Man Mohan Singh s/o Jothirambal Singh and Another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and Another and Another Appeal [2008] SGCA 24

Case Number : CA 85/2007, 86/2007

Decision Date : 30 May 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Renuka Chettiar, Ganesh S Ramanathan and Andy Chiok (Karuppan Chettiar & Partners) for the appellants in Civil Appeal No 85 of 2007 and the respondents in Civil Appeal No 86 of 2007; Ramasamy K Chettiar and Christopher Fernandez (Acies Law Corporation) for the respondents in Civil Appeal No 85 of 2007 and the appellant in Civil Appeal No 86 of 2007

Parties : Man Mohan Singh s/o Jothirambal Singh; Jasbir Kaur — Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd); Dilveer Singh Gill s/o Shokdarchan Singh

Tort – Negligence – Damages – Loss of dependency award – Whether longer life expectancy justifying higher multiplier than past analogous cases

Tort – Negligence – Duty of care – Claim for post-traumatic stress and depression – Whether grief and depression were recognisable psychiatric illnesses – Risk of double recovery if tortious damages awarded for grief – Section 21(4) Civil Law Act (Cap 43, 1999 Rev Ed)

Tort – Negligence – Duty of care – Whether negligent driver owing duty of care to victims' parents to avoid causing them to lose all their children in resulting accident – Whether factually foreseeable that driver's negligence would lead to victims' parents undergoing fertility treatment in attempt to conceive another child – Whether sufficient legal proximity between driver and victims' parents – Policy concerns about imposing liability on driver for parents' cost of fertility treatment

30 May 2008 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 On the evening of 2 December 2002, a tragic accident caused by a negligent driver, who was the second respondent in Civil Appeal No 85 of 2007 ("CA 85/2007"), robbed two loving parents – the appellants in CA 85/2007 ("the appellants") – of their only children, two teenage sons. Overnight, the appellants' close-knit family was torn apart and the appellants found themselves childless. They sued the second respondent in CA 85/2007 ("the second respondent") for:

(a) bereavement;

(b) funeral expenses;

(c) loss of dependency;

(d) damages for post-traumatic shock and depression; and

(e) the cost of fertility treatment undertaken in their attempts (which were ultimately unsuccessful) to conceive another child.

The first respondent in CA 85/2007 ("the first respondent") was joined as a co-defendant to the appellants' suit only at a later stage (see [4] below).

2 Being dissatisfied with various aspects of the decision made by the assistant registrar ("the AR") (see *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh* [2007] SGHC 73 ("the AR's GD")) and affirmed in part by the High Court judge ("the Judge") on appeal (see *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh* [2007] 4 SLR 843 ("the Judge's GD")), the appellants appealed to this court via CA 85/2007. The first respondent also filed a cross-appeal to this court (via Civil Appeal No 86 of 2007 ("CA 86/2007")) against part of the Judge's decision.

The facts

3 The appellants are Mr Man Mohan Singh s/o Jothirambal Singh ("the first appellant") and his wife, Mdm Jasbir Kaur ("the second appellant"). They are the lawful parents of Gurjiv Singh ("Gurjiv") and Pardip Singh ("Pardip"). On 2 December 2002, Gurjiv and Pardip went out with their cousin, who had rented a car bearing the registration number SZA 7159 S. Sometime after 6.00pm on the same day, Gurjiv and Pardip were travelling as back-seat passengers in the car, which was then being driven by the second respondent, a friend of the cousin. The second respondent lost control of the car, which skidded and hit a tree along Changi Village Road. Gurjiv and Pardip died as a result of the accident. They were 17 years old and 14 years old, respectively, at that time.

4 The second respondent left the country after the accident and did not defend the appellants' action against him. Interlocutory judgment in default of appearance was entered against him on 26 April 2004. The second respondent likewise did not appear before the AR at the assessment of damages, or before the Judge or this court in the ensuing appeals. The first respondent, which was the insurer of the car at the material time, included itself as a party to the action after interlocutory judgment against the second respondent was entered so as to defend the quantum of the awards made to the appellants in respect of the deaths of Gurjiv and Pardip.

The decisions below

5 As provided for under s 21(4) of the Civil Law Act (Cap 43, 1999 Rev Ed), the AR awarded the appellants a total of $20,000 for bereavement. He also awarded the appellants a sum of $10,000 for funeral expenses (the parties later agreed on a sum of $7,000 for this particular item). For the dependency claims, the AR awarded $68,508 and $78,165 for loss of dependency arising from the deaths of Gurjiv and Pardip, respectively. The appellants' claim for a sum of $10,000 for post-traumatic shock and depression, plus $200 for the cost of transport to Changi General Hospital ("CGH") to attend grief therapy was denied by the AR.

6 The Judge did not disturb the above aspects of the AR's decision. However, he overruled the AR in respect of the appellants' claim for the cost of fertility treatment undertaken in their attempts, following the deaths of Gurjiv and Pardip, to have another child after natural means of procreation did not succeed. The AR had awarded the sum of $32,847.90 for this head of claim on the basis that it was reasonably foreseeable to persons in the position of the second respondent that their negligence could cause persons such as the appellants to lose the sum total of their offspring in the resulting accident. The Judge considered the expenses incurred by the appellants for the purposes of fertility treatment to be a loss that was too remote and that the first respondent and the second respondent (referred to collectively as "the respondents") should therefore not be held liable for.

The issues on appeal

7 Before us, the appellants argued (in CA 85/2007) for:

(a) an increase in the awards for loss of dependency;

(b) damages for post-traumatic shock and depression; and

(c) the cost of the fertility treatment which they went through.

The first respondent cross-appealed (in CA 86/2007) on the quantum of the awards for loss of dependency. We shall now proceed to deal with each of these issues *seriatim*.

The awards for loss of dependency

8 The breakdown of the AR's awards for loss of dependency arising from Gurjiv's and Pardip's deaths, respectively, is as follows:

	Gurjiv	**Pardip**
Projected median monthly gross salary	$1,730	$2,412.50
Percentage of prospective salary apportioned to the appellants	30%	30%
Multiplicand	$519 (*ie*, 30% of $1,730)	$723.75 (*ie*, 30% of $2,412.50)
Multiplier	11 years	9 years
Total sum awarded	$68,508	$78,165

The Judge upheld the AR's awards.

