AYW *v* AYX
[2015] SGHC 312

Case Number : Suit No 102 of 2015 (Registrar's Appeals No 219 and 230 of 2015)

Decision Date : 07 December 2015

Tribunal/Court : High Court

Coram : George Wei J

Counsel Name(s) : Renganathan Shankar and Manoj Prakash Nandwani (Gabriel Law Corporation) for the plaintiff; Thio Shen Yi, SC and Sharleen Eio Huiting (TSMP Law Corporation) for the defendant.

Parties : AYW — AYX

Civil procedure – striking out

Tort – negligence – duty of care

Tort – negligence – causation

Tort – negligence – aggravated damages

7 December 2015 Judgment reserved

George Wei J:

1 Schools are vital institutions in which young people spend significant portions of their formative years learning, making friends, and growing into young adults. It is the place where children take their first tentative steps out of the home environment. From nursery school all the way to university, interaction with "strangers", peers and teachers is part and parcel of school-life and the learning process.

2 Whilst there was no direct evidence on this point, the fact that the school environment is academically and socially competitive is well-known. The pressure on children and teachers vary across the years. Quite apart from the pressure to "do well" academically as well as in various co-curricular activities, there is no doubting the competitive social environment, perhaps especially so, when children are given increasing independence and responsibility within the school environment in their later years. The physical and emotional vulnerability of students during their pre-teen and teenage years can be especially trying for children, parents, and indeed, the educators.

3 There is no dispute that as a general principle, schools owe their students a duty in law to provide a safe and secure environment for learning and growing. The broad question that arises in the present case is the *extent or scope* of that duty. This involves both the problem of defining the content of the duty of care, as well as determining whether there has been a breach of the duty, on the facts and circumstances. What is stressed at the outset is that these issues have arisen in the context of a striking out application.

4 The plaintiff, a 15-year-old student at the material time, sues her former secondary school ("the School"), in the tort of negligence for failing to effectively intervene to stop what she claims to be "bullying" by her peers. The School has taken up an application to strike out the action, and the

matter came before me on appeal from the assistant registrar's ("AR") decision to strike out only a portion of the statement of claim.

5 Quite apart from the broad question of the scope of a school's duty of care to its students in relation to bullying, the pleaded case also raises the question as to when, if ever, it is appropriate to award aggravated damages in the tort of negligence. Are these questions suitable or capable of being determined in a striking out application?

6 Having considered the case as pleaded in the statement of claim as well as the parties' submissions, I am striking out the plaintiff's entire claim on the ground that it is legally and factually unsustainable. My reasons for doing so will be explained in the paragraphs that follow.

Brief factual background

7 The plaintiff was a student of the School from 2010 to 2013. She has an exceptional talent in music. At the time of the claimed bullying, from 2012 to 2013 ("the material time"), the plaintiff was a member of the school's Chinese orchestra ("CO"). As the secretary of the CO, she was a part of its executive committee ("EXCO"). The EXCO comprised the School's students and was under the overall supervision of the School.

8 The factual substratum of this action finds its origins in the disputes that the plaintiff had with her fellow CO EXCO members beginning from about mid–2012.

9 According to the plaintiff, in July 2012, she was informed by a teacher-in-charge that she was selected to be the orchestra's student conductor along with another student. [note: 1] However, because the other CO EXCO members were unhappy at her dual appointment as student conductor and secretary, [note: 2] they eventually removed her as student conductor in early August 2012. [note: 3] The School denies that the plaintiff was ever appointed as student conductor, but asserts instead that she was merely nominated to go for a training course on conducting. [note: 4] As will become clearer, however, little needs to be made of this minor factual dispute. What should be noted is that the unhappiness between the plaintiff and her peers, as well as the alleged bullying, started from August 2012 and was sparked off by these events.

10 In fact, on or about 8 August 2012, the plaintiff's parents intervened in the unhappy state of affairs by sending an email to, *inter alia*, the School's deputy principal expressing their dissatisfaction at the process by which the CO chairman and student conductor were selected, and asking for an explanation as to why their daughter was not selected for either position. [note: 5] Indeed, this was merely the start of a long series of interactions and meetings between the plaintiff's parents and the principal, deputy principals, and various teachers of the School.

11 From August 2012 all the way to the point when the plaintiff communicated her decision to withdraw from the School (sometime in May 2013), the plaintiff's parents, in particular, her mother, met with various staff and teachers from the School to express her concerns about her daughter being bullied in school. [note: 6] Particulars of the bullying complained of will be set out below when the plaintiff's pleaded claim is discussed.

12 As mentioned, by way of a letter sent in May 2013, the plaintiff's parents informed the School that the plaintiff would be withdrawing from the School from July 2013. As of January 2013, the plaintiff already had a confirmed place in a specialist music school in the United Kingdom ("UK") for

pre-university students. [note: 7]

13 The plaintiff has since completed her A-level examinations in the UK and appears to be heading to the University of Oxford to pursue a music degree this year. [note: 8]

Plaintiff's claim

14 Whilst the plaintiff is now headed for the University of Oxford to pursue her studies in music, the plaintiff and her parents remain deeply concerned about what happened to the plaintiff in the year she spent at the School before she left. I accept that the plaintiff was emotionally affected by the incidents that took place in her last year at the School (especially bearing in mind that this is a striking out application). I point out, however, that there is no evidence or indeed assertion in the pleadings that the events in the School caused any *psychiatric* injury. Moreover, aside from a bare claim for "future medical expenses, if any", it does not appear that the plaintiff suffers from any *continuing*, actionable harm.

15 This does not, of course, mean that the plaintiff did not suffer *any* actionable loss or injury from the alleged bullying in the School. Specifically, she claims damages for physical injuries (irritant dermatitis), pain and suffering, and loss of amenity. [note: 9] She also claims for future medical expenses (if any) and special damages including the costs of her A-level education in the UK. Finally, she claims for aggravated damages. [note: 10] I pause to make the observation that there is a conspicuous absence of particulars in the pleadings in respect of the plaintiff's claim for pain and suffering, loss of amenity, and aggravated damages. The absence of particulars alone is not ordinarily a sufficient basis for striking out. But in the present case, given that there have been two rounds of amendments to the statement of claim, I found the absence of particularisation troubling.

16 I turn now to the details of the bullying pleaded in the plaintiff's statement of claim. These particulars lie at the heart of the present claim. I note that there is some dispute between the parties as to whether the pleaded conduct even amounts to "bullying". The relevance of this dispute will subsequently be considered. In this judgment, for ease of reference only, I shall refer to the said conduct as "the bullying". This should not, however, be construed to mean that the court agrees with the plaintiff's case that the conduct does amount to bullying (whatever the term means).

17 Particulars of the bullying are set out at paragraph 7 of the amended statement of claim. As counsel for the School, Mr Thio Shen-Yi, SC ("Mr Thio") observed in his submissions, these particulars were only added after the School pointed out that the original statement of claim was bereft of details. [note: 11] The bullying pleaded took place during two distinct time periods, and the substance of the bullying complained of changed in the second time period.

18 The first spate of alleged bullying took place between August and September 2012. It primarily consisted of negative comments, attitudes and reactions the other CO members expressed and held towards the plaintiff arising from the selection of the new CO EXCO and the plaintiff's desire for two separate positions. This is the substance of the particulars pleaded in the statement of claim:

(a) Between 7 and 8 August 2012, the Chairperson and the Vice Chairperson of the CO EXCO informed the plaintiff that she would no longer be student conductor and that another student would be the sole student conductor: para 7(a).

(b) Between 7 and 8 August 2012, the plaintiff was informed by the Chairperson and/or the Vice Chairperson of the CO EXCO that the EXCO was "freaking biased" against her, that the EXCO

has been "mean" to her, and that she was selfish for wanting a "double role" as student conductor and secretary: para 7(a).

(c) On 8 August 2012, the Vice Chairperson of the CO EXCO informed the plaintiff that the EXCO ostracised her and that it was "bitchy" of the EXCO to do so: para 7(b).

(d) Sometime between July and September 2012, the plaintiff was labelled as "greedy" and as desiring undue attention and/or "glam and glory" for wanting two positions in the EXCO: paras 7(c) and (d).

(e) Sometime between July and August 2012, the plaintiff was repeatedly badgered by a student in school regarding why she wanted to continue to be student conductor: para 7(e).

19 The second spate of alleged bullying took place between January 2013 and March 2013. The conduct complained of here primarily consisted of critical or mocking comments made by the students and ex-students of the School on social media websites about the plaintiff's and/or her parents' complaints to the School.

(a) After a student apologised to the plaintiff, another student responded to the fact of the apology by tweeting on the social media site, Twitter, on 31 January 2013 that they would "all be fine": para 7(f).

(b) On 22 March 2013, a student tweeted that the plaintiff's complaints about bullying were an attempt to "make bigger waves in the sea" and that the School "can't solve it, can they?": para 7(g).

(c) On 22 March 2013, a student tweeted that the school had "done nothing" because the plaintiff did not have a "legitimate case" and that the plaintiff should "shut up and fade away": para 7(h).

