumstantial proximity and causal proximity, including the closeness of the parties, the directness of the relationship between the parties as well as the assumption of responsibility on the part of one party to prevent injury to the other and any corresponding reliance on the part of the injured party that such care was being taken;

(c) The relative importance of each factor and the combinations of the factors is a legal question to be determined on the basis of legal reasoning, induction and deduction; and

(d) This test is to be applied incrementally, at [73] of *Spandeck*:

… We would add that this test is to be applied incrementally, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. …

28 NUS admits [note: 5] that there was legal proximity to the Deceased such that a duty of care arose only in its capacity as an occupier with a duty of care to visitors like the Deceased, an invitee, [note: 6] which was to warn them of unusual dangers, of which there were none, and to provide qualified lifeguards of reasonable competence according to the standards prevailing at the material time. It did not extend to providing lifeguards trained in the use of the Oxyviva and the AED. NUS however contends that the duty can however be delegated, which is what NUS says it did when it subcontracted the job of providing lifeguard services to Hydro Aquatic, who were also occupiers together with NUS of the swimming pool as they both had a sufficient degree of control over the swimming pool.

29 The Plaintiff says that this duty of care was not discharged because the system of pool safety was inadequate for the purpose, the lifeguards were incompetent or inadequately trained, slow in responding to the Deceased's struggles in the water, and had failed to afford him proper care due to their failure to use the Oxyviva machine and the AED.

30 There is no doubt that the Defendants owed a duty of care to lawful entrants, as the Deceased undoubtedly was, to take reasonable care for their safety. After *See Toh Siew Kee*, it is immaterial whether this duty of care is imposed as a presumption on the basis that the Defendants were occupiers (see *See Toh Siew Kee* at [80]) or whether the issue falls to be decided on a case-by-case basis (see *See Toh Siew Kee* at [130]).

31 In my judgment, under the first stage of the *Spandeck* test, there was sufficient legal proximity between the Defendants and the Deceased to give rise to a duty of care. NUS correctly and responsibly conceded legal proximity. Hydro Aquatic does not, and cannot, contend otherwise. However, the extent of that duty of care depends on all the facts and circumstances of each case and I caution that my decision should not be taken out of context as each case must be decided on its own facts and circumstances.

Was there a duty of care to provide properly trained lifeguards?

32 Before I turn to the next issue, I think that it is appropriate for me to discuss the duty of care in relation to the provision of lifeguards, notwithstanding the concessions made by the Defendants. I note that there is no legislation requiring or regulating the provision of lifeguards or safety equipment in swimming pools in June 2007 or even today, and it falls to the courts to reason and decide this issue from first principles. There is also a surprising dearth of decided cases to guide the court in the "incremental approach" laid down by the Court of Appeal in *Spandeck*. It is therefore appropriate that I make my findings on this issue in the event that the concessions made by the Defendants are challenged or a view is taken that these concessions were wrongly made.

33 I have described the NUS swimming pool in some detail above. It is clear that it was large and deep enough in parts such that a swimmer getting into difficulties would find it hard to reach the safety of the poolside and therefore risk serious injury or even death by drowning. Swimmers can get into difficulty for a variety of reasons: sudden muscle cramps; accidental ingestion of large amounts of water; collisions with other swimmers or the pool wall; diving mishaps; or falls into the pool. Because they are immersed in water, the danger of drowning or serious injury arising from near fatal submersions is obvious. Pool operators therefore have a duty to take reasonable care and responsibility for the safety of all who use their pools.

34 That said, I do not think that owners or operators of all the different kinds of swimming pools should be bound by the same scope and extent of duty of care to the users of such pools. Swimming pools come in all shapes and sizes and are built for different purposes. They may be deep or shallow or more commonly, with deep and shallow parts. They may be private pools in bungalows, small blocks of flats or large condominiums to which the public has no ready access or right of use, or they may be public swimming pools to which any member of the public can gain access upon payment of a modest fee. They may also be restricted swimming pools, as was the case here, available only to a class of persons who are members of a club or organisation. Must owners of *all* such swimming pools provide properly qualified lifeguards? This cannot be the rule for it would inflict an unduly onerous burden on some owners which is not proportionate to the expected benefits of the rule. Having said that, the kind of users of the pool may give rise to very different considerations, *eg*, where children have ready access and are known to frequently use the swimming pool. However these considerations may have to be balanced by a duty of supervision by parents or adults who can swim, especially in swimming pools within private condominiums. A duty of care may also be imposed on those carrying on an organised activity in a swimming pool, for example, a group of school children being given swimming lessons as part of the school's extracurricular programme. All facts and circumstances must be taken into account in deciding the issue of legal proximity and the scope of the duty of care that is owed.

35 Owners or operators of large or Olympic-sized swimming pools such as those commonly in use in public swimming complexes should, in my judgment, be under a duty to provide an adequate system of safety for their users as these pools are in effect open for public use. Those who use these pools will range from the very young to the very old and will necessarily differ in their ability to swim. Some may be so exuberant as to engage in dangerous horse-play. No owner or operator is entitled to assume that every user is physically fit and a competent swimmer who can cope with unexpected exigencies.

Even the fittest swimmer is not immune to mishaps.

36 Although the NUS swimming pool is a private swimming pool open only for members of the university and their guests to swim in, the potential users number in the thousands over a year. Therefore, I do not think that NUS should be treated differently from those who run large public swimming pools in this respect. Having invited use of this facility, NUS was thereby duty-bound to take steps to militate against the obvious risks of harm arising from the use of this facility in the manner in which it was intended to be used.

37 Consequently, an adequate system of safety for such pools would, absent any special circumstances, normally include having properly trained lifeguards stationed at appropriate locations around the pool. The lifeguards would be expected to survey the pool regularly, to remain alert to and be trained to spot cases of swimmers in difficulty or drowning or near-drowning and to intervene promptly with the proper techniques. They should also notice and stop over-exuberant behaviour or horseplay amongst children or young adults that may endanger themselves or other swimmers. These lifeguards should also be, as the first responders to any pool emergency, trained in the basic resuscitation techniques which would be critical in such rescues. As a matter of public policy, I can see no reason why it would not be fair, just and reasonable to impose liability on a pool owner or operator who negligently fails to implement such reasonable measures; neither would it be unduly onerous or a disproportionate measure in terms of cost or practicality in implementation.

38 I now deal with the second stage of the *Spandeck* test, *viz*, whether there are any considerations of public policy that limit the scope or extent of this duty of care, at this point. In my judgment there are some considerations that militate against extending the scope or extent of the duty too far. Learning to swim and swimming have obvious public benefits. It is desirable and in the public interest that as many people as possible should learn some basic swimming in the event that they unexpectedly find themselves in water or in the sea. It prevents unnecessary deaths by drowning. It is also a beneficial form of exercise for adults which does not unduly stress or damage the muscular-skeletal joints, and is therefore particularly beneficial as a form of exercise to those with joint deterioration or injury. As pointed out by Lord Sumption, who delivered the main judgment in *Woodland v Swimming Teachers Association* [2013] UKSC 66 ("*Woodland*") at [6], swimming "unquestionably involves risks and calls for precautions" but is not on any view an "extra hazardous activity". However this must be balanced by the fact that reasonable precautions can be taken without undue or onerous expense. In my judgment, on the facts of this case, there was a duty of care on NUS and that included the provision of two properly trained and qualified lifeguards to be on duty, as laid out in [36] above, when the swimming pool was open for use. On the facts of this case, it was not unreasonable for *one* of the lifeguards to check on an entrants' eligibility to use the pool from time to time or to collect fees. This would also include the issuing of other sports equipment, provided it only involved one of the two lifeguards.

39 In one of the very few reported cases on this point, *Anne Teresa Hanlon or Gallacher v City of Glasgow District Council* (1983) Inner House Cases 122 ("*Anne Teresa Hanlon*"), the local authority, which was the owner and occupier of a large public swimming pool, was found negligent for the drowning of an adult patron on the basis that the attendant on duty had failed to notice for some three or four minutes that the deceased was in trouble. It was found that for some unknown reason, the deceased got into difficulties and struggled feebly at the surface before sinking to the bottom of the pool. Shameen, one of three teenaged girls swimming leisurely at the time, spotted the deceased and pointed him out to her sister, who mistook her as referring to something else and did not respond. Shameen then went to one of the lifeguards on duty, whose back was to the pool, to inform her about the deceased's difficulty. The lifeguard replied, "I'll come in a minute," but continued to chat with some other girls. Shameen returned to the pool, pointed out the deceased to her sisters and the

three girls then went to rescue the deceased. This delay was later estimated at about three to four minutes. It was only when Shameen entered the pool to rescue the deceased that the lifeguard noticed what had happened and summoned the other lifeguard for assistance. The three girls brought the deceased to the surface and pulled him to the side of the pool where the lifeguard pulled him out of the water. Resuscitation was unsuccessful. The court noted that by the time the deceased was brought to the pool side and lifted out of the water, he was already dead. The court did not think it necessary that the attendants had to watch the pool at all times or that it was unreasonable for them to combine their supervisory duties with the collection of tickets and the opening of cubicle doors. However, it was held that the attendant had the duty of watching the pool and the swimmers in it and to respond timeously to any emergency; the fact that she did not notice anything in the crucial first three to four minute period until it was too late and the deceased had passed the "point of no return", was evidence of negligence. The court noted that the lifeguard failed to observe events which stretched over a period of minutes and her response to Shameen indicated that she had not previously seen anything which called for attention or action.

Was there a duty of care to provide an AED and Oxyviva equipment and to provide lifeguards who were trained in their use?

40 Was there, on the facts of this case, a duty on NUS to provide safety equipment, *viz*, the AED and Oxyviva machines, at their swimming pool and to have lifeguards trained in their use? In my judgment, I do not think that the standard of care that was reasonably to be expected of pool operators at the date the incident took place (in June 2007) extended to providing AEDs and oxygen resuscitators and lifeguards trained in the use of such equipment. I find that at that time it was not common or industry practice for pool owners or operators, even for the Singapore Sports Council ("SSC"), which runs Singapore's public swimming pools, to provide such equipment. I hasten to add that this may not necessarily be the case today but will say no more on this as it does not arise on the facts before me.

41 The evidence before me showed that although the technology on which such equipment is based not new, they were until quite recently fairly expensive and this retarded their adoption rate. In any event it is clear that as at June 2007 they were not in widespread use generally and particularly in swimming pools. I deal first with AEDs, which featured fairly prominently in the evidence.

42 I find the evidence of Professor Anantharaman, who was the chairman of the National Resuscitation Council ("NRC") from September 2007 among his other appointments and who gave evidence as an expert for the defendants, very useful in this regard and accept the same. The NRC was established by the Ministry of Health in 1998 with the following goals:

(a) To act as the coordinating body representing major groups involved in the teaching and practice of resuscitation;

(b) To promote unity and standardisation in resuscitation practices;

(c) To provide direction, national policies and guidelines for the teaching and practice of resuscitation.