9 It should be noted that the AR arrived at the above figures for Gurjiv's and Pardip's respective prospective earnings based on the method of calculation submitted by the appellants. In essence, he derived the projected median monthly gross salary for each of the deceased sons by taking *the average* of:

(a) the average median monthly commencement salary of each son; and

(b) the average median monthly salary which that son would have earned ("average median monthly salary").

The figures for both the average median monthly commencement salary and the average median monthly salary were derived from the Ministry of Manpower's "Report on Wages in Singapore, 2005" <http://www.mom.gov.sg/
publish/etc/medialib/mom_library/mrsd/files.Par.35700.File.tmp/mrsd_2005
ROW> (accessed 14 May 2008) ("the MOM Report"), which both parties had accepted as the basis for computing Gurjiv's and Pardip's projected earnings.

10 In CA 85/2007, the appellants sought to raise the proportion of the projected earnings that Gurjiv and Pardip (had they not died in the accident) would have contributed to them from 30% to 40%, and argued that the multiplier should be increased to 13 years in respect of Gurjiv's death and 11 years in respect of Pardip's death. On its part, the first respondent cross-appealed (in CA 86/2007) for a reduction in the multiplicand and the multiplier which would lower the awards for loss of dependency to $25,200 and $17,280 with regard to Gurjiv and Pardip, respectively.

11 Before dealing with the first respondent's specific objections to the AR's awards for loss of dependency, we shall first address its argument that the AR's awards meant that Gurjiv and Pardip would have been expected to contribute a total of $1,242.75 to the appellants every month and that this was "not realistic".[note: 1] The first respondent submitted that the combined multiplicand for both Gurjiv and Pardip should instead be $660 per month, comprising a monthly contribution of $300 from Gurjiv and $360 from Pardip. This "total contribution" argument is untenable. In *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 1 MLJ 325, a Singapore decision that went on appeal before the Judicial Committee of the Privy Council, it was stated (at 326, *per* Lord Fraser of Tullybelton) – which position we affirm – that:

> [T]he only proper way of deciding whether the global award is too low or too high is by assessing the separate items and arriving at a fair total.

Multiplicand

Prospective earnings

12 The first respondent contended that the AR had pitched Gurjiv's and Pardip's employment prospects at a level "much higher than what the evidence show[ed]".[note: 2] In this regard, the first respondent compared the factual matrix of the present appeals with that in *Ho Yeow Kim v Lim Hai Kuen* [1999] 2 SLR 246 ("*Ho Yeow Kim*"), where the deceased son (a 17-year-old accident victim) had already been in the final stages of his mechatronics engineering course at the Institute of Technical Education ("ITE") when he died, such that his employment prospects were less speculative than those of Gurjiv and Pardip at the time of their deaths. The first respondent did not dispute before this court the finding of fact (based on the evidence of the appellants as well as the vice-principal and teachers of Kuo Chuan Presbyterian Secondary School, where Gurjiv and Pardip had been studying at the time of the accident) that Gurjiv and Pardip would likely have attended the ITE and a polytechnic, respectively. However, the first respondent argued that even if Gurjiv and Pardip would have attended these institutions had they lived, there was inconclusive evidence as to what courses they would have pursued. It also took issue with the fact that the appellants did not call any representative from the ITE or a polytechnic to give evidence at the assessment of damages before the AR. We do not give credence to these arguments. The testimony of representatives from the ITE or a polytechnic, who would not have known Gurjiv or Pardip, would not necessarily have been more helpful than the written and oral testimonies of the above-mentioned vice-principal and teachers of Kuo Chuan Presbyterian Secondary School. If the first respondent had wished to adduce contradictory evidence at the assessment of damages before the AR, it should have summoned the appropriate witnesses at that hearing (which it did not do).

13 The first respondent argued that the AR had erred in accepting the appellants' calculations of Gurjiv's and Pardip's prospective average monthly gross salaries, which (so the first respondent contended) were "based on the average between the mean commencement wage and the mean wage at the tail end of the working life".[note: 3] It submitted that the AR should instead have adopted the approach taken in *Ho Yeow Kim* (which was not disapproved on appeal to the Court of Appeal), where the assistant registrar had calculated the deceased son's projected earnings based on the mean

salary of a mechatronics engineering graduate (mechatronics engineering being the course which the deceased son had been pursuing at the time of his death) after six to nine months of employment and the mean salary of such a graduate after five years of employment. In response, the appellants clarified that their calculations of Gurjiv's and Pardip's projected earnings had been based on the average of:

(a) the average median monthly commencement salary, as stated in the MOM Report, of a graduate from either the ITE (in Gurjiv's case) or a polytechnic (in Pardip's case); and

(b) the average median monthly salary, in terms of the average median monthly gross salary for males (likewise as stated in the MOM Report) for the types of employment which Gurjiv and Pardip were likely to have taken up.

14 In our view, even if the first respondent's argument is accepted such that the average median monthly salary which the AR relied on for the purposes of calculating the multiplicand (see [9] above) is replaced with the median monthly gross salary which Gurjiv and Pardip, respectively, would have been expected to earn after five to 15 years of employment, the alternative measure of the multiplicand would not vary substantially from that calculated based on the figures submitted by the appellants and accepted by the AR. The following table compares the average median monthly salary which the AR accepted with each son's median monthly gross salary at the age of 30–34 years (*ie*, after approximately five to ten years' employment) and at the age of 35–39 years (*ie*, after approximately ten to 15 years' employment):

	Gurjiv	**Pardip**
Average median monthly salary	$2,070	$2,850
Median monthly gross salary at 30–34 years of age	$1,893	$2,750
Median monthly gross salary at 35–39 years of age	$2,002	$2,916

As the data demonstrates that the first respondent's alternative calculations would yield median monthly gross salaries that do not differ significantly from those submitted by the appellants and adopted by the AR, we are of the view that the first respondent's objections to the AR's determination of Gurjiv's and Pardip's prospective earnings are without merit.