(d) On 23 March 2013, a student tweeted "Monday is when we unite: D". This was re-tweeted and marked as a favourite by six other CO students: para 7(i).

(e) On 23 March 2013, an ex-student of the School tweeted that the principal's office was becoming a "hot tourist attraction" in response to the fact that many students were seeing the school principal over the plaintiff's complaints: para 7(j). In response, the student referred to at (b) above tweeted that the plaintiff's complaint was baseless, she was essentially a coward, and that the ex-student may "need a plane ticket to the UK" because the school may have read her tweet about the principal's office: para 7(k). The plaintiff's case on this is presumably that the girls were mocking her for considering going to the UK in response to the bullying.

20 There are two other pleaded incidents of bullying in the statement of claim, but neither the persons responsible for the conduct pleaded, nor the date on which the conduct took place, has been particularised.

(a) On one occasion, one of the CO members saw the plaintiff at the school foyer and loudly said within the plaintiff's earshot that she "feels like announcing to the whole world that we got distinction for SYF": para 7(l). "SYF" refers to a national music student competition which the CO took part in, but which the plaintiff did not.

(b) On various occasions, the plaintiff received cold shoulders and piercing stares: para 7(m).

21 The statement of claim does not go into the details of how the School breached its duty of care *on the facts*, but the crux of the plaintiff's complaint is that the School failed to effectively intervene to stop the bullying and/or protect the plaintiff from it. Paragraph 8 of the amended statement of claim, for example, alleges that the School had "failed/neglected and/or omitted to take any or any adequate steps and/or effective measures to address, rectify and/or stop the distressing conduct and/or behaviour of the Plaintiff's peers and/or the Defendants' students and/or perpetrators towards the Plaintiff". Paragraph 26 of the amended statement of claim sets out with more specificity what the defendant allegedly failed to do (*eg*, failed to detect, prevent and/or stem further acts of labelling, ostracizing and/or bullying, failed to put in place any structure or accountability to protect the plaintiff from her peers, *etc*).

22 As a consequence, the plaintiff claims to have suffered from eczema (irritant dermatitis) and to have been "forced" to leave Singapore to go to the UK to complete her A-level education, something she never intended to do and which she would not have done but for the acts of bullying.

23 I pause here to observe that by and large, the acts of bullying comprised rude, insensitive, and sarcastic remarks and posts made both online and in school. While the plaintiff claims to have been ostracised, there was no threat of or actual physical violence. Further, it is to be noted that there was an extended gap between the two alleged episodes of bullying (from approximately end August 2012 to January 2013) when no acts of bullying occurred (or were pleaded) and during which discussions and meetings between the plaintiff's parents and the defendant school were taking place.

The AR's decision and the appeals before me

24 The AR did not strike out the entire claim primarily on the ground that there were novel questions of law involved, and that it was possible that "covert" acts of psychological bullying could form the basis of an actionable tort. The AR observed that "expressions of aggression in an all girl's environment can sometimes take the covert form of relational and social isolation." The AR also held that cyberbullying was a real problem and that the extent of a school's duty of care towards its students in preventing and addressing acts of cyberbullying was a real and novel issue best left to the trial court. However, she observed that the statement of claim was prolix and directed the plaintiff to amend or delete certain repetitive and/or vague paragraphs. Significantly, the AR struck out the plaintiff's claim for the costs of her A-level education in the UK on the basis that factual causation was not demonstrated.

25 The plaintiff appeals against the decision that her claim for the costs of her A-level education in the UK be struck out, [note: 12] and the defendant appeals against the AR's refusal to strike out the whole statement of claim. In the alternative, the defendant appeals against the AR's decision not to strike out certain paragraphs about the duties owed by the School, the claim for eczema, and the claim for aggravated damages. [note: 13]

Outline of the judgment

26 Several issues relating both to the threshold for striking out an action, as well as the tort of negligence, arise in the present application. I shall first discuss the general principles which govern a striking out action. In particular, when, if ever, should a court strike out an action which raises novel questions of law?

27 Thereafter, I consider the broad structure of the tort of negligence and in particular, the distinction between (i) defining the scope of the duty of care asserted; and (ii) defining the standards

of care owed (in the context of breach of duty).

28 As mentioned above, I have found that the plaintiff's claim is legally and factually unsustainable. It may be helpful to briefly explain the main reasons for the strike out before delving into the legal principles that I have applied.

(a) First, even assuming the plaintiff is able to prove all the facts pleaded in her statement of claim, I find that she would not be able to demonstrate that the School owed her a duty of care in the pleaded factual matrix.

(b) Second, even if a *prima facie* case for the existence of a duty of care and a breach of that duty was made out on the facts (in the sense that there are triable issues), I would strike out the majority of the plaintiff's claim for damages. In the case of the cost of her A-level education in the UK, I find that any assertion of causation is unsustainable. Moreover, I find that even if aggravated damages are available in the tort of negligence (on which I make no decision), there is no basis for such an award against the School.

(c) Finally, I should make clear that if the claim was not struck out on the basis that no duty of care was owed on the pleaded facts, I would not have struck out the claim in respect of eczema.

Threshold for striking out

The applicable legal principles

29 The principles that govern an application to strike out an action are well-established. Pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), an action may be struck out if it "discloses no reasonable cause of action or defence", it is "scandalous, frivolous or vexatious", it may "prejudice, embarrass or delay the fair trial of the action", or it is otherwise an "abuse of process". It is unnecessary to go into the finer conceptual distinctions between these four grounds for striking out at this juncture.

30 Broadly speaking, a court deciding a striking out application must consider whether the action is "plainly or obviously unsustainable" (*The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The "Bunga Melati 5""*) at [32]–[33]), or whether there are other reasons relating to the abuse of process and impossibility of a fair trial that justify striking out the action.

31 The question whether an action is "plainly or obviously unsustainable" involves an evaluation of the *merits* of the action. The court in *The "Bunga Melati 5"* helpfully provided a more "analytical formulation" of the merits test at the striking out stage (see *The "Bunga Melati 5"* at [34] and [39]):

(a) First, an action may be struck out if it is *legally unsustainable*, which means that it is clear as a matter of law that even if a party were to succeed in proving all the facts that he offers to prove, he will not be entitled to the remedy that he seeks.

(b) Second, an action may be struck out if it is *factually unsustainable*, which means that it is possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, for example, if it is clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.

32 In the present case, while Mr Thio did submit on behalf of the School that the statement of

claim was so prolix that it would embarrass the fair trial of the action, I did not think that this was an incurable defect. The more serious problem lies in the merits of the action. I now consider whether it can ever be said that a claim is legally and/or factually unsustainable (and hence should be struck out) if the questions of law it raises are novel and have not been tested in the local courts.

Novel questions of law at the striking out stage

33 The AR was not minded to strike out the plaintiff's entire claim as the case was the first of its kind in Singapore and there were "some novel points of law", including the scope of a school's duty of care to prevent and address bullying and cyberbullying, what amounts to acts of tortious bullying, and the standard of care expected of a school in relation to bullying. [note: 14] In his written submissions, counsel for the plaintiff, Mr Renganathan Shankar ("Mr Shankar"), repeatedly emphasised as well that there were complex and novel questions of law raised by the suit that required the scrutiny of a full trial. [note: 15]

34 Should a court exercise even more circumspection than ordinary in considering whether to strike out a claim if it raises novel points of law?

35 It is clear that the authorities support the view that novel questions of law *should not be resolved* at the striking out stage and should generally be litigated in full at trial. This is so even if the novel questions are pure questions of law which a court at the interlocutory stages of the trial may be in as good a position to resolve as a trial court who has heard all the evidence.

36 In *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 1 SLR(R) 980 at [13], the High Court affirmed the view that it may be critical to allow an action to continue if the statement of claim reveals a difficult and important point of law, and that such unsettled questions of law should not be disposed of at the interlocutory stages of the proceedings. In that case, the statement of claim raised, *inter alia*, the question whether the tort of trespass was engaged in the context of copyright when the defendant linked its websites to the plaintiff's websites for its own commercial benefit. In refusing to strike out the action, the court took into account the fact that the case raised a difficult question of law in the context of the evolution of the common law, an evolution that was described as being characterised by the hallmarks of pragmatism and incrementalism.

37 In the recent case *Lim Kok Lian (executor and trustee of the estate of Lee Biau Luan, deceased) v Lee Patricia (executor and trustee of the estate of Lee Biau Luan, deceased) and another* [2015] 1 SLR 1184, the High Court refused to strike out a counterclaim invoking the tort of malicious civil proceedings and the tort of abuse of process. The court observed that while there was certainly doubt as to whether such causes of action existed in Singapore, the uncertainty and novelty of the claim should not be a reason to strike out the action. Rather, "a novel and complex case that requires rigorous examination of law and policy should proceed to trial instead of being struck out in its nascent state" (see [16]).

