Ngiam Kong Seng and Another v Lim Chiew Hock
[2008] SGCA 23

Case Number : CA 38/2007

Decision Date : 29 May 2008

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Cecilia Hendrick and Wee Ai Tin Jayne (Kelvin Chia Partnership) for the appellants; Quentin Loh SC (Rajah & Tann) and Anthony Wee (United Legal Alliance LLC) for the respondent

Parties : Ngiam Kong Seng; Quek Sai Wah — Lim Chiew Hock

Tort – Negligence – Appeal against finding of fact – Whether trial judge plainly wrong to have found that accident was not caused by tortfeasor

Tort – Negligence – Duty of care – Psychiatric harm – Applicable test to determine existence of duty of care – Application of two-stage test set out in Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency – First stage involving consideration of whether there was sufficient legal proximity with three factors set out by Lord Wilberforce in McLoughlin v O'Brian playing important role – Second stage involving consideration of whether there are any public policy factors militating against the court imposing duty of care – Threshold considerations of recognisable psychiatric illness and factual foreseeability

Tort – Negligence – Duty of care – Psychiatric harm – Applicable test to determine existence of duty of care – Whether type of damage claimed should result in different test from two-stage test set out in Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency – Application of two-stage test irrespective of type of damage claimed

Tort – Negligence – Duty of care – Whether tortfeasor owing duty of care not to cause psychiatric harm – Whether communication of matters relating to accident sufficient to found duty of care

29 May 2008

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

Introduction

1 This was an appeal against the decision of the trial judge ("the Judge"), who dismissed the appellants' claims for damages (see *Ngiam Kong Seng v CitiCab Pte Ltd* [2007] SGHC 38) ("the GD")). We dismissed the appeal and now give the reasons for our decision.

2 In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 ("*Spandeck*"), this court set out the applicable test in Singapore for ascertaining the existence of a duty of care in cases involving claims for pure economic loss ("cases of pure economic loss") and cases involving claims for personal injuries and/or physical damage (collectively, "cases of physical damage"). The present appeal raises the issue as to what the applicable principles are for ascertaining whether a duty of care exists *vis-à-vis* cases involving psychiatric illness or nervous shock (collectively referred to as "psychiatric harm" in these grounds of decision).

3 While the focus of the hearing for the present appeal was on the decision of the Judge as to the question of whether the respondent had negligently caused the first appellant to suffer physical

injuries, the second appellant's claim that the respondent had caused her to suffer clinical depression entailed a consideration of the applicable principles for ascertaining whether a duty of care exists in cases of psychiatric harm.

The facts

4 The first appellant (the first plaintiff in the proceedings below), Ngiam Kong Seng, was the owner and the rider (at the material time) of motorcycle licence plate No AZ 3210 S ("the Motorcycle"). The second appellant (the second plaintiff in the court below), Quek Sai Wah, is the wife of the first appellant. The respondent (the second defendant in the proceedings below), Lim Chiew Hock, was the driver of taxi licence plate No SHA 9997 P ("the Taxi").

5 The first appellant, while riding the Motorcycle towards Ang Mo Kio, was involved in a traffic accident ("the Accident"), which was allegedly caused by the respondent (who was then driving the Taxi), on 27 January 2004 at about 3.19pm along the Central Expressway. As a result of the Accident, the first appellant sustained severe injuries which rendered him a tetraplegic. The first appellant is now dependent for the rest of his life on a caregiver – the main caregiver being the second appellant – for activities relating to daily living and mobility.

6 At the time of the Accident, the first appellant was 61 years old, and was working for the Port of Singapore Authority as an operations supervisor. He was due to retire a year later. The second appellant was 59 years old at the material time.

7 Both immediately after and during the period following the Accident, the respondent represented himself to be a helpful bystander who had rendered assistance to the first appellant. The second appellant was, accordingly, led to believe that the respondent was a good Samaritan and developed feelings of gratitude towards him. The inquiries by the appellants' solicitors eventually led to the second appellant being told that the respondent had been involved in the Accident. She subsequently suffered from major depression and suicidal tendencies resulting from, she claimed, having been "betrayed" (see the GD at [12]) by the respondent.

8 The appellants eventually started an action in negligence against the owner of the Taxi, CityCab Pte Ltd (the first defendant in the proceedings below), and the respondent. The claim against CityCab Pte Ltd was withdrawn before the trial in the High Court. The first appellant alleged that at the material time, the Taxi had collided into the rear of the Motorcycle, causing him to be flung backwards and onto the road. It was argued that the collision had been caused by the respondent's negligence, which was particularised to include, *inter alia*, driving at an excessive speed, failing to keep a proper lookout, failing to steer a safe and proper course, and failing to maintain a safe distance from the Motorcycle. The second appellant alleged that she had suffered from clinical depression as a result of:

(a) the respondent's failure to inform her of the severity of the first appellant's injuries and of his (the respondent's) involvement in the Accident; and

(b) the respondent's conduct in causing her to believe that he had been a helpful bystander at the time of the Accident.

9 In his defence, it was argued by the respondent that the Accident had not been caused by a collision between the Taxi and the Motorcycle, but had instead occurred after the Motorcycle had "self-skidded"[note: 1]. The respondent was adamant that the Taxi had not hit the Motorcycle, and argued that even if there had been a collision between the two vehicles, it would have taken place

after the Motorcycle had self-skidded. The respondent denied that the Accident had been caused or contributed to by his negligence, and argued that it had been caused or contributed to instead by the negligence of the first appellant in riding the Motorcycle. In so far as the second appellant's claim was concerned, the respondent argued that if the second appellant had indeed suffered the loss, damage and expense alleged, these would have been caused solely or partly by the negligence of the first appellant. The respondent also argued that the second appellant's claim should fail as she had not witnessed the Accident; nor had she been of sufficient proximity in time or space to the scene of the Accident such as would result in her alleged psychiatric problems.

10 At the trial, in so far as the appellants' case was concerned, both appellants testified, along with their eldest son, Ngiam Peng Hong. They also adduced expert testimony from medical practitioners on the mental state of the second appellant. In so far as the respondent's defence was concerned, the respondent testified, along with an independent witness, his passenger at the material time, Ms Maureen Andrew ("Ms Andrew"), as well as an accident reconstruction expert. The Traffic Police investigating officer who had investigated the case, Staff Sergeant Andy Foo ("Mr Foo"), was also called upon by the respondent to testify as an independent witness. (At the time of the trial, Mr Foo had already resigned from the Singapore Police Force to become an insurance agent.)

The decision below

11 Liability was the only issue which had to be determined in the court below. For the first appellant's claim, the Judge had to consider whether the respondent, on the facts, was "responsible for the first [appellant's] condition" (see the GD at [74]). This issue was also described as follows (see the GD at [26]):

> What was common ground was that the first plaintiff [*ie*, the first appellant] lost control of the [M]otorcycle. What was in dispute was why he lost control. Was it because the [T]axi rear-ended the [M]otorcycle as the first plaintiff asserted? Or, as the second defendant [*ie*, the respondent] was to contend, … was [it] because the [M]otorcycle self-skidded due to the wet and slippery road and not because of any impact with the [T]axi[?]

12 The Judge found the evidence of the first appellant to be inconsistent with regard to, *inter alia*, which part of the Motorcycle had been hit and how he had fallen off the Motorcycle. The Judge found the respondent's evidence, in contrast, to be consistent. Moreover, the evidence of the independent witnesses (Ms Andrew and Mr Foo), as well as other evidence including, *inter alia*, evidence of the absence of damage to the vehicles concerned supported the respondent's case. The Judge, accordingly, came to the conclusion that the respondent's version of the events should be accepted and that the first appellant's claim should therefore be dismissed (see the GD at [75]–[83]).

13 In so far as the second appellant was concerned, the Judge was of the view that the second appellant's case hinged on the first appellant's case, and, therefore, since the first appellant's claim had been dismissed, the second appellant's claim must, as a consequence, fail *in limine* (see the GD at [87]). The Judge also held that even if the respondent had been found to be liable to the first appellant, the second appellant's claim would still have been rejected on the grounds, *inter alia*, that (see the GD at [87]–[90]):

(a) the claim had no basis in law and was too remote;

(b) the depression suffered by the second appellant had been caused by her inability to cope with her new burden of being the first appellant's primary caregiver, rather than by the respondent's acts or omissions; and

(c) the claim had merely been an afterthought.

The first appellant's case on appeal

14 Before this court, the first appellant argued that the decision of the Judge on the facts – that the respondent was not responsible for the Accident – should be overturned. The law on whether an appellate court should overturn a finding of fact by a trial judge is clear and need not be elaborated upon, save to state that a trial judge's finding of fact must be plainly wrong before it will be overturned by an appellate court. We rejected the first appellant's arguments on appeal as there was no basis for finding that the Judge's decision was plainly wrong.

15 The only witness who firmly testified that the Accident had been caused by the respondent was the first appellant himself. However, there were inconsistencies in his evidence, as correctly pointed out by the Judge. Even if we had disregarded the inconsistencies, more evidence would have been needed to establish the first appellant's claim on a balance of probabilities as the Motorcycle had (allegedly) been hit in the rear, meaning that the first appellant could not have actually witnessed any collision as he would, in all likelihood, have been looking ahead (thus facing the opposite direction) and not behind at the alleged point of contact between the Motorcycle and the Taxi.

16 The only other eyewitnesses of the Accident who testified were the respondent and Ms Andrew. Of great significance was the fact that the evidence of Ms Andrew, an independent witness, not only did not contradict the respondent's evidence, but also did not support the first appellant's evidence.

17 Of even greater significance was the lack of objective evidence in support of the first appellant's case. The Traffic Police accident reports and the post-accident pictures of the Motorcycle and the Taxi revealed that there had been no damage to the rear of the Motorcycle and the front of the Taxi. The only "damage" that the first appellant could point to was a semi-circular black mark (which was described in the appellants' written submissions as an "imprint"[note: 2]) located on the left side of the Taxi just below the left wing mirror. It was contended that this was proof that the Taxi had struck the storage box at the rear of the Motorcycle ("the rear box"). Having examining photographs of the imprint, we agreed with the accident reconstruction expert's view, which was in fact consistent with common knowledge of the forces of nature, that it would have been physically impossible for the imprint to have been created by the Taxi hitting the rear box. The shape of the imprint was such that in order for the semi-circular arch to have been created, the rear box must have made contact with the Taxi initially at a point lower than the crest of the curve, with the point or area of contact then going up to the crest before going down again. In other words, the Motorcycle would have had to first fall, make contact with the Taxi, and then rise and fall again. This would be against the laws of gravity. Other than the rear box, only the tyres of the Motorcycle could possibly have caused the imprint on the Taxi, but we found this suggestion implausible. For one, as the accident reconstruction expert testified, the imprint was not consistent with the height of the front wheel of the Motorcycle, based on height measurements taken of that wheel and of the left side of the Taxi. As for the likelihood of the Motorcycle's rear tyre having caused the imprint, we likewise found this highly unlikely as that tyre was surrounded (or, loosely speaking, "protected") by protruding objects such as the exhaust pipes, the rear foot rest, the rear box and the rear suspension. If there had indeed been contact between the Motorcycle and the Taxi, these protrusions at the rear of the Motorcycle, rather than the rear tyre itself, would have come into contact with the Taxi first.

18 For the foregoing reasons, we came to the conclusion that the first appellant had failed to

establish his case on a balance of probabilities and, accordingly, dismissed the appeal as far as he was concerned.

The second appellant's case on appeal

19 The second appellant argued that the Judge had erred in holding that her claim for damages for clinical depression should fail and challenged the latter's reasons for this decision. In our view, before considering the substantive merits of the second appellant's arguments, it would be appropriate, first, to set out the applicable principles relating to the ascertainment of liability in the context of claims in negligence for psychiatric harm.