43 Professor Anantharaman said that the first defibrillation programme in Singapore began in 1989 and he was in fact responsible for starting that programme. The first guidelines for defibrillation were published only in 2001. Further guidelines on basic cardiac life support were issued by the NRC in 2006 ("the 2006 guidelines") which were updated in 2011 ("the 2011 guidelines"). The 2006 guidelines [note:

[7] set out objectives to promote the use of defibrillators among selected groups of personnel and the installation of AEDs in public areas including recreational areas such as sports complexes and golf courses. This last recommendation had been in place since the first guidelines in 2001. However, Professor Anantharaman said that in 2006 not many organisations had placed AEDs in their workplaces as recommended by the NRC. Nor were residential areas stocked with AEDs to any substantial degree. [note: 8] He referred to an interview that he gave and which was published in the SMA News of February 2006, volume 38(2) in which he had advocated strongly for the implementation of a nationwide public access defibrillation programme. He admitted that the then standard of AED access was nowhere near nationwide as cost issues as well as a general lack of training prevented wider implementation.

44 The 2011 guidelines expanded on these efforts. Increased focus was to be given to imparting AED skills to student groups, school teachers, staff of commercial and industrial establishments, and sports officers and instructors. The guidelines also recommended increasing the availability of deployed AEDs in many areas of Singapore such as public buildings, commercial areas, sports and entertainment complexes and educational establishments. I note that even as at 2011, the focus was still on expanding availability of AEDs and training those who might have occasion to use them. And indeed it seemed that by 2011, access to AEDs had expanded so that convention centres, many swimming pools and most major hotels were stocked with such devices.

45 This evidence was supported by that of Dr Dana Elliott Srither ("Dr Dana"), who was called by the plaintiff as an expert. I also find his evidence on the AED market from 2005 helpful and relevant as he had run a company selling AEDs. Dr Dana was formerly a general practitioner who ran his own practice in aesthetic medicine from 2004 until 2008 after which he became founding director of LifeResus Pte Ltd ("LifeResus"). LifeResus provides consultancy services in risk management for corporations that deploy AEDs and from 2005 to early 2012 also sold AEDs. Dr Dana said that when he first started selling AEDS, there was not much demand and units were priced several times as much as at present. [note: 9] Each unit was priced about $9,000 then. In contrast, such units now cost about $2,000 each. [note: 10]

46 I also find convincing evidence led to show that AED training was still not widespread in June 2007; lifeguards who had obtained the generally accepted certification that qualified them for employment as lifeguards had not in fact been required to be trained in the use of AEDs. I accept the evidence of the Plaintiff's witness, Alfred Chua Choon Liong ("Alfred Chua"), a senior manager with the SLSS, in this regard. The SLSS is a non-profit organisation that began life as the Singapore Branch of the Royal Life Saving Society and was renamed the SLSS in 1982. Its mission is to promote aquatic safety and lifesaving. To this end, the SLSS prepares a lifesaving manual which has been published in two editions, the first in 1992 and the second in 2010. These manuals illustrate basic lifesaving skills, resuscitation skills and emergency care techniques for the use of all lifesavers. The SLSS also administers a number of lifesaving courses and awards successful participants with certificates, which are used as the basis for the employment of lifeguards in Singapore. Alfred Chua said that the widely recognised basic certification required for a lifeguard in Singapore was and remains only a Bronze Medallion Award.

47 It was not disputed that both Cheong and Chua, the two lifeguards on duty on the day of the incident, had achieved this requisite certification. Cheong obtained his certification on 23 March 2005. He also had a certificate issued by the SLSS that qualified him to perform CPR and which was valid from 23 March 2005 to 23 March 2008. He had in fact been working for two years previously, from 2005 to 2006, as a lifeguard at the same NUS swimming pool. When the provision of lifeguards was outsourced, he was employed as a lifeguard by Hydro Aquatic at the suggestion of NUS so that he

would continue to have a job. He said that he did not even know that there was an AED at the pool. He had not been trained in its use and would not have used it as he thought it was a medical tool. [note: 11]

48 Chua held an Award of Merit for life saving along with the Bronze Medallion Award, Bronze Cross and certification as a senior resuscitator. An Award of Merit was a level of certification offered by the SLSS that, Alfred Chua said, was one level higher than that of the Bronze Medallion Award. Chua had only worked at NUS as a lifeguard since April 2007, or about two months before the incident. Previously, she had been working intermittently as a lifeguard since June 2004. In one of her previous jobs, she had observed the oxygen resuscitator demonstrated in a practice session and had some experience of it being used on her. She had also observed the AED being demonstrated but had not actually used it. I find that her experience with and knowledge of both machines was no more than rudimentary and she could not be said to be "trained" in any sense of the word. In fact, her evidence was that when she arrived at the scene with the Oxyviva machine, as it was in plastic packaging she thought that it was still disassembled and because she did not know how to put it together, she let it be. [note: 12] However, I accept that both Cheong and Chua had met and in Chua's case even exceeded the basic requirements to be employed as lifeguards on the basis that the basic requirement was a Bronze Medallion qualification.

49 I should point out that Alfred Chua agreed there was no concurrent requirement that lifeguards be trained in the use of AEDs. The SLSS set up a programme in 2009 to train people in the use of AEDs but no actual training has been conducted [note: 13] since there were other training providers in Singapore. Alfred Chua admitted that the NRC's 2006 and 2011 guidelines differed in that the 2006 guidelines advocated only the use of CPR, while the 2011 guidelines advocated the use of CPR combined with AEDs, and that these standards were also adopted by the SLSS. Alfred Chua further admitted that the first edition of the SLSS's lifesaving manual, which was the edition in use at the time of the Deceased's drowning, did not require the use of AEDs by lifeguards. Moreover, the course for the Bronze Medallion Award did not include training in the use of AEDs.

50 He said however that training in AEDs was recommended and I cannot disagree with that. No doubt, as a matter of best practice, lifeguards should be given comprehensive training in resuscitation techniques including training in the use of resuscitation machines such as the Oxyviva and AEDs. But a recommended practice is not the same as a common practice or industry standard.

51 The Plaintiff points to a speech by then Minister for Community Development, Youth and Sports Dr Vivian Balakrishnan in Parliament (see *Singapore Parliamentary Debates, Official Report* (19 July 2005) vol 80 at col 923):

> Sir, there was an average of 17 cases of drowning per year between 2001 and 2004. 41% of these drowning incidents occurred at the sea or near beaches. A further 13% occurred in rivers while swimming pools and reservoirs accounting for 10% each. Every single death by drowning is one too many. What is especially tragic is that each one is potentially preventable.
>
> Therefore, a holistic and comprehensive approach is needed to address this problem. MCYS and the Singapore Sports Council (SSC) are working with the relevant agencies which include MOE and the Ministry of Health to do three things. First, to enhance public education about the danger of swimming in inappropriate locations. Second, to increase the safety of swimming facilities. And third, to encourage more young people to learn how to swim.
>
> ...

> The SSC has implemented various water safety measures at its public pool facilities. For instance, it displays safety regulations prominently and advises pool users to exercise proper care. We also have in place emergency rescue plans, daily inspection of the pools and the safety equipment, rules on the ratio of students to swimming instructors as well as ensuring that there are adequate trained lifeguards on duty at all times.
>
> *By the end of August [2005], every swimming pool will have a defibrillator and staff would have been trained on how to use it.* I have also asked the SSC to work with the relevant agencies and partners, including the Singapore Lifesaving Society to consider other measures to improve swimming safety in private pools and other water bodies.
>
> [emphasis added]

52 The Plaintiff says that the italicised words show that by the date of the incident, AEDs were widespread and so were lifeguards trained in their use. She also says that SLSS itself had begun to offer courses to train instructors on how to train laypersons in the use of AEDs and indeed that Lim Kay Seng, the sole proprietor of Hydro Aquatic, as well as Sim himself, had attended such courses in early 2007.

53 With respect, I do not accept that the words of the Minister in Parliament were sufficient to prove that as at 2007, the use of AEDs was as widespread as the Plaintiff claimed or that it was standard practice for lifeguards to be trained in the use of such equipment. The speech cited above at [51] at best shows that there were plans afoot at that point to equip all public swimming pools with AEDs and to train lifeguards in their use and that it was anticipated that this programme would be completed by the stated date. The Plaintiff has not shown that this was actually done and having asserted this as part of her case, the onus was on her to prove it. In fact, Alfred Chua's evidence was that notwithstanding the Minister's speech, it was not common practice even for public pools operated by the SSC to have AEDs in 2007, some two years after the speech. [note: 14] I was also taken to local newspaper articles [note: 15] which stated that defibrillators were planned for Singapore Armed Forces camps from June 2013 and that there were plans to create a national registry of AED locations. The inference I was invited to draw was that widespread access to AED remains an effort in progress and that, certainly as at 2007, had not coalesced into standard practice. I note also that there were otherwise no guidelines or standards issued by the SLSS or the NRC that stated that AEDs should be placed in swimming pools and that lifeguards should be trained in their use in June 2007.

54 In so far as it is necessary, I similarly find that the evidence shows that Oxyviva machines were not in general use in June 2007. Alfred Chua agreed that as at 2007, the SLSS had not issued guidelines that stated that a lifeguard had to be trained in the use of an Oxyviva machine or even in the use of any kind of oxygen resuscitator. The training syllabus for the Bronze Medallion Award also did not require learners to know how to use any kind of oxygen resuscitator, let alone the Oxyviva machine. It was also Lim Kay Seng's evidence that it was difficult to source for an Oxyviva machine for the NUS swimming pool as there was not one present at the time and he did not initially find a supplier. [note: 16] He only managed to obtain one about one or two weeks before the date of the incident. [note: 17]

Was NUS's duty of care delegable?

55 I now turn to the next issue, which is whether NUS's duty of care to provide qualified and properly trained lifeguards was delegable.

56 The UK Supreme Court considered this issue in its recent decision of *Woodland*. The appellant, aged 10, was a pupil attending a swimming lesson organised by her school, within normal school hours and for which the respondent education authority was responsible. The swimming teacher and a lifeguard were provided by an independent contractor who had contracted with the education authority to provide swimming lessons to its pupils. Unfortunately, at some point, the appellant got into difficulties and was found "hanging vertically in the water". She was resuscitated but suffered serious hypoxic brain injury. A high court judge struck out the claim on the ground that on the pleaded facts, the education authority could not have been said to have owed the appellant a non-delegable duty of care. By a majority, the Court of Appeal agreed and dismissed the appeal. The UK Supreme Court unanimously allowed the appeal as the respondent education authority had assumed a duty to ensure that the appellant's swimming lessons were carefully conducted and supervised, by whomsoever they might get to perform these functions. The appellant was entrusted to the school for certain essential purposes, which included teaching and supervision. The control of the appellant went with these functions; the swimming lessons were an integral part of the school's teaching functions.