38 Indeed, the Court of Appeal's application of the "legal unsustainability" test in *The "Bunga Melati 5"* also supports the general position that novel questions of law should not be resolved summarily by the court at the striking out stage. At [57]–[59] of its judgment, the Court of Appeal refrained from determining "at this early stage of the proceedings" whether, as a matter of law, apparent authority was sufficient on the facts of the case, and instead held that this was the "proper task of the trial judge". It took a similar approach to the question of whether a representation could only be said to be continuing if it was a representation made for the purpose of a particular transaction. While the court expressed a provisional view on the question, it took the pains to emphasise that its provisional view was not intended to be binding on any court since it did not hear

full arguments on the matter (*The "Bunga Melati 5"* at [60]–[62]).

39 The above authorities make it clear that a court should not strike out an action if doing so requires a full determination of the novel questions of law raised by the claim. Further, it is well-established that the court should not engage in a detailed or minute examination of the documents and alleged facts. This is especially so where the facts and issues are in dispute.

40 However, the assertion of novel legal issues does not *automatically* preclude the striking out of an action. This is particularly so if the facts pleaded simply do not justify the legal remedy prayed for on *any reasonable resolution* of the novel questions of law said to have been raised by the pleadings. In such a case, the legal interest in pushing the frontiers of the law is not reason enough to allow the action to proceed to trial. Test cases whose facts do not fully raise and engage the novel legal issues at stake may not make for good law. The remarks of Sir Thomas Bingham in *E (A Minor) v Dorset County Council* [1994] 3 WLR 853 at 865 are worth setting out:

> … This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached. …

41 Thus, while the plaintiff's claim in the present case undoubtedly raises a novel situation in the tort of negligence (*ie*, the existence and scope of a duty of care to safeguard students from bullying) which has never been considered before by the Singapore courts, serious consideration must still be given to whether the facts (within the reasonable bounds of the pleading) may even remotely form the basis of an actionable tort. Indeed, this is so even if the scope of a school's duty of care in the context of school bullying and cyberbullying has never been explored in Singapore.

Tort of negligence – a conceptual analysis

42 Before addressing the specific factual and legal issues that arise in the present case, it may be helpful to take a step back and consider the structure and elements of the tort of negligence. This is necessary because of the way the plaintiff has pleaded the particulars of the duty of care owed to her by the defendant.

43 It is well–established that to prove liability in the tort of negligence, a plaintiff must show that the defendant owed it a duty to exercise reasonable care in the specific factual situation alleged. That is to say there has "to be recognition by the law that the careless infliction of the kind of damage in question on the class of persons to whom the plaintiff belongs by the class of persons to which the defendant belongs is actionable". Once a duty is established on the facts, it is necessary to show that the defendant breached the duty of care by failing to meet the standards of care expected by the law, that the breach caused loss to the plaintiff, and that the loss is not too remote to be recoverable: Michael A Jones (gen ed), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk & Lindsell*") at para 8–04.

44 While these four elements are conceptually distinct, there may be some overlap in analysis when they are considered and applied in a specific factual situation (see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 03.010 ("*Gary Chan*") where the example of the concept of foreseeability as straddling the legal requirements of duty, breach, causation and remoteness of damage is given).

45 My main concern at this juncture is the distinction drawn between the duty of care and breach of duty analysis. To say that a defendant owes a plaintiff a duty of care in a particular factual situation, the circumstances must be such that the defendant owes the plaintiff a duty to exercise reasonable care to avoid carelessly inflicting particular type(s) of damage on the plaintiff. As stated in *Clerk & Lindsell* at para 8–05, to establish a duty of care situation, "it has to be shown that the courts recognise as actionable the careless infliction of the kind of damage of which the complainant complains". By contrast, if a duty of care does not exist, a party can do as he pleases and will not attract legal liability even if he carelessly inflicts loss on another (see CT Walton MA (gen ed), *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 13th Ed, 2014) ("*Charlesworth & Percy*") at para 2–01).

46 It bears emphasis that the duty of care in negligence is always *framed generally* as a duty to take *reasonable care*. What amounts to taking reasonable care depends on the facts and circumstances of the case. The particulars of the alleged failure to take reasonable care can vary from case to case. To give an obvious example, a dentist owes a duty of reasonable care to his patient. In one case, it may be that his breach consists of an allegation that the drill-bit was dirty. In another case, it may be that the dentist has failed to keep abreast of new medical knowledge which reveals the dangers of a former medical practice. The list is endless. In short, it would usually be misconceived to speak of duties to *act in particular ways* in framing the duty of care owed.

47 I note that Mr Thio attempted to explain this with reference to Immanuel Kant's universalizability test. While this test may well have philosophical attractions, I am inclined, with respect, to the view that an attempt to explain the law and the tort of negligence using Kantian concepts is likely to obfuscate rather than clarify. Nothing, however, turns on this. Instead, it is more helpful to simply recognise that the duty question is concerned with the *general nature of the relationship between the parties*, and asks whether a duty to take reasonable care exists in that *type* of relationship; or put another way, whether the *nature or kind* of relationship requires that care be taken (*Clerk & Lindsell* at para 8–144). To be clear, "relationship" is used here in a broad sense. It does not mean that a duty of care only arises where there is some pre-existing specific relationship between the parties. It goes without saying that once the existence of a duty is found to exist in law, the scope of the duty will depend on the particular circumstances of the relationship. As *Clerk & Lindsell* postulates further at para 8-144, "the level of specific care required, [for example] whether a warning should have been given, will depend on the particular circumstances of the case".

48 The decision in *N v Agrawal* [1999] PNLR 939 succinctly encapsulates the point. Responding to the plaintiff's submission that the defendant (medical examiner) had a duty to take all reasonable steps to provide evidence and to attend the trial as a prosecution witness, Stuart Smith LJ opined (at 943):

> In my judgment an attempt to formulate a duty of care in this way is wholly misconceived. If a duty of care exists at all it is a duty to take reasonable care to prevent the claimant from suffering injury, loss or damage of the type in question, in this case psychiatric injury. *A failure to attend to give evidence could be a breach of such duty; but it is not the duty itself.* Thus a motorist owes a duty to take care not to injure other road users or damage their property. He does not owe a duty to take care to blow his horn; his failure to do so when proper care requires that he should, may amount to a breach of that duty of care.
>
> [emphasis added]

49 This does not mean that there can be no *particularity* when framing the duty of care owed. While it is contrary to the structure and spirit of the tort of negligence to set out the *specific*

conduct required by a defendant in the formulation of the duty of care, the law does on occasion *limit* the scope of the duty of care with reference to, *inter alia*, the class of plaintiffs, the class of defendants, and the type(s) of injury to avoid (*Clerk & Lindsell* at para 8–05). Much depends on the specific factual situation the parties find themselves in. As May LJ observed in *Rice v Secretary of State for Trade and Industry* [2007] ICR 1469 at [6], it is conceptually questionable if one may ask the "bare question whether a defendant owes a claimant a duty of care, without defining the scope of the duty with reference to the injury or loss for which the claimant claims damages".

50 Thus, while it is wrong to frame the duty of care owed as a duty to act in a specific way, it is often also inappropriate to frame the duty of care in excessively broad terms. How is the scope of the duty of care owed in a particular situation defined? As noted in the Court of Appeal's leading decision *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [30], "legal control mechanisms" such as reasonable foreseeability, proximity and public policy define the scope of the duty of care owed, and serve the purpose of limiting liability. *Spandeck* established that the general approach to determining if a duty of care is owed in any given situation is to consider whether the threshold requirement of factual foreseeability of harm is satisfied (at [75]–[76]), and if it is, whether there is sufficient legal proximity between the claimant and defendant (at [77]) and whether there are public policy considerations which negate the imposition of a duty of care (at [83]–[85]).

51 While factual foreseeability has been variously described as a "threshold requirement" or a requirement that is pitched at "a low threshold" (*Gary Chan* at para 03.046), it is not to be treated as a mere formality. Even though it may be thought that at the threshold stage, the enquiry should simply be whether the damage to the relevant class of persons resulting from a defendant's act or omission is factually foreseeable, later cases support the view that even at this step, it may be appropriate to delve into the specific facts of the case (see *Gary Chan* at para 03.051, citing the Court of Appeal in *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 ("*Ngiam Kong Seng*") and *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] 3 SLR(R) 735 ("*Man Mohan Singh (CA)*")). *Ngiam Kong Seng* involved a claim for psychiatric harm arising from various communications from the defendant to the plaintiff. The Court of Appeal, having considered the factual matrix in which the tort was alleged to have been committed, held at [132] that "[t]o hold that it is reasonably foreseeable that the mere communication of the information in question without more could result in harm to a party boggles the imagination and stretches the realms of reality".

52 Only if a duty of care is established on the facts, does the question of a breach of the duty and the failure to exercise reasonable care arise. At this stage of the analysis, the court may then consider whether the defendant's failure to act in a particular manner amounts to a breach of the duty of care. Again, I emphasise that if no duty of care is owed on the facts, the defendant simply cannot be held liable in negligence, *no matter how careless he was*.