The law relating to claims in negligence for psychiatric harm

Overview

20 The general position in Singapore with respect to liability for negligence in cases of *pure economic loss* and cases of *physical damage* has now been settled by the recent decision of this court in *Spandeck* ([2] *supra*). Briefly stated, the position in Singapore follows, in the main, the two-stage test laid down by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns*"), where the learned law lord observed, as follows (at 751–752):

> [I]n order to establish that a duty of care arises in a particular situation, *it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.* Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise … [emphasis added]

21 More specifically, Chan Sek Keong CJ, delivering the judgment of the court in *Spandeck*, observed thus (at [73]):

> ***In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if its application is preceded by a preliminary requirement of*** *factual* ***foreseeability. We would add that this test is to be applied*** *incrementally*, ***in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy.*** As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. ***We would admit at this juncture that this is basically a restatement of the two-stage test in Anns, tempered by the preliminary requirement of factual foreseeability. Indeed, we should point out that this is the test applied in substance by many jurisdictions in the Commonwealth***: see, for example, the Canadian case of *Cooper v Hobart* (2001) 206 DLR (4th) 193; the New Zealand case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 … [emphasis in

original in italics; emphasis added in bold italics]

In a similar vein, the learned Chief Justice summarised the applicable law in Singapore at the end of the judgment in *Spandeck* in the following terms (at [115]):

> To recapitulate: A *single* test to determine the existence of a duty of care should be applied regardless of the nature of the damage caused (*ie*, pure economic loss or physical damage). It could be that a more restricted approach is preferable for cases of pure economic loss but this is to be done within the confines of a single test. ***This test is a two-stage test, comprising of, first, proximity and, second, policy considerations. These two stages are to be approached with reference to the facts of decided cases although the absence of such cases is not an absolute bar against a finding of duty. There is, of course, the threshold issue of factual foreseeability but since this is likely to be fulfilled in most cases, we do not see the need to include this as part of the*** *legal* ***test for a duty of care.*** [emphasis in original in italics; emphasis added in bold italics]

22 The court in *Spandeck* did not need to consider what ought to be the applicable legal rules and principles with respect to liability in the sphere of *psychiatric harm*. That particular issue, however, arises in the present appeal in relation to the second appellant and raises an important (and related) question: To what extent is the two-stage test laid down in *Spandeck* applicable in the sphere of psychiatric harm? By way of a brief overview of the answer to this question, which will be elaborated upon in more detail in a moment, this same two-stage test applies in cases of psychiatric harm as well, although specific criteria would apply in this particular context.

23 The law relating to liability in negligence for psychiatric harm has had a lengthy and (to a large extent) chequered history (see, generally, Peter R Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (Lawbook Co, 2nd Ed, 2006), especially at ch 1). It is clear, however, that a significant legal watershed occurred when the leading decision of the House of Lords in *McLoughlin v O'Brian* [1983] 1 AC 410 ("*McLoughlin*") was delivered in 1982 (this was followed in subsequent decisions, notably, the (also) House of Lords decisions of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 ("*Alcock*") and *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 ("*White*")). The next major landmark in this area of the law (also laid down by the House of Lords) was the decision in *Page v Smith* [1996] AC 155 ("*Page*"). As we shall see, the decisions in *McLoughlin* and *Page*, whilst seminal in their own right, have engendered difficulties which require clarification (in the case of the former) and even rejection (in the case of the latter) in the context of what the position in Singapore ought to be. We will elaborate upon these observations in due course.

24 It is apposite, in the meantime, to note that there is a dearth of case law in Singapore with regard to claims in negligence for psychiatric harm. Indeed, there appears to be only one significant decision which has analysed the duty of care in this area of the tort of negligence in any detail – the Singapore High Court decision of *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317 ("*Pang Koi Fa*"), where the principles laid down in *McLoughlin* were applied. These principles were also applied in the Malaysian High Court decision of *Jub'il bin Mohamed Taib Taral v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 669. There is an older Malaysian High Court decision, *Zainab Binti Ismail v Marimuthu* [1955] MLJ 22, where *Bourhill v Young* [1943] AC 92 ("*Bourhill*") and *Hambrook v Stokes Brothers* [1925] 1 KB 141 ("*Hambrook*") were cited. There is also a more recent decision (also of the Singapore High Court), *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh* [2007] 4 SLR 843, where there was some discussion of the issue (an appeal against the High Court's decision is currently pending before this court).

25 It would be appropriate, in our view, if we examine – in greater detail – the decisions of the House of Lords in both *McLoughlin* and *Page* before setting out what we consider the law in Singapore ought to be with regard to liability in negligence for psychiatric harm and how this legal framework relates to the approach and principles laid down in *Spandeck* ([2] *supra*).

The decision in McLoughlin

The decision itself

26 Although the law preceding the House of Lords' decision in *McLoughlin* ([23] *supra*) was not by any means a legal vacuum (see, for example, the (earlier) House of Lords decision of *Bourhill* ([24] *supra*)), as alluded to earlier (above at [23]), *McLoughlin* was a major landmark in the law relating to liability for negligence that had inflicted psychiatric harm on the victim/plaintiff. It represented a detailed (and up-to-date) analysis of the law and laid down further guidelines for the courts.

27 The fact situation in *McLoughlin*, which is important to note, was as follows. There was a tragic and horrendous road accident which involved the plaintiff's husband ("Mr McLoughlin"), who was driving, and three of her children. Another child ("the fourth child"), travelling in a following car, was (fortunately) not involved in the accident. The collision was between the car driven by Mr McLoughlin and a lorry driven by the first defendant (and owned by the second defendant). That particular lorry had, in fact, been in a collision with another lorry driven by the third defendant (and owned by the fourth defendant). It was admitted that the accident to the car driven by Mr McLoughlin was caused by the defendants' negligence.

28 Mr McLoughlin suffered bruising and shock. One child, a son aged 17 ("the first child"), suffered injuries to his head and his face, cerebral concussion, fractures of both scapulae as well as bruising and abrasions. Another child, a daughter aged seven ("the second child"), suffered concussion, a fracture of the right clavicle, bruising, abrasions and shock. A third child, a daughter who was nearly three years old ("the third child"), was so seriously injured that she died almost immediately.

29 The plaintiff herself ("Mrs McLoughlin") was at home at the time of the accident. This was about *two miles* from the scene of the accident. The person driving the car in which the fourth child (a son aged 11) was travelling reported the accident to Mrs McLoughlin about *an hour or so later*. He told her that he thought that the first child was dying, and that he did not know the whereabouts of Mr McLoughlin or the condition of her daughter. *He then drove her to the hospital to which her children and Mr McLoughlin had been taken*.

30 *At the hospital*, Mrs McLoughlin met the fourth child (who had been in the other car, thereby escaping injury), who told her that the third child was dead. Mrs McLoughlin was then taken down a corridor and, through a window, she saw the second child, who was crying, with her face cut and covered with dirt and oil. She could also hear the first child shouting and screaming. She was then taken to Mr McLoughlin, who was sitting with his head in his hands and who was dishevelled and covered in mud and oil. He began sobbing when he saw Mrs McLoughlin. The latter was then taken to see the first child, whose left face and left side were covered entirely. He appeared to recognise Mrs McLoughlin, but then lapsed into unconsciousness. Mrs McLoughlin was then taken to see the second child, who had by then been cleaned up. The latter was too upset to speak and simply clung on to Mrs McLoughlin. As Lord Wilberforce put it (see *McLoughlin* at 417):

> There can be no doubt that these circumstances, witnessed by the appellant [*ie*, Mrs McLoughlin], were distressing in the extreme and were capable of producing an effect going

well beyond that of grief and sorrow.

31 Mrs McLoughlin subsequently brought proceedings against the defendants. It is important to note that it was *assumed* by the trial judge that Mrs McLoughlin was a person of reasonable fortitude and had indeed suffered the condition complained of, which was described by Lord Wilberforce as "severe shock, organic depression and a change of personality", with "[n]umerous symptoms of a physiological character … manifested" (*ibid*). The type of psychiatric harm which Mrs McLoughlin claimed she had suffered is a not unimportant point, simply because a *threshold* requirement (as described by Lord Bridge of Harwich in *McLoughlin* ([23] *supra*) at 431) which must be satisfied before there can be recovery for psychiatric harm is that the claimant must have suffered from *a recognisable psychiatric illness* (though *cf* the terminology utilised in Australian legislation at [113] below).

32 The trial judge gave judgment in favour of the defendants, holding that they owed no duty of care to Mrs McLoughlin because it was not reasonably foreseeable that she would suffer nervous shock.

33 The English Court of Appeal affirmed the decision at first instance, albeit on somewhat different grounds. This was well-summarised by Lord Wilberforce, as follows (*id* at 417):

> Stephenson L.J. took the view that the possibility of injury to the appellant by nervous shock *was* reasonably foreseeable and that the respondents [*ie*, the defendants] owed the appellant a duty of care. However, he held that considerations of policy prevented the appellant from recovering. Griffiths L.J. held that injury by nervous shock to the appellant was "readily foreseeable" but that the respondents owed no duty of care to the appellant. The duty was limited to those on the road nearby. Cumming-Bruce L.J. agreed with both judgments. [emphasis in original]

34 Mrs McLoughlin then appealed to the House of Lords. Lord Wilberforce set out, in succinct fashion, the fundamental issue in the case, as follows (*id* at 417–418):

> The critical question to be decided is whether a person in the position of the appellant, i.e. one who was not present at the scene of grievous injuries to her family but who comes upon those injuries at an interval of time and space, can recover damages for nervous shock.

35 The House of Lords held in favour of Mrs McLoughlin and therefore allowed the appeal. The leading judgment was, in fact, delivered by Lord Wilberforce. Significantly, Lord Wilberforce had earlier also laid down the two-stage test in *Anns* ([20] *supra*). The observations made by Lord Wilberforce in *McLoughlin* ([23] *supra*) will be set out in full not only because (as just mentioned) he delivered the leading judgment, but also because it is important, in our view, to clarify any terminological uncertainty that might be generated (particularly if we compare Lord Wilberforce's observations in *McLoughlin* with his formulation of the two-stage test in *Anns*). Indeed, we shall demonstrate that Lord Wilberforce's approach in *McLoughlin* towards ascertaining whether a defendant owed a duty of care was consistent with his approach in *Anns* and, consequently, with the approach that this court adopted in *Spandeck* ([2] *supra*). In order to proceed in the clearest way possible, we propose to divide Lord Wilberforce's observations (which are important, albeit relatively lengthy) into three parts. Before proceeding to do so, however, we should note that two other law lords in *McLoughlin* arrived at the same result by adopting what was, in our view, a *much broader* approach. In particular, Lord Bridge and Lord Scarman applied a "pure" test of reasonable foreseeabilty without more (reference may also be made to the views of Thomas J in the New Zealand Court of Appeal decision of *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, which may, in turn, be contrasted with the views of the other four judges in the same case, who adopted Lord Wilberforce's

approach in *McLoughlin* instead). With respect, the approach taken by Lord Bridge and Lord Scarman in *McLoughlin* is, in our view, too broad. As we shall see in a moment, Lord Wilberforce added three factors which served to constrain the otherwise extensive liability that might result if a "pure" test of reasonable foreseeability alone were applied.