57 Lord Sumption who gave the main judgment, and with whom all the other judges agreed, surveyed the origins of the law and cases and gave an admirably succinct analysis of the law, especially at [3] to [5] and [7]. I am, with respect, in entire agreement and gratefully adopt it. Lord Sumption stated that in general, the law of negligence is fault based. In principle, liability in tort depends on a personal breach of duty. The law does not, in the ordinary course, impose personal, as opposed to vicarious, liability for what others do or fail to do. The only true exception to this principle is vicarious liability, which has been expanded recently to include tortfeasors who are not employees of the defendant, but stand in a relationship analogous to employment, *eg*, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1. This exception is based on public policy. But vicarious liability has never been extended to the negligence of those who are truly independent contracts, (as the swimming teachers in the case before them).

58 What the common law has done is to find that, in certain cases, a tortfeasor is personally liable not for his own failure to take care, but for failing to procure the careful performance of work delegated to others; these cases being described as cases involving "non-delegable duties". Two major classes of non-delegable duties were identified by Lord Sumption. The first, which is irrelevant here, has to do with cases where a defendant employs an independent contractor to perform some function that is either inherently hazardous or liable to become so in the course of his work. I have already noted Lord Sumption's observation that the care of a swimming pool is not one of such extra hazardous duties.

59 There is a second category of non-delegable duties which has three essential characteristics identified by Lord Sumption in *Woodland* at [7]:

> First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and is not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do the work carefully.

60 I think that this is a crucial passage and the analogy with cases of assumption of duties is

instructive. For many decades now, the assumption of a positive duty of care has been the basis for which liability has been found against the defendant. In certain cases, *eg*, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, that assumption of a positive duty of care was found to arise out of a special relationship equivalent to contract but that was not contractual. In the so-called employment cases, such as *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, the employer had a "non-delegable" duty to ensure that its workmen had a safe system of work. This was because the law took a protective approach to the vulnerable workmen who were not in a position to defend their own interests. In the so-called hospital cases such as *Gold v Essex County Council* [1942] 2 KB 293 ("*Gold*") and *Cassidy v Ministry of Health* [1951] 2 KB 343 ("*Cassidy*"), the principle was stated that hospital authorities had an obligation to the patient even if such treatment called for an exercise of a special skill which the authorities could not reasonably be expected to supervise or control.

61 Lord Sumption opined, at [22], that the main problem is to prevent the exception from eating up the rule. Non-delegable duties are exceptional to the fault-based principles of negligence and the difference between an ordinary duty of care and a non-delegable duty must therefore be more than just a question of degree. Lord Sumption, after putting the highway and hazard cases to one side, referred to the judgments of Lord Greene MR in *Gold* at 301 and of Denning LJ in *Cassidy* at 362-363 as well as some Australian cases (*Commonwealth v Introvigne* (19820 150 CLR 258, *Kondis v State Transport Authority* (1984) 154 CLR 672, *Burnie Port Authority v General Jones Pty* (1994) 179 CLR 520 and *New South Wales v Lepore* (2003) 212 CLR 511) that had expanded on the principles identified in those judgments. Lord Sumption then identified, at [23], the underlying principle upon which non-delegable duties of care rest and their defining features as follows:

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

62 It will be seen that most of these elements are clearly missing on the facts of the case before me. The Deceased was not a patient or a child or in any way especially vulnerable. He had a severely compromised heart, a point which I will take up later in more detail, but his illness was not apparent to anyone including himself. He did not have an antecedent relationship with NUS that would justify the imputation to it of an assumption of a positive duty to protect him from harm. The Deceased was

engaged in an activity of his own volition and choosing and for which there were some inherent but not unduly hazardous risks. I therefore find that NUS's duty of care to provide properly trained lifeguards was a delegable duty. Whether NUS did in fact delegate this duty is an issue I will discuss at a later point.

Breach of duty of care

63 The next issue is whether the Defendants breached their duty of care to the Plaintiff. Whether there was a breach depends on the applicable standard of care, which I have addressed above, and whether the Defendants' conduct fell short of that standard. It is trite law that the appropriate standard of care is that which could be expected of a reasonable person in the circumstances of the defendant: see *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Ex 781 *per* Alderson B. A number of variables go into this determination: the likelihood and risks of harm, the extent of harm, the costs of avoiding the harm, the defendant's conduct or activity, the hazard or danger posed to plaintiff and the industry standards or common practice (see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at paras 5.013–5.035).

64 Furthermore, the standard of care is based on the standard of reasonableness as determined at the time of the tortious event: *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 at [54]. I have already made some reference to what was to be expected from lifeguards at a swimming pool of this nature in June 2007 at [32] to [39] above.

Was NUS negligent in appointing Hydro Aquatic to outsource their duty of providing properly trained lifeguards or negligent in not checking if Hydro Aquatic had carried out its duties properly?

65 Although NUS's duty to provide properly trained lifeguards for its swimming pool is a delegable duty, NUS would still be liable if it was negligent in appointing Hydro Aquatic as its contractor to do so: see *The Law of Torts in Singapore* at para. 19-080 citing *MCST Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("*Seasons Park*") at [37].

66 When NUS put out the provision of lifeguards and the cleaning of the swimming pool to tender, Hydra Aquatic was the only party to submit a tender. Its first tender, dated 19 October 2006 [note: 18], was for the sum of $148,960. The duties of the tenderer were comprehensively set out and cannot be faulted. There was a resubmitted tender document, dated 27 November 2006 [note: 19], with a reduced tender sum of $125,956 which was accepted by NUS. Mr Jeffrey Beh, counsel for the Plaintiff, thus questioned this reduction in price. Lim Kay Seng testified that his original tender catered for five lifeguards, or two shifts of two with one to cover for anyone taken ill. He was told at the tender interview that he could not bill for five lifeguards, only four, and that he was to reduce the number and adjust the tender sum. [note: 20] Mr Koh Yong Chea, who worked for NUS on the tender exercise, gave evidence that he did not tell Lim Kay Seng that his first tender was too high, but agreed that the internal cost estimates for keeping the lifeguard service in-house was $137,000 and it would be difficult to recommend outsourcing at a higher price. [note: 21] I find that Hydro Aquatic was therefore asked to lower its tender price and there is some validity in pricing a standby lifeguard on a different basis from that of a fifth lifeguard, especially if Hydro Aquatic had contracts with other parties to provide lifeguards.

67 The Plaintiff was not really able to show that NUS was negligent by awarding the contract to Hydro Aquatic and the reduction in the tender price *per se* is not evidence of negligence. The fact that Hydro Aquatic was the only tenderer and was eventually awarded the contract is also not

evidence of any negligence. I note however that other than Mr Beh's brief foray into the details of the awarding of the contract, the Plaintiff's complaints did not really focus on NUS negligently appointing Hydro Aquatic as their contractor.

68 It was also the Plaintiff's pleaded case that NUS was negligent in supervising Hydro Aquatic. NUS's defence is that if Hydro Aquatic was a properly appointed independent contractor, it followed that its employer NUS would not be vicariously liable for Hydro Aquatic's negligence if any: see *Seasons Park* at [37]. The real issue then is: was Hydro Aquatic an *independent* contractor? An independent contractor is defined in Charlesworth & Percy on Negligence (Christopher Walton gen ed) (Sweet & Maxwell, 12th Ed, 2010) at para 3 – 172 as:

> … a person who carries on a business independently on his own account and, in contracting for work, can decide for himself how it should be done. Whilst he may be employed to perform certain work, he is not under any contract of service to, or under the control of the employer and he is free to perform the work on his own way.

69 The test was stated by McCardie J in *Performing Right Society, Limited v Mitchell and Booker (Palais de Danse), Limited* [1924] 1 KB 762 in the following terms, at 767:

> It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance.

70 I turn first to the requirement specifications of the tender under which Hydro Aquatic was appointed to provide lifeguard and pool cleaning services. [note: 22] These specifications were incorporated into the contract between NUS and Hydro Aquatic. I think it is clear that according to the terms of this contract, NUS retained a considerable amount of control over the manner in which Hydro Aquatic was to carry out its duties; Hydro Aquatic was not free to decide for itself how the work should be done. There are a number of clauses that make this clear. Clause 1.2 stated that the successful tendering agency was to "carry out the works in accordance with these specifications, Conditions of Contract and to the satisfaction of the Facility Officer." "Facility Officer", although not defined there, undoubtedly refers to the officer employed by NUS who is responsible for care and management of the sporting and recreational facilities of the university. I think in the present case the Facility Officer was Sim. Although his actual designation was the "Management Assistant Officer in the Office of Student Affairs" of NUS, he stated in his affidavit of evidence-in-chief that he was in charge of the booking and maintenance of facilities within the sports and recreation centre of NUS. In any case, there is no doubt that the Facility Officer was an employee of NUS and was entitled to exercise, on behalf of NUS, supervisory control over the activities of Hydro Aquatic.

71 Under cl 4.2, the lifeguards on duty were required to attend twice-weekly briefings at the facility office of the sports and recreation centre. By cl 4.3, the Facility Officer was permitted to request for the deployment of extra lifeguards with two weeks' notice. Further, under cl 6.1 which set out the duties and responsibilities of the lifeguards, part ix states that in the absence of the Facility Officer or his assistants, the appointed lifeguard in charge was to be fully responsible for the proper supervision and operation of the pool. This suggests that there was a hierarchy of control over the day-to-day workings of the pool, at the top of which was the Facility Officer. Under part xiii of cl 6.1, the lifeguards were further required to do any additional duties assigned by the Facility Officer as required. Under cl 7.3, the lifeguards had to position themselves "as instructed by the Facility Officer and his assistants". Under cl 7.13, the lifeguards were to take instructions only from certain persons: the senior manager, managers and sports officers of the Sports and Recreation Centre, and the

Facility Officer and duty officers and "any other personnel as authorised by the Facility Officer from time to time." Significantly, cl 15.1 provides for liquidated damages for breach of contract by the successful service agency (successful tenderer) which includes, *inter alia*, damages set at $50 for each case of "failure to carry out instructions given by staff from" NUS and $100 damages for each instance of failure to be alert while on duty.