53 In making the above point, the distinction drawn by *Clerk & Lindsell* at paras 8–05 to 8-07 and English cases between a "notional duty" and a "factual duty" is noted. A notional duty applies to a general class of relationship and damage. The key question is whether in relation to all factual situations within that class, a notional duty exists. However powerful the arguments in favour of a duty on the particular facts of the claimant's case, they may be outweighed by counter arguments relating to the general class of relationship within which that case falls to be assessed. It is here that the other considerations of proximity and public policy are of especial importance. Once a notional duty of a given scope has been accepted, the question is whether the particular claimant comes within the scope of that duty so as to render the damage actionable at his suit; the question

becomes one of factual duty: *Clerk & Lindsell* at 8-07. For example, whilst it is accepted that a motorist owed a notional duty to those within the foreseeable area of risk caused by his driving, it was held on the particular facts in *Hay or Bourhill v Young* [1943] AC 92 that he did not owe a duty of care to avoid psychiatric harm to a particular bystander who witnessed the accident.

54 Whilst the distinction drawn by the English cases between a notional and factual duty is helpful, the leading and controlling authority in Singapore is the well-known decision of the Court of Appeal in *Spandeck*, which analysed duty into three elements: factual foreseeability, legal proximity (arising out of or founded on the finding of factual foreseeability) and policy considerations. The summary of the *Spandeck* approach in *Gary Chan* at para 03.014 is helpful. The *Spandeck* approach is to be taken in all cases, irrespective of the nature of the damage caused. Factual foreseeability is treated as a threshold requirement. Establishing factual foreseeability is the foundation stone for the next step (which is often described as the first stage) namely whether there is sufficient legal proximity between the parties. Whilst it has also been suggested that factual foreseeability is an integral part of the legal test of proximity (*Ngiam Kong Seng* at [104]), nothing turns on this point. Either way, factual foreseeability is not in itself sufficient. Factual foreseeability does not have normative force: *Gary Chan* at para 03.038. Determining whether there is legal proximity depends on a range of factors, including physical, circumstantial and causal proximity, as well as any voluntary assumption of authority and reliance. Once there is a finding of factual foreseeability and legal proximity, a *prima facie* duty of care arises. Policy considerations (if any) are then brought in at this stage to determine whether the *prima facie* duty should be negated.

Duties pleaded in the present case

55 At this juncture, it is appropriate that I deal with the defendant's alternative prayer that particular paragraphs of the statement of claim, which plead the existence of certain duties owed by the School, be struck out. While this is unnecessary in light of my decision to strike out the entire statement of claim, I shall nevertheless address this briefly given that it was argued before me at some length.

56 On appeal, Mr Thio submits that the following sub-paragraphs of paragraph 9 of the statement of claim should be struck out because they are vague and/or have no basis in law:

> **Particulars of the Duty of Care owed to the Plaintiff**
>
> …
>
> (b) Duty to exercise reasonable care to protect students from any wrongful behaviour (including, but not limited to, acts of bullying, including cyber bullying) by the Defendants' students and/or perpetrators during the period they were/are enrolled with the institution and/or keep the matter under ongoing review;
>
> (c) Duty to have in place and to employ operational and/or effective policies and/or protocols/ directions to prevent incidents of wrongful behaviour… by the Defendants' students and/or perpetrators;
>
> (d) Duty to ensure that reasonable steps are taken to prevent incidents of wrongful behaviour… of the Defendants' students and/or perpetrators, outside of the school premises and/or schooling hours, from affecting the health, safety and overall wellbeing of the students of the Defendants including the Plaintiff;

(e) Duty to properly counsel the Defendants' students and/or perpetrators involved in any wrongful conduct;

(f) Duty to ensure that the Defendants' and/or its employees and/or its servants are properly trained to handle incidents of wrongful conduct in an appropriate manner;

…

57 Following from the earlier discussion on how a duty of care in the tort of negligence should be framed, it is clear that sub-paragraphs 9(c), (e) and (f) ought to be struck out on the grounds that they are framed as a duty to act in particular ways. As Mr Thio rightly pointed out, the School's purported failure to act in the ways set out in those sub-paragraphs are only relevant when considering whether there has been a breach of duty.

58 That said, I add that even if the matters pleaded in these sub-paragraphs had been cast (or are recast by way of amendment) as particulars of the School's breach of duty, I am of the view that the action as pleaded is bound to fail in any event for reasons that are explained below.

59 As for sub-paragraphs 9(b) and (d), I do not think that these suffer from the same legal defect. Widely framed as they may be, the duties therein are properly framed as a duty to exercise reasonable care to a particular group of people in respect of certain types of harm. Whether the sheer breadth renders it legally unsustainable in light of the case authorities is something that I make no comment on at this stage.

Did the School owe the plaintiff a duty of care?

60 If the School did owe the plaintiff a duty to exercise reasonable care on the facts pleaded, the question as to whether reasonable care was exercised given the measures the School took to deal with the alleged acts of bullying becomes an issue of mixed fact and law which is best dealt with at trial. However, the plaintiff must first be able to demonstrate at least a *prima facie* case that the School did owe her a duty of care on the pleaded facts. In my view, this has not been demonstrated by the facts pleaded in the statement of claim. I should clarify that I am not suggesting that the burden is on the plaintiff in a striking out action to demonstrate that he/she has a viable action. I am however satisfied that on the present facts, the defendant has discharged its burden of showing that the claim is plainly and obviously unsustainable. The plaintiff has failed to show otherwise.

61 In the course of his submissions, Mr Thio strenuously emphasised that the events pleaded do not amount to "bullying". At the oral hearing before me, Mr Thio submitted that the alleged "bullying" consisted either of other students informing the plaintiff about what others were saying behind her back, or of students expressing an opinion about her complaints of bullying. The submission was that none of these acts amount to bullying as defined by case authorities from other jurisdictions. Neither did they fall within the School's internal policy on bullying. [note: 16] According to Mr Thio, the pleaded acts did not even fall within the dictionary definition of bullying.

62 In response, Mr Shankar for the plaintiff submits that there is no legal definition of bullying in Singapore. He submits that whether the acts pleaded amount to bullying or cyberbullying is a determination that can only be made at trial, after all the evidence, expert opinions (including those of the Ministry of Education's) and legal arguments have been fully ventilated. [note: 17]

63 Whilst I accept that there are and will be varying definitions of bullying (used by schools, the Ministry of Education and the public at large *etc*), it is clear that there is a disconnect between the

intense argumentation about whether the conduct pleaded amounted to bullying, and whether the pleaded facts disclosed a possible case for negligence liability in law. Neither Mr Thio nor Mr Shankar attempted to demonstrate the *legal* significance of whether the conduct constituted "bullying" to the inquiry before me.

64 In *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 07 ("*Bradford v West Sussex*"), a student brought a claim in negligence against her school in respect of various episodes of bullying. Some of the episodes took place within the school. Others took place outside of school. The bullying took place over many years, and included physical abuse, interference with property and extremely offensive name calling. Various academic definitions of bullying were referred to and discussed in the decision of the trial judge (*eg*, where the student is "exposed repeatedly and over time to negative actions on the part of one or more students", or a subset of "aggressive behaviour" causing intentional physical or psychological hurt).

65 At the appeal against the trial judge's decision to find for the school, the Court of Appeal made an important observation at [38] of its judgment: "[t]here is no magic in the term bullying… the question is always whether the school was in breach of its duty of care towards that pupil and whether that breach has caused the particular harm which was suffered". This court agrees with that observation.

66 In this respect, it is unfortunate that the School did not take a clear position on the legal implications of the absence of "bullying" on the facts. While the parties acknowledged before me that focus had to stay on whether a duty of care existed, and if so, whether there was a breach of duty, there was unfortunately little direct engagement of these questions in the submissions. In my view, there is little to be gained from an extended debate as to whether any particular act or series of acts (or statements) amounts to "bullying". "Bullying" is not a legal term of art. The question is not whether the acts or statements are properly described as "bullying." The question is whether on the pleaded facts and circumstances a duty of care arises.

67 Both sides agree that a school does owe a duty of care to its students. According to the defendant, a school's duty is to "take reasonable care for the health and safety of its students". This however does not equate to a duty to insure students against all types of harm however caused. [note: 18]

68 Putting aside the duties which were wrongly formulated as a matter of law, the plaintiff's pleaded case is not too far from the claim that the School owed a duty to protect the plaintiff from *all harm*. At paragraph 9(a) of her statement of claim, the plaintiff asserts that the School has a duty to "take reasonable care for the health, safety and overall wellbeing of the students". Specifically, paragraph 9(b) asserts that the School also has a duty to "take reasonable care to protect students from *any* wrongful behaviour (including, but not limited to, acts of bullying, including cyberbullying) by the Defendants' students and/or perpetrators during the period they were/are enrolled with the institution" [emphasis added].

69 It is incontrovertible that a school does owe its students a duty of care in law. Case authorities from other jurisdictions show that this applies equally when the direct cause of the injury is the conduct (acts/statements) of a third party: see *Cox v State of New South Wales* [2007] NSWSC 471 ("*Cox v NSW*") at [72] and *Bradford v West Sussex* at [34]. However, the exact contours of the duties owed by a school have not been precisely defined in Singapore. Important questions such as whether a school owes a duty to protect students outside school premises, outside school hours, or from acts by persons who are no longer students at the school arise. Moreover, given the prevalence of social networking websites and online platforms such as blogs, important questions as to the

school's duty to protect its students from harm that may be perpetuated *via* the internet arise as well. This is especially when the school may have little, if any, control over the activities on the internet, especially after school hours or of persons who do not belong to the school.

