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Liability of maker towards subject of negligent statement: Tan Woo Thian v PricewaterhouseCoopers

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Liability of Maker Towards Subject of Negligent Statement: Tan Woo Thian v PricewaterhouseCoopers

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Negligent misstatement cases typically involve claims by the recipient of the statement. Since Spring v Guardian Assurance, there has been an increasing number of cases where the plaintiff is the subject of the negligent misstatement, which is quite a very different matter. In Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd, Singapore's High Court and Court of Appeal consider the legal intricacies of such a claim.

Introduction

The tort of negligence is a dynamic and still evolving tort. Conventionally, the tort involves the establishing of duty of care, breach of duty, causation, and unremote damage. Additionally, scope of duty analysis is gaining importance.1 For duty of care, Singapore courts follow the approach laid down in Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency,2 of a two-stage test of proximity and policy, preceded by a threshold question of foreseeability.3

Negligent misstatement cases fall into two categories: recipient cases and subject-claimant cases. In the first category, the statement is communicated to the claimant, directly or indirectly, and the claimant, relying on the statement, suffers loss. There is a veritable body of authority on this subject, beginning with Hedley Byrne & Co Ltd v Heller & Partners Ltd,4 and followed and refined by cases such as Caparo Industries plc v Dickman,5 Smith v Bush,6 and, more recently, Banca Nazionale del Lavoro SPA v Playboy Club London Limited.7

In the second category, the claimant is the subject of the statement and the statement is usually not communicated to him but to another party and that other party conducts himself in a way that may cause loss to the claimant. A typical factual matrix in this category is the giving of a negligent reference by a former employer in respect of his ex-employee, causing the latter the loss of employment prospects. The seminal case in this area is Spring v Guardian Assurance plc (Spring).8 In Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd (Ramesh),9 which involved a similar factual matrix, the Singapore High Court gleaned insights from Spring and applied the proximity factors for a duty of care to be found:

- causal proximity, in that a negligent reference could seriously injure an ex-employee's employment prospects;10
- circumstantial proximity, in that the employer with special knowledge provides a reference in respect of the ex-employee, for his assistance and with his express or implied authority;11 and
- an "attenuated" form of voluntary assumption of responsibility (VAR) and reliance since the ex-employee relies on the employer (in a broad sense) and expects him to exercise due care in the provision of reference.12

The above approach appears relevant to Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd (Tan Woo Thian),13 the case at hand.

Facts of Case

This case involved a negligent fact-finding review conducted by the defendant auditors, who were engaged by a company (SBI) to investigate certain transactions. One of the transactions was for the acquisition and disposal of a Chinese company. The plaintiff, as SBI's former CEO, was involved in this transaction, which the investigation report suggested was invalid and illegal.

The plaintiff claimed for several items of loss which he alleged was caused by the defendant's negligence in investigation and reporting – loss to personal reputation, diminution in the value of his SBI shares, emotional trauma and loss of influence in SBI.

High Court Decision

In the High Court, See Kee Oon J dismissed the claim, holding that the defendant did not owe the plaintiff a duty of care,14 and that there was no breach.15 Furthermore, the plaintiff did not suffer any consequential losses.16 While the threshold of foreseeability was satisfied,17 the parties did not share a "special relationship" capable of making them legally proximate.18 The reason was that it was "difficult to see"19 how the defendant could have voluntarily assumed responsibility to the plaintiff, a third party to the contract between SBI and the defendant.

As regards VAR, the judge was of the view that the criterion of reliance was absent.20 The plaintiff contended21 that while he may not be said to have "relied" on the defendant's report in the way that a commissioning party would have done, he nonetheless "depended" upon it and hence there was VAR. However, the Court rejected the argument, noting that Singapore courts have not endorsed the concept of dependence as a relevant connector for VAR.22

In any event, in the Court's view, proximity was negated since the defendant had expressly disclaimed responsibility to any person except SBI's Audit Committee.23

Lastly, policy considerations such as the potential overlap between the claim in negligence and the law of defamation, the potential conflict with the defendant's contractual duties, and the chilling effect on professional fact-finding, militated against the imposition of a duty of care.24

Court of Appeal Decision

The Court of Appeal, comprising Sundaresh Menon CJ, Andrew Phang JCA and Belinda Ang JAD, upheld the High Court's decision, not on the ground of duty of care but for the reason that the claim was bound to fail at the stage of causation, even if duty and breach had been established.25 This was because the appellant's only argument on causation wrongly conflated the separate questions of causation and quantum of losses;26 in the first place, the losses could not be proven to have been causally connected with the respondent's alleged breach.27 Accordingly, the appeal was dismissed.