72 I have gone into the clauses of the tender requirements in some detail to illustrate the fact that NUS had contracted for and retained for itself a very considerable degree of control over the way and manner in which Hydro Aquatic carried out its duties. It was certainly not a case in which it had delegated its duties to an independent contractor and left it to the independent contractor to carry out the job. There were in fact regular equipment checks by a staff member of NUS. [note: 23] Lim Kay Seng was taken to the notes of a meeting on 19 September 2007 attended by himself, Koh Yong Chea, Sim, and two others. [note: 24] After the incident on 6 June 2007, NUS had conducted a review of the safety conditions at the pool and the findings of the review were communicated to Lim Kay Seng at the meeting on 19 September 2007. The first note of the meeting was in the following terms:

> Positioning of Lifeguards during Peak Hours
>
> It was noted that lifeguards on duty didn't take up their position at opposite side of the pool during peak hours.
>
> After some deliberation, Kelvin agreed to the rationale of putting a lifeguard at the mentioned duty point during peak hours.
>
> …
>
> One of the lifeguards on duty should station at either mid point opposite the pool entrance or near deep end where the lifeguard could clearly observe the swimmers in the pool during the above Peak Hours. Besides, the lifeguard has to do patrolling at the opposite side whenever there are activities and the pool is crowded.

73 Under cross examination, Lim Kay Seng said that earlier on, he had been directed to place lifeguards at opposite lengths of the pool but his evidence was that he had disagreed at that point. It was only at this abovementioned meeting that he agreed that this was to be done. [note: 25] It is clear that up to 6 June 2007, NUS never checked whether their directions had been complied with. In my view the meeting and Lim Kay Seng's evidence illustrate the point that NUS possessed, and had exercised, close and detailed supervisory control over Hydro Aquatic and the performance of the latter's duties. Their relationship was not one in which NUS had fully delegated all aspects of pool safety to an independent contractor. It was not just a case of what was to be done; NUS reserved to itself the right to instruct Hydro Aquatic how it was to be done.

74 I therefore find that Hydro Aquatic was not an independent contractor. NUS, having retained for itself a very high degree of control over the manner in which Hydro Aquatic was to carry out its work, had a duty to continue to supervise Hydro Aquatic. Hydro Aquatic was appointed from 1st April 2007 and the incident occurred on 6 June 2007. It was just barely two months into the contract and Hydro Aquatic were still in the process of complying with all the requirements placed on it. I have already noted how the Oxyviva was procured just weeks before the incident. Beyond the evidence I have considered above, there was not much evidence led on the extent to which NUS had supervised the safety arrangements at the swimming pool during that period of two months. I will return to this

point later when I consider the alleged negligence of the lifeguards.

Should NUS, which recognised the benefits of having the AED and Oxyviva equipment at its swimming pool, be held to that higher standard?

75 The Plaintiff's attack on the appointment of Hydro Aquatic homes in on the tender documents under which NUS had tendered out the provision of pool cleaning and lifeguard services at its pool. Under cl 8.1 of the requirement specifications which were incorporated into the contract between NUS and Hydro Aquatic, [note: 26] Hydro Aquatic was to provide lifeguards with a Bronze Medallion award from the Singapore Life Saving Society or its equivalent *and* it was expressly stipulated that these lifeguards had to be trained in spinal injury management, use of an Oxyviva resuscitator and defibrillators. Under cl 8.3, Hydro Aquatic was to provide an Oxyviva machine and an AED at the swimming pool and to maintain the equipment in good working condition. The Plaintiff says that as the pool operator had specified the requirement that such equipment were to be provided and that the lifeguards were to be trained in their use, this was the standard of care which it had to meet.

76 Mr Behfor the Plaintiff relies on the case of *Sato Kogyo (S) Pte Ltd and another v Socomec SA* [2012] 2 SLR 1057 ("*Sato Kogyo*") for the proposition that NUS, although operating a private swimming pool, having set itself a higher standard of lifeguarding had to adhere to it and it would not lie in the mouth of NUS to claim that the less stringent requirement was sufficient. Mr Beh relies particularly on the remarks of Judith Prakash J at [52]:

> In the absence of expert evidence and where the defendant itself prescribes two types of tests which differ in the level of detail tested and the care taken, the defendant must be obliged to carry out the test which fulfils a higher standard of care. It does not lie in the defendant's mouth to claim that the less stringent test is sufficient.

77 With respect, I do not agree with Mr Beh's submissions for the following reasons. As Lord Greene MR noted in *Gold* at 301, the extent of the obligations which one person assumes toward another is to be inferred from the circumstances of the case. In the present case, these tender requirements created obligations that in the first instance arise only as between the parties to the contract. It may be that as between NUS and Hydro Aquatic there may be concurrent obligations in contract and tort with reference to the contract terms and this may be relevant if the Defendants are found liable and the time comes to apportion liability between them. But there was no authority given to me for the proposition that as a third party to the contract the Plaintiff is entitled to rely on the standards stipulated therein in an action for negligence against one of those parties. I think that NUS was contractually entitled to assure itself of a higher standard of lifeguard services than would have otherwise applied in the industry. I do not think that in so doing it had represented to patrons of the swimming pool that its lifeguards were trained in the Oxyviva machine and in the use of AEDs and thereby assumed responsibility if the patrons had relied on it in this regard. The court has still to ascertain the applicable standard of care having regard to the standard of a reasonable person in the position of the defendant. My conclusions on this have already been set out above.

78 Further I think that the case of *Sato Kogyo* is distinguishable on the facts. That case involved the supply of eight Uninterruptible Power Supply units ("UPS units"), produced by the defendants, which allegedly caused a fire. All eight UPS units passed the defendant's less stringent Automatic Test. A more stringent Factory Acceptance Test ("FAT") was only conducted for one of the units and not the rest and it was alleged that one unit in the latter category was defective and caused the fire. The evidence was that the FAT was far more detailed and stringent, spanning some 115 pages as compared to the Automatic Test, which comprised only some 6 pages. Moreover, the defendant's working documents shows that the FAT was conducted as proof of the stringent Quality Assurance

programme of the manufacturing of the UPS units. There was *no* expert evidence adduced as to the proper procedures and checks that need to be carried out by a UPS unit manufacturer and the only evidence as to what is required of such a manufacturer came from the procedures and checks adopted by the defendants themselves. Prakash J's remarks have therefore to be read in the context of the facts in that case.

79 In the present case there is substantial expert evidence of the prevailing standards of safety in the industry. The contractual terms are not in my view sufficient evidence to outweigh the other evidence that I have already discussed. Moreover, it does not follow that simply because certain standards are provided for in service agreements or tender documents, such standards fall to be considered, without anything more, as evidence of industry practice. It seems that the tender requirements were customised for the situation; they were certainly not derived from a form contract and there was no evidence that these were standard industry terms.

80 No doubt a defendant that follows industry standards or common practices to the letter will not thereby be immune from a claim in negligence if these standards or practices were not reasonable in the circumstances: *Management Corporation Strata Title Plan No 2668 v Rott George Hugo* [2013] SGHC 114 at [31] and *Edward Wong Finance Ltd v Johnson, Stokes and Masters* [1984] 1 AC 290. I have already discussed the extent of the duty of care which should be borne by owners of swimming pools and the conclusion must be that the industry standards were not unreasonable in the circumstances and in particular, in view of the risks involved. In 2006, according to the SLSS annual report, there were 281 rescues in Singapore and 23 deaths recorded. Although NUS reported 42 rescue cases for 2006, Alfred Chua said only two of them had taken place in the NUS swimming pool. There was evidence that there had not been a single case of death by drowning in the NUS pool from March 1982 until June 2007 when the Deceased drowned. [note: 27] Of course, any death is always to be lamented. But it does not follow that tortious liability will be found against the pool operator in every case; it will only be in cases where it has not provided a reasonable system of pool safety. On the facts and circumstances of this case, I do not think it was reasonable to expect a pool operator to have safety equipment such as the AED and the Oxyviva and to provide lifeguards who have been properly trained in their deployment and use in June 2007.

81 I think that if a defendant who conforms to the industry standard nonetheless strives to achieve a higher standard, it should not be penalised if it fails to reach that higher standard. It would be against public policy to discourage parties from trying to achieve safety or other standards of care that exceed industry or acceptable standards of that time by penalising them if they fail to reach the same. Moreover, it cannot be right that one defendant who conformed to industry or current standards is held not liable but another who tried to achieve more than industry or current standards but failed to do so is liable for its failure to achieve that higher standard.

82 It appears to me, and on the evidence I so find, that the NUS swimming pool was in fact one of the earliest in the country to have an AED; in this regard it was in advance of the rest of the country. The reason for this as I have accepted was that NUS wanted to provide a higher standard of safety. Furthermore, the evidence of Lim Kay Seng was that he had some difficulty in obtaining the required equipment and in arranging training for his lifeguards which suggested that the requirements were novel.

Were the lifeguards negligent in the carrying out of their duties?

83 I now set out my detailed findings of fact on the events of that crucial period between the time the Deceased was first discovered to be in difficulties and the time he was handed over to the ambulance crew. At that material time, despite it being a potentially "busy" period being lunch time,

there were not many swimmers using the pool. The record sheet indicated only 11 people were present. I do not think it was entirely reliable as it does not show one of the 11 as a guest, as Er was, but it does suggest that there were not many people present. Cheong thought it could be about 10 to 15 swimmers and that appears correct on the evidence. It was certainly not crowded. Not all the lanes were occupied, only some lanes towards the lifeguards' side.

84 As noted above, both Cheong and Chua were sitting in chairs next to the entrance turnstile at the material time. I have found that the first time they were alerted to the emergency was when they heard Er's shout for help. Er was by then already at the side of the pool with the Deceased. This means both Cheong and Chua did not notice that the Deceased had stopped swimming and getting into difficulties; nor did they notice the Deceased sink to the bottom of the pool, albeit in an upright position, and they did not see Er swim to the Deceased and struggle with the Deceased to reach the side of the pool. Those were indeed the very crucial first three minutes when the Deceased was mostly submerged in the water.

85 It was not disputed that after warming up for about five minutes, the Deceased and Er started swimming in Lane 9, from the shallow end towards the deeper end. Er started first, and the Deceased followed shortly after that. The Deceased was a better, *ie*, faster, swimmer than Er and they crossed each other but Er could not remember how many times. Er's clear evidence was that he was on his seventh lap when he saw the Deceased in difficulties at the deeper end of Lane 9 and the Deceased was facing him. At that point in time, the Deceased was fully submerged and his feet were touching the bottom of the pool; he was waving his arms and appeared to be trying to return to the surface. I find that Er had completed his sixth lap at the shallow end, had turned around to start his seventh lap and had proceeded for about 20m before he noticed the Deceased in difficulties. As the Deceased was already in difficulties and was facing him, it is more likely than not that the Deceased was swimming towards the shallow end when something happened. By the time Er reached the Deceased, his feet were a little off the bottom of the pool.