70 What is clear, however, is that a school does not have a duty to take reasonable care to protect its students from *all* types of harm, *no matter when, where and how the harm is caused*. It cannot be assumed that whenever some form of harm or loss befalls its students, the school *automatically* owes that student a duty to exercise reasonable care in respect of that "harm."

71 The English Court of Appeal case *Bradford v West Sussex* is instructive. In that case, the school knew that the plaintiff was being bullied by its students outside school as well as when she was making her way to and from school. The plaintiff suffered from a "depressive illness" as a consequence. Nevertheless, the court did not take the question of whether a duty of care was owed by the school *vis-à-vis* the bullying as a foregone conclusion. Instead, the court analysed the facts in detail and concluded that the school's duty of care did not extend to the policing of its students' activities when its students had left its charge (at [32]). It is clear that each case must be analysed on its own facts, and the court must be satisfied that the general duty of care owed by the school to its students *is engaged* on the facts. Indeed, in dismissing the appeal, the Court of Appeal at [37] took pains to stress that in all these cases "it is necessary to identify with some precision any breach of duty found" and "that it is not enough to find that there has been bullying, to find some breach of duty and then to find that the bullying caused the injury. There must be a causal connection between the breach of duty and the injury. That will often be difficult to prove."

72 In the present case, the various acts and statements complained of, and the context in which they arose, have been set out above. The acts, statements and context are largely undisputed. In any case, even if they were disputed, taking the plaintiff's case at its highest (as befits a striking out application), the complaint relates to the following:

(a) Statements made by fellow CO EXCO students between 7 and 8 August 2012 (i) that she would no longer be the student conductor; (ii) that the EXCO was "freaking biased" and that the plaintiff was selfish for wanting a double role; and (iii) that it was a "bitchy" thing for the EXCO to have ostracised her.

(b) Statements made between July and September 2012 (i) that the plaintiff was greedy or desired undue attention and or "glam and glory"; and (ii) questioning why she wanted to be a student conductor.

(c) Five (or thereabouts) comments posted on social media sites between January and March 2013 by students of the School (including a former student of the School) on the apology made by another student and the plaintiff's complaints. The posts were brief in nature.

(d) An incident occurring on an unspecified date when a student remarked in the school foyer within the plaintiff's earshot that she wanted to announce to the world the fact that CO received a distinction in a music competition without the plaintiff's participation.

(e) The fact that on various occasions, the plaintiff received cold and piercing stares.

73 The plaintiff was clearly upset and hurt by the above and there is no doubt that she suffered anguish and disappointment. Her parents were also upset, concerned and engaged the School through emails and meetings. It appears that many of these meetings or discussions took place between late August 2012 and early 2013. It was in these circumstances that the plaintiff decided to leave the CO

at the end of January 2013. It also appears that it was during this period that the plaintiff and/or her parents explored the possibility of the plaintiff continuing her studies overseas. It will be recalled that by January 2013, the plaintiff had secured an offer from the specialist music school in the UK. It was during this period that she sought treatment for eczema. No other injury or illness has been pleaded. There is no assertion that the plaintiff suffered any psychiatric harm or other physical harm. She was not physically assaulted. There was no threat to inflict harm. There is no suggestion that her physical belongings were interfered with. To be clear, this court is not stating for a moment that the school's duty to take reasonable care is limited to protection of students from physical acts causing physical harm. There are other forms of actionable damage such as psychiatric injury which may found an action in tort in appropriate cases.

74 In this judgment, I do not propose to go through in minute detail the authorities helpfully cited to me on bullying and the scope of a school's duty of care. As mentioned, it is inappropriate for a court to thoroughly examine novel and complex questions of law at this interlocutory stage of the proceedings. Had a full and thorough determination of the contours of a school's duty of care in relation to bullying been necessary, I would have had no qualms allowing the claim to proceed to trial.

75 However, for the reasons I shall presently go into, I do not think that a full exploration of this novel and important issue of law is necessary to dispose of the present case. In my view, there are very clear reasons why the School's duty of care to its students, however it may ultimately be defined, *is not engaged on the facts of the present case*. I find that it is plain and obvious that as a matter of law, the duty of care which the School owes the plaintiff does not extend to intervening in the "bullying" pleaded in the statement of claim.

Reasons why the School did not owe the plaintiff a duty of care

76 As mentioned, the School does owe certain duties to all its students, including the plaintiff. However, this does not mean that the school is always under a duty to exercise reasonable care to protect its students from *any* sort of harm that may befall them. The facts of the present case constitute, in my view, one instance where, within the reasonable bounds of the pleaded case, the School *did not* owe a duty to its student.

77 My primary ground for this conclusion is that the threshold requirement of foreseeability of damage has not been met. There is no viable basis on which foreseeability could be established within the reasonable scope of the statement of claim. Having considered the plaintiff's pleadings, I find that it is not foreseeable that any form of actionable damage would result from the alleged bullying.

Threshold requirement of factual foreseeability

78 To establish that a duty of care exists, the plaintiff must be able to demonstrate that the damage claimed is foreseeable (*Spandeck* at [75]). It goes without saying that when speaking about "damage", the court refers to actionable damage such as personal injury, psychiatric injury, damage to property or economic loss. Mere distress, grief, injury to feelings, or unhappiness is not actionable in the tort of negligence: *Man Mohan Singh s/o Jothirambal Singh and another v Dilveer Singh Gill s/o Shokdarchan Singh and another* [2007] 4 SLR(R) 843 at [15], [16] and [18]. In *Man Mohan Singh (CA)* at [35] and [37], the Court of Appeal recognised the magnitude of the appellants' grief (on the facts before it), and acknowledged that laypersons may view the difference between grief and reactive depression (psychiatric illness) a "needless squabble over semantics". Nevertheless, the Court of Appeal held that the law has clearly circumscribed liability for psychiatric harm within certain limits (at [37]).

79 The cases of school bullying cited have placed emphasis on the question whether it is foreseeable that the *injury* suffered by the plaintiff will result from the bullying. For example, in discussing the nature and content of the duty owed to the plaintiff-student, the court in *Oyston v St Patrick's College* [2011] NSWSC 269 observed at [15]:

> In this case, that bullying at school may result in harm, including psychiatric injury, was not controversial. Such a risk is not only foreseeable, on the evidence it was foreseen by the College… There was no issue that a reasonable person in the College's position, would have taken steps to protect a student such as Ms Oyston…

80 The court was clearly concerned to make clear that the psychiatric injury the plaintiff suffered was foreseeable given the bullying conduct in question, which included calling the plaintiff names like "slut", "bitch", "pimple face" and "drama queen" on a daily basis, elbowing, jostling and nudging her daily, pushing her against the toilet wall, and mocking her in class whenever she answered a question. Other acts included being hit by a plastic coke bottle in the playground following which the school teacher had to place ice on her head. In 2004, which was said to be the worst year, the verbal and physical abuse continued. The plaintiff suffered from panic attacks and anxiety and became suicidal. The persistent nature of the acts and the content of the statements complained of, coupled with the physical abuse, affected whether the school was under a duty to take steps to protect the student.

81 In the present case, the threshold question is whether it was foreseeable that the plaintiff would suffer any *actionable* damage as a result of the School's alleged non-intervention in the conduct of her peers. Having considered the plaintiff's pleaded case, even taking it at its highest, and assuming all the facts therein can be proven, I do not think that it was foreseeable that any actionable damage would result from the various acts of "bullying" pleaded (whether individually or collectively). I repeat the earlier point that foreseeable unhappiness and anguish is not enough. What is required is foreseeable harm that is recognised by the law (*ie*, personal injury, psychiatric injury, property damage, or economic loss).

82 I have particularised the conduct complained of at [18]–[20] and [72] above, and propose to go through the conduct outlined in some detail to explain my conclusion.

83 In relation to the first spate of alleged bullying, I find that it is *at most* foreseeable that the plaintiff would be upset by the way the other students spoke about her or "labelled" her. Even assuming that the School was aware of the acts complained of, I note that the first "spate" as pleaded comprised of a number of statements made on a few occasions in August and September 2012. In my view, it is not foreseeable that the plaintiff would suffer *any* physical or psychiatric injury, or economic loss, arising from the conduct complained about. I set out my analysis of the facts in the table below:

Particulars of bullying	**Foreseeable damage**
Between 7 and 8 August 2012, the Chairperson and the Vice Chairperson of the CO EXCO informed the plaintiff that she would no longer be student conductor and that another student would be the sole student conductor: para 7(a).	While one might expect the plaintiff to be disappointed or even upset, it is not foreseeable that the plaintiff will suffer any physical or psychiatric injury, or economic loss, from being informed that she was not selected as student conductor.