Lord Wilberforce's observations in McLoughlin (in three parts)

36 In the *first part* ("*Part 1*") of his judgment in *McLoughlin* ([23] *supra*), Lord Wilberforce observed thus (at 420–421):

> [A]t the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed *as a matter of policy*. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not automatically impose a duty of care … [and] does not do so in fact where policy indicates the contrary. This is an approach which *one can see very clearly from the way in which Lord Atkin stated the neighbour principle* in *Donoghue v. Stevenson* [1932] A.C. 562, 580: "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected. …" This is saying that *foreseeability must be accompanied and limited by* the *law's judgment* as to persons who ought, *according to its standards of value or justice*, to have been in [the defendant's] contemplation. ***Foreseeability***, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom [a] duty may be owed, and the consequences for which an actor may be held responsible. *It is* ***not merely an issue of fact*** *to be left to be found as such*. When it is said to result in a duty of care being owed to a person or a class, *the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered*. ***That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear.*** I gave some examples in *Anns v. Merton London Borough Council* [1978] A.C. 728, 752, *Anns* itself being one. I may add what Lord Reid said in *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623:
>
> > "A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."
>
> ***We must then consider the policy arguments***. In doing so we must bear in mind that cases of "nervous shock," and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself, but only an example of a more general rule that *recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close,* ***proximity*** *to such a situation*.
>
> [emphasis added in italics and bold italics]

37 Lord Wilberforce then proceeded, in the *second part* ("*Part 2*") of his judgment in *McLoughlin*, to enunciate what he viewed to be the "*policy* arguments *against* a wider extension" [emphasis added] (*id* at 421) of liability, as follows (*ibid*):

> *The policy arguments against a wider extension* can be stated under *four heads.*

First, it may be said that such extension may lead to a proliferation of claims, and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage, for all, or many, road accidents and industrial accidents.

Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, *a large additional burden will be placed on insurers, and ultimately upon the class of persons insured – road users or employers*.

Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation.

Fourthly, it may be said – and the Court of Appeal agreed with this – that *an extension of the scope of liability ought only to be made by the legislature, after careful research.* This is the course which has been taken in New South Wales and the Australian Capital Territory.

The whole argument has been well summed up by Dean Prosser (*Prosser,Torts*, 4th ed. (1971), p. 256):

> "The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle."

Since he wrote, the type of damage has, in this country at least, become more familiar and less deterrent to recovery. *And some of the arguments are susceptible of answer. Fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated – experience in other fields suggests that such fears usually are. If some increase does occur, that may only reveal the existence of a genuine social need: that legislation has been found necessary in Australia may indicate the same thing.*

[emphasis added]

38 Finally, in the *third part* ("*Part 3*") of his judgment in *McLoughlin*, the learned law lord observed as follows (*id* at 421–422):

> ***But, these discounts accepted, there remains***, in my opinion, just because "shock" in its nature is capable of affecting so wide a range of people,***a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons*** *whose claims should be recognised*; the ***proximity*** *of such persons* ***to the accident; and the means by which the shock is caused.*** As regards the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. *I think, however, that it should follow that other cases involving less close*

relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. ***The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.***

As regards ***proximity*** *to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the "nervous shock." Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called* ***the "aftermath" doctrine*** *one who, from* ***close proximity****, comes very soon upon the scene should not be excluded.* In my opinion, the result in *Benson* v. *Lee* [1972] V. R. 879 was correct and indeed inescapable. It was based, soundly, upon

> "direct perception of some of the events which go to make up the accident as an entire event, and this includes … the immediate aftermath …" (p. 880.)

The High Court's majority decision in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, where a child's body was found floating in a trench after a prolonged search, may perhaps be placed on the other side of a recognisable line (Evatt J. in a powerful dissent placed it on the same side), but, in addition, I find the conclusion of Lush J. [in *Benson v Lee*] to reflect developments in the law.

Finally, and by way of reinforcement of "aftermath" cases, I would accept, by analogy with "rescue" situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene – normally a parent or a spouse – could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.

Subject only to these qualifications, I think that a strict test of ***proximity*** *by sight or hearing should be applied by the courts.*

Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik* v. *Brenner* (1967) 65 D.L.R. (2d) 651. *The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.*

[emphasis added in italics and bold italics]

Lord Wilberforce's observations considered

39 *Part 1* of Lord Wilberforce's judgment in *McLoughlin* ([23] *supra*) (reproduced above at [36]) is instructive in several ways. In its most *general* sense, this portion of the learned law lord's judgment not only reaffirms his earlier views in *Anns* ([20] *supra*) at 751–752 (reproduced above at [20]), but also (and more importantly) supports and is consistent with the views of this court in *Spandeck* ([2] *supra*), as reproduced above at [21]. These views constitute, in fact, the *general foundation* upon which a duty of care in claims in negligence for non-physical injury (including psychiatric harm) is based. Briefly, these views include the following:

(a) The court needs to draw clear *boundaries to (or place limits on)* liability in negligence for non-physical injury in order to ensure that such liability does not become indeterminate and/or arbitrary. As Prof Tan Keng Feng aptly points out (see Tan Keng Feng, "Liability for Psychiatric Illness – The English Law Commission" (1999) 7 Tort Law Rev 165 ("Liability for Psychiatric Illness")), there is *no* difficulty in so far as *physical* injury is concerned as the *very nature* of the injury *itself* constitutes the necessary boundary or limitation (which he terms the "physical impact limit" (*id* at 166)). It should also be noted that this court in *Spandeck* was of the view (at [64] and [70]–[72]) that there should not be different tests for determining whether a duty of care exists in cases of physical injury on the one hand and cases of non-physical injury on the other. Most importantly, perhaps, such boundaries or limits are drawn by the court as a matter of *policy*. *However*, Lord Wilberforce's reference to "policy" in *McLoughlin* will (as we shall see below) require some *clarification*.

(b) Mere *factual* foreseeability, whilst a necessary condition or prerequisite to establish a duty of care, is *not* (*in and of itself*) sufficient (see *Spandeck* at [75]–[76]).

(c) *Proximity* between the plaintiff and the defendant is *also* a *condition or prerequisite* which must be satisfied in order to establish a duty of care (*id* at [77]) and, to this end, *policy* arguments must be considered.

40 Before proceeding to consider *Part 2* of Lord Wilberforce's judgment in *McLoughlin* in more detail *and* in its *context*, an important clarification of the learned law lord's use of the concept of "*policy*" (at, *inter alia*, 421) is not only instructive, but also necessary in order to avoid the very real confusion that would otherwise result. Indeed, the danger of such confusion reminds us of the famous (and oft-cited) words of Burrough J in the leading English decision of *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294 (at 252; 303) that public policy is:

> [A] very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law.

It is, of course, true that the ebullient Lord Denning MR was, in comparison, more sanguine when he observed in the English Court of Appeal decision of *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 (at 606) that:

> With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.

It is, nevertheless, clear that the concept of "public policy" is not an easy one and the court must be vigilant to ensure that it is properly conceived as well as properly applied. In the specific context of the present appeal, let us elaborate on how possible confusion can, in fact, be avoided.

41 The key to avoiding the possible confusion referred to in the preceding paragraph is to recognise that there are *different conceptions* of the *concept* of "*policy*". Indeed, the concept of "*public* policy" referred to in that very same paragraph is but *one* conception of the concept of "policy".

42 As we shall illustrate in a moment, Lord Wilberforce was, in *McLoughlin* ([23] *supra*), referring to *two different conceptions* of the concept of "*policy*".

43 The *first* conception of "policy" does *not* refer to "*public* policy" as such. It is, rather, a reference to the *factors* that must be taken into account as between *the parties* to a negligence

action (which constitute, in our view, an example of "*legal* policy" [emphasis added] as referred to in the House of Lords decision of *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 108, *per* Lord Millett). In particular, these factors will ensure that there is sufficient *proximity* between the parties. Indeed, as this court emphasised in *Spandeck* ([2] *supra* at [77]), *proximity* is the key *legal* focus in so far as the *first stage* of the two-stage test established therein is concerned. Looked at in this light, we would respectfully suggest that it is preferable (from both theoretical as well as practical points of view) *to avoid the use of the term "policy" altogether* when discussing *legal* policy and to refer, instead, to the concept of "*proximity*". In other words, the term "policy" should be reserved exclusively for use in the context of "*public* policy".

44 The *second* conception of "policy" refers, as just mentioned, to "*public* policy". Put simply, this particular conception of "policy" does *not* refer to the relationship between *the parties* as such (which, as we have emphasised in the preceding paragraph, is more appropriately characterised as well as analysed under the rubric of "*proximity*"), but refers, instead, to *broader societal* considerations. It is *this* particular conception of "policy" that constitutes the *second* stage of the two-stage test laid down by this court in *Spandeck*. In *Spandeck* itself, Chan CJ elaborated upon this particular conception of "policy", as follows (at [83]–[85]):

> 83 Assuming a positive answer to the preliminary question of factual foreseeability and the first stage of the legal proximity test, a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties.
>
> 84 We also recognise that the obvious objection to utilising policy as the overarching determinant of liability is its potential to result in arbitrary decisions. Although it is generally recognised that public policy is an unruly horse (*per* Burrough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303), it cannot be *completely* ignored. The danger is *not* with judges deciding cases based on policy considerations but rather with judges deciding cases based *solely* on them. We agree with [Prof Tan Keng Feng, "The Three-Part Test: Yet Another Test of Duty in Negligence" (1989) 31 Mal L Rev 223 at 228] that "[t]he truth lies somewhere in between pure principle-based decisions and policy-based decisions" and that "[i]t is obviously impossible to decide cases *in vacuo*, exclusive of the interests and the context of the community for which the decisions are made". In our view, it is inescapable that some measure of public policy must be considered but it must not be the sole determinant.
>
> 85 We would also caution that when applying policy considerations to negate the imposition of a duty of care, the courts must be careful to differentiate such considerations from the requirement of proximity in the first stage of the test we have articulated. The courts must, as far as possible, avoid giving the impression that there remain "unexpressed motives" behind their finding for or against a duty. The courts must also not have litigants believe, as J A Smillie put it in "The Foundation of the Duty of Care in Negligence" (1989) 15 Monash U L Rev 302 at 302, that "none of [the tests articulated by the courts] is truly explanatory of judges' reasoning or provides a helpful framework for analysis of the duty question". If there is truly a *pertinent and relevant* policy consideration involving value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals, we feel that it would be better if the courts were to articulate these concerns under the requirement of policy considerations, rather than subsume these concerns within the proximity requirement, which may then lead to an overall distortion of the legal test to determine the existence of a duty of care. In this respect, we agree with Nicholas J Mullany when he notes in "Proximity, Policy and Procrastination" (1992)

9 Aust Bar Rev 80 at 83 that:

> Judges should openly express the true premises of their decisions and, if recovery is considered to be undeserved, in the light of greater moral, social, economic, administrative or philosophical public perceptions, then these reasons and not others inherently uncertain in nature, should be expressed as the true foundation for denial of recovery.

[emphasis in original]

45 Unfortunately, Lord Wilberforce did *not*, with respect, distinguish between the two conceptions of "policy" referred to earlier (above at [43]–[44]). For example, in *Part 1* of his judgment in *McLoughlin* (reproduced above at [36]), the learned law lord was, in point of fact, referring to the *first* conception of "policy", *viz*, *legal* policy (or, to use the preferred term (see [43] above), *proximity*) . *However*, in *Part 2* of his judgment in the same case (reproduced above at [37]), Lord Wilberforce appeared to be referring to aspects of the *second* conception of "policy", *viz*, *public* policy, instead. That *Part 2* of his judgment *follows immediately from Part 1* of the same judgment serves only to exacerbate the confusion in so far as the various conceptions of "policy" are concerned. It is admitted, however, that because the line between the universal and the particular (see the correlation between the two as pointed out by this court in *Spandeck* at [28]) is, by its very nature, not always clear (and may even be blurred), the opportunities for confusion are (unfortunately) multiplied. Nevertheless, a clear reading of *Part 2* of Lord Wilberforce's judgment in *McLoughlin* does, in fact, suggest (on *balance*) that it was the *second* (and *broader*) aspect of (*public*) "policy" that the learned law lord was referring to. That this is the correct interpretation to adopt is *confirmed*, *in no uncertain terms*, *by Part 3* of Lord Wilberforce's judgment in the same case – to which our attention must now turn.

46 *Part 3* of Lord Wilberforce's judgment (reproduced above at [38]) is, in fact, the *most important* part of his judgment in *McLoughlin* ([23] *supra*). It is, indeed, *this* particular part of the judgment that is cited most often. This is not surprising in view of the fact that the learned law lord set out in *Part 3*, in detail, the "three elements" (*id* at 422) which the court ought to consider in every claim founded on negligence that has resulted in *nervous shock*. Indeed, as already noted (above at [24]), these three elements were considered and applied by the *Singapore* High Court (in *Pang Koi Fa* ([24] *supra*)).

