Man Mohan Singh s/o Jothirambal Singh and Another v Dilveer Singh Gill s/o Shokdarchan Singh and Another
[2007] SGHC 73

Case Number	: Suit 137/2004, NA 63/2006
Decision Date	: 17 May 2007
Tribunal/Court	: High Court
Coram	: Yap Yew Choh Kenneth AR
Counsel Name(s)	: Renuka Chettiar (Karuppan Chettiar & Partners) for the plaintiffs; Ramasamy s/o Karuppan Chettiar and Christopher Fernandez (ACIES Law Corporation) for Co-Defendants
Parties	: Man Mohan Singh s/o Jothirambal Singh; Jasbir Kaur — Dilveer Singh Gill s/o Shokdarchan Singh; Zurich Insurance (Singapore) Pte Ltd

17 May 2007

AR Yap Yew Choh Kenneth:

Introduction

1 This case for assessment of damages raises a novel head of claim under the law of negligence. It involves the question of whether bereaved parents can claim for the cost of medical expenses incurred in their attempts to conceive again in order to replace their demised children. At stake is the broader issue of whether a tortious wrongdoer should owe a duty of care to secondary victims who are the next of kin of the primary victim, and who incur reasonably foreseeable expenses in finding a substitute for the loss of their loved ones.

2 As can be imagined, this rather unusual claim raises thorny questions of law and policy. It potentially opens the door to a wide scope of liability, which is of understandable concern to motor accident insurers. Yet, to deny the claim would result in bereaved parents having no recourse under such circumstances.

3 I considered the matter at length. I do not believe the loss should lie where it falls. I think this is a case where the boundaries of tort law can be pushed outwards without violating its self-imposed constraints of legal proximity and countervailing policy considerations. The heart of the matter is whether it is reasonable for a negligent driver who takes the lives of primary victims in an accident to contemplate that their parents may be minded to and have reasonable justification for undergoing medical treatment in order to attempt to replace their only offspring. I cannot in good conscience find this proposition to be unreasonable or unfair to the defendant. I therefore allowed the claim by the plaintiffs, and will explain my decision in detail. I will first proceed to lay out the background facts and deal with the traditional heads of claim.

Facts

4 The plaintiffs are the lawful parents of Gurjiv and Pardip Singh ("Gurjiv" and "Pardiv" respectively), both of whom were killed as a result of a road accident on 2nd December 2002 whilst travelling as back seat passengers in a motor car driven by the Defendant. The defendant absconded and it was left to the co-defendant insurer of the motorcar at the relevant time ("the insurer"), to defend the action.

5 Gurjiv and Pardip were the plaintiffs' only children. The first plaintiff ("the father") and the second plaintiff ("the mother") were left childless as a result of the accident at the age of 46 years and 44 years of age respectively. They are now 51 and 48 years old respectively. At the time of their death, Gurjiv was 17 years old and Pardip was 14 years old.

6 The plaintiffs claim damages and consequential loss under the following heads:

(1) Bereavement,

(2) Funeral Expenses,

(3) Loss of dependency,

(4) Post-traumatic shock and depression as a result of the loss of plaintiffs' only two children, and the consequential transport expenses incurred for attending medical appointments at Changi General hospital; and

(5) Cost of fertility treatments undertaken by the mother.

7 I will deal with each of these heads of claim in turn.

Bereavement

8 Pursuant to section 21 of the Civil Law Act (Cap 43), I granted the plaintiffs $20,000 as bereavement for the death of both their sons.

Funeral Expenses

9 There was some dispute as to funeral expenses as the plaintiffs could not produce receipts for all of the expenses incurred. They claimed $10,000 for funeral expenses for both children, representing the cost of customary prayers and cremation.

10 Counsel for the co-defendant insurer, Mr Ramasamy s/o Karuppan Chettiar, dutifully objected to the lack of evidence in this regard. Ms Renuka Chettiar, counsel for the plaintiffs, noted that in *Ng Lim Lian v Port of Singapore Authority* [1997] SGHC 62, C.R. Rajah JC (as he then was) awarded $8,000 as funeral expenses even though the plaintiffs in that case were not able to produce any accounts or receipts relating to such expenses. Mr Ramasamy pointed out that there was an explanation provided in *Ng Lim Lian* as to why documents were unavailable, and that no such explanation was forthcoming in the present case.

11 I took note of Mr Ramasamy's objections. However, it is understandable that in a time of loss, the last concern on the mind of the bereaved would be retaining receipts for the purposes of litigation. I therefore adopted a broad brush approach and granted $10,000 as a reasonable estimate of the funeral expenses of both deceased children.