Amount of prospective earnings to be apportioned to the appellants

15 In terms of how much of their prospective earnings Gurjiv and Pardip were likely (had they lived) to have contributed to the appellants, the AR accepted the first respondent's submission that 30% would be an appropriate rate of apportionment, rather than 40% as claimed by the appellants. In deciding on this percentage, the AR took into account the following considerations:

(a) if Gurjiv and Pardip had not been killed in the accident, they might, in the event of marriage, have reduced the quantum of their contributions to the appellants;

(b) some discount had to be given for the advance receipt of a lump sum;

(c) there would have been two children (*ie*, Gurjiv and Pardip) supporting the appellants;

and

(d) the appellants were not in urgent need for money given the first appellant's present age and earning capacity.

16 The appellants argued that this court should follow its previous decision in *Ho Yeow Kim* ([12] *supra*), where it was held that the deceased son would, on average, have apportioned 40% of his prospective salary to his parents. (As mentioned earlier (at [12]–[13] above), the deceased son in that case had been a mechatronics engineering student at the ITE at the time of his death. He had been assessed to have had a 70% chance of successfully completing his course and graduating from the ITE.)

17 When young persons meet untimely deaths in accidents, any assessment of loss of dependency entails, by its very nature, a measure of estimation. However, this is not a valid reason for applying, in all cases, conservative estimates that would invariably put the defendants in a more advantageous position than the grief-stricken loved ones and future dependants of the victims. In the present appeals, it is both logical and fair to assume, based on an extrapolation from the last available academic results of Gurjiv and Pardip, that they would have completed their studies at the appropriate level had they lived; in this respect, they should not be treated any differently from the deceased son in *Ho Yeow Kim*. Support for this position can be found in the Singapore High Court decision of *Tan Ngo Hwa v Siew Mun Phui* [1998] SGHC 376 ("*Tan Ngo Hwa*"), in which the 16-year-old accident victim, the only child, had not taken either her General Certificate of Education "Ordinary" Level or "Advanced" Level examinations yet at the time of her death. Taking into consideration the financial situation of the victim's family, the judge opined that while the academic results of the victim suggested that she might not have qualified for the local universities, it was likely that her parents could have afforded to send her overseas for her tertiary education. On the basis of this assumption, the judge computed the prospective earnings of the victim and, in turn, the monthly amount which she was likely to have given to her parents from her earnings had she lived. In *Ho Yeow Kim*, Yong Pung How CJ did not question the judge's reasoning when he referred to *Tan Ngo Hwa*.

18 In the circumstances, therefore, we are inclined to raise the apportionment rate in the present appeals to 40% so as to be in line with *Ho Yeow Kim* as well as a more recent Singapore High Court decision, *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR 513. However, in view of the likelihood that both Gurjiv and Pardip would have married and established their own families by their early to mid-20s, which was also the second appellant's stated wish for them, we are of the view that an apportionment rate of 35% would be more appropriate. The multiplicand would thus be $605.50 per month (35% of $1,730) and $844.38 per month (35% of $2,412.50) for Gurjiv and Pardip, respectively – *ie*, the total amount that Gurjiv and Pardip would have contributed monthly had they lived would have been $1,449.88 ($605.50 plus $844.38) ("the sons' total monthly contribution").

Multiplier

19 Taking a broad-brush approach, the AR set a multiplier for each of the deceased sons instead of apportioning each son's contribution between the appellants, as follows (see the AR's GD at [29]):

> … I decided to adopt a broad[-]brush approach and did not distinguish between how much each son would have given to each of [the appellants]. Accordingly, I granted a multiplier of 11 years for Gurjiv and 9 years for Pardip, *to take into account the difference in their ages*. [emphasis added]

20 The appellants sought to raise the multiplier to 13 years and 11 years, respectively, in

relation to Gurjiv's death and Pardip's death. The first respondent, on the other hand, contended that seven years and four years, respectively, would be the more appropriate figures for the multiplier.

21 In the Singapore High Court decision of *Ng Siew Choo v Tan Kian Choon* [1990] SLR 331 at 333–334, [7], Yong Pung How J quoted the following statement of principle by Greer LJ in the English Court of Appeal decision of *Flint v Lovell* [1935] 1 KB 354 at 360:

> In order to justify reversing the trial judge on the question of [the] amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that [the] amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

While bearing the above principle in mind, our view, with respect, is that the multiplier fixed by the AR (and affirmed by the Judge) in respect of each of the deceased sons is unjustifiably low and warrants an upward adjustment.

22 Before we proceed further, we should clarify that while we appreciate the logic of the AR's reasoning in departing, in the circumstances of the present case, from the conventional approach of applying a separate multiplier for each dependant (as illustrated by, *inter alia*, the Singapore High Court decision of *Ling Kee Ling v Leow Leng Siong* [1995] 2 SLR 189 at 191, [8]), we are of the view that adopting a separate multiplier for each dependant is still the preferable approach and, conceptually, the neater solution. Even after accounting for the unusual facts of the present appeals, the AR's approach would, with respect, give rise to difficulties when compared to decided cases. Furthermore, it would tend to obscure dependant-specific factors, such as age and life expectancy, which are important considerations when setting the multiplier. For example, a mother would typically have a longer life expectancy than a father; and, if she was a housewife, she would also for that reason have a greater need for financial support.

23 The main cases in this area of law suggest that the multiplier set by the court usually ranges from between eight to 12 years. In the Singapore High Court decision of *Sim Hau Yan v Ong Sio Beng* [1996] SGHC 256, the accident victim was 26 years old and was working as a supervisor at the time of his death. Goh Joon Seng J fixed the multiplier at nine years for the victim's 56-year-old father and 12 years for the 53-year-old mother.

24 In *Tan Ngo Hwa* ([17] *supra*), both the father and the mother of the accident victim were aged 46 years at the time of her death and 49 years at the date of the assessment of damages. The court set a multiplier of eight years for the father and ten years for the mother, and noted (at [28]) that the defendant's counsel had not objected to an assumed life expectancy of 70 years for each parent. In *Ho Yeow Kim* ([12] *supra*), the father of the deceased son was 49 years old at the time the dependency action was commenced. The Court of Appeal raised the multiplier in that case from seven years to ten years to align it with *Tan Ngo Hwa* (see *Ho Yeow Kim* at [32]–[33]).