86 I find that Chua had clearly forgotten a lot of the details of the incident by the time of trial. Nonetheless, it is clear she was not watching the part of the pool wherein the Deceased was swimming at the material time. She claimed to be watching the smaller "instructional" pool. Her first intimation of the incident was hearing Er's "faint" shout for help and seeing Cheong running down the gallery steps towards the opposite corner of the pool with his slippers "flying". She did not follow but watched him run. I find that she was not sure what to do and froze momentarily in shock, but when Cheong later waved his arms at her and shouted, she called for the ambulance then went to look for the Oxyviva and AED. Chua admits that she did not patrol the swimming pool and that she did not initially know or recognise the AED in the cabinet. She brought the Oxyviva machine to Cheong and the Deceased first, but did not know what to do with it as she had found it still in its original plastic packing and unassembled. It was only on her second attempt at the place where the AED was stored that she located it but did not know how to use it, having only seen it being demonstrated.

87 Chua also said she could not remember if Cheong had patrolled the pool other than once in the morning, upon coming on duty around 8am, to check if everything was in order. She intimated that although not explicitly said, it was a tacit understanding that she had to "walk around", [note: 28] but she did not do that. She only walked up and down the top of the gallery to stretch her legs. I find that she did not want to implicate Cheong in any way but the fairly clear import of her evidence was that she did not see Cheong patrolling the pool other than when he came on duty in the morning.

88 As for Cheong, I do not accept that he was scanning the swimming pool as he claimed, or that he had looked at that very spot where the Deceased was found only some five to ten seconds before the incident. That was certainly untrue on the objective facts. His claim that he walked around the

pool once or twice during peak hours, including between 12pm and 1pm, is also untrue. I find that he did not. Chua did not remember if he did so. Cheong said he and Chua took turns but, as noted above, Chua said she did not do any patrolling. When cross-examined further, Cheong said that he could not remember if he patrolled the pool on 6 June 2007 between 12pm and 1pm. He also tried to say he saw Er and the Deceased at the side of the pool, whereupon he stood up to get a better look and then heard the shout. This was quite unbelievable if, as he claimed, he really was looking at that spot only some five to ten seconds previously. If this was true it was surprising that he did not see the Deceased in the water and waving his arms, Er swimming to the Deceased and then struggling with Er to the side of the pool. Further, Cheong's story on this point was contradicted by his statement to the police which was: "When I heard the shout, I saw that there were two male Chinese subjects inside the pool …" which indicated that he heard the shout first and only then became aware of something amiss.

89 I find Er to be a truthful witness. He was clearly very affected by the incident but nonetheless gave his recollection in an honest and straightforward manner. When he could not remember he clearly said so and did not embellish any of his evidence. He had nothing to gain or lose by what he said and his honesty came through clearly. He gave a detailed statement to the police soon after the incident and accepted that that was probably the most accurate as his recall, with the passage of time and with his wanting to forget the trauma of that day, was affected.

90 I find that Cheong and Chua were less forthcoming, understandably perhaps as allegations of negligence had been made against them. Further, their recollections had dimmed over time and elements of self-justification had clearly crept in. Both noted in their affidavits of evidence-in-chief that they had seen the Deceased swimming at the pool before and that he was a good swimmer. But on cross-examination, Chua could not remember seeing the Deceased or Er enter the swimming pool entrance that day and later admitted that she could not remember seeing them before the incident [note: 29]. Chua fared worse than Cheong under cross-examination; she was combative and quite evasive and her evidence was unreliable in material aspects. Their affidavits of evidence-in-chief are predictably almost identical, which illustrates the classic danger of putting words into witnesses' affidavits which do not come from them; cross-examination will quickly reveal their weaknesses and inconsistences. In Chua's case this occurred when it was compared to the police statement she had made after the incident. The element of self-justification was strongest in Lim Kay Seng and a perusal of the transcript will show this clearly. He was a little too quick to give his answers and a little evasive at times. I found his and Chua's evidence quite unreliable in the material aspects. It was strange for Cheong to categorically state that the Deceased had a cut on his tongue. This led to cross-examination of the experts as to whether the Deceased suffered a fit whilst swimming although Dr Gilbert Lau confirmed the Deceased's tongue did not have a cut. I therefore think this was a bit of embellishment on Cheong's part to suggest causes of death that would not touch upon the lifeguards' actions. Lim Kay Seng was also eager to say that he was there shortly after the tragedy and was actively assisting in the resuscitation efforts. If so, it is strange that no one else mentioned his presence. It is possible that he was in fact present but for him to claim that he was taking an active part in aiding the Deceased in two-man CPR was in my view pure embellishment. He was just too eager to emphasise how well the resuscitation efforts were carried out and his role in it. It has not escaped my attention that he had been trained to use the AED although it is clear from the evidence that it was Sim who administered the AED 'shock'.

91 With these observations on the general credibility of the witnesses in mind, I find that Cheong and Chua were not surveying the pool as they should have been doing. The Deceased was swimming freestyle, as he always did, [note: 30] and therefore would have been swimming along the surface of the pool. There is a possibility that he may have been swimming underwater upon executing what is

called a "flip turn" and therefore might have been hidden from view for a time, but there was no evidence that he was able to execute a flip turn, or that it was his practice to begin new laps in this fashion. I therefore find that the Deceased was swimming on the surface of the water and thus easily visible.

92 If Cheong and Chua were carrying out their duty properly, they would have noticed the Deceased had stopped swimming and had then sunk to the bottom feet first with his hands moving as if he was trying to regain the surface. Er clearly saw that and realised something was amiss. The lifeguards from their better, albeit more distant, vantage point ought to have seen this earlier if not at the same time as Er, whose vision would have been obscured by the water in the pool and had no reason to expect an impending tragedy to his friend. They also did not notice Er swim to the Deceased, nor did they see Er struggling to the side of the pool with the Deceased. Chua accepted in cross-examination that there was nothing happening at the entrance which would have distracted them at that point in time. They were entirely unaware of what had happened until they heard Er's shout for help. In my judgment, Cheong and Chua were clearly negligent in the performance of their lifeguarding duties.

93 I also find the stationing of one lifeguard at or along Lane 9, at the opposite length of the pool, a reasonable measure that should have been implemented as there was one lifeguard near Lane 1 at the entrance turnstile. This was to ensure they could observe the pool from different vantage points and be closer to possible casualties along that side of the pool. I do not think that it is correct that both should be seated together. It would encourage distracting chit-chat between the lifeguards of the sort that was deplored by the Inner House in *Anne Teresa Hanlon* and which in that case was found to be fatally negligent. Also, from the photograph C-5, I note that a swimmer under the surface is still visible to the photographer at the gallery and the lifeguards should have noticed the Deceased "hanging" vertically in the pool with his feet touching the bottom of the pool. This would be especially so if one lifeguard was along Lane 9.

94 Cheong said and it was submitted that as it was lunch time, there was some reflection of the sun on the surface of the water. Whilst there was no evidence of this other than a bare claim by Cheong and a submission from the Bar with reference to one photograph (for which there was no evidence as to the time at which it was taken), I find that if this was true, it would have been all the more important that there should have been one lifeguard along Lane 9 or the far length of the pool so that that lifeguard could keep an eye on those swimming on that side of the pool and notice anyone getting into difficulty in that area of the pool, unaffected by any glare or reflection off the water. However, I have my doubts that there was any such reflection; the incident took place at around 1.10pm and the sun would be nearer the overhead position than at an angle to the lifeguards.

95 The Plaintiff also relies on an internal investigation conducted by NUS after the incident which had reviewed the safety procedures at the swimming pool and had suggested a number of changes: lifeguards had to be deployed at both sides of the pool; the Oxyviva machine and the AED should be placed next to the lifeguards and the lifeguards should sit in high chairs placed on opposite sides of the pool. That the Defendants had not ensured this in the first instance is, the Plaintiff says, in breach of their duty of care. There is some truth in that submission and underscores, in my view, the importance of correct positioning of the lifeguards in a pool of this size in the discharge of a pool operator or owner's duty of care to the swimmers.

96 In *Crupi v Royal Ottawa Hospital* 1988 Carswell Ont 584, the father of a victim who had drowned at a beach brought an action against the operator of the beach on the ground that its lifeguards had negligently failed to supervise the swimmers. The claim was dismissed because it was found that the lifeguards had not breached any duty of care; they had not witnessed the victim

drowning but that was because he had "slipped silently, without any thrashing, beneath the surface, ingesting water into his lungs rapidly which in turn caused rapid unconsciousness, and because of his size and weight he did not resurface." The case is clearly distinguishable from the facts of the present case. That case involved a mishap in the sea and not a swimming pool where the visibility would be much clearer. There is no evidence that the Deceased slipped silently underwater without thrashing. He was swimming freestyle, at the surface, with hands regularly moving; he was swimming faster than Er and had completed more than seven laps. Any properly trained and alert lifeguard seeing the Deceased stop swimming and then sink to the bottom albeit upright and waving his arms would have realised that something untoward had happened. It was not only that the lifeguards had failed to notice this; there was a further delay in that it was only when Er had reached the side of the pool and shouted for help that the lifeguards were alerted to the Deceased's troubles. I find that by the time Cheong rushed to the poolside, assisted in pulling the Deceased out of the water, assessed the casualty and then started CPR, another precious two or three minutes had elapsed; this was in addition to the time that the Deceased had spent struggling in the water before he was noticed by Er.

97 But once CPR was started, I find that what could be done for the Deceased was done properly and with reasonable care. I accept that there was delay in bringing the AED and applying the first shock to the Deceased, but whether this would have made a difference is a matter I shall deal with later. I find that the CPR was properly carried out. In the opinion of Professor Anantharaman who relied on the AED's internal log, the CPR was of sufficient and even commendable quality and I accept his evidence on this fact. He said that in 2007 the national guidelines recommended that compressions be given at a rate of 100 a minute and that after 30 compressions were given at that rate, the rescuer was to give two mouth-to-mouth ventilations which should take a further six seconds. At this rate, about 75 compressions could be performed in every minute, which was consistent with the actual rate of about 73 compressions according to the AED's internal log. The guidelines also stated that the chest should be compressed to a depth of about 4–5cm. The Plaintiff says that the information provided by the log did not record the depth of compression given to the Deceased and the quality of the CPR was thereby compromised. But Professor Anantharaman noted that the chart log produced by the AED, which was recording the Deceased's data while CPR was being performed, showed that the compressions were of consistent amplitude and from this he inferred that the CPR performed on the Deceased was of good quality. On balance I agree with Professor Anantharaman that the CPR given was of an acceptable quality as he has proven and notable expertise in the area and I find his evidence more persuasive in this regard.