The Court of Appeal left open the issue of whether a duty of care may be owed by the maker of a misstatement in a subject-claimant case such as this. The Court cited the "significant commercial ramifications on professionals and their insurers"28 as a reason for their hesitation to make a conclusive pronouncement on this issue.

The judgment of the CA was delivered, ex-tempore, by the honourable Chief Justice Sundaresh Menon in his characteristically succinct manner. The honourable Judge helpfully set out the proximity and policy arguments which support and militate against imposing a duty of care.

Arguments Against

Several arguments were put forward by Menon CJ for not recognising such a duty.

First, the scope of the professional fact-finder's contractual duties to its client and his tortious duties to the world at large, and particularly the target of his investigation, might potentially clash. He remarked:

> "This may be said to apply in an even more pronounced manner in contexts where the very object of the contractual arrangement is to find a basis upon which the fact-finder's client can take a course of action that is adverse to the third party."29

Second, individuals who believe they have been wronged by the findings of professional fact-finders may seek recourse in alternative avenues such as the tort of defamation or complaints of professional misconduct.30

Third, as suggested by the High Court, imposing a duty may place undesirable limits on professional fact finding. As the Menon CJ explained:

> "Recognising a duty of care… might engender defensive and excessively circumspect reporting, which could be deleterious for professional fact-finders and those who engage their services."31

Arguments in Favour

The learned Judge also canvassed arguments which support the finding of a duty.

First, legal proximity between the subject-claimant and the professional fact-finder could be found by circumstantial and causal proximity. Menon CJ observed:

> "Circumstantial proximity arises insofar as the professional fact-finder has procured and gained 'special knowledge' of the third party…. Moreover, there is causal proximity insofar as loss to the third party would be a direct and immediate, or at least a highly foreseeable, consequence of the professional fact-finder's negligence in preparing and presenting his findings on the third party…."32

Second, an investigator's contractual obligations and tortious duties might not necessarily clash and much depends on the "content" of the duty. Using the example of a building contractor owing concurrent contractual duties and tortious duties to prevent foreseeable harm to a neighbouring property caused by careless work,33 the Court posed the following questions:

> "Does this analysis necessarily change because the purpose of the contractual engagement is to do something that is in some ways likely to be adverse to the third party? If so, how and why? Does the notion of owing a duty to a third party necessarily present a potential for conflict with the professional fact-finder's duty to the appointing party?"34

Finally, the existence of alternative causes of action such as defamation need not necessarily preclude the finding of a duty of care. After all, defamation, which is aimed at the vindication of reputation, "might not always address the mischief that a claim in negligence would".35 His Honour emphasised:

> "Professional fact-finders who make negligent or careless observations that give rise to loss may have done so… in circumstances that do not affect the reputation of the claimant… As a result, denying the existence of a duty of care in these circumstances might give rise to a legal 'black hole' in which loss suffered by a claimant as a consequence of a misdeed on the part of another might not be recoverable."36

Comments on High Court's Reasoning

The High Court's reasoning is unsatisfactory in several regards.

First, on proximity, perhaps the Court should have considered Ramesh and examined if an “attenuated” form of VAR had existed in the parties’ relationship, basically with “reliance” being replaced by “expectation”. It should be noted that the claimants in both cases knew they were the subject of the defendant’s statement,37 and had the expectation that the defendant would take due care in writing the statement. Seen in this light, there appears to have been proximity between the parties in Tan Woo Thian.

Second, as regards the disclaimer clause, it is surprising that the Court did not consider its validity under the Unfair Contract Terms Act.38 While it may be reasonable to exclude the defendant’s responsibility to remote third parties, it is a different matter where closely connected parties, such as the subject of a review or a target of an investigation, are concerned. It seems unreasonable to unilaterally impose the disclaimer clause on such a proximate party who did not assent to the disclaimer and whose interests are closely affected by the statement.

Third, as regards policy, the Court was of the view that the tort of defamation was not fundamentally inconsistent with the imposition of a duty of care in negligence;39 indeed, this view found support in the Court of Appeal.40 However, the High Court went on to say that imposing a duty of care in negligence would “unfairly deprive the defendant of certain defences (such as qualified privilege) which may only be available under defamation”.41 This runs contrary to the view taken in Ramesh, that the fact that the defendant has been careless in his belief will not deprive him of the defence of qualified privilege if his belief was honestly held and that he did not act with an improper motive.42 Indeed, the High Court’s misconception was set aright by the Court of Appeal, as will be discussed below.

Comments on Court of Appeal’s reasoning

The Court of Appeal’s judgment is to be welcomed. In the first place, it is understandable that the Court refrained from making a definitive pronouncement on the matter of duty of care in subject-claimant cases; after all, “difficult and important”43 questions and issues are involved. Menon CJ’s nuanced statements provide salient observations and helpful clarifications on the key issues.