25 More recently, in the Singapore High Court decision of *Lee Kwan Kok v Wong Chan Tong* [2004] SGHC 211 ("*Lee Kwan Kok*"), the deceased was 25 years old at the time of his death; his father and his mother were 50 years old and 46 years old, respectively, at that time. The assistant registrar fixed the multiplier at ten years for the father and 12 years for the mother, citing, *inter alia*, statistics published by the Ministry of Health which showed that the average life expectancy of a Singaporean male at the time of the assessment was 77 years while that of a Singaporean female was 81 years.

26 We note that in *Tan Ngo Hwa*, life expectancy was assumed to be 70 years for each parent (*id* at [7] and [28]). Such an assumption was impliedly adopted in *Ho Yeow Kim*, where the Court of Appeal revised the multiplier in respect of the bereaved father from seven years to ten years in view of the decision in *Tan Ngo Hwa* (see [24] above). In comparison, in 2002, when the fatal accident that gave rise to the present appeals took place, life expectancy for male residents in Singapore was 76.8 years and the corresponding figure for female residents in Singapore was 80.6 years (see Singapore Department of Statistics, *Yearbook of Statistics Singapore 2003* at p 10). A longer life expectancy is a factor that, in our view, could justify a slightly higher multiplier being applied than that adopted in previous analogous cases, all other things being equal. We therefore endorse the assistant registrar's reasoning in *Lee Kwan Kok* (in taking into account life expectancy when determining the appropriate multiplier), but with two important qualifications: first, life expectancy should be considered as at the date of the accident, and not at the date of the assessment of damages hearing; and, second, it must be borne in mind that life expectancy remains but one factor in what is essentially a multivariate equation. Therefore, if a case that is analogous to *Tan Ngo Hwa* were to occur today (*ie*, assuming that the fatal accident takes place in 2008), a one-year increase in the multiplier for the father and the mother of the deceased to nine years and 11 years, respectively, would be eminently reasonable and justifiable if there are no other countervailing factors. Similarly, in today's context, a multiplier of 11 years instead of ten years for each parent of the deceased son in *Ho Yeow Kim* would not necessarily be an aberration if the court at first instance finds that the facts support a higher multiplier.

27 We have decided, in the context of the present appeals, to fix the multiplier at eight years for the first appellant and 13 years for the second appellant. The first appellant was 46 years old at the time of Gurjiv's and Pardip's deaths. We are of the view that eight years, which is the same multiplier as that applied to the father of the deceased in *Tan Ngo Hwa*, is reasonable. The first appellant can continue working for another decade or so until he is at least 62 years old, barring any contingencies. Taking into account a discount for the vicissitudes of life and, more particularly, payment upfront, we think it is reasonable to expect that, after his retirement, the first appellant would have sought eight years of financial support from Gurjiv and Pardip had they not died in the accident.

28 The second appellant was 44 years old when her sons died. Taking into account the baseline multiplier of eight years which we have decided on for the first appellant (see [27] above), a multiplier of 13 years for the second appellant is, in our view, justified given her longer life expectancy as well as her greater need for financial support from her sons (she has not worked since 1988, after Pardip was born).

The sums to be awarded to the appellants for loss of dependency

29 In the circumstances, we vary the AR's awards for loss of dependency to provide for a multiplier of eight years in respect of the first appellant and 13 years in respect of the second appellant. Since the second appellant has not worked for a long time, we apportion 65% of the sons' total monthly contribution to her for the first eight years of dependency (the assumption being that the first appellant would no longer be working during this period, but would still have some means of supporting the second appellant, for example, by way of his Central Provident Fund savings). For the next five years, we apportion to the second appellant 75% of the sons' total monthly contribution (the assumption being that she would be on her own during this later period). We set out the necessary calculations as follows:

The sons' total monthly contribution	$1,449.88

The first appellant

Proportion of the sons' total monthly contribution	35%
Multiplier	8 years
Total award to the first appellant	$48,715.97

The second appellant

First eight years

Proportion of the sons' total monthly contribution	65%
Multiplier	8 years
Total for the first eight years	$90,472.51

Subsequent five years

Proportion of the sons' total monthly contribution	75%
Multiplier	5 years
Total for the subsequent five years	$65,244.60
Total award to the second appellant	$155,717.11

30 We should emphasise that the very unfortunate events that gave rise to the present appeals presented a factual matrix that is uncommon (arguably, even unique). As a result, the considerations which we have taken into account in deciding on the appropriate sums to award the appellants for loss of dependency – including the appellants' sudden loss of both of their sons in the same accident and the concomitant loss of all prospects of financial support from either of their two children, as well as the highly unlikely prospect of the appellants having another child in the future – are specific to these appeals, and the sums which we have ultimately decided on cannot be regarded as setting new benchmarks for future cases. Indeed, it is clear that, in this particular area of the law, no one decision can, in any event, be generally regarded as setting firm guidelines or benchmarks as every case turns on its facts (see also, for example, *Tan Ngo Hwa* ([17] *supra*) at [28]).

The claim for post-traumatic shock and depression

The test for establishing a duty of care

31 This court recently re-examined, in some detail, the applicable law in Singapore in respect of claims for damages for psychiatric illness or nervous shock (collectively referred to as "psychiatric harm") sustained as a result of the defendant's negligence (see *Ngiam Kong Seng v Lim Chiew Hock* [2008] SGCA 23 ("*Ngiam*")). In that case, we elaborated upon how claims for psychiatric harm should be analysed within the framework of the two-stage test that this court laid down in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 ("*Spandeck*") for determining whether a duty of care in tort exists ("the *Spandeck* test").