98 I also note that a doctor, Dr Patrick Tan, was quickly alerted to rush to the scene. Although the AED was applied probably later than it would have been had the lifeguards been trained in its use, it was applied. In any event prompt and active CPR had been carried out. This was unlike the case in *Anne Teresa Hanlon*, where the lifeguard in question had not focused her attention on the pool, and on being alerted to the fact of the deceased in that case being in difficulties, had actually carried on her conversation with another person and had eventually responded only when the deceased had passed "the point of no return."

99 I have already made my findings on the use of AEDs and Oxyviva. The fact that Cheong and Chua had not been trained to and did not apply them itself was not negligent. Where the lifeguards and therefore Hydro Aquatic fell short of the standard of care was in their performance of the lifeguarding duties.

100 I have found at [74] above that Hydro Aquatic was not an independent contractor and that NUS retained duties of supervision over it. If NUS had adequately supervised Hydro Aquatic the standard of the lifeguarding would not have been so poor. The lifeguards were part-timers in their

early twenties, enrolled as students of NUS and seeking to earn some money from their part-time lifeguard duties. I am not sure they fully appreciated the importance of their duties. I think they would not have fallen so short of the standard expected of them if they had been appropriately and adequately supervised, both by their own employer, Hydro Aquatic, and also by NUS's officers in the sports and recreation centre. As noted above, NUS had expressly reserved for itself the right to supervise the lifeguards in such areas as their positioning and level of alertness. The lifeguards were at all times also subject to the control of NUS's officers. On the assumption there is liability to the Plaintiff, in my judgment, NUS must share a third of the liability with Hydro Aquatic bearing two thirds.

101 However, before I can reach a conclusion that the negligence of Cheong and Chua in the performance of their lifeguarding duties (with the contributory negligence of NUS) was the proximate cause of the Deceased's death, I have to deal with a strongly contested issue: the medical condition of the Deceased and its role in the causation of the Deceased's death.

Causation

102 The thrust of the Plaintiff's case against the Defendants is that resuscitation had been delayed; and as the medical evidence is clear that in all cases of drowning, and especially where the victim had underlying heart disease, time was of the essence and the delay had materially reduced the Deceased's chance of survival.

103 The Plaintiff called Dr Gilbert Lau, the forensic pathologist who had supervised the post mortem examination of the Deceased and had also signed the autopsy report, and Dr Jimmy Gordon Lim Tien Wei ("Dr Jimmy Lim"), a cardiologist. NUS called Dr Michael Lim Chun Leng ("Dr Michael Lim") and Hydro Aquatic called Professor Anantharaman. An expert witnesses' conclave with a series of questions largely agreed between the parties and finally settled by the court was apparently impossible to arrange because of the doctors' conflicting schedules. I did not insist for obvious reasons but must say it was a pity because many of the medical facts about the Deceased's condition and what it entailed could have been agreed. A lot of the expert witnesses' time in the witness box could have been saved. However Professor Anantharaman and Dr Michael Lim prepared their written answers to the series of questions.

104 Having heard and considered the evidence of the experts, I have reluctantly come to the conclusion and find that on balance, the Deceased was not likely to have survived, even if Cheong and Chua had acted more promptly.

105 I reach this finding for two reasons. First, the Deceased was at the time of the incident in very poor health even though he was physically very active and his physical activities masked to some extent how ill he actually was. There were tell-tale signs, as when he complained of chest discomfort following his warm up exercises on 3 May 2006, but he did not do much about it if anything and persisted in his strenuous exertions. The undeniable evidence is that his heart was badly diseased and liable to give way under stress and all the medical experts were in agreement on this.

106 The autopsy report was prepared by one Dr Rashi Agrawal, (then a trainee histopathologist in the Health Sciences Authority who has since left its service) under the supervision of Dr Gilbert Lau. Dr Gilbert Lau was present throughout the entire autopsy, approved the report and signed on it as well. The post mortem examination showed that the Deceased had ischaemic heart disease, *ie*, there was reduced blood supply of the heart muscle, as the main coronary arteries were badly obstructed by blockages or stenosis. The left main artery was 60% blocked; the left anterior descending artery was 80% to 90% blocked and the right coronary artery was almost completely blocked and there was only a slit-like opening in it allowing minimal blood flow. The left circumflex artery was also found to be

50% to 70% blocked. The Deceased's heart weighed 470g which was significantly heavier than it should have been and this was because the heart muscles were substantially enlarged; the left ventricle wall was abnormally thick at 1.6cm. The medical experts were agreed that this was due to the Deceased's high blood pressure because the thickness or hypertrophy of the heart muscle was uniform or concentric which suggested an underlying cause such as hypertension rather than one-off acute events such as heart attacks which would have caused eccentric or non-uniform hypertrophy. Dr Gilbert Lau said: "There was, er, very severe, er, stenosis or approaching occlusion really of the---of one of the man, er, coronary arteries. … (in confirming triple vessel blockage) Yes, er, er, that ---that is correct. Er, both the left anterior descending branch as well as, in fact, the right corona---coronary artery also, er, er, showed, erm, very severe, er, obstruction." [note: 31] He graphically described the extent of the blockage in one of the arteries as "a very narrow slit that---that---that was all that remained of the lumen, the space with the, er, coronary artery." [note: 32]

107 Dr Patrick Tan gave evidence of and produced the medical records of the Deceased at the NUS University Health Centre which is a clinic run for the benefit of students and staff at the university. These records of medical check-ups over a few years before this tragic incident show that the Deceased had a history of hypertension and hyperlipidaemia. Dr Patrick Tan said that he had conducted the Deceased's pre-employment check-up on or about 25 June 1999. The Deceased was detected then to have elevated blood pressure measured at 150/100mmHg to 160/110mmHg. Three days later, the Deceased's blood pressure was checked again and it remained elevated at 150/100mmHg to 150/110mmHg. He was prescribed atenolol, a type of beta blocker, to lower his blood pressure, as well as Norvasc, a calcium channel blocker used to treat high blood pressure. Dr Patrick Tan said he referred the Deceased to a cardiologist for further treatment. A further medical report dated 5 August 2003 by the cardiologist stated that the Deceased was taking medication for hypertension "on and off" and that he was also overweight. The Deceased complained of feeling tired after taking atenolol so he was taken off atenolol and his prescribed dosage of Norvasc was doubled instead. [note: 33]

108 On 6 May 2005 his blood pressure was again taken and it measured 150/90mmHg. On 3 May 2006, he visited the NUS health centre and according to the notes on the Deceased's records, told the attending doctor, one Dr Victor Loh (who did not give evidence in the trial), that he had been exercising regularly and had experienced 15 minutes of chest discomfort following warm-up activity. His weight was taken and recorded at 92.6kg and an ECG was also done which showed no sign of heart disease. His blood pressure was recorded as 130/90mmHg on the medical card. The Deceased was asked to return the next day for a health screening which tested the Deceased's blood, urine and stools. The Deceased did so. He was also asked to do a treadmill test although it appears that he did not in fact do a treadmill test. [note: 34] A chest x-ray was done and nothing abnormal was found. Dr Patrick Tan said under cross examination that his opinion of the outcome of the health screening was that it was "not too bad a result": [note: 35] The Deceased's cholesterol levels were acceptably low and in the event, the Deceased was only given a booster for hepatitis immunity. On 11 May 2006 the Deceased returned to the health clinic where he complained of pain in the front of his chest and said that he had meals at irregular times. He was diagnosed with gastro-esophageal reflux and prescribed medicine. It was also then that he was given a booster shot for hepatitis. There was a subsequent visit to the clinic on 18 September 2006 and no blood pressure was recorded then.

109 The Plaintiff's evidence was that in or around September 2005, the Deceased realised that at 105 to 110kg and about 1.7m tall he was seriously overweight, even obese, and therefore decided to begin a fitness regime and exercising regularly. He started to eat more healthily and also began hiking on weekends and swimming regularly. Gradually he added cycling, jogging and playing golf to his routine. He exercised as often as four times a week. He became fit enough that he was able to

complete a half-marathon in December 2006. From February 2007, he routinely swam at lunch time in the swimming pool in NUS and at the time of his death he was in training for a full marathon. [note: 36] Er said that the Deceased was also training for a triathlon. The Plaintiff said that as a result of the fitness regimen, the Deceased lost about 30kg so that about six to nine months before his death he weighed 78kg. The Plaintiff's expert witness, Dr Jimmy Lim, said that the Deceased would have been classed as a New York Heart Association Class 1 patient, in that he had cardiac disease but had no symptoms and no limitation in ordinary physical activity.

110 It is significant that all the medical experts were in agreement that from the port mortem findings, the Deceased had suffered multiple myocardial infarctions or heart attacks in the past without realising it. The autopsy found transmural fibrosis of the myocardium, *ie* that the heart muscle was scarred all around its circumference. Dr Gilbert Lau confirmed: "in fact, large areas where there was scarring involving the full thickness of the---of the myocardium." [note: 37] Dr Gilbert Lau also said the extent of the scarring and the fact that it was very dense indicated to him that the deceased might have had heart attacks in the past, and said: "heart attacks in the---in terms of, er, having had an acute myocardial infarct where the blood supply to certain regions of the heart was so---so severely compromised that those parts of the heart, er, had been irretrievably, irreversibly damaged, er, resulting in the, er, consequent---er, consequential and subsequent, er, formation of scar tissue." [note: 38] Dr Michael Lim said that there was substantial scarring across several areas of the heart which were served by different blood vessels. This meant that there was not one single blockage or infarction but multiple blockages.

111 I therefore find from the medical evidence presented that the Deceased's heart was in very poor condition before the incident as he had ischaemic heart disease to a severe degree and had suffered several possibly severe heart attacks in the past that remained undetected. The Deceased was in the opinion of the experts at clear risk of a cardiac event leading to sudden death.

112 There was some question as to whether the Deceased had suffered a sudden myocardial infarct whilst swimming that fateful day. Dr Gilbert Lau opined that there was no evidence from his post mortem examination of a fresh or recent plaque rupture or thrombosis, which I take to mean that the piece of ruptured or dislodged plaque travels along the artery and when it reaches an occluded section then completely blocks any blood flowing through that section. Dr Gilbert Lau also explained that chemical evidence (such as the presence of enzymes) and physical signs of an infarction show up only some time after a myocardial infarction occurs; if death followed speedily as the result of the infarction, the evidence would not have time to present itself. However, he agreed that he could not rule out a myocardial infarction although, in his considered opinion, whether the Deceased had a myocardial infarct or developed cardiac arrhythmia whilst swimming was moot, the consequence or result was the same; it would have led to his drowning.