Loss of Dependency

12 The parties naturally disagreed on the relevant multiplier and multiplicand for the plaintiffs' dependency claim.

13 Gurjiv and Pardip were both from Kuo Chuan Presbyterian School ("the school"). Both the

plaintiffs as well as the teachers from their school were called to give evidence on their academic performance and future earning potential.

14 At the time of his death, Gurjiv was in Secondary 5 (normal stream), and had just completed his G.C.E. 'O' Levels examinations a week before his death. Academically, he was an average to below average student, having obtained a Grade 6 or better in only 2 of his 6 subjects at the G.C.E. 'O' Levels. However, by all accounts, he had a good attitude, was a reliable and helpful student, and had served as a class monitor. Gurjiv was also particularly interested in and showed an early aptitude for audio visual skills. According to his father, he was sociable, eloquent and also exhibited some potential for disk-jockeying. His geography teacher, Ms Helen Ng, thought that there was a high chance that he would have qualified for the Institute of Technical Education (I.T.E.), although she acknowledged that he would not likely have made it to Polytechnic. Mr Ramasamy pointed out in his submissions that there was no strict proof in this regard. While that may be so, I did not have reason to doubt that, based on his modest academic performance thus far, Gurjiv would more likely than not have entered and graduated from the I.T.E., were he still alive today.

15 Pardip was in Secondary 2 (express stream) at the time of his death. According to his form teacher, Mr Brian Koh, Pardip was an intelligent boy, although he was playful, talkative, and less hardworking. He was very interested in computers and had expressed his interest in computers to his parents. Pardip had passed his Secondary 2 examinations with reasonable grades (he scored an aggregate of 55.2%, although he failed 5 of a total of 10 subjects taken) and was promoted to the Secondary 3 express stream. His form teacher confirmed that all the pupils in Pardip's class have since finished Secondary 4 and have secured places in Polytechnics or higher institutions of learning. The vice-principal of the school, Mrs Grace Chua, revealed that for the class of 2004, 97.4% of the school's students were eligible for Polytechnic. To my mind, there was no doubt that Pardip would have in all likelihood qualified for a position in a Polytechnic, and would have pursued a course of his interest, very likely computing.

Plaintiffs' case for loss of dependency

16 Counsel for the plaintiff submitted that Gurjiv would have earned at least $1,390 per month as his average commencing median salary had he not died, and would have eventually drawn a gross median salary of $2,070 per month. This figure is derived from the Report of Wages 2005, and is based on the assumption that he would have taken on employment in either the clerical, production craftsman or plant/machine operator and assembly work categories. For the sake of clarity, I note that this figure comprises basic salary, fixed allowances, overtime pay and commissioners, but excludes bonuses. Based on the average between the starting and median salaries, the plaintiffs proposed a multiplicand of $1,730 per month. Ms Renuka also submitted that for both deceased, 40% of their monthly salary would be apportioned to the benefit of the plaintiffs, and that a multiplier of 14 years should be adopted.

17 In Pardip's case, Ms Renuka submitted that he would have been able to secure employment as a Technician or Associate Professional, which provides a commencing gross median salary of $1,975 per month and a gross median salary of $2,850 per month. She then proposed $2,412.50 as the average figure for the purposes of the multiplicand. Applying a similar apportionment percentage of 40% and multiplier of 14 years, the dependency claim by the plaintiffs amounted to $116,256 for Gurjiv and $162,120 for Pardip.

Co-defendants' case for loss of dependency

18 Mr Ramasamy objected strenuously to the plaintiffs' measures of assessment. He regarded

the dependency claim based on Gurjiv to be in the realm of speculation, as there was no clear evidence that he would enter ITE, nor was there evidence of the course he would have taken, the eventual career he would have pursued or the salary he would have earned. Given these uncertainties, Mr Ramasamy proposed a multiplicand of $1,000 per month, discounted from the median monthly *commencing* gross wage of production craftsmen, plant and machine operators, and sales and service workers, which stands at $1,232.66. As for the percentage of apportionment, Mr Ramasamy submits that the percentage should be 30%, and that the multiplier for Gurjiv and Pardip should be 7 years and 4 years respectively.

Award on loss of dependency

19 It is axiomatic that each case should be decided on its own facts, and attempts to compare and distinguish authority in such instances should be undertaken with a measure of circumspection. I found it more helpful to start from first principles, and to refer to previous authority to provide a rough indicia of the acceptable ranges or parameters within which an award might be granted in this particular case.