47 In *Part 3* of Lord Wilberforce's judgment in *McLoughlin*, the three elements referred to are clearly part of the first (and *narrower*) conception of "policy", *viz*, *legal* policy, which (as we have noted above at [43]) relates to the issue of *proximity* between *the parties* themselves. The learned law lord, in fact, *expressly stated* that this was so. He referred to the concept of "proximity" no fewer than five times in this part of his judgment. Indeed, he stated at 422 (see the passage reproduced above at [38]) that "[t]he claim … ha[d] to be judged in the light of the other factors, such as *proximity* to the scene in time and place, and the nature of the accident" [emphasis added]. It is also extremely significant, in our view, that *Part 3* of Lord Wilberforce's judgment *follows immediately from Part 2* of the same judgment, where (as we noted above at [45]) there is a clear reference to the *second* (and *broader*) conception of "policy", *viz*, *public* policy. Indeed, the contrast between the second and the first conceptions of "policy", *as embodied within Part 2 and Part 3 (respectively)* of Lord Wilberforce's judgment in *McLoughlin*, could not be clearer.

48 The upshot of the above analysis is that the apparent "policy" factors referred to by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* are, *in substance*, factors that relate to *proximity* between *the parties* instead. There would remain residuary "policy" factors that are, in our view, "true" policy factors inasmuch as they relate to *public* policy and thus fall within the purview of

the *second* conception of "policy". It will be seen that both these aforementioned stages of legal analysis – *ie*, consideration of, first, proximity, followed by public policy – *correspond precisely to the two-stage test set out by this court* in *Spandeck* ([2] *supra*) (reproduced above at [21]). In other words – and this is an extremely important point – the two-stage test laid down in *Spandeck* is *equally* applicable to a situation where there is a claim in negligence for psychiatric harm. There is therefore no need for a *separate* legal regime governing such a claim. It will be explained, further, *why* the two-stage test in *Spandeck should* be the legal approach that is to be adopted in *all* types of claims in negligence in *the Singapore context* in so far as establishing a legal duty of care on the part of the defendant is concerned. At this stage, it will suffice to state that such an approach, whilst simple, is by no means simplistic. On the contrary, it brings certainty to a much vexed (albeit extremely important) area of the law of tort that has engendered many difficulties, both confused and confusing, across Commonwealth jurisdictions.

A comparison of Lord Wilberforce's observations in McLoughlin and in Anns

49 At this juncture, it remains for us to consider the possibility that, as a result of the approach which Lord Wilberforce took in *McLoughlin* ([23] *supra*), the two-stage test which he laid down in *Anns* ([20] *supra*) at 751–752 (reproduced above at [20]) must now be reinterpreted as referring to *factual* foreseeability at the *first* stage, followed (at the *second* stage) by "*policy*" considerations in the *narrower* (and *first*) conception of "policy", which (as we saw above at [43] and [45]) relates to *proximity*. We do not, however, think that this is what the learned law lord intended or meant.

50 In the first place, our analysis earlier (above at [42]–[47]) clearly demonstrates that Lord Wilberforce was referring to *two separate and distinct* conceptions of "policy" in *McLoughlin*. This, in all likelihood, means that he similarly had these two distinct conceptions of "policy" in mind when enunciating his two-stage test in *Anns*.

51 Secondly, and on an even more important as well as closely-related note, Lord Wilberforce referred, in *his very formulation* of the two-stage test in *Anns* itself, to the requirement, at the *first* stage, of "a sufficient relationship of *proximity* or neighbourhood" [emphasis added] (see *Anns* at 751).

52 Thirdly, at least one subsequent House of Lords decision has adopted the interpretation of Lord Wilberforce's judgment which we have advocated. In *Alcock* ([23] *supra*), the court treated the three factors enunciated by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* ([23] *supra*) as falling within the sphere of *proximity* instead (*viz*, the first stage of the two-stage test set out in *Anns* (reproduced above at [20]) and in *Spandeck* (reproduced above at [21])). Amarjeet Singh JC put it well in *Pang Koi Fa* ([24] *supra*), as follows (at 326, [33]):

> The additional consideration applied by their Lordships [in *Alcock*] was that of the 'relationship of proximity' according to the three proximities applied by Lord Wilberforce in *McLoughlin*, *but unlike Lord Wilberforce, their application of the three proximities was not a consideration of policy which limits the classes of cases where liability may be established.* Instead, their considerations of the three proximities were as a means of conditioning the duty of care, a further limitation to the existence and scope of the duty. In other words, *instead of considering the proximities as limitations to the classes where as a matter of policy, recovery may be permitted, the proximities were legal requirements defining the classes wherein recovery may be permitted, barring the additional considerations of justice and reasonableness*. As *legal* requirements, the threshold for their fulfilment is thus a *legal* threshold, and the extension of liability would be on an incremental basis by analogy with established categories, rather than on general principles of reasonable foreseeability. The parameters of the scope of the duty to avoid inflicting nervous

shock had thus been redefined. [emphasis added]

53 Finally, and on the equally important level of general principle and development of the law in this difficult area, the approach which this court adopted in *Spandeck* (reproduced above at [21]) serves, simultaneously, to reconcile the *substance* of what appear to be rather inconsistent approaches (particularly under English law).

54 It is, in the circumstances, *highly unlikely* that Lord Wilberforce was referring to only *factual* foreseeability (*instead of proximity*) in the *first* stage of his two-stage test in *Anns*. If he was (and, as just mentioned, we do not think that this was the case in the first place), we must, respectfully, *disagree* with such an approach. However, it is vitally important to point out that, *even if* the *first* stage of Lord Wilberforce's two-stage test in *Anns* is taken as referring to *factual* foreseeability *only*, *nothing* of *substance* would turn on it because, as this court explained in *Spandeck*, there must, in principle as well as in logic, justice and fairness, be a *holistic and integrated* analysis of the relevant factual matrix *both* from the perspective of *proximity* (as between *the parties*) *and* from the perspective of *public* policy (on a *broader societal* level). The latter may operate to exclude a duty of care for the purposes of the tort of negligence *even if* the situation concerned passes legal muster under the former (inasmuch as there is otherwise *proximity* between the parties in law).

55 Indeed, in *Spandeck* ([2] *supra*), this court was clearly aware of the possible difficulties surrounding the meaning of the first stage of the two-stage test in *Anns*. As Chan CJ put it (*id* at [34]):

> It is well known that there is some controversy regarding the meaning of the first stage of the test: Did it relate only to the *factual* issue of reasonable foreseeability *or* did it introduce the *legal* conception of proximity … ? [emphasis in original]

56 The response to the question posed in the preceding paragraph was clear and unambiguous to this court. Chan CJ observed thus (*id* at [75]):

> As we mentioned earlier (see [34] above), there is *some controversy* in relation to *the interpretation of the first stage* of Lord Wilberforce's test in *Anns*, *ie*, whether it refers to mere factual foreseeability or legal foreseeability or proximity. *In our view, factual foreseeability is too wide a criterion to be effective as a legal control mechanism if all that it means is that the defendant ought to have known that the claimant would suffer damage from his (the defendant's) carelessness. If this is the approach to be adopted, it would be fulfilled in almost all cases, because the two parties are likely to be in some degree of physical relationship in the relevant case.* [emphasis added]

Summary of our analysis of Lord Wilberforce's observations in McLoughlin

57 In summary, a close analysis of the observations of Lord Wilberforce in *McLoughlin* ([23] *supra*) (in the context of his earlier enunciation of the two-stage test in *Anns* ([20] *supra*)) reveals that his statements of principle in both of these cases are consistent with what this court decided in *Spandeck* (which adopted a two-stage test, with (legal) foreseeability or proximity as the focus at the first stage and (broader) public policy as the focus at the second stage) to the extent that the three factors set out in *Part 3* of the learned law lord's judgment in *McLoughlin* are an integral part of the *first* stage of the two-stage test in *Anns*, which formed the basis of the (likewise) two-stage test laid down in *Spandeck*.

58 We turn now to consider the second major House of Lords decision, *viz*, *Page* ([23] *supra*).

The decision in Page

The decision itself

59 The decision in *Page* was another major legal landmark in the law relating to liability in negligence for psychiatric harm. In that case, the House of Lords drew a clear distinction *between primary and secondary victims*. This distinction had, in fact, been drawn in earlier cases (for instance, *per* Lord Oliver of Aylmerton in *Alcock* ([23] *supra*) at 407). However, *Page* not only brought this distinction to the fore, but also elaborated upon it in some detail. More importantly, the House of Lords held in *Page* that where the plaintiff was the *primary* victim, he or she was entitled to recovery against the defendant *even when* the *psychiatric* harm suffered was *not reasonably foreseeable* by the latter – *provided that physical* injury to the plaintiff (which he or she *apprehended and* which need *not* have *actually occurred*) *was foreseeable and the apprehension of such physical injury resulted in the psychiatric harm*. Indeed, in *Page* itself, *physical* injury, whilst *foreseeable*, did *not*, in fact, *actually occur*. *Nevertheless*, it was held (consistent with the general principle just set out) that the plaintiff in that case ("Mr Page") was *entitled to recover* against the defendant in that case ("Mr Smith") for the *psychiatric* illness that ensued as a consequence of the collision between their cars.

60 It is significant, in our view, that the decision in *Page* was *not a unanimous one*. Indeed, it was a decision based on the barest of majorities – three to two. As we shall see in a moment, the two dissenting judgments were not unpersuasive. More importantly, perhaps, we find, with respect, significant difficulties with the decision of the majority. Looked at in this light, it is important to proceed to consider these judgments in more detail.

61 By way of factual background, there was, in *Page*, a motor accident in July 1987. Mr Page was driving his car along a road when Mr Smith, driving in the opposite direction, cut across his (Mr Page's) path whilst entering a side road. A collision occurred in which Mr Page sustained *no physical injury*. There was also no physical injury sustained by either Mr Smith, his wife or his child, who were passengers in his car. Put simply, this was *a minor* motor accident (although there was considerable damage to both vehicles). However, Mr Page had, for a very long time, suffered from a condition known as myalgic encephalomyelitis ("ME") (also known as chronic fatigue syndrome or post-viral fatigue syndrome). He had suffered a particularly severe attack of ME some four months earlier (in March 1987) as a result of a viral infection. Prior to the accident, he had been recovering from that attack and had hoped to return to work in September 1987. Mr Page brought an action against Mr Smith for damages for personal injuries caused by the latter's negligence. He argued that his condition (relating to ME) had become chronic and permanent as a result of the accident and that he would never be able to work again. According to Mr Page, he had felt exhausted three hours after the accident and had taken to his bed, whereupon the exhaustion continued and his condition became chronic and permanent.

62 The House of Lords, as mentioned earlier (above at [59]), found in favour of Mr Page, but only (as was noted above at [60]) by a bare majority of three to two. We turn now to consider the various judgments delivered by the court.

63 Turning, first, to the judgments delivered by the majority, the leading judgment was delivered by Lord Lloyd of Berwick (with whom Lord Ackner and Lord Browne-Wilkinson agreed). The learned law lord drew a (crucial) distinction between a primary victim on the one hand and a secondary victim on the other. In *Page*, the facts related to a *primary* victim and the basic issue before the court was whether or not the *foreseeability* of *physical* injury (*as opposed to psychiatric* injury) to Mr Page was sufficient to enable him to recover damages for nervous shock (bearing in mind that there had been

no actual physical injury to Mr Page himself).