First, the honourable Judge discussed the relevance of circumstantial and causal proximity in ascertaining whether a duty of care arises and explored the possibility of how, in a subject-claimant case such as Tan Woo Thian, legal proximity might be found. Clearly, VAR is not the only measure of proximity.

Second, the Court pointed out that the argument that the imposition of a duty of care might lead to a potential conflict with the defendant’s contractual duties can be turned on its head. As indicated in the quotation of the CA judgment above, the defendant’s possible duty to the third party may often be in line with the defendant’s duty to the contract party. For example, it is in the property owner’s interest that the contractor does not negligently cause harm to a third party, such as the owner of the adjoining property.

Similarly, when an auditor investigates into a matter and makes a report, it will usually be in the recipient’s interest that the report is fair and accurate as it relates to the subject(s) under investigation. Worries that the imposition of a duty of care might engender defensive and excessively circumspect reporting44 appear to be overstated.

Third, the Court helpfully clarified that the imposition of a duty of care and other courses of action can co-exist. While it is inevitable for different torts to overlap and intersect, one should bear in mind the fact that different torts seek to protect different interests.45 Sometimes, what is claimable under one tort may not be claimable in another.46 In general, the application of two (or more torts) to a particular situation may sometimes yield the same answer and at other times they may not. 47 It is for the Court to decide on the claims and the appropriate outcome.

Applicability of Ramesh Approach

As mentioned earlier, the CA's thinking on the legal rubrics pertaining to causal and circumstantial proximity were in accord with those expressed by the HC in Ramesh.48 As acknowledged by the CA, it is conceivable that there is sufficient proximity where the maker of a statement had "special knowledge" of the claimant.49

In addition, the writers suggest that the Ramesh "attenuated" form of VAR plus reliance (essentially VAR plus expectation) can and should be applied. In a subject-claimant scenario as this, it is reasonable to say that the professional fact-finder assumes a responsibility over the target of his investigations to conduct his inquiry in a way as to avoid harming him.

Further, as the subject-claimant is at the mercy of the professional fact-finder, it is true to say that he depends on the fact-finder to take reasonable care. The following words of the CA suggest that the Court may even be empathetic towards a concept of VAR plus dependence:

> "… the professional fact-finder in circumstances such as the present is tasked with making factual findings and drawing specific conclusions directly pertaining to the third party's conduct, and it is easy to see that erroneous findings can have harmful consequences on the target of the investigation."50

It should be noted that Ramesh also makes it clear that such an attenuated form of VAR plus reliance is relevant, but not sufficient on its own in finding proximity between the parties.51 The writers would respectfully defer on this point and suggest that while it may sometimes be appropriate to use VAR plus reliance and the Sutherland proximity complementarily, it should not be a rule that both must be applied. Often, using either of them to find proximity would suffice.

A Fair Outcome?

The inevitable question one asks of a court decision is – is the outcome fair? The case faltered on the lack of evidence, both as to breach and causation; in that regard, the outcome is fair. However, one wonders how the case would have panned out if the hurdles of breach and of causation had been scaled. Would the Court of Appeal have concluded that the respondent owed the appellant a duty of care?

This is of course conjecture, but based on the pointers given by the apex court as to the proximity and policy considerations, the writers are of the view that a duty of care could and would be found. Allowing the professional fact-finder to escape liability and leaving the subject-claimant without redress appears to run counter to the ethos of the tort of negligence of achieving outcomes that are fair, just, and reasonable,52 as well as to the broader tort objective of compensating innocent victims.

Another thought – what would the outcome have been, if the present case were modified to a recipient case, such as where a CEO who, acting on behalf of the company, appoints a professional fact-finder who makes negligent findings about the company and, in reliance of the findings, the company as well as the CEO suffer losses? The existing legal jurisprudence on recipient cases, briefly mention at the start of this article, would then be brought to bear.

Concluding Remarks

The Tan Woo Thian case has highlighted the challenges of a negligent misstatement claim mounted by subject-claimants. The exact legal framework for deciding such a claim has not been finalised, although the CA has given several helpful pointers. Of course in ascertaining duty, one considers proximity and policy.

As regards proximity, what may be gleaned from the CA judgment in Tan Woo Thian as well as the HC judgment in Ramesh, is that both Sutherland proximity factors (and their variations)53 as well as VAR should be considered, perhaps in combination, if necessary. As regards VAR, the writers' view is that VAR plus expectation is expressly supported by Ramesh.

As for policy, the arguments for and against the imposition of a duty should be carefully considered and balanced against each other. There is no merit for the supposition that policy considerations generally militate against the imposition of duty.