32 Where a claim in negligence for psychiatric harm is concerned, just as in the case of a negligence claim that does not involve psychiatric harm, certain prerequisites must be met before the question of whether a duty of care exists becomes relevant. First, the type of injury suffered must be a "recognisable psychiatric [illness]" (*per* Lord Bridge of Harwich in *McLoughlin v O'Brian* [1983] 1 AC 410 ("*McLoughlin*") at 431); and, second, it must have been factually foreseeable that the plaintiff could sustain psychiatric harm as a result of the defendant's negligence. With those preconditions in place, the *Spandeck* test would then apply, in relation to claims for psychiatric harm, as follows:

(a) at the *first stage*, the court considers whether there was sufficient *legal proximity* between the plaintiff and the defendant at the material time, with the three factors set out by Lord Wilberforce in *McLoughlin* at 422 playing an important role at this stage of the inquiry; *and*

(b) at the *second stage*, the court considers whether there are any *public policy* factors that militate against the court imposing a duty of care on the defendant even though the first stage of the *Spandeck* test has been satisfied inasmuch as it has been established that sufficient proximity existed between the plaintiff and the defendant.

33 As we explained in *Ngiam* (at [47], [48] and [57]), the "three elements inherent in any claim" (*per* Lord Wilberforce in *McLoughlin* at 422) for psychiatric harm, as distilled by the learned law lord in that case (*ibid*), relate to the issue of proximity between the parties and are thus applied under stage one of the *Spandeck* test. In summary, these three elements or specific "proximities" are:

(a) the class of persons whose claims should be recognised by virtue of relational ties;

(b) the proximity of such persons, in terms of space and time, to the event which is alleged to have caused psychiatric harm; and

(c) the means by which the shock is caused.

Stage two of the *Spandeck* test is confined to pure *public policy* considerations, or what Lord Wilberforce referred to (in *McLoughlin* at 421) as the "policy arguments against a wider extension" of liability.

Whether the second respondent owed the appellants a duty of care

34 An application of the *Spandeck* test (as set out at [32] above) to the appellants' claim for damages for post-traumatic shock and depression has led us to affirm both the AR's and the Judge's decisions (which were arrived at on different grounds) that this particular head of claim must be dismissed. This is despite our deep sympathy for the appellants, given the devastating loss that they have suffered.

35 We have no doubt that the appellants experienced, and are continuing to experience, grief of a magnitude that is unimaginable to persons who are not in their position. We note that on the referral of a doctor at Singapore Airport Terminal Services Ltd (the first appellant's employer), the appellants attended grief therapy at CGH from sometime in early 2003 to April 2005. A medical report dated 28 April 2005 ("the Medical Report") by Dr Angelina Chan,[note: 4] a consultant psychiatrist at CGH, stated that after the tragic accident, the first appellant took medical leave from work for about two to three months because "he was depressed, unable to concentrate at tasks and needed time with his wife [*ie*, the second appellant] to grieve" (see p 2 of the Medical Report). After returning to work, the first appellant only worked morning shifts because the second appellant was "uncomfortable being at home alone at nights" (*ibid*). The appellants had been "depressed and mourning over the loss of their children" (see p 1 of the Medical Report) since the accident. The family had been "very close-knit" (*ibid*); therefore, the appellants were finding it "extremely difficult to cope with adjusting to the change at home and family life as a result of loosing [*sic*] both their sons" (*ibid*). The Medical Report concluded (at p 2) that:

> As [the appellants'] relationship with their sons [was] extremely close, it is not uncommon for their grief reactions to be protracted especially since there may not be a closure to the incident as the driver has yet to be arrested.

36 At the hearing before us, counsel for the first respondent argued that grief was not a recognisable psychiatric illness and that since the Medical Report did not mention that the appellants had suffered any other form of psychiatric harm that constituted a recognisable psychiatric illness, the appellants' claim could not succeed. Counsel for the appellants, on the other hand, stressed the protracted nature of the appellants' grief and depression and the fact that the first appellant was so affected by Gurjiv's and Pardip's deaths that he could not work for some months after the accident.

37 To a layperson, the argument over the meaning of "grief" and how ordinary grief and sorrow or pathological grief (none of which constitutes a recognisable psychiatric illness) may be distinguished from reactive depression (which is a recognisable psychiatric illness) may seem to be a needless squabble over semantics that ignores the underlying human tragedy which gave rise to such grief. However, this clearly is *not* the case because the law has to circumscribe liability for psychiatric harm within certain limits. Indeed, such an approach is also reasonable and fair when viewed from an extralegal perspective. Lord Oliver of Aylmerton put this point well, yet with compassion, in the House of Lords decision of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416–417, as follows:

> Grief, sorrow, deprivation and the necessity of caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. *It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.* In my opinion, the necessary proximity cannot be said to exist where the elements of immediacy, closeness of time and space, and direct visual or aural perception are absent. [emphasis added]

38 There is also a risk of double recovery if grief is recoverable under the tort of negligence. As stated earlier (at [5] above), s 21 of the Civil Law Act provides an award for bereavement (currently fixed under s 21(4) at $10,000 in respect of each victim of a fatal accident that is caused by a wrongful act, neglect or default) for the benefit of certain very close relatives of the victim. This award for bereavement replaced the previous award to the estate of a deceased person for "loss of

expectation of life", which award was "usually regarded as a 'solatium', a consolation, to the close relatives of the deceased" (see the second reading of the Civil Law (Amendment) Bill 1987 (Bill 1 of 1987) in *Singapore Parliamentary Debates, Official Report* (4 March 1987) vol 49 at col 68). In our view, the main difference between an award for bereavement and an award for "loss of expectation of life" lies in the persons who can bring claims for such awards; both awards would cover consolation for grief.

39 We are cognisant that in the English Court of Appeal decision of *Vernon v Bosley (No 1)* [1997] 1 All ER 577 ("*Vernon*"), the plaintiff succeeded in his claim for damages for psychiatric harm, notwithstanding the fact that he had suffered pathological grief as a result of witnessing the unsuccessful rescue efforts to save his children, who were trapped in a car that had veered off the road and crashed into a river. *Vernon* can, however, be distinguished from the present appeals because the plaintiff in that case was assessed to be suffering from *both* post-traumatic stress disorder (which was *actionable*) as well as pathological grief disorder ("PGD") (which, on its own, was *not* indisputably actionable). *Vernon* was also a majority decision of two to one, and one of the judges in the majority, Evans LJ, explained his decision to allow the claim as follows (at 604–605):

> … I would hold that damages are recoverable for mental illness caused or at least contributed to by actionable negligence of the defendant ie in breach of a duty of care, notwithstanding that the illness may also be regarded as a pathological consequence of the bereavement which the plaintiff, where the primary victim was killed, must inevitably have suffered.