20 I started from the position that the determination of lost income to dependents is not to be premised on mere speculation of pecuniary benefit. The plaintiffs have to show that they have lost a reasonable possibility of pecuniary advantage (see *Ng Siew Choo v Tan Kian Choon* [1990] SLR 331, at 335, where the High Court applied *Barnett v Cohen* [1921] 2 KB 461*)*. There is no need to show actual loss in terms of evidence of what the deceased was earning at the time of death, or how much of it was contributed to the parents. In the words of Lord Atkinson in *Taff Vale Railway Co v Jenkins* [1913] AC 1, at p 7,

> I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact – there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff.

21 Neither is there any minimum floor below which a deceased person is considered too young for the parents to say they have lost a reasonable expectation of pecuniary benefit. Notably, in *Chew Lay Teck & Ors v Kuala Yakin Sdn Bhd* (Suit No. 1326 of 2002) (unreported), the dependency claim was granted even though the deceased was 12 years old at the time of death.

22 Having said that, the science of estimation is notoriously imprecise and the plaintiff does face practical disadvantage where the deceased is very young and therefore far from attaining working age. The risk that earning potential may be lowered due to the vagaries of life is also amplified when the deceased is younger. Finally, it may be harder to estimate loss where future earnings are in the informal sector and no objective benchmarks are obtainable. For example, in *Hassan bin Mohamad & Anor v Teoh Kim Seng* [1987] 1 MLJ 328, the plaintiffs' claim for prospective loss was denied because they had failed to prove that the small sums earned by their deceased 12 year old child as a market assistant could be reducible to a money value.

23 In the present case, I do think the plaintiffs have cleared these hurdles. There is ample evidence that, on the balance of probabilities, Gurjiv would have graduated from the I.T.E., and that Pardip would have obtained a diploma from a Polytechnic. Both counsel have also accepted the Report of Wages 2005 as a common basis for salary calculations for both deceased.

24 It may be useful at this juncture to refer to the authorities whose factual matrixes are similar to the present case. This gives us a good sense of the ranges within which the quantum of damages should lie. I start with *Ho Yeow Kim v Lai Hai Kuen & Anor* [1999] 2 SLR 246. Its facts are on all fours with the present case. In *Ho Yeow Kim*, a 17 year old student who had been studying at the ITE for about 3 months was killed in a motor accident. It was assessed that the deceased would likely have graduated from ITE as a Mechatronics Engineering graduate, and would have earned $1,784.50 per month as an average prospective salary. The parents were 49 years old in that case. The deceased had a 13 year old brother whom he was likely to have helped support and educate as well. The Court of Appeal eventually apportioned 40% of this sum for the dependency claim, and applied a multiplier of 10 years. Mr Ramasamy made some attempts to distinguish this case, most notably on the basis that the father's income in our present scenario would have been, at $4,500 a month, more than sufficient to sustain the family. He also made the point that in a traditional Punjabi family such as that of the plaintiffs, the stated expectation of the parents was that their sons would marry early, and that this would further lower the allowance provided. I think these are fair points, but they do not detract from the fact that *Ho Yeow Kim* provides a general flavour of where the quantum of damages should like in such a case.

25 The next relevant case is that of *Tan Ngo Hwa v Siew Mun Phui* (Suit No. 1638 of 1995 – unreported). Here the deceased was the only child of the plaintiffs. She was aged 16 at that time of death, and had not taken her G.C.E. 'O' Level Examinations. The plaintiffs were both aged 44 years at the time of death and 49 years at the time of assessment. The court accepted that she could have obtained an overseas university degree, and took into account that she would have earned $2,000 as a starting salary, and $4,000 to $5,000 subsequently in her career. On that basis, it awarded a combined multiplicand for both parents at $900 for the first 2.5 years, and $1,000 for the next 7.5 years. The notional apportionment percentage of her median income ($3,500) would have been between 26% and 29%.

26 Counsel for the plaintiff also submitted a slew of other authorities on the relevant multipliers, namely *Lim Lay Gio v Vijayan a/l Nalathamby* (DC Suit No. 1233 of1999) (unreported), *Ng Swee Eng v Ang Oh Chuan* [2004] 4 SLR 425, *Chew Lay Teck & Ors v Kuala Yakin Sdn Bhd* (Suit No. 1326 of 2002) (unreported), *Koh Chin Keng v Tan Sian Khoon* (DC Suit No. 2367 of 2002)(unreported), and *Lee Kwan Kok v Non Chan Tong* [2004] SGHC 211. It suffices to say that a quick scan indicates that the multipliers given were between 8 -12 years for parents whose age ranged from 34 to 57 years of age.