64 Lord Lloyd was of the view that "[t]hough the distinction between primary and secondary victims [was] a *factual* one, it ha[d] … important *legal* consequences" [emphasis added] (*Page* at 184). However, in our view, with respect, this merely *factual* distinction does *not, in and of itself,* translate into a *legal* distinction in the absence of *a normative legal justification*. Lord Lloyd did observe that foreseeability of *psychiatric* harm was relevant only *vis-à-vis secondary* victims. However, in so far as *primary* victims were concerned, since foreseeability of *physical injury* was sufficient to found a duty of care on the part of the defendant, *and* given the fact that no distinction ought to be drawn between physical and psychiatric injury (given the expansion in the state of medical knowledge), there was no need for a plaintiff who was a primary victim to demonstrate (further) that *psychiatric* injury was also foreseeable. This last-mentioned legal control mechanism ought only to apply to *secondary* victims. In the learned law lord's words (*id* at 190):

> There is no justification for regarding physical and psychiatric injury as different "kinds" of injury. Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both.

65 Turning, next, to the judgments delivered by the minority, Lord Keith of Kinkel was of the view (*id* at 169) that "[r]easonable foreseeablility being the test, there [was] no logical ground for distinguishing between the two classes of claimants [*ie*, primary victims and secondary victims]". Lord Jauncey of Tullichettle, who was the other dissenting judge, observed thus (*id* at 171–172):

> When a plaintiff suffers damage as a result of the negligent act of another he must establish foreseeability of the general type of damage before he can succeed. The fact that personal injury is a likely consequence will not support a claim for pure economic loss. In the normal personal injury case arising from a factory or road accident the foreseeability of such injury arising from the negligent act seldom requires to be addressed since it is self evident from the circumstances. However that is not to say that the need for it is dispensed with. It is by no means impossible that a plaintiff could be directly involved in an accident caused by a negligent act where the circumstances required specific proof that injury was foreseeable. In *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 426, the judgment of the Board contained the following observations:
>
> > "Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is 'direct.' In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580: 'The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.' It is a departure from this sovereign principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature?"
>
> If therefore a plaintiff who is directly involved in an accident [is] require[d] to establish that the physical injuries sustained by him were the foreseeable consequences of a negligent act it is not easy to see in principle why such a plaintiff who suffers merely nervous shock and its consequences should not [be] require[d] to prove that it [*ie*, nervous shock] was similarly foreseeable. As a matter of common sense physical injuries are far more likely to result from an

> impact accident than is nervous shock causing subsequent illness. While it is not uncommon for a severe physical injury to give rise to some degree of psychiatric illness it is not the law that such illness is presumed to be a foreseeable consequence of every physical injury, rather … each case depend[s] on its own circumstances. If therefore the foreseeability of psychiatric illness consequent upon physical injury [is] require[d] to be established independently of the foreseeability of the physical injury why should the position be different where there was at the most a risk of physical injury which never eventuated?

The learned law lord also observed, later in his judgment, thus (*id* at 175):

> [F]oreseeability of injury is necessary to determine whether a duty is owed to the victim. Unless such injury can be foreseen the victim is not a neighbour within the celebrated dictum of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 and cannot recover.

Criticisms of the majority's approach

66 As alluded to earlier (above at [60]), we find, with respect, the decision of the majority in *Page* ([23] *supra*) to be problematic for a number of reasons. Indeed, many of them are to be found in the characteristically perceptive judgment of Lord Goff of Chieveley in the House of Lords decision of *White* ([23] *supra*). Whilst the learned law lord dissented in that particular decision, his criticisms of *Page* (being, strictly speaking, *obiter dicta*) were not commented on adversely by his brethren.

67 Lord Goff was of the view that there were three broad grounds of criticism in respect of the majority's decision in *Page*. His observations in this regard merit (because of their importance) extensive quotation, as follows (*White* at 475–476):

> In summary the basic grounds of criticism appear to be threefold.
>
> (a) There has been no previous support for any such approach, and there is authority in England and Australia to the contrary. …
>
> (b) The approach favoured by Lord Lloyd [in *Page*] appears to be inconsistent not only with the adoption by Viscount Simonds in *The Wagon Mound No. 1* [1961] A.C. 388, 426, of Denning L.J.'s statement of principle [in the English Court of Appeal decision of *King v Phillips* [1953] 1 QB 429], but also with the actual reasoning of the Privy Council in that case [*ie*, *The Wagon Mound No. 1*]. There a particular type of damage to property, viz. damage by fire, was differentiated from other types of damage to property for the purpose of deciding whether the defendant could reasonably have foreseen damage of that particular type, so as to render him liable in damages in tort for such damage. That differentiation was made on purely common sense grounds, as a matter of practical justice. On exactly the same grounds, a particular type of personal injury, viz. psychiatric injury, may, for the like purpose, properly be differentiated from other types of personal injury. It appears to be in no way inconsistent with the making of that common sense judgment, as a matter of practical justice, that scientific advances are revealing that psychiatric illnesses may have a physical base, or that psychiatric injury should be regarded as another form of personal injury. Moreover the absence of any previous challenge to the general application of the principle stated by Denning L.J., and adopted by Viscount Simonds, perhaps provides the strongest endorsement of that common sense judgment.
>
> (c) The majority in *Page v. Smith* [1996] A.C. 155 may have misunderstood the so-called eggshell skull rule. In the course of his opinion, Lord Lloyd said, at p. 187:

> "We now know that the plaintiff escaped without external injury. Can it be the law that this makes all the difference? Can it be the law that the fortuitous absence of actual physical injury means that a different test has to be applied?"

These rhetorical questions Lord Lloyd answered in the negative. Yet the effect of the "eggshell skull" rule, i.e. the rule that a wrongdoer must take his victim as he finds him, is that the absence (or, more accurately, the presence) of physical injury to the plaintiff, may make all the difference. Lord Lloyd said, at p. 193:

> "There is nothing in *Bourhill v. Young* [[24] *supra*] to displace the ordinary rule that where the plaintiff is within the range of foreseeable physical injury the defendant must take his victim as he finds him."

However, it appears from the passage from Lord Wright's opinion in *Bourhill v. Young* [1943] A.C. 92, 109–110 … [*viz*, Lord Wright's statement that "if the wrong is established the wrongdoer must take the victim as he finds him"] that that is not the ordinary rule. The maxim only applies where liability has been established. The criticism is therefore that Lord Lloyd appears to have taken an exceptional rule relating to compensation and treated it as being of general application, thereby creating a wider principle of liability.

I recognise that the impact of this new statement of principle [in *Page*] is likely to be relatively slight, in that it does no more than extend liability for psychiatric damage to those cases where physical damage is reasonably foreseeable (though none is suffered) but psychiatric damage is not. In any event, however, this situation does not arise in the present appeals, since none of the claimants was within the range of foreseeable physical injury; and your Lordships do not therefore have to form a view about the validity of the criticisms which I have summarised above. Your Lordships can therefore proceed on the basis that, for the purposes of the present appeals, the relevant test is, as in the past, the test of foreseeability of psychiatric damage.

68 We would gratefully adopt the reasoning of Lord Goff set out in the preceding paragraph, and add some observations of our own.

69 Leaving aside the issue of precedent (which was Lord Goff's first point, and a not unimportant one at that), the basic difficulty centres on the issue of *characterisation*. The basic thrust of the approach of the majority in *Page* ([23] *supra*) was as follows. The court ought not now to distinguish between physical injury on the one hand and psychiatric harm on the other. In the premises, if physical injury was foreseeable, then even if no actual physical injury resulted, the plaintiff was entitled to recover damages for any psychiatric injury inasmuch as such injury would be considered as part of the *extent* of the *physical* injury suffered as a result of the defendant's negligence pursuant to the "eggshell skull rule".

70 With respect, the premises upon which the majority in *Page* based their arguments are flawed.

71 Whilst there ought not now to be an artificial distinction between physical injury on the one hand and psychiatric harm on the other in relation to the applicable test for determining whether a duty of care exists, it is clear that there nevertheless ought still to exist a distinction from the perspective of *legal control mechanisms to prevent a floodgate of litigation ensuing*. In other words, physical injury in the conventional sense (which excludes psychiatric harm) delimits, by its *very nature*, the extent of liability owed by the defendant concerned to potential plaintiffs. Put simply, the danger of a floodgate of litigation ensuing is minimal or non-existent where physical injury is

concerned.

72 Contrast the situation where physical injury occurs, however, with two other situations.

73 The first relates to cases of *pure economic loss*. This court in *Spandeck* ([2] *supra*) has dealt with (the legal rules and principles relating to) this particular type of loss comprehensively (see above at [21]).

74 The second, which is one of the important issues in the present appeal, relates to negligence that results in *psychiatric harm*. *Not unlike pure economic* loss, the *potential reach* of a negligent act or statement that may cause *psychiatric harm* is potentially *open-ended*. *Unlike* the situation where *physical illness or injury* is caused (where the extent of the damage is *necessarily limited in space and time*, as noted above at [71]), this is *not* the situation with regard to *psychiatric harm* (and explains the increasingly stringent approach adopted by the House of Lords, particularly in *McLoughlin* ([23] *supra*), *Alcock* ([23] *supra*) and *White* ([23] *supra*)). In this regard, the following observations by Prof Tan Keng Feng in Law Reform Committee, Singapore Academy of Law, *Discussion Paper on Liability for Negligently Inflicted Psychiatric Illness* (22 August 2000) ("*Discussion Paper*") at pp 2–3 should also be noted (a similar passage by the same author also appears in "Liability for Psychiatric Illness" ([39] *supra*) at 167):

> The most cogent reason, however, for limiting liability for psychiatric illness is the fear of opening the floodgates of litigation. … *Non-impact psychiatric illness undoubtedly induces wider claims than impact physical damage*. It is better to accept some inevitable arbitrariness in drawing a line somewhere on … liability for psychiatric illness than to endure unmanageable chaos [resulting] from … unfettered recovery [for] such damage. [emphasis added]

Tony Weir, in his review of Nicholas J Mullany & Peter R Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* (Lawbook Co Ltd, 1993) *at [1993] CLJ 520, stated, in a similar vein, thus (at 521):*

> *Vulnerability to physical lesion is pretty standard throughout the population – a force which wounds you would wound me, too – but the range of psychic liability is very great indeed – a quite minor accident can throw one person into a serious decline … and leave another wholly unaffected.*

75 Hence, the majority of the court in *Page* ([23] *supra*) was, with respect, in error when it *equated* physical injury with psychiatric harm *for the purposes of formulating legal control mechanisms*. As we have just seen, given the *nature* of each type of injury, the respective *legal control mechanisms* ought to be *different*.

76 It may, however, be argued that the legal control mechanism *vis-à-vis* psychiatric harm *is* different inasmuch as the majority of the court in *Page* had distinguished between primary victims on the one hand and secondary victims on the other. *However*, the question that then arises is this: *Why should such a distinction be drawn if both categories of victims have suffered the same type of injury,* viz*, psychiatric harm?* The answer, presumably, would be that a primary victim who suffers both physical injury and psychiatric harm ought to be subjected to fewer legal preconditions with regard to recovery because both types of injury ought to be treated as being the same. *However*, for the reasons we have given earlier (above at [70]–[74]), this answer is, in fact, flawed.

77 More important, perhaps, is the issue of *substantive justice* – or, as Lord Goff put it in *White* ([23] *supra*) at 475 (see the quotation set out above at [67]), "practical justice". Put simply, there

is, in our view, no reason grounded in policy, principle or justice and fairness as to why a primary victim should be treated more favourably than a secondary victim; from this perspective, there is a powerful reason for doing away with the distinction between primary victims and secondary victims. Let us elaborate.

78 The law, as originally formulated, has moved (in the context of damages for psychiatric harm) from allowing recovery by a primary victim only to extending recovery to a secondary victim.