40 The other judge in the majority in *Vernon*, Thorpe LJ, was more inclined to accept a broader definition of "recognisable psychiatric illnesses" (*per* Lord Bridge in *McLoughlin* ([32] *supra*) at 431). He noted (at 611) that "PGD may be a recognisable psychiatric illness", citing Dr Colin Murray Parkes, "Bereavement" (1985) 146 British Journal of Psychiatry 11.

41 Without resolving the debate about whether PGD is actionable (since it is not at issue in the present appeals), we would emphasise that the absence of sufficient evidence that the appellants suffered from a recognisable psychiatric illness is not the only basis on which we disallow their claim for post-traumatic shock and depression. We also agree with the AR that the second respondent did not owe the appellants a duty not to cause them psychiatric harm. At stage one of the *Spandeck* test, the second and the third factors or "proximities" stated by Lord Wilberforce in *McLoughlin* ([32] *supra*) were not present as the appellants: (a) were not close to the scene of the accident, in terms of both time and space; and (b) were not involved in the "aftermath" of the accident. Although the appellants had rushed to the hospital upon hearing news of the accident, there was no suggestion that they had witnessed Gurjiv and Pardip suffering in pain before the sons died, or that they had seen their sons' bodies in their badly-injured state. There was therefore insufficient (legal) proximity between the appellants and the second respondent for the purposes of establishing a duty of care on the part of the latter *vis-à-vis* the former.

42 At this juncture, we would reiterate the point we made in *Ngiam* ([31] *supra* at [97]), in relation to proof of a recognisable psychiatric illness in claims in negligence for psychiatric harm, about the desirability of adducing evidence from an *independent* psychiatric expert whose appointment is either agreed to by both parties or made by the court. Such an expert should be called to testify before the assistant registrar or the trial judge in order to give both the parties and the court the fullest opportunity (via *independent* evidence) to resolve all the terminological ambiguities that could arise in determining whether the plaintiff did suffer from a recognisable psychiatric illness.

The cost of fertility treatment

43 The accident left a terrible void in the appellants' lives which they hoped to fill by having another child. When attempts at natural procreation did not succeed, they sought treatment at National University Hospital in 2003, and the second appellant underwent intra-uterine insemination. This treatment was unsuccessful. The appellants were then referred to Dr Foong Lian Chuen ("Dr Foong"), a consultant obstetrician and gynaecologist at Gleneagles Hospital, who advised them that, in view of the second appellant's age, in vitro fertilisation ("IVF") was likely to be their best option. The appellants were informed of the risks involved. The first attempt at IVF using the second appellant's ovarian eggs failed. The second appellant then underwent a second IVF procedure using ovarian eggs donated by her 39-year-old sister. This attempt led successfully to pregnancy; unfortunately, the pregnancy failed to develop past eight weeks.

44 The AR allowed the appellants' claim of $32,847.90 for the cost of the fertility treatment undertaken after their unsuccessful attempts to conceive a child naturally to "replace" their deceased sons. The Judge adopted a different view and allowed the first respondent's appeal against the AR's award for the cost of fertility treatment.

45 This novel head of claim throws into sharp relief the fact that in analysing a claim in tort, the question of "reasonable foreseeability" is pertinent at more than one level. Each level, however, is substantively distinct from the other. To elaborate, the first level is whether it was reasonably foreseeable that the tortfeasor's negligence could cause harm to the victim of the tort ("the tort victim"). This question is concerned with whether the tortfeasor owed the tort victim a duty of care. The second level at which "reasonable foreseeability" operates is in terms of the type of injury that the tortfeasor could reasonably have foreseen his negligent act or omission as causing the tort victim, assuming that it has been established that the tortfeasor owed the tort victim a duty of care and did breach that duty of care. This goes to the question of *remoteness of damage*, another area of the law of torts that, unfortunately, remains mired in uncertainty.

Existence of a duty of care

46 The AR stated the duty of care, the existence of which was to be determined, as follows (at [51] of the AR's GD):

> [W]hether 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 [have a] substitute for their lost children.

On the other hand, the Judge stated the issue as follows (see the Judge's GD at [33]):

> [W]hether a motor insurer [such as the first respondent] should be liable under a motor policy to indemnify bereaved parents for expenses incurred in their attempt to conceive a child after the death of their child in a motor accident.

On a closer reading, the Judge's formulation was only slightly broader than the AR's inasmuch as it did not expressly limit liability to only those parents who became childless after all their living children died in the same accident.

47 The AR came to the conclusion that a negligent driver did owe a duty of care to the parents and loved ones of a person whose death he negligently caused on the following basis (see the AR's GD at [48]):

> I think [the negligent driver] should equally be expected to know and contemplate that such

victims [*ie*, the victims of his negligent driving] 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. [emphasis in original]

48 In our view, the AR's finding stretches the powers of foreseeability of a driver too far. Where a driver's negligent driving kills a child or children (for ease of reference, we shall use the term "the victims" in this paragraph to cover both possibilities) travelling in another car, the driver may not know whether the victims have a living parent or parents. It is likely that the victims may have such a parent or parents, and (to that extent) we can concede that the driver is expected to know that the victims have a living parent or parents. But, is the driver also expected to know that the victims would constitute all the children of the parent or parents, when it is arguable that the driver should not be expected to know that the victims are all from the same family? Even if we fix the negligent driver with such a degree of (factual) foreseeability, for example, where the driver is a friend or a relative of the victims, the problem arises as to whether the driver is expected to know, further, that the parents would be of any particular age or have any particular medical condition such that they would have to resort to assisted reproduction by medical means to fulfil their desire to replace their deceased offspring. In our view, we do not think that it is justifiable to fix the driver with such a degree of foresight as to impose a common law duty on him in these circumstances. While the lack of factual foreseeability is an important premise for our decision that the second respondent did not owe the appellants the relevant duty of care, we would also add that there was *insufficient legal proximity* between the appellants and the second respondent at the material time. The second respondent could not be regarded as having assumed the broad duty of ensuring that the appellants would not be rendered childless by his negligent driving, and, conversely, it could not be said that the appellants relied on him to assume that level of legal responsibility.