27 Having perused the case law, I arrived at the dependency award in the following manner. Given my findings that Gurjiv and Pardip would have graduated from the I.T.E. and a Polytechnic respectively, I saw no reason to depart from the plaintiffs' estimates for median gross salary, i.e. $1,730 for Gurjiv and $2,412.50 for Pardip. These figures were based on occupations in which both deceased children had shown a degree of interest or aptitude, and were nowhere as speculative as counsel for the co-defendant had alleged.

28 Having said that, I do agree with Mr Ramasamy that the percentage of income apportioned to the parents should be lesser than the 40% granted in *Ho Yeow Kim*. The available surplus that the deceased children would make available to their parents is what remains after deducting the deceased's living and other personal expenses from his net earnings, including contributions to the Central Provident Fund. It also has to take into account the possibility of a reduced quantum of support due to marriage. Although I did not consider the deceased to be particularly predisposed to early marriage, I thought it reasonable to assume that they would get married in their mid-20s. I also took note of Mr Ramasamy's argument that the dependency had not yet started with regard to Pardip (who would be 18 years old at present), and that some discount should be given for the advance receipt of a lump sum. Finally, considering also that there are two children supporting the parents,

and that the plaintiffs are not in pressing need for money given the father's present income of $4,500, I agreed with Mr Ramasamy's proposed percentage of 30% of each deceased's estimated income. This results in a multiplicand of $519 from Gurjiv and $723.75 from Pardip.

29 With respect to the multiplier, I decided to adopt a broad brush approach and did not distinguish between how much each son would have given to each of his parents. Accordingly, I granted a multiplier of 11 years for Gurjiv and 9 years for Pardip, to take into account the difference in their ages. This falls mid-way between what seems to be the acceptable range of 8 – 12 years in the cited authorities. The total quantum of the dependency claim for both plaintiffs would therefore be $68,508 for Gurjiv and $78,165 for Pardip.

Post-Traumatic Shock or Depression

30 The plaintiffs claim damages for post-traumatic shock or depression ("nervous shock") to the sum of $10,000, as well as about $200 of consequential transport costs. The basis for this claim lies in the report of Dr Angelina Chan, a Consultant Psychiatrist of Changi General Hospital, who administered grief therapy to both plaintiffs from January 2002 to September 2006. Her report confirms that the plaintiffs were devastated by the death of their sons. The first plaintiff required medical leave from work for about 2-3 months due to depression, and although he returned to work in February 2003, he could only take morning shifts as his wife was uncomfortable with being alone at home at nights. The plaintiffs were also outraged that their nephew, to whom they had entrusted the care of their sons during the fatal outing, had allowed the defendant to drive the vehicle while allegedly under the influence of alcohol. They were angry at their nephew for refusing to accept any responsibility for the accident, and were estranged from their relatives as a result. As the defendant had absconded, there was also no closure to the incident, which they say led to a protracted grief reaction and depression.

31 While I sympathize with the plaintiffs' grief and indignation, the law relating to recovery of damages for nervous shock is restrictively framed, and for good reason. The applicable principles are found in *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317, which adopted the test espoused in the English cases of *McLoughlin v O'Brian* [1983] AC 410 and *Alcock & Ors v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907. Liability for nervous shock can only be established if the 'three proximities' are satisfied: i.e. there is a close relationship between the plaintiff and the primary victim, there is proximity between the plaintiff and the primary victim in terms of time and space to the tortious event, and the shock comes through direct exposure to the event or its immediate aftermath.

32 The law hesitates to render a defendant liable to a secondary victim of a tort for nervous shock unless these requirements are met. In this case, I do not think the plaintiffs were proximate enough to the accident to succeed under the *McLoughlin* test. They were certainly not within the special scope of proximity for which recovery was allowed in previous cases. For example, while the plaintiff in *McLoughlin* was not at the scene of the accident, she succeeded in her claim because she was at the hospital soon after, where she saw her injured husband and her son who was screaming in pain, and where she was told that her youngest daughter had died. In a similar vein, in *Pong Koi Fa*, the plaintiff was present in the hospital as her daughter suffered from the effects of a negligent operation, and died after much pain and suffering caused by leaking brain fluid and meningitis. These cases are a far cry from the present facts. The plaintiffs had received information that their sons had met with an accident at 8:50 pm and rushed to the hospital soon after. By that time, Pardip had already died, and Gurjiv was pronounced dead soon after at 11 pm. There was no evidence to suggest that the plaintiffs saw their mangled bodies, or witnessed their pain and suffering.