79 In the English High Court decision of *Dulieu v White & Sons* [1901] 2 KB 669 ("*Dulieu*"), the plaintiff was permitted to recover for nervous shock which was caused by her apprehension of physical injury as a result of the negligent conduct of the defendant. What engendered controversy was Kennedy J's *dictum* in that case (at 675) to the effect that the shock concerned must arise from *reasonable fear of immediate personal injury to oneself*. This *dictum* was, in fact, *rejected* by the majority of the English Court of Appeal in *Hambrook* ([24] *supra*). In *Hambrook*, the plaintiff's wife had *not herself been in any personal danger*. However, she had just parted with her three children (a daughter and two sons), having (as was her habit) accompanied them part of the way to school. Shortly thereafter, she witnessed a lorry, which the defendants' servant had negligently left unattended, charging down the steep incline (where she was standing) and rapidly round the bend in the direction of where she had left her children. Although her children were not within her sight, the plaintiff's wife became very anxious for their safety. She inquired of bystanders what had happened and discovered that a little girl who wore spectacles had been taken away injured. This fit the description of her daughter. She became agitated, tearing her hair and screaming. She then rushed to the school and found her two sons there. However, her daughter was missing. She went to the hospital, where she found her daughter, who had been knocked down by the lorry and had suffered serious injuries. The plaintiff's wife was three or four months pregnant at that time. As a result of what happened, she suffered a serious nervous shock and, as a consequence, a severe haemorrhage as well. She recovered partially, but then suffered a relapse. She was operated on and a dead foetus was removed. Unfortunately, she died a few days later. The plaintiff brought an action against the defendants under the Fatal Accidents Act 1846 (c 93) (UK) in respect of the death of his wife to recover damages for the loss of her services as manageress of his restaurant. Although the defendants admitted the negligence alleged by the plaintiff, they argued that the shock alleged to have been sustained by the deceased wife was too remote. The majority of the court, however, held in favour of the plaintiff, although (unlike the situation in *Dulieu*) there had been no reasonable fear of personal injury to the plaintiff's wife herself. The majority's observations are particularly apposite and merit quotation in full.

80 First, Bankes LJ observed, in *Hambrook*, as follows (at 151):

> Accepting the line of reasoning illustrated by these authorities [which included, *inter alia*, *Dulieu*], it follows that what a man ought to have anticipated is material when considering the extent of his duty. Upon the authorities as they stand, the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. *Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is*

seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognize a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not. In my opinion the step which the Court is asked to take, under the circumstances of the present case, necessarily follows from an acceptance of the decision in *Dulieu v. White & Sons*, and I think that *the dictum of Kennedy J.*, laid down in quite general terms in that case, *cannot be accepted as good law applicable in every case*. [emphasis added]

81 Atkin LJ observed, in the same case, thus (*id* at 157):

I can find *no principle to support* the self-imposed restriction stated in the judgment of Kennedy J. in *Dulieu v. White & Sons*, *that the shock must be a shock which arises from a reasonable fear of immediate personal injury to oneself.* It appears to me inconsistent with the decision in *Pugh v. London, Brighton and South Coast Ry. Co.* [[1896] 2 QB 498], and with the decision in *Wilkinson v. Downton* [[1897] 2 QB 57], in neither of which cases was the shock the result of the apprehension of the injury to the plaintiff. *It would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not, and in which a mother traversing the highway with a child in her arms could recover if shocked by fright for herself, while if she could be cross-examined into an admission that the fright was really for her child, she could not. In my opinion such distinctions would be discreditable to any system of jurisprudence in which they formed part.* [emphasis added]

8 2 *Hambrook* is an important decision inasmuch as it *shifted* the English courts' approach *vis-à-vis* claims in negligence for psychiatric harm from what has commonly been described as the "impact theory" to the "shock theory" (see, for example, Tan Keng Feng, "Nervous Shock to Primary Victims" [1995] Sing JLS 649 at 653). This shift is also justified by considerations of justice and fairness (as embodied in the observations of Bankes and Atkin LJJ in *Hambrook*, which have just been quoted in the preceding two paragraphs; significantly, the latter judge was later to formulate the famous "neighbour principle" in the seminal House of Lords decision of *Donoghue v Stevenson* [1932] AC 562).

83 What *Page* ([23] *supra*) has, in substance, effected is a *return* to the "impact theory" in so far as *primary* victims are concerned (see "Nervous Shock to Primary Victims" at 653). As aptly stated in Nicholas J Mullany, "Psychiatric damage in the House of Lords – Fourth time unlucky: *Page v Smith*" (1995–1996) 3 Journal of Law and Medicine 112 ("Psychiatric damage in the House of Lords") at 119–120:

Insistence on foreseeability of mental injury through shock does not drive one to the conclusion that there is a separate tort of causing psychiatric damage. Clearly there is not. It is simply an insistence on the application of the tort of negligence to a particular type of personal injury rather than subsumption of damage to the mind within the broader category … Lord Lloyd [in *Page*] saw insistence on reasonable foreseeability of mental injury by shock in direct participant cases as "a step backwards" … *The exact opposite is true. English common law has now backtracked in relation to such cases to a position not all that far removed from the "impact" theory* ... [emphasis added]

Reference may also be made, in this regard, to Peter Handford, "A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords" (1996) 4 Tort Law Rev 5 ("A New Chapter in the Foresight Saga"), where the learned author observed thus (at 7):

> Whatever may have happened to the law of psychiatric damage in its earlier formative period, for the past fifty years this category of claim has been regarded as conceptually separate from ordinary cases of personal injury, marked off by the requirement that there must be reasonable foresight of psychiatric harm, assessed on an ex post facto basis, and limited by various other principles of proximity of relationship, time and space, and manner of infliction which do not apply to ordinary personal injury cases. … Lord Oliver has [in *Alcock* ([23] *supra*)] made a valuable contribution to this branch of the law by distinguishing between primary and secondary victim cases, *but this is a distinction which merely goes to the issue of proximity and makes it easier to appreciate that psychiatric damage cases can arise in situations which do not involve an "accident" in the ordinary sense of the word*, for example cases in which such harm is occasioned by work conditions … *Under Lord Lloyd's view [in* Page*], these developments are negated. Psychiatric damage as a category disappears except in cases involving secondary victims, thus putting the focus back on the traditional situation of witnessing accidents.* [emphasis added]

84 The result of the majority's approach in *Page* is *to favour primary victims over secondary victims* although, as the observations of both Bankes and Atkin LJJ in *Hambrook* ([24] *supra*) illustrate (see above at [80] and [81], respectively), there is no reason in logic, principle or (for that matter) justice and fairness to adopt such an approach. Indeed, one would have thought that, *at the very least, both primary as well as secondary victims ought to be treated in the same way. If so, then the test for determining the existence of a duty of care* vis-à-vis *both of these categories of victims in the context of claims for nervous shock should be the same*.

85 There are also *other difficulties* that arise from adopting the approach of the majority in *Page*.

86 There are, first, *practical difficulties* in *defining as well as identifying who a primary victim is*.

87 The relevant case law itself demonstrates that there are both broader as well as narrower views of who a primary victim is (as embodied in the judgments of Lord Oliver in *Alcock* ([23] *supra*) at 407 and Lord Lloyd in *Page* ([23] *supra*) at 184, respectively).

88 Even more importantly, perhaps, it would, in our view, be invidious if the strictness of the applicable legal test as well as the possibility of completely contrary results ensuing were to depend on *how the relevant fact situation is characterised*. Put simply, a victim in the *same* fact situation could, *depending on how the relevant facts are perceived*, be *characterised* as either a primary victim or a secondary victim (and, on many occasions, with *equal persuasiveness*). In this regard, the following examples given by Prof Trindade in a characteristically perceptive note on *Page* make the point both eloquently and pointedly, and are therefore quoted in full (see F A Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 LQR 22 at 24):

> It is implicit in the judgments of the majority in *Page v. Smith* that those who fall into the category of primary victims will be easy to identify; but is this likely to be the case? In *Page v. Smith* it was not difficult to conclude that the plaintiff was within the area of physical impact and that there was therefore a foreseeable risk of bodily injury to the plaintiff. But cases will not always be as simple as that. What of the passengers sitting on a bus with which a negligent motorist collides? Is it only the passengers who are in close proximity to the part of the bus where the impact occurs, or every passenger on the bus who could be said to be within the range of foreseeable physical injury? What of a passenger train which is derailed by the negligence of the engine driver? Is it only the passengers sitting in the derailed carriage or all the passengers on the train who are within the range of foreseeable physical injury? And what of the situation of a disabled aircraft which flies over a city and then crashes into a residential building … or a runaway lorry as in *Hambrook v. Stokes* [1925] 1 K.B. 141? Would there not be many

people within the range of foreseeable injury? In the case of a runaway lorry would it matter that the plaintiff would have had ample time to step aside into a shop into a position of safety? Would that prevent the plaintiff [from] claiming to be a primary victim? And what of the example given by Lord Ackner in *Alcock* … of a petrol tanker careering out of control into a school in session and bursting into flames? Who would be within the range of foreseeable physical injury? The children and teachers in the classrooms, those in the playground, parents or friends waiting to collect children, passers-by who fear that the petrol tanker might explode as a result of the collision?

If all these persons can be said to be within the range of foreseeable physical injury then all of them could be said to be primary victims of the defendant's negligence. If this is so, then as a result of *Page v. Smith* all of them would be able to recover for any psychiatric illness that might be suffered by them, provided only that they can prove that the psychiatric illness was shock induced, genuine and caused by the accident. They would not be subject to any of the control mechanisms insisted on by the courts until now to keep in check liability for nervous shock. Even the passer-by unconnected with any child in the school could recover for nervous shock merely because he was within the range of foreseeable physical injury from the collision. The fact that nervous shock to him would not ordinarily be within the range of reasonable foreseeability would be irrelevant.

89 In a similar vein, Mrs Hopkins has observed thus (see C A Hopkins, "A New Twist to Nervous Shock" [1995] CLJ 491 at 493):

[I]s the distinction between primary and secondary victims, or between participants and non-participants, an entirely valid one? What of the "near miss"? Would Mr. Page [in *Page*] have succeeded if he had feared a collision because of the defendant's negligent driving but none had actually taken place? After a fifty-car motorway pile-up, is the driver of the fifty-first car who skilfully steers his vehicle safely onto the hard shoulder, witnessing scenes of carnage all around him and shaken in spite of his lucky escape, a primary or a secondary victim of the motorist who caused the initial crash? And, if all heads of illness can be lumped together as a type (which Lord Lloyd regards [in *Page*] as "sensible" because of the continuing expansion of medical knowledge), is there not a case for combining different types of property damage because of the continuing expansion of scientific knowledge? Is the phoenix of *Re Polemis* [1921] 3 K.B. 560 about to emerge from the ashes of *The Wagon Mound* [*ie*, *Overseas Tankship (UK) Ltd v Morts Dock Engineering Co Ltd* [1961] AC 188]? [The latter case overruled the former inasmuch as the latter laid down the general principle of remoteness of damage in tortious negligence based on reasonable foreseeability, whereas the former case had extended liability to everything that was the direct consequence of the defendant's initial negligent conduct.]

90 The practical (and related) result of the majority's approach in *Page* ([23] *supra*) is well-put by two leading commentators in the field, who observe that "[t]he result is that counsel will still be looking to squeeze plaintiffs into the primary [victim] category wherever possible" (see Nicholas J Mullany & Peter R Handford, "Moving the Boundary Stone by Statute – The Law Commission on Psychiatric Illness" (1999) 22 UNSW Law Journal 350 ("The Law Commission on Psychiatric Illness") at 405). Indeed, they also point to actual inconsistencies which have been generated in the case law itself (*id* at 404–405; see also United Kingdom, *Liability for Psychiatric Illness* (Law Com No 249, 1998) ("*The English Law Commission Report*") at para 6.12). The learned authors further point – correctly, in our view – to the fact that "[t]he [English] Law Commission was quite clearly uncomfortable with the developments stemming from *Page v Smith*" (see "The Law Commission on Psychiatric Illness" at 403), but nevertheless did not resolve the difficulties and made inconsistent recommendations instead (see generally *id* at 403–407; see also (for an overview of the difficulties engendered by *Page* and the English Law Commission's recommendations) *The English Law Commission Report* at paras 2.52–2.60,

5.11–5.16 and 5.45–5.54).