Between 7 and 8 August 2012, the plaintiff was informed by the Chairperson and/or the Vice Chairperson of the CO EXCO that the EXCO was "freaking biased" against her, that the EXCO has been "mean" to her, and that she was selfish for wanting a "double role" as student conductor and secretary: para 7(a).	Similarly, while one might expect the plaintiff to be upset, it is not foreseeable that the plaintiff will suffer any actionable damage from being informed *second-hand* that the EXCO was biased and mean towards her, or that the EXCO ostracised her. In fact, as Mr Thio points out, the Vice Chairperson appears to be taking the plaintiff's side by informing her about the EXCO's conduct and expressing her opinion that the EXCO was "bitchy".
On 8th August 2012, the Vice Chairperson informed the plaintiff that the EXCO ostracised her and that it was "bitchy" of the EXCO to do so: para 7(b).	
Sometime between July and September 2012, the plaintiff was labelled as "greedy" and as desiring undue attention and/or "glam and glory" for wanting two positions in the EXCO: para 7(c) and (d).	While such name-calling may be unpleasant and upsetting, the events as pleaded are not persistent or serious enough to give rise to foresight of actionable damage to the plaintiff.
Sometime between July and August 2012, the plaintiff was repeatedly badgered by a student in school regarding why she wanted to continue to be student conductor: para 7(e).	It is not foreseeable that the plaintiff would suffer physical or psychiatric injury, or economic loss, from being asked for her reasons for wanting to be student conductor, even if the questioning may be repeated. There is no suggestion that the questioning was aggressive or threatening.

84 In relation to the second spate of alleged bullying, which mainly took place between 22 and 23 March 2013, I find that it is also unforeseeable that the plaintiff would suffer from any actionable damage as a result of the tweets mocking and criticising her complaints about the bullying she claims to have faced.

Particulars of bullying	**Foreseeable damage**
After one of the students *apologised* to the plaintiff, another student responded to the fact of the apology by tweeting on the social media site, Twitter, on 31 January 2013 that they would "all be fine": para 7(f).	It is unforeseeable that the plaintiff would suffer from any sort of actionable damage from reading this tweet, which was not even expressly directed at her.
On 22 March 2013, a student tweeted that the plaintiff's complaints about bullying were "making bigger waves in the sea" and that the School "can't solve it, can they?": para 7(g).	Even assuming these tweets were directed at the plaintiff, whilst it is to be expected that the plaintiff would feel disgruntled and unhappy that the other students were rude and did not take her complaints of bullying seriously, it is unforeseeable that she would suffer from any harm beyond mere injured feelings.
On 22 March 2013, a student tweeted that the school had "done nothing" because the plaintiff did not have a "legitimate case" and that the plaintiff should "shut up and fade away": para 7(h).	

On 23 March 2013, a student tweeted "Monday is when we unite: D". This tweet was written in response to a facebook post written by the plaintiff, and was re-tweeted and marked as a favourite by six other CO students: para 7(i).	It is unforeseeable that the plaintiff would suffer any injury from reading this tweet which contains no hint of violence or any threatening conduct. No further context which may justify a more menacing interpretation of the tweet has been provided by the plaintiff. While the plaintiff did make a police report after reading the tweet, that in my view was a wholly disproportionate response. It is telling that the police took no action thereafter. [note: 19]
On 23 March 2013, a former student of the School tweeted that the principal's office was becoming a "hot tourist attraction" in response to the fact that many students were seeing the principal over the plaintiff's complaints: para 7(j). In response, another student tweeted that the former student may "need a plane ticket to the UK" because the school may have read her tweet about the principal's office: para 7(k).	The students here may have been mocking the plaintiff's situation and her inclination to "escape" to the UK. However, the conduct is clearly not sufficiently grave, persistent or threatening such as to make it foreseeable that the plaintiff would suffer any harm beyond injured feelings after reading the tweets.

85 The same reasoning applies to the final two un-particularised incidents of alleged bullying outlined at [20] above. In my view, it is not foreseeable that the plaintiff would suffer any actionable damage from "cold shoulders", "piercing stares", or from being told that the CO got a distinction in the SYF.

86 On the whole, there is no suggestion of a persistent pattern of physical gestures (let alone threatening gestures) over a period of time such as to give rise to a foreseeable risk of harm if steps were not taken to intervene. To be clear, this is a case where the complaint largely concerns statements and remarks of third parties. The alleged perpetrators of the statements and remarks (barring one case) are pupils of the School. The basic complaint is that the School failed to take sufficient steps to control the behaviour of its students in circumstances where the School ought to have foreseen that if adequate steps were not taken to stop the statements and remarks, actionable damage would likely arise.

87 It may be argued that while each incident on its own may be trivial and unlikely to cause any actionable damage to the plaintiff, collectively, they may constitute what the AR termed "relational and social isolation" which would foreseeably cause the plaintiff some degree of psychiatric injury.

88 Even taking the conduct all together, I find that it is not foreseeable that the plaintiff would suffer from any sort of physical or recognised psychiatric injury from the "ostracisation" and name calling she faced from the CO EXCO. The pleaded conduct discloses at most a few incidents of critical remarks made about her, most of which took place behind her back or online. Few of those remarks were made directly at her, and were merely sighted or heard by her because she viewed the other students' correspondence on social media, or because she was informed by her friends. The facts reveal an unfortunate falling out between a group of friends or peers, and some consequent unhappiness that inevitably ensued from such falling out. It is entirely unforeseeable that any actionable damage would be caused by such ordinary, non-threatening student exchanges. Indeed, the fact that the plaintiff was bold enough to stand up against the CO EXCO in a Facebook post-

dated 22 March 2013 asking them to explain themselves [note: 20] suggests that she was not a vulnerable victim who was psychologically traumatised by what was going on in school. Indeed, the plaintiff has never pleaded that she suffered any psychiatric illness.

89 As such, because it was unforeseeable that any actionable damage would be caused by the pleaded bullying, I find that it is plain and obvious that the School did *not* owe the plaintiff a duty to intervene to protect her from what was going on, or to stop the students from criticising her in the manner pleaded. If the School decided to intervene proactively by counselling the students and calling meetings *etc*, that is a matter of school governance. Her claim is thus legally unsustainable as the pleaded facts do not reveal a viable cause of action.

90 To be clear, the court accepts that ostracisation and mocking and critical comments both online and offline of a sufficiently persistent and severe nature may on some facts justify school intervention not simply as a matter of school governance but as a matter of law (duty of care and tort). It is all a matter of degree. While this uncertainty would in most circumstances justify a trial to determine what exactly happened, this case is, in my judgment, relatively "unique" in that the pleaded case, even taken at its highest, reveals nothing more than a few critical comments from a few unhappy peers, most of which was not even expressly said for the plaintiff to hear. The conduct as pleaded and claimed by the plaintiff was not of an intensity, gravity or persistence to disclose even a remote basis of an actionable tort such as to justify a full trial.

Public policy

91 Given my findings on factual foreseeability, it is not necessary to examine legal proximity and policy. That said, a few brief observations on public policy may be helpful should the matter be taken further. Whilst it is obvious that schools owe a general duty to their students to take care of the their well-being (both physical and psychological), the question as to whether schools also owe a duty in tort to provide a certain quality level of education or to provide a "happy" school experience for all its charges is far more complex. This is not to deny for a moment that such an aspiration or goal is in the interests of the individual and society in general. The point is that the law of tort may be a blunt instrument for achieving such educational goals, which include the development of the individual character, self-reliance and working within a group with peers.

92 Unhappiness over the selection of executive committees of school clubs and societies, gossip about other students, mocking and critical comments about students, and other experiences of such nature are all to be expected as a part of student life. It is in this context that schools are entrusted by society and have in law a general duty to take reasonable steps to safeguard the well-being of its charges. A law that requires schools to intervene in every episode of unhappiness between their students where there is no threat of physical injury, and where the "psychological assault" merely comprises disappointment and unhappiness would impose a heavy burden on the school and its teachers. Courts, therefore, have to tread carefully given the public policy considerations at stake.

93 Ultimately, society and the law must strive to find the right balance. The balance is not to be found simply in the tort of negligence. It is ultimately found, and rightly so, in school governance policies and regulatory control by the educational authorities as well.

94 To be clear, my decision to strike out the present suit is made on the basis that there is no viable factual and legal basis for the plaintiff's claim. Specifically, there is no viable basis to assert that it was foreseeable that the plaintiff would suffer the loss and damage that she claims.

Claim for various heads of damages

95 As an alternative to striking out the whole action, the defendant also seeks to specifically strike out the plaintiff's claim for the costs of her A-level education in the UK, damages for eczema, and aggravated damages. Given my finding that a duty of care is not disclosed on the facts pleaded, it is not necessary to address these further issues. Nevertheless, in case my decision on duty is taken further, it will be helpful to render my decision on the issue of damages as an alternative ground for my decision to strike out a substantial part of the claim. Indeed, as will be seen, even if I had found that it was triable whether a duty of care existed on the facts, my decision to strike out the claim for the plaintiff's A-level education in the UK and the claim for aggravated damages would leave only a small part of the plaintiff's claim left.