49 The appellants' claim for the cost of fertility treatment, in our view, also fails *stage two* of the *Spandeck* test. We note that the AR attempted to circumscribe liability in this regard by limiting it to only those plaintiffs "of a certain mindset" (see the AR's GD at [51]), that is, "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)" (*id* at [61]). Looked at in this light, so the AR reasoned, there would be less risk of a proliferation or floodgate of claims arising from recognising the appellants' novel head of claim. The AR opined that apart from claims by parents who, like the appellants, had tragically lost all their children in a single accident, only two other classes of persons could avail themselves of damages under this head of claim, namely (*id* at [63]):

(a) an orphan who incurred incidental expenses in finding new guardians; and

(b) a bereaved spouse who was unable, under normal circumstances (perhaps due to disability), to find a new partner and who had to engage the assistance of a marriage agency in this regard.

50 With respect, we cannot agree with such an approach. Take, for example, a family that has several daughters and only one son, and assume, further, that the parents had high hopes that the son would carry on the family name. Unfortunately, the son is killed in an accident caused by a driver's negligence, and the parents then undergo fertility treatment in the hope of conceiving another son. Should such parents be allowed to claim the cost of fertility treatment, assuming that (like the appellants) they are also of relatively advanced age? If, despite their relatively advanced age and their lack of success at natural procreation, such parents are denied recovery (on the ground that they still have other surviving children even though they have lost their only son) whereas the claims of parents in the position of the appellants are allowed, this would lead to inconsistent and unjust results. Another example of potential discrimination would arise in the case of a child who is

raised by loving and supportive grandparents or other relatives because his parents are not in a position to take proper care of him. If such a child loses his guardians (say, both grandparents) in an accident, should he be denied recovery for the expenses incurred in attempting to find new, responsible and caring guardians simply because, under the law, his parents have to provide for him? As for the claim by a bereaved spouse for the cost of engaging the services of a dating and marriage agency to find a new spouse, the use of such services is commonplace nowadays. If a relatively young, bereaved spouse who has no physical disability argues that he has an extremely demanding job and that his chances of finding a new partner without the aid of a dating and marriage agency are therefore slim, or, if such a spouse has not succeeded in finding a new partner through his own efforts after a period of time and thus enlists the assistance of a dating and marriage agency, on what grounds should the court distinguish his case from that of the bereaved spouse whom the AR had in his contemplation at [63] of the AR's GD (see [49] above)? Another scenario to be considered, in the context of a bereaved spouse, is that of a young widow whose husband's death was caused by a negligent driver. The widow could assert that it ought to have been within the contemplation of a reasonable person, including the driver, that someone in her position would wish to, and would likely, remarry. Should she then be allowed to recover the expenses incurred for her second wedding? As can be seen from the foregoing examples, if this court were to allow the appellants' claim for the cost of fertility treatment, the boundaries of liability would expand without any sound legal basis or clear direction, and society as a whole would be worse off.

51 In essence, in challenging the Judge's decision to disallow their claim for the cost of fertility treatment, the appellants are asking this court to recognise that they have a right at common law to replace their deceased sons (Gurjiv and Pardip), who were all the children that they had. We do not believe that we can or should recognise such a right, as a matter of both law and policy, even though we are deeply sympathetic towards the appellants' plight. Human beings are unique. The law makes provision for damages to alleviate the pain and suffering arising from the loss of a loved one, but that is the furthest extent of compensation that the law permits. As a matter of policy, defendants should not be liable for the costs of "replacing" a loved one since there is no fundamental or legal right to "replace" a deceased person. Further, while this point is not crucial to our decision, we would record our agreement with the Judge's opinion (at [39] of the Judge's GD) that if the appellants' claim for the cost of fertility treatment were allowed, there would be an attendant danger of double compensation. As mentioned above (at [38]), the law already provides for an award for bereavement and an award for loss of dependency. The damages awarded under these two heads rest on the premise that the deceased person will not be "replaced".

52 Another policy concern arising from the appellants' claim for the cost of fertility treatment is the prospect that the availability of such compensation could change the matrix of post-accident options available to tort victims. The courts have, therefore, to be very cautious about holding a defendant liable for the plaintiff's subjective post-accident choices, even if the defendant did breach a duty of care which he owed to the plaintiff. In this instance, for example, Dr Foong was of the opinion that for a 45-year-old woman in the second appellant's situation, the success rate of IVF – that is, the chance of obtaining a foetus with a heartbeat – was less than 5% if the procedure was carried out using the woman's own ovarian eggs.[note: 5] If IVF was attempted using ovarian eggs from a donor, the success rate would be the same as the donor's chance of conceiving. (In the present case, since the second appellant used donor eggs from her 39-year-old sister for the second IVF procedure (see [43] above), the success rate for that second procedure would be about 15%.[note: 6]) In both cases, even if IVF did result in a foetus with a heartbeat, the chance of a successful delivery would be one fifth of the chance of obtaining a foetus with a heartbeat.[note: 7] Whilst it is one thing to empathise with the appellants' profound desire to have another child to fill the void in their lives, it is quite another thing to hold the respondents liable for the cost of the fertility treatment which the appellants sought, given that the chances of success were so remote.

Remoteness of damage

53 The Judge disallowed the appellants' claim for the cost of fertility treatment mainly on the ground of remoteness of damage. He stated as follows (see the Judge's GD at [38]):

> The [appellants'] claim for the cost of fertility treatment does not concern consequential losses as they had not suffered any physical harm from which economic losses flowed. In my view, this claim fails because of the rule on remoteness of damage, which is another important control mechanism for negligence claims.