113 Dr Gilbert Lau said more than once, and I accept his evidence, that the Deceased, due to his underlying heart condition, was prone or predisposed to developing a sudden episode of cardiac arrhythmia, or abnormal irregular heartbeat or electrical activity in the heart, particularly when undergoing strenuous activity such as swimming. [note: 39] He opined that the Deceased's exertions while swimming had caused an abnormal heart rhythm resulting in the immersion of the Deceased; water entered his airways and lungs resulting in a lack of oxygen, electrolyte imbalance and fluid overload. His underlying heart disease, Dr Gilbert Lau said, undermined his resistance to immersion but the primary or substantive cause of death was drowning with ischaemic heart disease as a contributory cause. In legal language, the immediate cause of death was drowning but the proximate cause of his death was his ischaemic heart disease and therefore the underlying poor physical condition of his heart.

114 There was some claim that the Deceased had suffered fits or had a seizure before he died based on the fact that some witnesses purportedly saw a cut on his tongue, but Dr Gilbert Lau said the autopsy found no evidence of such a cut and there was no other evidence of a seizure although again he could not definitively rule it out. Dr Gilbert Lau concluded that on the whole drowning due to cardiac arrhythmia brought on by ischaemic heart disease was the most plausible cause of death. I accept the evidence of Dr Gilbert Lau as it was not seriously disputed by the other experts who did not in any event have the benefit as he had of contemporaneous observation at the autopsy. I must mention that the frequent "er" that appears on the transcript and pauses ("---") of Dr Gilbert Lau's evidence do not show hesitation or uncertainty; rather he was being very careful and choosing his words carefully as he had previous experience of giving evidence in court. [note: 40]

115 On the evidence, the Deceased was a strong and fast swimmer. There must have been a reason for him to stop swimming suddenly and then to be found suspended vertically in the water with his feet touching the bottom of the pool and struggling to reach the surface. He was only about 1m from the side of the pool but could not reach it through his own physical exertions.

116 I find on the evidence that the Deceased had suffered cardiac arrhythmia which incapacitated him whilst he was swimming. [note: 41] As Dr Gilbert Lau testified, because of the Deceased's underlying heart disease, he would be prone to developing sudden episodes of cardiac arrhythmia, particularly when undertaking strenuous activity such as swimming and said: "A person can develop cardiac arrhythmia which is, er, incapacitating, and collapse as a consequence of that without necessarily developing all the signs and symptoms of---of heart failure." The other experts did not differ on this issue. I find that the cardiac arrhythmia suffered by the Deceased on that day to be incapacitating; his heart could not or did not pump out the oxygenated blood as it was required to do given the strenuous physical exertion of swimming, the rhythm became completely abnormal, his brain began to be deprived of oxygen and the Deceased could not effectively move his hands and legs to swim or even to get himself to the side of the pool, [note: 42] which was only about 1m away; he was not rendered unconscious or incapacitated immediately but it was progressive and by the time Er saw the Deceased in the water, all the Deceased could do was to move his arms but ineffectively as he could not even surface or get to the side. It was obvious that by the time Er first saw the Deceased submerged in the water, his incapacity to swim or get himself to safety had already developed.

117 The second reason for my finding that the Plaintiff has not proved causation is that I do not think any intervention would have been likely to save the Deceased; I find that the combination of the Deceased's underlying medical condition, his submersion in the water, and the likely state of his health when he was recovered from the pool, meant that it was unlikely that any earlier intervention would have saved him.

118 The medical experts agreed that the earlier an AED is applied, the more effective it would be. I was referred to academic research that showed that the ability of AEDs to shock a victim back to life diminishes over time. It is a rule of thumb that for each minute that an AED shock is delayed the chance of survival would fall by seven to 10%. Generally the rate at which survivability falls off is taken as linear over time but in fact the first five minutes are the most crucial and the efficacy of intervention drops dramatically thereafter. There are three important periods of time. The first four or five minutes after a problem surfaces are the most crucial. This is called the electrical phase, where the only problem is that the heart's electrical rhythm has been disrupted. A shock at this point is very often successful and most people tend to survive. But after this first phase of about five minutes of electrical disruption, the heart muscle completely stops pumping and the problem becomes not merely electrical but, in medical terms, mechanical. A shock at this point is often not effective but survival is still possible albeit unlikely. About ten minutes after the first disruption, chemical changes take place

in the body. This is the metabolic phase and from then on intervention is often too late.

119 Dr Jimmy Lim said that if an AED had been applied to the Deceased within ten minutes or during the first two phases described above, he would have had a higher chance of survival. Dr Jimmy Lim said that cardiac arrhythmia could occur as a result of ischemia and in such cases the chances of survival would be higher than in cases of infarction. His opinion was that if the arrhythmia was corrected, this would sort out the electrical issue and as the heart was still mechanically functional, it would still be able to pump adequate blood to the body. The chances of survival in this case would be higher than if there was a case of infarction. In infarction cases there is no blood flow to parts of the heart entirely so that even if the electrical activity was normalised, the heart cannot resume pumping because there is no blood flow to power its muscles. A shock from an AED applied during the electrical or mechanical phase could have restored a normal heartbeat and given the Deceased a greater chance of survival.

120 It is significant that Dr Jimmy Lim stopped short of asserting that the Deceased would have lived had the AED been applied earlier. [note: 43] He said that in the circumstances of the incident: that the Deceased was submerged under water; that water had entered his lungs; and that he was not able to reach the surface; his chances of survival were very poor. It would have improved from very poor to merely poor if there was an AED nearby that was promptly applied, but overall his prognosis would have been bad. [note: 44] I asked Dr Jimmy Lim whether it would have made any difference if the Deceased got into difficulties while jogging instead of swimming. Dr Jimmy Lim's answer was honest and illuminating:

> Court: Can I just ask one question before the rest continue? If he was[n't] swimming – maybe just jogging when this happened, what were his chances of survival?
>
> …
>
> Witness: So if it's a similar situation, I think, you know, erm, I agree with the fact that being in a water environment made it more difficult, being the fact that he had a second problem would have made it more difficult to resuscitate him as well as making the resuscitation less successful. But regardless, I think, therefore, if he was jogging in a field and there is an AED nearby in the same situation that he had to have---he would have had a better chances of survival. But again, erm, when we say he has poor survival, in ---regardless of the situation, if an AED was applied earlier, it is my opinion that even if it's poor, relatively, not absolutely but relatively speaking, his chances of survival would have been higher. It might have been very poor to poor. There would have been some improvement if the AED was applied earlier, but overall, his prognosis would have been bad.

121 It also bears noting that Dr Jimmy Lim also said, more than once, that persons like the Deceased, with his severe blockages, previous undetected heart attacks and concentric hypertrophy had a higher chance of suffering from sudden death. At one stage he said: "Yes, he is at high risk of sudden death." [note: 45] He also said: "They are prone to abnormalities of cardiac rhythm which may result in sudden collapse or inability to escape from immersion." [note: 46] He therefore agreed that because of the Deceased's exertion, it is very likely that it precipitated an acute cardiac event. [note: 47]

122 Dr Michael Lim gave a similar explanation of the likely turn of events. He said that because of the Deceased's underlying heart condition, when he exerted himself during swimming, his condition triggered either a heart attack or severe ischaemia and either condition would have caused

deterioration in the ability of his heart to pump oxygen. His blood pressure would have fallen. He would have become weaker and started ingesting water and he would have had no strength to regain the surface. His lungs would have become congested in water further reducing the supply of oxygen to his body and creating a vicious cycle. [note: 48] Dr Michael Lim said that based on the autopsy report and the events that surrounded his death it was likely that the Deceased's heart was by this time in mechanical failure and if so, the application of an AED would not help because the underlying problem was mechanical not electrical. At this stage, what was needed was specialised equipment that could take over the mechanical pumping function of the heart and this was available only in a hospital. Further, by the time he was rescued his lungs were oedematous, *ie* there was significant amounts of water in his lungs so that even if oxygen was delivered manually to him (for example through an Oxyviva machine) he would not have revived because the water would have prevented oxygen from entering the system. Dr Michael Lim concluded that because the Deceased had severe blockages in the major arteries of his heart; severe damage of the heart muscle; a severe impairment of the heart pump function; and also water in the lungs, he therefore had very little or no chance of survival in the circumstances, even if the acute attack had taken place in a hospital. [note: 49] This conclusion was based on the available medical evidence, even without taking into account any intervention by the lifeguards which in Dr Michael Lim's opinion would have made little difference. I accept the evidence of Dr Michael Lim. In so far as Dr Jimmy Lim's evidence is taken to mean the Deceased's *chance* of survival would have improved from "very poor" to "poor", I prefer the evidence of Dr Michael Lim set out above.

123 Professor Anantharaman reconstructed events on the day according to the timings given to him which were estimates of the witnesses to the incident. These timings were not synchronised and therefore there was some uncertainty about the exact timings and the exact intervals between each event. Professor Anantharaman said that with these caveats in mind, he had prepared a detailed chart of events that logged the time taken for each event and also the cumulative period of time that had elapsed from the time the Deceased first went into distress.

124 From his log he was able to conclude that even had Chua been able to bring the AED to the Deceased the first time (instead of having to make a second trip to look for it) the earliest the shock would have applied was 12 minutes after the Deceased got into difficulties, as compared to at least 16 minutes which was his estimate of the actual time that had elapsed and which estimate was consistent with those of Dr Michael Lim and Dr Jimmy Lim. Professor Anantharaman said that AED intervention at this 12 minute mark was already too late as the chances of survival were already very low even disregarding the fact that the Deceased had a heavily diseased heart to begin with.

125 No doubt the timeline prepared by Professor Anantharaman is only as good as the estimates and witness evidence upon which it was based and Professor Anantharaman admitted candidly that it could be quite wrong. It is probably the case that, in general, early intervention with an AED produces better outcomes on victims with cardiac issues. But the issue is whether, in the circumstances of this case and given the Deceased's underlying heart problems, earlier intervention with an AED would have made a sensible difference. Even if the AED could have been applied earlier, I do not think that the Deceased would have survived. I note that all three doctors were in agreement that the Deceased had a severe underlying condition that meant that he was unlikely to survive the combination of a cardiac event and immersion in water. As noted above, the furthest that Dr Jimmy Lim could go was to say that the Deceased's chance of survival would have improved from very poor to merely poor had there been earlier intervention. I further accept the evidence of Dr Gilbert Lau that it made no difference whether the Deceased had a myocardial infarct or cardiac arrhythmia; it would have led to the same situation developing. I further accept that earlier application of an Oxyviva machine would have been futile; the evidence of Dr Michael Lim which I accept was that because the Deceased had

by then significant amount of water in the lungs, oxygen delivered through the machine would have been prevented by the water layer from entering into the capillary system to be used by the body.