A-level education in the UK

96 The AR struck out the plaintiff's claim for the costs of her A-level education in the UK because she found that the plaintiff had always intended to pursue an overseas education and hence, there was a lack of causation in fact between the School's alleged failure to intervene effectively, and the costs the plaintiff incurred in going overseas. On this point, having heard submissions from the parties, I am satisfied that the AR erred to the extent that her decision was based on the assumption that the plaintiff intended to go overseas for her A-levels even *before* the bullying started. Mr Shankar has demonstrated that the communications about going overseas pre-bullying related only to plans to pursue a *university education*, rather than an *A-level education* overseas. [note: 21] Based on the evidence before me, the first time it was indicated that the plaintiff may want to go overseas to pursue her A-levels was sometime in October 2012, when the plaintiff's parents requested for leave for the plaintiff to attend an audition in Bath, United Kingdom. [note: 22] This was clearly after the first spate of bullying. The possibility of causation, therefore, cannot be dismissed on the ground that the plaintiff had plans to go overseas for her A-levels even *before* the bullying started.

97 That said, the plaintiff has to demonstrate at least a *prima facie* case of causation. By this, what is meant is that there must be some chance of success in establishing causation bearing in mind that the question arises on a striking out application. The beginning of proof normally involves the application of the "but for" test. The test serves to exclude from consideration irrelevant factors: *Gary Chan* at para 06.023. It follows that there will be cases where the "but for" test will not be sufficient to determine the effective cause as a matter of law. This is most self-evident where there are several multiple "but for" causes. In such cases, the question is whether the defendant's breach *materially* contributed to the damage. It is not necessary to show that the breach was the sole or dominant cause. The difficulties in establishing causation in cases of bullying were noted in *Bradford v West Sussex.* The trial judge addressed the question in the following manner: did the alleged breach by the school contribute to the student's psychiatric illness? Was it more than a *de minimis* cause? On the facts, the court found that the school's omission to intervene was a sufficient cause of the loss suffered by the plaintiff, although no liability was ultimately imposed because it was held that the school did not have a duty of care to prevent bullying which took place outside school premises. On appeal, the Court of Appeal upheld the decision, but commented at [37] that it was not enough to find bullying, breach of some duty and then to find that the *bullying* caused the injury. There had to be a causal connection between the *school's breach of duty* and the *injury* and that will often be difficult to prove.

98 The question is whether the School's alleged breach of duty is a "but for" cause of the plaintiff incurring the costs of pursuing her A-level education in the UK. While it need not be the *sole* cause, was the alleged breach of duty at least a material (more than *de minimis*) cause of those costs and expenses? Has the plaintiff demonstrated a triable issue on factual causation? On the case as pleaded, even if the plaintiff did not have plans to go to England to complete her A-level studies

before the bullying started, I am doubtful as to whether the plaintiff has demonstrated a triable issue on causation in fact. What the plaintiff must establish is that the alleged breach by the School was at the very least a material cause of that loss. Nevertheless, given the uncertainty, I am not prepared to strike out this aspect of the claim simply on the basis of the application of the "but for" test.

99 To be clear, I affirm the AR's decision to strike out the plaintiff's claim for her A-level education in the UK (at prayer (c) of the statement of claim and item 3 of the statement of special damages), but on slightly different (but related) grounds.

Break in the chain of causation

100 Where a plaintiff has some part to play in the eventual loss that he or she suffers, there is a question as to whether the plaintiff's conduct breaks the chain of causation. In *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 at [100], the Singapore Court of Appeal held that only "reckless" or "deliberate" conduct would warrant a finding that the claimant had acted so unreasonably as to break the chain of causation. In its earlier decision *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 at [76], the Court of Appeal held that to break the chain of causation, the intervening conduct had to be "of such a nature as to constitute a wholly independent cause of the damage".

101 Whilst terms such as "wholly independent cause", "reckless" or "deliberate" leave room for the courts to exercise its judgment on the facts, it has been suggested that one relevant factor is whether the conduct of the plaintiff is a natural, reasonable, prudent or foreseeable result of the negligent breach of duty. If so, it is appropriate to attribute the losses arising from the plaintiff's own conduct to the negligent tortfeasor's act (see *Gary Chan* at para 06.077). That said, the mere fact that the plaintiff's conduct was unreasonable (or that there was contributory negligence) does not mean that the chain of causation is broken. The case authorities in Singapore draw a distinction between unreasonable conduct that does not break the chain of causation, and wholly unreasonable conduct which does break the chain of causation.

102 In the present case, it is clear that the costs of the plaintiff's education in the UK were only incurred because the plaintiff and her parents made the decision for the plaintiff to continue her studies in the UK. I find that the plaintiff (and indeed her parents) made a free choice to go to the UK to pursue her A-level education. The facts do not in my view disclose a triable issue on this point. Given the abundance of local alternatives, I find it impossible to conclude that the plaintiff was compelled to go overseas to pursue her studies as a result of the alleged bullying. In my view, there is no factual basis for the argument that the alleged bullying was so severe that local schools were no longer an alternative for the plaintiff. Her *choosing* to go overseas was "deliberate" and a "wholly independent cause" of the economic costs she (or her parents) incurred. Based on the plaintiff's case, I am satisfied that there is no triable issue as to whether that choice was compelled by the alleged bullying. The chain of causation between the School's alleged failure to intervene and the plaintiff (or her parents) incurring the costs of an A-level education in the UK is clearly broken. Indeed, the plaintiff had already secured a place at the specialist music school in the UK by the time the second alleged episode of bullying took place (where matters were arguably escalated). Put in a different way, even if the "but for" test is applied, the alleged breach of duty is, taking the pleaded case at its highest, only a *de minimis* cause of the decision to go to the UK for her A-level education.

Remoteness

103 The remoteness inquiry is concerned with whether the type of damage is reasonably foreseeable: *Overseas Tankship (UK) v Morts Dock & Engineering Co Ltd* [1961] AC 388 at 422–423,

affirmed in *Man Mohan Singh (CA)* at [54]. Whilst it is not necessary that the defendant should have foreseen the extent or precise manner of the harm, it is necessary that the *type* of harm is reasonably foreseeable: *Gary Chan* at para 06.094.

104 It may well be foreseeable in some cases that a student who has been bullied may feel "compelled" to leave the school and find an alternative school. However, on the facts as alleged and pleaded, the defendant argues that it is wholly unforeseeable on any reasonable construction of the plaintiff's pleaded case that the student would have no choice but to attend a school overseas that is so significantly more expensive than the current local school she is in.

105 Mr Shankar submits that it was foreseeable that the plaintiff would not be able to attend any alternative local school because her grade point average at her mid-year exams in 2013 dropped from 3.6 to 2.6, making it difficult for her to get into any local school with a music elective programme. [note: 23] However, while I note that my role at the striking out stage is not to examine the documents in detail, it is plain and obvious on the face of the evidence before me that this submission simply does not accord with common sense and logic. The plaintiff had gained a place in the specialist music school by *January 2013*, which strongly suggests that she contemplated leaving the School *by then*. At that point, she had not taken her mid-year examinations and could clearly have applied to other schools with her 2012 results. It is somewhat disingenuous for the plaintiff to now submit that because of the drop in her results, she had no choice but to go overseas.

106 Whilst it may have been foreseeable that the plaintiff would seek an alternative school in Singapore, the costs of studying overseas might be said to be of a completely different order of magnitude and scale. The question is whether this is enough to make the "harm" (the costs) of a sufficiently different nature, such as to render it a different *type* of harm, and whether this is something that can be decided on a striking out application.

107 It is not, however, necessary to decide the point since I am of the view that even if the cost and expense of the plaintiff's A-level education in the UK are not properly to be regarded as a different *type* of harm, the chain of causation, as discussed above, is broken or not established. First, there is no triable issue as to whether the pleaded acts of bullying and eczema were anything more than a *de minimis* cause of her decision to proceed to UK to complete her schooling. Second, her decision was an independent decision which on the facts as claimed and pleaded amounts to a wholly independent cause of her A-level education expenses. It bears repeating that mental distress and unhappiness, whilst real, is not in and of itself a recognised head of damage. The question that arises in the striking out application is whether there is a viable case for the proposition that her eczema and unhappiness was a sufficient cause in fact and law of the overseas schooling expenses.

108 Thus, for the reasons I have given, I affirm the AR's decision to strike out the plaintiff's claim for the costs of her A-level education in the UK.

Eczema

109 Mr Thio's main submission on appeal in relation to the plaintiff's eczema claim is that there is not a single shred of evidence, medical or otherwise, which supports a causal link between the plaintiff's eczema outbreak, and the alleged bullying. [note: 24] The medical evidence only testifies to the fact that the plaintiff did suffer from an eczema (irritant dermatitis) outbreak from around November 2012. [note: 25] There is no evidence about the cause of the eczema. Mr Thio further submits that given the plaintiff has had many opportunities to produce medical evidence about the cause of her eczema but has failed to do so, this strongly suggests that no such evidence exists.

110 This submission raises an interesting point on the test for striking out an action. Can a court conclude that a claim is factually unsustainable on the ground that there is a *complete absence of evidence* supporting the claim (in this case, that there is a causal link between the eczema and the bullying), especially if it is clear that the plaintiff had many opportunities to adduce such evidence knowing that the defendant was seeking to strike out the claim on that ground?