Further, other issues might potentially arise, such as, assuming there is a duty, what the applicable standard of care should be. As Menon CJ noted, "[b]eyond the existence of such a duty of care, the precise content of such a duty may also be usefully considered".54 Some answers have already been provided. The HC in Tan Woo Thian suggested that the statement-maker's findings and the means of arriving at these findings, must be reasonable, fair and objective.55 Further, CA in Ramesh suggested that the statement-maker must provide in the statement facts that are true and opinions that are based on and supported by true facts.56 Depending on the factual matrix, there may be other criteria.

In conclusion, negligent misstatement cases are diverse and complex, and present difficulties and challenges. For subject-claimant cases especially, the law is still evolving. The CA in Tan Woo Thian has given us precious pointers. One awaits the next apex court decision for greater clarity and finality as to the exact thinking and framework in this emerging area of law.

Endnotes

1 See South Australia Asset Management Corporation v York Montague Ltd (1997) AC 191, Rubenstein v HSBC (2012) EWCA Civ 1184, Hughes-Holland v BPE Solicitors (2018) AC 599, and most recently, the related judgments of the UKSC in Khan v Meadows (2021) UKSC 21 and Manchester Building Society v Grant Thornton UK LLP (2021) UKSC 20.

2 Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency (2007) 4 SLR(R) 100.

3 Id, at (73).

4 Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465.

5 Caparo Industries plc v Dickman (1990) 2 AC 605.

6 Smith v Eric S Bush (1990) 1 AC 381.

7 Banca Nazionale del Lavoro SPA v Playboy Club London Limited (2018) UKSC 43.

8 Spring v Guardian Assurance plc (1995) 2 AC 296.

9 Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd (2015) 4 SLR 1 ("Ramesh v AXA HC)").

10 Id, at (252).

11 Id, at (253).

12 Id, at (251) and (255).

13 Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd (2020) SGHC 171 ("TWT v PWC (HC)"), on appeal Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd (2021) SGCA 20 ("TWT v PWC (CA)").

14 TWT v PWC (HC), supra n 13, at (92).

15 Id, at (140).

16 Id, at (144).

17 Id, at (64)–(65).

18 Id, at (74) and (82).

19 Id, at (76).

20 Id, at (81).

21 Id, at (80), citing White v Jones (1995) 2 AC 207 at 271H–272A.

22 Id, (80).

23 Id, at (78).

24 Id, at (86)–(91).

25 TWT v PWC (CA), supra n 13, at (6).

26 Id, at (7).

27 Id, at (12).

28 Id, at (14).

29 Id, at (17).

30 Ibid.

31 Ibid.

32 Id, at (18).

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

37 TWT v PWC (HC), supra n 13, at (33); see Ramesh v AXA (HC), supra n 9, at (145) and (148).

38 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

39 TWT v PWC (HC), supra n 13, at (86), citing Ramesh v AXA (HC), supra n 9, at (272)–(273).

40 TWT v PWC (CA), supra n 13, at (18).

41 TWT v PWC (HC), supra n 13, at (87).

42 Ramesh v AXA (HC), supra n 9, at (277).

43 TWT v PWC (CA), supra n 13, at (19).

44 Id, at (17); see TWT v PWC (HC), supra n 13, at (89).

45 As was mentioned above, defamation might not address the mischief that a claim in negligence would: TWT v PWC (CA), supra n 13, at (18).

46 For example, it was suggested in Low Tuck Kwong v Sukamto Sia (2014) 1 SLR 639 at (98), that losses that do not relate to the damage to one's reputation but are consequentially linked to an impugned statement, might be claimable in negligence but not defamation.

47 For instance, raising the defence of unintentional defamation under section 7 of the Defamation Act requires the publisher to have exercised "all reasonable care" in relation to the publication. This seems to impose a higher standard of

care than in negligence. Therefore, in a case where a plaintiff is deciding between mounting a claim in negligence or in defamation, as against the defendant who has published the impugned statement, it might be more favourable to claim in defamation but not negligence.

48 TWT v PWC (CA), supra n 13, at (18); see Ramesh v AXA (HC), supra n 9, at (252)–(253).

49 Ramesh v AXA (HC), supra n 9, at (253).

50 TWT v PWC (CA), supra n 13, at (18).

51 Ramesh v AXA (HC), supra n 9, at (256).

52 Caparo, supra n 5, at 609.

53 Such as knowledge proximity, which was used by Steven Chong JA in NTUC Foodfare v SIA Engineering (2018) 2 SLR 588 at (50).

54 TWT v PWC (CA), supra n 13, at (19).

55 TWT v PWC (HC), supra n 13, at (138).

56 Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd (2016) 4 SLR 1124 at (102).

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