33 Counsel for the plaintiff sought to refer to *Hevican v Ruane* [1991] 2 All ER 65 to support her

case. In *Hevican*, the plaintiff was allowed to claim for nervous shock even though the plaintiff did not observe the fatal accident, and only saw the son's body three hours later in the morgue (and in that case, the body did not show signs of disfigurement). Nevertheless, I have some doubts about how accurately *Hevican* applied the *McLoughlin* test, given that Mantell J in *Hevican* had rejected the requirement of physical proximity altogether (an observation that has already been made by Amarjeet Singh JC (as he then was) in *Pang Koi Fa*). Further, and more importantly, I do not think that policy considerations justify a claim for nervous shock on the present facts. If I were to allow this claim, nervous shock would become *de rigueur* in every motor accident fatality, so long as the family actually suffers some form of emotional trauma as a result. For these reasons, I would disallow the plaintiffs' claim for nervous shock and depression.

Claim for Cost of Fertility Treatment

34 The second plaintiff is a housewife who has dedicated her life to her two children. She was aged 44 years at the time of their death and naturally considered conceiving again. She was not yet menopausal. However, by 2003, the plaintiffs had not experienced any success with natural procreation. Accordingly, the mother consulted with a doctor at the National University Hospital and attempted intra-uterine insemination ("IUI"). This was unsuccessful. She was then referred to Dr Foong Lian Cheun, a Consultant Obstretrician and Gynaecologist at Gleneagles Hospital.

35 Given the poor success rate of IUI, Dr Foong advised her to undergo in vitro fertilisation ("IVF") instead. The mother went through two IVF procedures under Dr Foong's care. First, in May 2004, she tried IVF treatment using her own ovarian eggs. Dr Foong explained that it was preferable to use her own genetic material in the first instance, although given her age, the chances of success were not high. He estimated the chance of a successful conception under this method at about 5%, and the chance of a successful delivery at about 1%. Dr Foong explained that the difference between these two statistics was due to the possibility of post-conception complications such as premature delivery, congenital abnormalities, and other risks associated with diabetes, high blood pressure, etc. As it turned out, the first IVF attempt using the mother's ovarian eggs failed.

36 The mother next underwent a second IVF procedure using donated ovarian eggs from her 39 year old sister. According to Dr Foong, there was a higher chance of success when using donor eggs, as the chances would depend ultimately on the age of the donor. If, for example, a 21 year old had donated her eggs, the chance of successful treatment would have been that of a 21 year old woman. In this case, he estimated the second plaintiff's chances of conception to be 15%, although he acknowledged that the chances for a successful delivery at the end of term would be about 3% due to the risk of the aforementioned complications. This second IVF procedure proved successful. The mother successfully became pregnant. Unfortunately, after 8 weeks, she lost the foetus due to natural reasons.

37 Dr Foong highlighted that the second IVF treatment required approval from the Ministry of Health, as its guidelines stipulate that the patient must not be over 44 years of age. The Ministry's approval was granted upon Dr Foong's written request. He believed that there was ample reason to proceed in this case given the second plaintiff's poor response to the initial IUI and IVF treatment. These treatments had shown that she not producing ovarian eggs of sufficient quality despite the help of drugs. Dr Foong also explained that the fact that she was heading towards early menopause was not a barrier where donor eggs were concerned. Menopause merely limits the supply of ovarian eggs but not the possibility of successful implantation. According to medical reports, even a 62 year old woman could conceive by this method of IVF treatment.

38 While Dr Foong acknowledged that the second plaintiff's chances would have been better if a

younger donor's eggs were used, he noted that a genetic match is preferable for emotional as well as practical reasons, since it is extremely difficult to get an anonymous donor in Singapore. The procedure for harvesting eggs from the donor involves daily injections for up to 4 weeks. The eggs are extracted via an invasive procedure through the vagina with the use of a long needle. The donor must also be acting purely voluntary and not for commercial benefit. This effectively limits potential donors to family or very close friends.

40 The plaintiffs now seek to recover $32,847.90 for the cost of the IUI and IVF treatments. Ms Renuka acknowledged that this was a novel claim and was unable to find any direct authority to rely upon for support.

The two-stage test for duty of care

40 As we were dealing with a novel claim in tort, I directed counsels' attention to the judgment of Andrew Phang J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Meng Eric* [2006] SGHC 222. This seminal judgment, delivered on 15 December 2006, was, with respect, a veritable *tour de force* on the law of negligence. It sought to reconcile three decades of confusion and vacillation in the English courts (and, to some extent, our own courts) between a 'two-stage' test for establishing a duty of care in negligence, as proposed in *Anns v Merton London Borough Council* [1978] AC 728), and the subsequent 'three stage' test in *Caparo Industries plc v Dickman* [1990] 2 AC 605. *Sunny Metal* went on appeal before the Court of Appeal on 26 April 2007. The court allowed the appeal and a written judgment is still pending. However, I am given to understand that in its oral grounds, the court did not disagree with Justice Phang's discourse on the test for the duty of care. It is therefore still good law for present purposes.