111 In this respect, I find the Court of Appeal's observations in *The "Bunga Melati 5"* helpful. In explaining the meaning of "factual unsustainability", the Court of Appeal gave the example of a statement of facts being *contradicted* by documents or other materials on which it is based (*The "Bunga Melati 5"* at [39(b)]). It appears that the *complete absence of supporting evidence* is not on its own sufficient to justify a finding that a particular factual claim is factually unsustainable at the striking out stage. As the Court of Appeal emphasised in *The "Bunga Melati 5"* at [45], "[s]ave in the plainest of cases", a court should not in a striking out application decide between conflicting factual accounts.

112 To his credit, Mr Thio's submissions do go further than asserting a complete absence of supporting evidence. First, he submits that the periods during which the plaintiff's eczema worsened do not coincide with the time periods during which the first and second spate of bullying took place. [note: 26] Second, he submits that surrounding evidence such as the plaintiff's blog posts reveal that there were other sources of stress in her life, such as her academic and non-academic commitments. [note: 27] While these facts certainly cast some doubt on the existence of a causal link between the bullying and the plaintiff's eczema, I do not think that the court can make a factual determination that such a causal link is absent at this stage of the proceedings. The evidence mentioned by Mr Thio is not sufficiently conclusive to render the plaintiff's assertion that her eczema was caused by the bullying "fanciful" or "entirely without substance" (*The "Bunga Melati 5"* at [39(b)]). That said, it is noted that according to the statement of claim, what was suffered was "irritant dermatitis". Whether this means that the dermatitis was due to "contact" with some substance or due to stress arising from the bullying will depend on the medical evidence. At this stage of the proceedings, it is too early to tell if that was the case.

113 Thus, if I had found that it was triable whether the School owed the plaintiff a duty of care on the facts, I would have affirmed the AR's decision not to strike out the plaintiff's claim for eczema. The absence or presence of a causal link between the alleged bullying and the eczema is an issue that can only be determined at trial. But to be clear, I find that there is no viable basis for holding that it was foreseeable that actionable damage would arise from the pleaded facts.

Aggravated damages

114 In her decision, the AR did not strike out the plaintiff's claim for aggravated damages on the grounds that it was a "novel question of law whether aggravated damages should be allowed in the law of negligence", and because a claim should not be struck out simply because it was "bare of particulars". [note: 28]

115 The School disputes both these grounds on appeal. Mr Thio submits that in law, a claim for aggravated damages cannot be claimed in negligence, and that on the facts, there is simply no plausible case that the School should be liable for aggravated damages.

116 I agree with Mr Thio that there is no factual basis to justify an award of aggravated damages. Not only has the plaintiff failed to *plead* any grounds for justifying an award of aggravated damages, before me, during oral submissions, Mr Shankar was also unable to explain what it was about the

School's conduct that could possibly justify the exceptional award of aggravated damages. There was nothing exceptional or contumelious about the School's conduct (see *Tan Harry and another v Teo Chew Yeow Aloysius and another* [2004] 1 SLR(R) 513 ("*Tan Harry*") at [82]). Indeed, the plaintiff's only complaint is that the School did not do *enough*; she is not saying that the School actively encouraged the bullying, or that they completely ignored her and entirely failed to act. Thus, in light of the pleaded case and the uncontroverted facts that have been put before me, I find that the claim for aggravated damages is doomed to fail and should be struck out for being plainly and obviously unsustainable.

117 That said, it is recognised that in Singapore, it has not been authoritatively decided whether a claim for aggravated damages is available in principle in respect of a negligence claim. The High Court in *Tan Harry* at [83] did not take an affirmative position on this issue given that, much like the present case, it was unnecessary to decide the point there. If a decision on the issue had been necessary in this case, I would have been inclined to agree with the AR that such a novel legal point was better determined after fuller arguments have been ventilated at trial. It would not be appropriate for me to come to a conclusive determination on this novel legal issue at this interlocutory stage.

118 Nevertheless, I would like to make a few comments on this issue given that the parties (in particular, the defendant) have presented helpful and extensive submissions on it. First, Mr Thio submits that it is well-established in the UK that aggravated damages are not awarded for negligence claims (see *Krajl and another v McGrath and another* [1986] 1 All ER 54). [note: 29] Second, Mr Thio submits that this position makes sense and should be adopted in Singapore because for an award of aggravated damages, there must be some measure of deliberate and intentional conduct which sits at odds with the very nature of a claim in negligence, which connotes carelessness and a lack of intention. [note: 30]

119 On my part, whilst I find merit in Mr Thio's submissions, I add that it is not entirely impossible to have conduct that is both careless (negligent) and intentional (see *Emblen v Myers* (1860) 6 H & N 54). As noted by the learned authors of *Charlesworth & Percy* at para 1–26, negligence may arise even where the damage complained of has arisen from some wilful or intentional act. This may cast some doubt on whether there ought to be an absolute legal bar against awarding aggravated damages in a negligence claim. That said, this is not a matter that arises in the present case and I make no further comment.

120 What is clear is that even if there is no absolute legal bar against an award of aggravated damages in negligence (an issue which I am not deciding presently), it must be the case that such an award would only be made in highly exceptional cases. The plaintiff's pleaded case, even at its highest, certainly does not fall within that category.

121 I thus strike out the plaintiff's claim for aggravated damages as well.

Conclusion

122 In conclusion, I allow the School's appeal against the decision set out in paragraph 1 of Registrar's Appeal No 219 of 2015, and dismiss the plaintiff's appeal in Registrar's Appeal No 230 of 2015. The entire statement of claim in Suit No 102 of 2015 is struck out. Costs here and below are awarded to the defendant, to be agreed or taxed.

123 In reaching this decision, I stress that the court accepts that the plaintiff may very well have suffered anguish and hurt from the pleaded acts of bullying. It is not disputed that the School and the

plaintiff's parents did have meetings and that the School did try to respond to the complaints. Whether they could or should have done *more* to control the alleged bullying is an important matter of school governance and society. If I had found that there was an *operative* duty of care on the facts, the question as to whether the School had taken reasonable care would have been triable. Beyond this, it is clear and obvious that control and regulation of school bullying is a matter which extends far beyond the confines of the tort of negligence.

124 Indeed, I note that Parliament is aware of the problem of school bullying by students. Section 4 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) ("PHA"), which came into force in November 2014, sets out a provision on harassment and causing alarm or distress. The illustration provided sets out the example of a student, X, who posts a vulgar tirade against another student, Y, on a website accessible to all of their classmates. One of Y's classmates shows the message on the website to Y, and Y is distressed. X is guilty of an offence under this section. Under s 11, the victim is also given a statutory action for damages. The PHA also provides in s 14(1) that the common law tort of harassment was abolished and that no civil proceedings for harassment are to be brought save under the PHA. That said, s 14(2) provides that the exclusion in subsection (1) does not apply to acts or conduct taking place before 15 November 2014. Whether a common law tort of harassment existed is in any case not something that has been authoritatively established. I say no more since the issue is not before me. The PHA does not of course apply in the present case. The point, however, is that the control of bullying in schools and elsewhere is not simply a matter for the tort of negligence. It requires a broader response by society and Parliament.

[note: 1] Statement of Claim (Amendment No 2) ("SOC 2") at [5]

[note: 2] SOC 2 at [7]

[note: 3] SOC 2 at [7a]

[note: 4] Defence (Amendment No 1) ("Defence") at [9]

[note: 5] SOC 2 at [13] and the School Principal's affidavit dated 21 May 2015 ("the School Principal's 1st Affidavit") at [21] and p 69

[note: 6] SOC 2 at [13] to [24]

[note: 7] The School Principal's 1st Affidavit at [76]

[note: 8] The School Principal's affidavit dated 16 June 2015 ("the School Principal's 2nd Affidavit") at [20]

[note: 9] SOC 2 at [28], [30] and p 29

[note: 10] SOC 2 at [29] and p 29, prayer (b)

[note: 11] Defendant's submissions dated 19 August 2015 ("The School's submissions") at [28]

[note: 12] RA 230/2015

[note: 13] RA 219/2015

[note: 14] AR's Minute Sheet dated 27 July 2015 at p 6

[note: 15] Plaintiff's written submissions for SUM 2447/2015 dated 22 June 2015 ("Plaintiff's 22/6/15 Submissions") at paras 66–67

[note: 16] The School's submissions at [30]

[note: 17] Plaintiff's 22/6/15 Submissions at [71]–[75]

[note: 18] The School's submissions at [70]

[note: 19] The School Principal's 1st Affidavit at [43]

[note: 20] The School Principal's 1st Affidavit at p 86

[note: 21] Plaintiff's written submissions dated 19 August 2015 ("Plaintiff's 19/8/15 submissions") at [8] and [11]

[note: 22] The School's submissions at [126(b)]

[note: 23] Plaintiff's 19/8/15 submissions at [17]

[note: 24] The School's submissions at [94] and [95]

[note: 25] The School's submissions at [91], Plaintiff's mother's affidavit dated 10 June 2015 at p 19

[note: 26] The School's submissions at [91]–[97]

[note: 27] The School's submissions at [98]

[note: 28] AR's Minute Sheet dated 27 July 2015 at p 9

[note: 29] The School's submissions at [116]

[note: 30] The School's submissions at [121]

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