91 The following example by a local author illustrates both the difficulties referred to earlier (above at [77]–[90]) in terms of distinguishing between primary and secondary victims, as well as the possible injustice that might result from the distinction itself (see Teo Cheng Seong, Daniel, "The New Orthodoxy in the Foresight Saga: A Look at *Page v Smith*" (1997) 18 Sing LR 300 at 309–310):

> To illustrate the potential for injustice, consider the following example. A is slowly driving along a road in a long line of traffic and B is walking on the pavement alongside A's car. A crash barrier separates the road from the pavement so that a minor collision will not pose any foreseeable risk of physical injury to a passing pedestrian. Both A and B witness the car which is first in line negligently collide with a lorry, causing a pile-up which stops two cars short of A. Both consequently suffer nervous shock even though, owing to the relative mildness of the collision, nervous shock to either was not reasonably foreseeable. A may capitalize on the slight risk of physical injury to himself and recover for his psychiatric damage under *Page v Smith*, while B who is adequately protected from physical danger by the crash barrier fails in his action. To allow A's claim and deny recovery to B merely because some physical injury was foreseeable to the former seems as unfair as it is arbitrary.

92 However, this is not to state that there are no substantive legal consequences whatsoever arising from the fact that one plaintiff is, in effect, a primary victim and another, a secondary victim – even if this distinction is only recognised as a matter of *fact* (rather than, as *Page* ([23] *supra*) mandates, as a matter of *law*). As Mullany pertinently pointed out (see "Psychiatric damage in the House of Lords" ([83] *supra*) at 116):

> The only significance of the difference between a person who witnesses or is informed of an event and a person directly involved in it is that *psychiatric impact to the direct participant is more likely to be foreseeable than [psychiatric impact] to the secondary victims*. This does not warrant the introduction of different duty tests and consequent unnecessary and undesirable complexity in liability assessment. The traditional foreseeability test is sound in principle … [emphasis added]

Reference may also be made to "A New Chapter in the Foresight Saga" ([83] *supra*). Indeed, as Lord Keith pertinently pointed out in *Page* (at 167):

> Where the plaintiff is personally involved in a terrifying incident proof of proximity presents no problem. Where, however, the plaintiff is what may be described as a secondary victim proximity may be very difficult to establish.

The following observations by Lord Jauncey in the same case ought also to be noted (*id* at 176):

> Lord Oliver [in *Alcock* ([23] *supra*)] was considering proximity as determinative of the existence of a duty of care *and drawing a distinction between a victim directly involved in an accident and one who merely witnessed it.* He certainly was *not* saying that a victim directly involved in an accident did not require to prove the foreseeability of the nervous shock from which he suffered as a result thereof. [emphasis added]

93 Whilst it is true that Lord Hoffmann pointed out, in the recent House of Lords decision of *Rothwell v Chemical & Insulating Co Ltd* [2007] 3 WLR 876 ("*Rothwell*"), that *Page* "does not appear to have caused any practical difficulties and is not … likely to do so if confined to the kind of situation which the majority in that case had in mind" (at [32]), that observation itself cuts both ways, so to

speak, inasmuch as given (as we pointed out above at [86]–[90]) the difficulty of defining who a primary victim is as well as the possibility of substantive injustice being engendered by classifying a plaintiff in a particular way (*ie*, as either a primary victim or a secondary victim), the fact that *Page* is (according to Lord Hoffmann in *Rothwell*) intended to apply in a very limited sphere only raises the question as to whether or not it is worth the effort to keep the legal principles laid down therein at all. Significantly, in *Rothwell* itself, the court was at pains to distinguish *Page* on the basis that the foreseeable event (*viz*, the development by the claimant of an asbestos-related disease due to exposure to asbestos in the course of his employment) had not occurred yet.

94 Since an initial draft of this judgment was prepared, the House of Lords has handed down another decision where *Page*, whilst not directly applicable to the fact situation concerned, was referred to – see *Corr v IBC Vehicles Ltd* [2008] 2 WLR 499. Significantly, the criticism of *Page* was acknowledged by two law lords in that case (*per* Lord Scott of Foscote at [29] and *per* Lord Walker of Gestingthorpe at [40]), although the decision in *Page* itself was not directly challenged in that particular appeal. Even more significantly, Lord Neuberger of Abbotsbury (with whom Lord Mance agreed (at [46])), referring, *inter alia*, to Lord Goff's critique of *Page* in *White* ([23] *supra*) (which is reproduced above at [67], and which we accepted (see above at [68])), clearly left the door open to a *reconsideration* of *Page* in the foreseeable future in the *English* context when he commented as follows (see *Corr v IBC Vehicles Ltd* at [54]):

> The first point concerns the somewhat controversial decision of this House in *Page v Smith* [1996] AC 155. As Lord Bingham [of Cornhill] has explained [in *Corr v IBC Vehicles Ltd* at [7]], neither party has criticised that decision, let alone invited the House to review it. At least for my part, I understood that was the position of the employer because, even if we had been persuaded that *Page v Smith* was wrongly decided, that would not have ensured the success of this appeal. I agree. Accordingly, not least in the light of the trenchant observations of Lord Goff of Chieveley in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 473D–480F, I would not want to appear to prejudge any decision as to the correctness of the majority view in *Page v Smith*, if it comes to be challenged before your Lordships' House on another occasion.

95 Although English decisions on the common law (in particular, those emanating from the House of the Lords) are accorded great respect by our courts, they ought not to be followed blindly. Given the various difficulties pertaining to both justification as well as justice and fairness with regard to *Page* as set out earlier (above at [66]–[91]), this is one occasion when we would respectfully hold that the law as laid down by the majority in *Page* ought not to be followed.

The position in Singapore

The position stated

96 It is now appropriate to draw the various threads of analysis together and state what the position is in the Singapore context in so far as liability in negligence for psychiatric harm is concerned.

97 It is clear that, as an extremely important threshold requirement, the plaintiff must prove that he or she has suffered what has often been termed a "recognisable psychiatric illness" (see, for example, the English Court of Appeal decision of *Hinz v Berry* [1970] 2 QB 40 at 42 *per* Lord Denning MR). We should observe, parenthetically, that although it might be argued that this requirement should be considered, strictly speaking, under the rubric of "damage" instead, from a practical perspective, it would be more appropriate that such a requirement (if it is considered by one (or more than one) party to constitute a live issue) is considered at the outset. Returning to the

requirement proper, it is, in fact, a requirement that is more easily stated than ascertained (see, for example, generally, the discussion in *The English Law Commission Report* ([90] *supra*) at paras 3.1–3.33). Psychiatric illness must be distinguished from sorrow and grief (no matter how severe), for the latter are considered as constituting part of the vicissitudes of life. It should also be noted that proof of a recognisable psychiatric illness will depend, in the main, upon the relevant expert psychiatric evidence tendered before the court, which, of course, retains the ultimate supervisory responsibility of ensuring that such expert evidence is defensible as well as grounded in logic and common sense (see, for example, the decision of this court in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR 460 at [49]–[53] (citing the House of Lords decision of *Bolitho v City and Hackney Health Authority* [1998] AC 232)). Indeed, it seems to us that it may well not only save time and costs, but also aid the court immensely if *an independent psychiatrist* could be agreed upon by the parties or be appointed by the court in cases of this nature in the future.

98 We also endorse the approach taken in *Pang Koi Fa* ([24] *supra*) inasmuch as it adopts the approach in *McLoughlin* ([23] *supra*) – in particular, we accept the three factors set out in the latter decision by Lord Wilberforce in *Part 3* of his judgment therein (reproduced at [38] above), *albeit with important modifications* (see below at [109]). On a related note, we are further of the view that a "pure" test of reasonable foreseeability alone (as advocated by Lord Bridge and Lord Scarman in *McLoughlin* (see above at [35])) is too wide and, hence, ought not to be adopted in preference to that set out by Lord Wilberforce in the same case. However, we disagree, with respect, with the view that Lord Wilberforce's characterisation of the three factors in *Part 3* of his judgment in *McLoughlin* is to be construed as a qualifying "*policy*" (in the sense of public policy) within the *second* stage of the two-stage test in *Anns* ([20] *supra*). As we explained earlier (above at [45]–[52]), this is not what we think the learned law lord meant to say. If it is, we would, with respect, disagree with it as it would be both confusing and misleading. As explained (at [48] above), we are of the view that these factors relate, instead, to the concept of *proximity* within the *first* stage of the two-stage test laid down in *Spandeck* ([2] *supra*) (reproduced above at [21]), which is itself modelled (albeit with modifications) on the test in *Anns*.

99 Before turning to consider the three factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* proper, it would be useful to recount briefly the nature and function of the concept of *proximity* as set out in *Spandeck*. In that case, Chan CJ observed as follows (at [77]–[82]):

> 77 The *first* stage of the test to be applied to determine the existence of a duty of care is that of proximity, *ie*, that there must be sufficient *legal* proximity between the claimant and [the] defendant for a duty of care to arise. The focus here is necessarily on the closeness of the relationship between the parties themselves, as alluded to by Bingham LJ in the Court of Appeal stage of *Caparo Industries Plc v Dickman* [1989] QB 653, where he said (at 679) that while "[t]he content of the requirement of proximity, whatever language is used, is not … capable of precise definition" and "[t]he approach will vary according to the particular facts of the case, … the focus of the inquiry is on the *closeness and directness of the relationship between the parties*" [emphasis added]. Indeed, in *Hedley Byrne* [*& Co Ltd v Heller & Partners Ltd* [1964] AC 465] itself, the House of Lords used language which pointed to the relationship between the parties as being determinative of duty.
>
> 78 Although Lord Keith in *Yuen Kun Yeu* [*v Attorney-General of Hong Kong* [1988] AC 175] referred (at 194) to the concept of "close and direct relations", he did not clarify what the concept mean[t]. However, in the Australian High Court decision of *Sutherland* [*ie*, *The Council of the Shire of Sutherland v Heyman* (1984–1985) 157 CLR 424], Deane J has observed thus (at 55–56):

> The requirement of proximity is directed to *the relationship between the parties* in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves *the notion of nearness or closeness and embraces physical* proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (*perhaps loosely*) be referred to as *causal* proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect *an assumption by one party of a responsibility* to take care to avoid or prevent injury, loss or damage to the person or property of another or *reliance* by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. *Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.* That does *not mean* that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as *a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances.* The requirement of a relationship of proximity *serves as a touchstone and control of the categories of case in which the common law will adjudge that a duty of care is owed.* Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a *question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is "fair and reasonable" … or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.* [emphasis added]

79 We respectfully agree with this analysis which merely unpacks "proximity or neighbourhood" as a composite idea, importing the whole concept of the necessary relationship between the claimant and the defendant described by Lord Atkin in *Donoghue v Stevenson* [([82] *supra*)] (at 580). However, in this regard, we also acknowledge that there are numerous judicial pronouncements on the difficulty (and indeed, redundancy) in defining "proximity". Some of these examples have already been cited above and it suffices only to reproduce Lord Oliver of Aylmerton's speech in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, where he said (at 411):

> [I]n the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.

80 Notwithstanding these judicial views, … these observations are … puzzling … If indeed the "proximity" concept is merely a label or an artificial exercise in judicial creativity, then one must ask why the concept is still resorted to or utilised in the various tests. Its very presence suggests that it has some substantive content that is capable of being expressed in terms of legal principles. Rather than denouncing it as a mere "label", the courts should strive to infuse some meaning into it, if only so that lawyers who advise litigants and even law teachers can make some sense of the judicial formulations.

81 In our view, Deane J's analysis in *Sutherland*, that proximity includes physical, circumstantial as well as causal proximity, does provide substance to the concept since it

includes the twin criteria of voluntary assumption of responsibility and reliance, where the facts support them, as essential factors in meeting the test of proximity. Where A voluntarily assumes responsibility for his acts or omissions towards B, and B relies on it, it is only fair and just that the law should hold A liable for negligence in causing economic loss or physical damage to B …

82 We only need to add, further, that in determining proximity as expounded by Deane J in *Sutherland*, the court should apply these concepts first by analogising the facts of the case for decision with those of decided cases, if such exist, but should not be constrained from limiting liability in a deserving case only because it involves a novel fact situation.