41 Justice Phang's decision in *Sunny Metal* essentially calls for a return to a restated 2-stage *Anns* test. In his judgment, the learned judge reasoned that the first limb of the *Anns* test should refer to "legal proximity" rather than "factual forseeability". Having discussed and resolved what he saw as only an apparent conflict in English as well as Singapore authority on this matter, he provided a helpful summary of the test on establishing a duty of care in negligence. He described the test at paragraph 100 of his judgement as follows:

> (a) The test to be applied is the "*two-stage process*", comprising the need (in order to establish that a duty of care exists) to prove, first, the existence of (legal) *proximity* between the parties and, secondly, that there is no material factor or *policy* which prevents such a duty of care from otherwise arising.
>
> …
>
> (e) In so far as the *application* of the concept (or, rather, test) of *proximity* is concerned, whilst the court's findings will be dependent very much on the precise facts concerned, useful concepts that will aid in this particular process include the *voluntary assumption of responsibility* and *reasonable reliance*, both of which are in fact *complementary* concepts.

42 To elaborate further on the two-stage process, it would be helpful to refer to LP Thean JA's earlier observation in *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR 449 ("Eastern Lagoon") (at paragraph 31):

> Stripped of the verbiage, the crux of such approach is no more than this: the court first examines and considers the facts and factors to determine whether there is sufficient degree of proximity

in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former … Next, having found such degree of proximity, the court next considers whether there is any material factor or policy which precludes such duty from arising.

Legal Proximity

43 Counsel for the co-defendant, in applying the re-stated test in *Sunny Metal*, sought to distinguish the case on the basis that it concerned a pure economic loss arising from a quasi-contractual relationship, where concepts such as the assumption of responsibility and reasonable reliance had greater meaning. I do agree that in the context of fatal accidents, it is harder to apply "assumption of responsibility" or "reasonable reliance" as a methodological aid. There is no prior relationship between the parties until seconds before the incident, and it is difficult to conceive that either party conceives or acts on the basis of any pre-conceived obligations it believes is owed to the other.

44 That observation does not detract from the applicability of the two-stage test as restated by *Sunny Metal*. However, bereft of this methodological aid, the court of first instance receives precious little guidance on how to proceed when applying the test of legal proximity. We start with the famous "neighbour principle" as stated by Lord Atkins in *Donoghue v Stevenson* [1932] AC 562 (at 580):

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*. [Emphasis added]

45 We are then told to proceed pragmatically to ascertain what is within the reasonable contemplation of the plaintiff. In the words of Lord Bridge of Harwich in *Caparo v Dickman* (supra) at 618:

> [T]he concepts of proximity and fairness … are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.

46 Bearing these observations in mind, the central question we face in the present case can be phrased as follows. Are the parents of the victims of a motor vehicle accident the persons so closely and directly affected by the tortfeasor that he should have them in mind when he commits the wrong? Put another way, if one causes a vehicle accident, does one expect to be responsible for reasonably foreseeable consequential losses that may arise on the part of the parents of the victim?

47 To my mind, this somewhat complex enquiry is more easily answered when broken down into three components, namely whether the defendant reasonably contemplates that:

(i) The victims of the motor accident may be the only children of a set of parents,

(ii) Those parents may be of a certain mindset that compels them to attempt to conceive again, and

(iii) The parents may be of such age as to require medical fertility treatment in their efforts to re-conceive.

48 I think component (i) is easily satisfied. Any driver knows or reasonably expects that victims of his negligent driving would have loved ones. I think he should equally be expected to know and contemplate that such victims may constitute the entirety of a certain class of relations as far as the bereaved plaintiff is concerned, i.e. *all* the children of the plaintiff parents, or *both* parents of the plaintiff children. The harder questions are that those raised in (ii) and (iii), which really pertain to how a defendant should regard his *secondary* victim. Admittedly, (ii) and (iii) overlap somewhat with the enquiry on remoteness, but this overlap is in some sense unavoidable, and I think it appropriate to deal with the issues here.