54 As a preliminary point, we would respectfully clarify that the extract above should not be read as equating damage that is too remote with damage that is not "consequential" (nor do we think that the Judge intended such a reading). Before the decision of the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 ("*The Wagon Mound*"), that was indeed the position of the law – *ie*, the defendant was liable for all of the plaintiff's losses that were a direct consequence of his negligence (see the English Court of Appeal decision of *In re An Arbitration between Polemis and Furness, Withy and Company, Limited* [1921] 3 KB 560 ("*Polemis*") at, *inter alia*, 570, 572 and 577). *The Wagon Mound* heralded a radical departure from this position. In that case, the defendant's negligence resulted in furnace oil spilling into the sea. The oil spread across the water and came to lie beneath the plaintiff's wharf, where welding operations were being carried out. A fragment of molten metal set the oil ablaze, damaging the plaintiff's wharf. The Privy Council held that the fire was not reasonably foreseeable because the scientific knowledge available then was that furnace oil had a very high flashpoint and would not ignite easily. Thus, the defendant was not liable for the damage to the plaintiff's wharf. Viscount Simonds (who delivered the judgment of the Board) stated the principle established in *The Wagon Mound* in emphatic terms, as follows (at 422–423):

> Enough has been said to show that the authority of *Polemis* has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

55 We agree with the Judge that the costs incurred by the appellants in undergoing fertility treatment in the hope of having another child were not reasonably foreseeable by the respondents since, in the first place, the fact that the appellants would become childless was not reasonably foreseeable. This determination supplements our primary decision that the appellants cannot recover the cost of fertility treatment because the duty of care owed by the second respondent to the appellants did not include a legal liability to bear the appellants' costs of starting a family again in the event that his negligence caused the deaths of all of the appellants' living children.

Other observations

56 Since the appellants' claim for the cost of fertility treatment is a novel head of claim in

negligence, we believe, at this juncture, that it would be helpful to make some observations on the distinction between non-recovery on account of: (a) the absence of factual foreseeability or legal proximity, which in turn precludes a duty of care from arising; and (b) the damage sustained being too remote. This would also serve to explain why our primary decision in respect of this particular head of claim is in fact capable of standing on its own without the need to consider if the damage alleged by the appellants was too remote.

57 The rule in relation to remoteness of damage acts as the final line of defence, so to speak, against an excessively wide scope of liability. It is, as V K Rajah JA stated in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782, the line that marks out the boundary at which the law distinguishes claims giving rise to "full reparation for the loss suffered" (at [56]) from those that would impose an "excessive burden … on human activity" (*ibid*) if the wrongdoer were to be bear all the consequences of his default. The point where this line is to be drawn is informed by "legal policy and accepted value judgment" (*ibid*). What is important to emphasise again is that before the question even arises as to whether the damage alleged by the plaintiff is too remote, the defendant must first be held to have caused such damage *in breach of* his duty of care towards the plaintiff.

58 Finally, as a point of contrast, it is instructive to refer to the decision of this court in *Tan Hun Hoe v Harte Denis Mathew* [2001] 4 SLR 317 ("*Harte*"), which the appellants cited in support of their arguments. In that case, the plaintiff ("Mr Harte") and his wife ("Mrs Harte") had been trying to start a family for some time, without success. Mr Harte then underwent an operation known as bilateral varicocelectomy, which was supposed to improve his fertility. However, due to a fall that Mr Harte sustained shortly after the operation and the defendant surgeon's lack of post-operation care following that fall, Mr Harte suffered permanent damage to his testicles. Amongst the claims that Mr Harte brought against the surgeon was a claim for the cost of two procedures – namely, testicular sperm extraction and intracytoplasmic sperm injection ("ICSI") – that he and Mrs Harte subsequently underwent in the hope that he could father a child. The appellants highlighted that Mr Harte was already sub-fertile before the operation and that Mrs Harte was a "secondary victim"; yet, the former was allowed to recover the costs of the fertility and hormone replacement treatment undertaken.

59 *Harte* can be readily distinguished from the facts of the present appeals. The purpose of the bilateral varicocelectomy operation in *Harte* was to improve sperm quality. This court accepted Mr Harte's submission that the operation had been successful and that, but for his fall and the subsequent lack of post-operation care extended by the surgeon, there should have been "more than an even chance" (*id* at [82]) – based on the surgeon's opinion and other evidence before the court – that Mr Harte's sperm quality would have improved, in which case it would probably not have been necessary for Mrs Harte to undergo ICSI or other assisted means of fertilisation in order to achieve pregnancy. The harm suffered in *Harte* (*viz*, undergoing assisted means of fertilisation because of the low chance of natural conception and the associated expenses) was reasonably foreseeable since it would have been clear to the surgeon that Mr Harte and Mrs Harte were very keen to have children. That knowledge put the surgeon in a very different position from that of a negligent driver such as the second respondent.

Conclusion

60 For the reasons stated above, the appellants' appeal (*ie*, CA 85/2007) in respect of the awards for loss of dependency is allowed in so far as the proportion of Gurjiv's and Pardip's prospective earnings which is to be apportioned to the appellants is raised to 35%, and the multiplier is increased to eight years for the first appellant and 13 years for the second appellant, respectively. It follows, therefore, that the first respondent's cross-appeal on this issue (*ie*, CA 86/2007) is

dismissed.

61 CA 85/2007 is, however, dismissed in so far as the appellants' claims for post-traumatic shock and depression and for the cost of fertility treatment are concerned. Since the appellants have succeeded only in part in CA 85/2007, we order each party to bear its own costs for that appeal. The costs for CA 86/2007 will be borne by the first respondent. The usual consequential orders are to follow. The costs orders made in the proceedings below are to stand.

[note: 1]See para 17 of the Appellant's Case filed by the first respondent in respect of its cross-appeal in CA 86/2007.

[note: 2]*Id*, at para 14.

[note: 3]*Id*, at para 15.

[note: 4]See the Appellants' Core Bundle (vol 2, at pp 54–55) filed in respect of CA 85/2007.

[note: 5]See p 5 of the certified transcript of the notes of evidence of the assessment of damages before the AR on 27 February 2007.

[note: 6]*Id*, at p 18.

[note: 7]*Id*, at p 25.