126 The finding and conclusion I have reluctantly come to after hearing the evidence from the witnesses and the medical evidence is that given the Deceased's severe underlying heart disease, when he suffered a cardiac arrhythmia attack in the swimming pool, it was unlikely he would have survived even if he had been pulled out of the water earlier and the AED applied at an earlier point in time.

Preliminary issue: the public liability policy

127 On the first day of the trial I decided as a preliminary issue that, assuming the plaintiff was able to make out her allegations of negligence against Hydro Aquatic, Hydro Aquatic was covered by the public liability policy [note: 50] it took out with OAC. I now set out the detailed grounds of my decision.

128 The public liability policy comprised both a schedule, which contained endorsements that were then incorporated into the policy, as well as a set of standard policy terms. In the schedule, the territorial limit was stated to be anywhere in Singapore in connection with the insured's trade or business, which was the operation of a swimming school/gym. The policy period was stated as 14 June 2006 to 13 June 2007. The limit of indemnity was $500,000 for any one occurrence or unlimited for any one period of insurance. There was no dispute that the death of the Deceased was an incident that fell within the applicable policy period and the territorial limits.

129 OAC pointed to two clauses that it said excluded Hydro Aquatic's potential tort liability from coverage. First, the First Aid Treatment/Facilities Clause ("the FAT/F clause") contained in the schedule read:

> The policy extends to cover legal liability of the insured arising out of provision by the insured of first aid facilities but excluding any act of negligence, omission or neglect of any duly qualified member of the medical profession or any employee or voluntary worker of any hospital or ambulance organisation.

OAC's position was that this clause served to exclude any act of negligence, omission or neglect of any employee of Hydro Aquatic, including the lifeguards employed by them.

130 The second submission was founded on cl 8(a) of the exceptions ("Exception 8(a)") in the standard policy terms which excluded:

> Liability in respect of injury loss or damage caused by or through or in connection with
>
> (a) any advice or treatment given or prescribed or due to any professional error neglect or omission

OAC said Hydro Aquatic was therefore not covered because Exception 8(a) referred to professional negligence and a lifeguard was a professional.

131 Hydro Aquatic said that the FAT/F clause applied to exclude acts of employers or voluntary workers of any hospital or ambulance organisation but not that of employees of Hydro Aquatic. It said also that Exception 8(a) did not refer to Hydro Aquatic because where the policy referred to Hydro Aquatic in the rest of the document, there was a clear reference to the "Insured" and no such

reference existed in Exception 8(a).

132 I begin my analysis with the insuring clause [note: 51] which was in the widest terms as was to be expected in a public liability policy. The words have been in use for a very long time and certainly since I began in practice. This cover was expressed to be an indemnity to indemnify the insured against:

> All sums which the insured shall become legally liable to pay for compensation in respect of
>
> 1. Accidental bodily injury (including death or disease) to third parties
>
> 2. Accidental loss and/or damage to property belonging to third parties
>
> occurring within the Territorial Limits in connection with the Insured's trade or business during the Period of Insurance.

133 Hydro Aquatic provided lifeguard and pool cleaning services and I found that both services fell within its trade or business as described in the policy. Accordingly, OAC became legally liable to pay compensation in respect of unfortunate incidents like the death in this case and the question was whether such liability was excluded.

134 In my judgment, I could not agree with OAC that the words "any employee" in the FAT/F clause referred to employees of Hydro Aquatic. The phrase "or any employee" could not be read disjunctively. The exclusion covered two main groups: first, duly qualified members of the medical profession; and second, any employee or voluntary worker of any hospital or ambulance organisation. The plain and ordinary meaning which would have been given to the phrase by the contracting parties was that it referred to employees of any hospital or ambulance organisation and not to employees of Hydro Aquatic. That was also the meaning that would be given to the exclusion by people in the industry. Professional indemnity is usually taken outside public liability clauses because it is generally the case that doctors or other employees of hospitals are themselves covered by their own professional insurance and there is no need to cover them twice. I found OAC's suggested reading remarkable and one that made no commercial sense. Moreover, the clause was an exclusion clause and it was incumbent on OAC to make it clear that "any employee" meant "any employee of the Insured" rather than to dispute the clause at a later stage.

135 I also could not agree that Exception 8(a) applied to Hydro Aquatic's staff. With all due respect, I did not think that the word "professional" could in this context be construed to mean a lifeguard. Neither could it be construed to cover a person who cleans swimming pools. A common definition of "professional" can be found in *Jackson & Powell on Professional Liability* (John Powell and Roger Stewart gen eds) (Sweet & Maxwell, 7th Ed, 2012) at para 1–005. The learned authors said that there are four characteristics of professionals. First, the nature of the work they do is skilled and specialised and a substantial part of the work they do is mental rather than manual. A period, usually substantial, of dedicated training is required before the work can be adequately performed. Second, professionals are usually expected to be committed to certain moral principles that go beyond the general duty of honesty. They are expected to provide a high standard of service for their own sake and for the sake of the profession. Third, professionals normally belong to a collective organisation such as a professional association, which regulates its members and for this purpose, usually sets examinations or tests of competence and often also issues and enforces professional codes of conduct. Fourth, most professions have as a result of the foregoing a high status in the community. Some privileges are conferred by legislation and others by common consent. I drew further support from the case of *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647 at 657 where Scrutton

LJ, while admitting that he was reluctant to propound a comprehensive definition, proceeded to characterise professionals much in the same terms as I listed above.

136 No doubt a lifeguard is trained in first aid. He might even be trained in the use of specialist equipment. He might even be skilled in their use and certified as such. But he is not a person with the characteristics that I have described above. Thus I could not accept that lifeguards could be regarded as professionals in the sense of the word as I have explained above, let alone in the context of an insurance exclusion clause. It went against commercial sense that a business would attempt to get policy cover that excluded liability for any of its staff on the ground that its staff were to be regarded as professionals. OAC was not able to provide any authority which said that lifeguards were to be regarded as professionals in this context.

137 A second reason for my decision that Exclusion 8(a) did not apply to exclude liability was that it did not refer to death but merely injury, loss or damage. I compared this to the main insuring clause which I cited at [132] above and which referred to bodily injury *including death or disease*. I relied on the approach in construction that exclusion clauses should be construed strictly and if an insurer wished to provide that cover was excluded in certain circumstances it should have done so in clear words; if it did not, any ambiguity or lack of clarity would be resolved against it (see *Singapore Telecommunications Limited v Starhub Cable Vision* [2006] 2 SLR(R) 195 at [52].)

Conclusion

138 This was a very tragic event. It underscores the fact that hypertension and hyperlipidemia are silent killers as well as the dangers of unknowingly adopting a vigorous exercise regime in an attempt to reduce weight when the heart has already become ischemic and damaged and the folly of not taking prescribed medication faithfully. I fully sympathise with the plight of the Plaintiff who has lost her husband and main breadwinner in the prime of his life and who now has to bring up two very young children alone. But unfortunately, liability in negligence is fault-based and we cannot allow hard cases to make bad law. The claims against NUS and Hydro Aquatic must therefore be dismissed as must Hydro Aquatic's claim against Overseas Assurance.

139 Although the lifeguards, and therefore NUS and Hydro Aquatic, were negligent in the performance of their duties, and although there was contributory negligence on the part of NUS, their negligence did not cause the Deceased's death. Thus there is no necessity for me to proceed to apportion liability between the defendants but if this is necessary, my judgment is that NUS should bear one-third and Hydro Aquatic two-thirds of the liability for the reasons I have given above. In the event, it follows that Hydro Aquatic will not have to claim an indemnity under the public liability policy against Overseas Assurance, but if I am wrong on the issue of causation then it would follow that Hydro Aquatic is entitled to an indemnity under the policy issued by Overseas Assurance.

140 I will hear the parties on costs. Notwithstanding their success in this matter in the final outcome, I think that NUS and Hydro Aquatic should direct their minds to addressing me on why I should exercise my discretion to award them costs against the Plaintiff, given my findings above. OAC will no doubt also consider its position. The Registrar will fix a date for submissions. The parties are to exchange skeletal submissions on costs and disbursements and include quantum where appropriate, at least three clear days before the hearing on costs.

[note: 1] NE, Day 2 p 44

[note: 2] AEIC of Tan Tong Nam, p4

[note: 3] Exhibit "2D-6", admitted 29 November 2012, 10.15am.

[note: 4] 1st Defendant's closing submissions, at para.73, p 35.

[note: 5] 1st Defendant's closing submissions, at para.74, p 35-36.

[note: 6] 1st Defendant's closing submissions, at paras.386-398, pp 169-173

[note: 7] 1st Defendant's Bundle of Documents, p 72

[note: 8] NE, Day 15 p 77

[note: 9] NE day 14, p 54.

[note: 10] NE day 14 p 104.

[note: 11] NE day 12 p 20.

[note: 12] NE Day 10 p 124.

[note: 13] NE day 4 p 36

[note: 14] NE, 17 Aug, p 41

[note: 15] 1st Defendant's closing submissions, Annex A

[note: 16] NE day 9 p 46

[note: 17] NE day 10 p 19

[note: 18] 2AB523

[note: 19] 3AB691

[note: 20] NE 17 August 2012, p.36

[note: 21] NE 27 November 2012, p.80

[note: 22] 1AB255

[note: 23] NE, Day 6 p 98

[note: 24] 3AB 643

[note: 25] NE, Day 10 p 35

[note: 26] 1st Defendant's Bundle of Affidavits, AEIC of Koh Yong Chea, p 33.

[note: 27] NE, 15 Aug, p 30, ln28

[note: 28] NE, 21 August 2012 p 100-101

[note: 29] NE, 21 August 2012 p 104-106

[note: 30] NE, 7 August 2012, p 24

[note: 31] NE, 28 November 2012 p 13

[note: 32] NE, 28 November 2012 p 15

[note: 33] AEIC of Tan Tong Nam, p 3, 19.

[note: 34] AEIC of Tan Tong Nam, p 13. NE day 5 p 38.

[note: 35] NE, day 4 p 134

[note: 36] AEIC of Teong at p 7

[note: 37] NE 28 November 2012, p 16

[note: 38] NE 28 November 2012 p 17.

[note: 39] NE,Day 14 (28 November 2012) p 26.

[note: 40] NE, 28 November 2013, p 36

[note: 41] NE, 28 November 2012 p 26

[note: 42] NE, 28 November 2012, pp 31-32; Dr Jimmy Lim's evidence at NE 27 November 2012 pp 31 and 34

[note: 43] NE 27 November 2012, p 102

[note: 44] NE day 13 p 103.

[note: 45] NE 27 November 2012 p 80

[note: 46] NE 27 November 2012, pp 20-23

[note: 47] NE, 27 November 2012, p.29

[note: 48] NE, day 16, p 27

[note: 49] NE, Day 16, p 75

[note: 50] 3AB732–743

[note: 51] 3AB736