49 Counsel for the plaintiff had argued that a defendant should take his secondary victim as he finds him. She seeks to apply, analogously, the 'egg-shell' skull plaintiff rule for *primary* victims as espoused in *Smith v Leech Brain & Co. Ltd. And Anor* [1931] 3 All E.R. 1159, where Lord Parker C.J. said, at 1161:

> It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of Kennedy J, in *Dulieu v White & Sons* [1901] 2 K.B. at p. 679, where he said: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not an unusually thin skull or an unusually weak heart.

50 Counsel for the co-defendant contended that it would be wrong to extend this strict rule to secondary victims and to expect the defendant to take this wider range of claimants in whatever shape or form they should appear. To some extent, I am given to agree with him. It is one thing to assume that the defendant is made to bear all risks where the *physical injury* to the *primary* victim is concerned, but it may not be fair and reasonable to do the same once a wider range of secondary victims come into play. This is exacerbated where the loss suffered by the secondary victims is purely economic in nature and therefore more unpredictable in quantum. Let me posit an extreme example to stress-test the point. Suppose the secondary victim here was the ruling monarch of a country, whose only son the crown prince had just perished in an accident. We surely could not expect, in all reasonableness, that the defendant be responsible to the monarch for all consequential losses to the kingdom due to the loss of a royal successor.

51 But I think the plaintiffs in this case do not need to resort to the blunderbuss reasoning of the 'egg-shell skull' rule. Bereft of that rule, the question still remains whether the defendant owes a duty to secondary victims of a certain mindset towards their offspring, namely one which compels them to seek medical treatment to conceive again in order to substitute for their lost children.

52 Counsel for the co-defendant challenged the reasonableness of this mindset. He submitted that unlike other direct financial consequences visited upon secondary victims, these costs were caused solely by the peculiar desire of the plaintiffs to insist on conceiving again despite being in the twilight years of their fertility.

53 This is what I believe to be the tipping point of the claim. Were the parents justified in desiring to have offspring again, and should defendants reasonably contemplate that this limited class

of secondary victims would hold such views? To put the matter in (real-life) perspective, I cite the following extract from the father's testimony:

> We were depending on them, we did not lose one, we lost two. Do you know how painful it is? Who is going to take care of us when we grow old?

54 I think this extract neatly sums up the plaintiffs' sentiments. To some parents, raising a family is the seminal purpose in life. Should the law tell them that they are not entitled to seek medical help to conceive again when a tragic accident robs them of the sum total of their offsping? If a court should adjudge that the loss lies where it falls, bereaved parents (of limited fertility) without sufficient means would effectively be denied an opportunity to procreate again.

55 I pause here to point out that the plaintiffs are not seeking damages on the basis of solatium, i.e. damages given for injured feelings, grief or on the ground of sentiment. They do not seek to parlay grief into gold, or to parsimoniously profit from tragedy. They will never be put in a better position than they would have been but for the tortious wrong. Even if the treatment had succeeded, they would still have been worse off, for by Mr Ramasamy's own argument, life, unlike chattels, can never be adequately substituted. I would add that even if the fertility treatment been successful, the parents would have been saddled with the attendant (and certainly unrecoverable) cost of raising children all over again.

56 Having considered the issue at length, I did not think that the plaintiffs were unreasonable to seek to replace their offspring in their particular circumstance. They had sought medical advice, and had taken incremental approaches towards the various options for fertility treatment. Neither the doctor nor the Ministry saw fit to stop them from undergoing the procedures. While the ultimate chance of success (at 3%) was not high, that has to be weighed against the relatively modest cost of the treatment ($32,847.90), and more significantly, the crucial importance to the parents of conceiving again.

57 In the final analysis, I did not find the plaintiffs, in proceeding as they had, to be within a special class of 'thin-skulled' or 'weak-willed' secondary claimants, for whose losses the defendants could validly disclaim responsibility. I think it reasonable to consider that parents of normal fortitude might consider the concept of begetting offspring to be so important as to leave no stone unturned in trying to mitigate their loss. I do not see why it should lie in the mouth of a defendant to say that he need not expect parents who have lost all their children to his negligent act to stoically accept their fate. Accordingly, I have little doubt that there is sufficient legal proximity on these facts to establish a duty of care between the defendant and the plaintiff parents.

Policy Considerations

58 The next step of the two-stage test of *Sunny Metal* is to consider whether policy considerations militate against the finding that a duty of care exists.

59 There are two possible policy concerns that weigh in my mind in extending the duty of care to this case. The first is the obvious concern that imposing liability would open a floodgate of litigation by the primary victim's next-of-kin in fatal accident claims. There is considerable and, if I may say, completely justifiable judicial angst that arises whenever a plaintiff seeks to push the frontiers of tort into the somewhat uncharted territory of secondary victims. The worry is that allowing liability for indirect or incorporeal consequences of the tortfeasor's actions might result in "liability in an indeterminate amount for an indeterminate time to an indeterminate class", borrowing from the oft-cited words of *Cardozo CJ* in *Ultramares Corporation v Touche* 174 NE 441 (1931).

60 I think the concern of floodgates can be assessed by reference to a series of sub-questions. The first is whether it is clear *which* secondary victims are entitled to sue the defendant for breach of duty. Should the lines delineating liability be unclear, or the class of plaintiffs be too indeterminate, unnecessary litigation would result. The next question is whether the class of secondary victims is capable of being cast in such wide terms that virtually every motor accident would involve such claims.

61 I do not think the concern of opening the floodgates is merited in this instance. This case is unlike that of *Alcock & Ors v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907, where every television viewer who witnessed the Hillsborough stadium disaster on television was a potential plaintiff. In contrast, the class of potential claimants under this novel head of claim is extremely small. It is limited to bereaved next-of-kin who have lost an entire category of relations in the accident (there would otherwise not be sufficient justification for seeking to 'replace' their loved ones). By definition, this would create at its furthest stretch a handful of potential plaintiffs (for example, the children of parents who are killed in an accident).

62 Further, there are in practice relatively few scenarios where a plaintiff can actually show that economic losses were reasonably incurred in the cause of seeking to 'replace' his loved one. In the present case, the plaintiffs happen to require medical help to procreate. Other younger and more fertile couples would not be able to avail of this justification. As a footnote, I may add that counsel for the co-defendant did point out that future technology might make cloning possible and thereby enlarge the scope of claimants. While this made for fascinating discussion, I do think the reasonableness of such action in terms of the cost, viability and moral appropriateness are so speculative at this stage that it would not be profitable to delve further on this issue at this point.

63 In any case, during the course of discussion with counsel, I had only been able to conceive of two instances where other claimants would presently succeed under this new head of claim. The first is that of an orphan who can prove incidental expenses incurred in finding new guardians (perhaps arising from having to relocate overseas), and the other is that of a bereaved spouse who is unmarriageable in the normal course of events (perhaps due to disability or otherwise), and who requires the assistance of a marriage agency to re-marry. Apart from these instances, I do not see how normal parents, spouses or orphaned children would be able to avail of this head of claim. I think the fact that such a claim has never arisen until today bears ample testimony of the rarity of its occurrence.

64 The second policy concern that could possibly arise is that the imposition of liability may be so draconian that it could deter the economically or socially beneficial activity of the defendant in this regard. The threshold of liability should not be so low that drivers are deterred from driving. However, I find in this instance that the category of claimants is sufficiently restricted, and the quantum of possible claims sufficiently modest, that drivers would not be sufficiently affected by an imposition of this new head of liability. While insurance premiums may rise as a result (which, as I understand from counsel, is the commercial motivation for any appeal on this issue), I again do not see that as sufficient reason to deny the existence of a duty of care.

65 That leaves me to conclude that a duty of care was owed in the present case to the present plaintiffs with regard to the claim for fertility treatments. As the breach of the duty is conceded, and no objections were raised with regard to causation and remoteness, I found that the co-defendant was liable to the plaintiff for the sum of $32,847.90, representing the cost of the IUI and two IVF treatments undertaken by the second plaintiff.

Interest and Costs

66 Mr Ramasamy for the co-defendant also submitted that the plaintiff should be penalized in terms of interest due to their alleged tardiness in prosecuting the case. He argued that although liability had been conceded in October 2004, the summons for directions for the assessment proceedings was only taken out by the plaintiff in October 2005. In reply, Ms Renuka for the plaintiffs explained that the delay was due to the need to finalize the IVF treatments, which only ended in June 2006, and that the interim period between that date to the first hearing (on 30 Jan 2007) was necessary to allow time to gather the necessary evidence.

67 I took into account the co-defendant's concern that the case took an unusually long time to reach the assessment hearing. Accordingly, I exercised my discretion to award a rate of 5.33% for pre-judgment interest for bereavement and funeral expenses, to run from the date of filing of the writ of summons to the date of judgment. I also limited interest for the fertility treatments to run at the same rate from the date of the amended statement of claim (i.e. on 21 October 2005, when the head of claim on fertility treatments was added) to the date of judgment.

68 Finally, I fixed costs at $22,500, and also ordered that reasonable disbursements to be paid for by the co-defendant to the plaintiff. I would add that the sum awarded is somewhat higher than usual for a 2 ½ day long assessment hearing given that a novel point of law was contested.

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