[emphasis in original]

100 The above observations have been set out in full above not only because they represent the leading *general* analysis of the concept of *proximity* in the *Singapore* context, but also because (as will be shown below at [101]–[103]) they are in fact *consistent with* the more *specific* factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* (reproduced above at [38]) in the context of liability for *nervous shock*, which factors are somewhat different when compared to, for example, the factors to be considered in a situation involving liability for pure economic loss (where the twin criteria of voluntary assumption of responsibility and reliance would more appropriately apply (although these criteria could also possibly apply in a situation of psychiatric harm, depending on the precise facts of the case at hand)). In particular, the three factors set out by Lord Wilberforce are consistent with the broad categories set out by Deane J in the Australian High Court decision of *The Council of the Shire of Sutherland v Heyman* (1984–1985) 157 CLR 424 ("*Sutherland*") (see the quotation at [99] above), which were accepted by this court in *Spandeck* at [78]–[79] (see, likewise, above at [99]) (see also the observations by Deane J in the (also) Australian High Court decision of *Jaensch v Coffey* (1984) 155 CLR 549 ("*Jaensch*") at 584–585).

101 The *first* factor set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* ([23] *supra*), centring on *the class of persons* whose claims should be recognised, corresponds to the general category of *circumstantial* proximity referred to by Deane J in *Sutherland* at 497.

102 The *second* factor mentioned by Lord Wilberforce, relating to *the proximity of the claimants to the accident*, corresponds to the general category of *physical* proximity referred to by Deane J in *Sutherland* (*ibid*).

103 The *third* factor stated by Lord Wilberforce, relating to *the means by which the shock is caused*, corresponds to the general category of *causal* proximity referred to by Deane J in *Sutherland* (*ibid*).

104 We note, at this juncture, that *Spandeck* ([2] *supra*) has been the subject of very recent (and perceptive) critique by Prof Kumaralingam Amirthalingam (see "Refining the Duty of Care in Singapore" (2008) 124 LQR 42 and "Lord Atkin and the Philosopher's Stone: The Search for A Universal Test for Duty" [2007] Sing JLS 350 ("Lord Atkin and the Philosopher's Stone")). Prof Amirthalingam makes many salient points. Foremost amongst them is the argument that the concept of reasonable foreseeability should be restored as a *legal* test for determining the existence of a duty of care for, in his view, this concept "serves an important normative function" (see "Lord Atkin and the Philosopher's Stone" at 353). This would, in effect, reinstate the three-part test laid down by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 ("*Caparo*"), which comprises the following elements: (a) foreseeability, (b) proximity, and (c) the requirement that the imposition of any duty of care be "fair, just and reasonable" (*id* at 618). With respect, we do not think that the law would be advanced by such a change. Indeed, the concept of *proximity itself*

represents a *legal (or normative)* concept of *reasonable foreseeability*. The *alternative* concept of reasonable foreseeability which is advanced by Prof Amirthalingam is, in substance and effect, a *factual* one which we view as being *an integral part of the (legal) test of proximity in the first place.* In other words, if the threshold issue of *factual* foreseeability is not even satisfied in the first instance (an occurrence which, we should think, would, in the nature of things, be rare, as we noted in *Spandeck* itself at [75]), *then the court cannot possibly proceed to ascertain* whether or not there is the requisite (legal) proximity between the parties simply because there is *no factual foundation* on which (legal) proximity can be founded. This is *not* to state that the establishment of a factual foundation will *necessarily* lead to a finding of (*legal*) *proximity*. The former is a necessary, but not sufficient, condition for the establishment of the latter. And, viewing the entire matter from a holistic as well as practical perspective, it is clear that there is no difference, *in substance*, between the approach adopted in *Spandeck* and that proposed by Prof Amirthalingam.

105 It should also be noted that although the two-stage test in *Anns* ([20] *supra*), which forms the basis of the test laid down by this court in *Spandeck*, has not been followed in England, the law in that particular jurisdiction continues (as this court noted in *Spandeck* at [46]–[49]) to remain in a state of flux (see, for example, the House of Lords decision of *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181).

106 It is also interesting to note that the position in Canada is similar to that presently applicable in Singapore, where (as mentioned earlier at [98] above) a somewhat modified version of the two-stage test in *Anns* has been adopted. In particular, whilst affirming the two-stage test in *Anns*, the Canadian courts have considered both reasonable foreseeability and proximity under the first stage (see, for example, the Canadian Supreme Court decisions of *Cooper v Hobart* (2001) 206 DLR (4th) 193 at [30]–[31]; *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 at [46]–[50]; *Hill v Hamilton-Wentworth Regional Police Services Board* (2005) 259 DLR (4th) 676 at [47]; *Childs v Desormeaux* (2006) 266 DLR (4th) 257 at [9]–[12]; and *Syl Apps Secure Treatment Centre v BD* (2007) 284 DLR (4th) 682 at [23]–[30]). This approach is not necessarily at variance with that adopted in *Spandeck*, for (as we explained above at [104]) the concept of reasonable foreseeability is also an integral part of the process of ascertaining whether there is sufficient (legal) proximity between the plaintiff and the defendant, albeit on a preliminary (and factual) level.

107 The position in Australia appears to be somewhat in a state of flux (see generally Francis Trindade, Peter Cane & Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th Ed, 2007) at ch 9).

108 It is important, however, to emphasise that every application of the concept of proximity is heavily dependent on the precise factual matrix concerned. In other words, there is no mechanical formula that is to be applied by the court *vis-à-vis* these factors. In a similar vein, no one factor is more important than the other; nor is there any one unique way in which a particular factor is to be applied.

109 We now turn to consider a separate – albeit no less important – point (or, in fact, major requirement) which arises from the very nature of *psychiatric harm* itself, namely, the potentially limitless reach of liability in negligence for this particular type of injury (see also [71] and [74] above). Given this factor, we are of the view that after applying the test for proximity, which incorporates the three factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* ([23] *supra*), the *second* stage of the two-stage test laid down by this court in *Spandeck* should likewise be applied in the context of claims for psychiatric harm (*cf* also the reference by Deane J to the concept of "some other overriding limitation" or "other overriding control" in *Jaensch* ([100] *supra*) at 592, and 600 as well as 603, respectively; see also the reference to the question of whether "the court considers it

fair, just and reasonable that the law should impose a duty" *per* Lord Bridge in *Caparo* ([104] *supra*) at 618). *In other words, the test under Singapore law for determining the existence of a duty of care in the context of claims in negligence for psychiatric harm is the same two-stage test that was laid down by this court in* Spandeck *([2] supra). The first stage of this test encompasses the three factors set out by Lord Wilberforce in* Part 3 *of his judgment in* McLoughlin *(as set out at [38] above), while the second stage comprises public policy considerations. Before the two-stage test applies, however, the presence of a recognisable psychiatric illness and factual foreseeability must, of course, first be established. This two-stage test is also (as emphasised in* Spandeck *at [73]) (reproduced above at [21]) to be applied incrementally*. To this extent, therefore, the test which we have just laid down with regard to liability in negligence for psychiatric harm in the Singapore context is a *modified* version of the test enunciated by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* inasmuch as the learned law lord did *not* refer to those *policy considerations* which (as we have just mentioned) comprise the *second* stage of the two-stage test we have proposed.

110 *However*, we would (for the reasons elaborated upon in detail above at [66]–[91] and [95]) respectfully disagree with the distinction drawn in *Page* ([23] *supra*) between primary and secondary victims. The result is that in order for a plaintiff to establish a duty of care on the part of the defendant in the context of psychiatric harm, the plaintiff will have to establish factual foreseeability as well as proximity in the context of *psychiatric harm* in accordance with the criteria stated at [99]–[103] above (which include the factors set out in *Part 3* of Lord Wilberforce's judgment in *McLoughlin* as part of the first stage of the two-stage test).

Possible reform of the three factors set out by Lord Wilberforce in McLoughlin?

111 Returning to the three factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* ([23] *supra*) (which form part of the *first* stage of the two-stage test to be applied for determining liability in cases of psychiatric harm), we are cognisant of the fact that the English Law Commission has recommended that *only the first* factor (centring on the class of persons whose claims should be recognised) be retained (see item 3 of the "Executive Summary" of *The English Law Commission Report* ([90] *supra*)). In a similar vein, there have been suggestions by academic commentators to the effect that "[p]erhaps one solution is a shift in emphasis to relational proximity [*viz*, the first factor], with resort to physical and perceptional proximity [*viz*, the second and third factors, respectively] only if the relationship is not a close one" (see Lee Eng Beng, "Vindication of the Three Proximities" [1992] Sing JLS 528 at 539; see also F A Trindade, "The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock" [1986] CLJ 476 at 494–495, which is cited in the former article). However, such a suggestion might well become (in substance and effect) a back-door means of introducing (whether intended or otherwise) reform to this area of the tort of negligence, which (as we point out below at [116]–[120]) is a task not for the courts as such, but (rather) for the *Legislature*. Further, as Lee correctly admits ("Vindication of the Three Proximities" at 540):

> However, once this position [of shifting the emphasis to relational proximity, with physical and perceptional proximity coming into play only if the requisite relational proximity is missing] is achieved, should not the law logically also include claims for psychiatric illnesses caused by having to care for an invalid husband, or by having to cope with having lost a child? *Again one faces the prospects of limitless liability. Ultimately, it has to be conceded that such a solution involves the mere substitution of one arbitrary line with another.* [emphasis added]

It is significant that *The English Law Commission Report* recommended that the above change (or reform) in the law be effected via *legislation* (see, in this regard, the draft Negligence (Psychiatric Illness) Bill at Appendix A of *The English Law Commission Report*). This signifies – by implication, if not

expressly – that such a reform would *entail policy issues that are best decided by the Legislature*. We note that such a change in the law has in fact been effected in Australia via case law instead (see the Australian High Court decision of *Tame v New South Wales* (2002) 211 CLR 317 ("*Tame*") (reference may also be made to the prescient observations of Deane J in the earlier decision of the same court in *Jaensch* ([100] *supra* at 608–609), as well as the perceptive comments on a leading South African decision (*viz*, *Barnard v Santam Bpk* 1999 (1) SA 202): see Jonathan Burchell, "An Encouraging Prognosis for Claims for Damages for Negligently Inflicted Psychological Harm" (1999) 116 S African LJ 697 ("Damages for Negligently Inflicted Psychological Harm") and Nicholas J Mullany, "Personal Perception of Trauma and Sudden Shock – South Africa Simplifies Matters" (2000) 116 LQR 29 ("Personal Perception of Trauma and Sudden Shock")). However, it is also pertinent to note that well before *Tame* was decided, the Australian state of New South Wales had already promulgated *legislation* which allowed recovery by close relations (as defined therein) for "mental or nervous shock" under certain circumstances (see s 4(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) ("the 1944 NSW Act")). Section 4 of the 1944 NSW Act read as follows:

4. Extension of liability in certain cases

(1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by —

(a) a parent or the husband or wife of the person so killed, injured or put in peril; or

(b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family.

(2) Where an action is brought by a member of the family of any person so killed, injured or put in peril in respect of liability for injury arising wholly or in part from mental or nervous shock sustained by the plaintiff as aforesaid and claims have been made against or are apprehended by the defendant at the suit of other members of the family or such person in respect of liability arising by operation of subsection one of this section out of the same act, neglect or default the defendant may apply to the court and the court may thereupon stay any proceedings pending at the suit of any such other member of the family arising out of the same act, neglect or default and may proceed in such manner and subject to such regulations as to making members of the family of such person parties to the action as to who is to have the carriage of the action and as to the exclusion of any member of the family who does not come in within a certain time as the court thinks just. The jurisdiction conferred by this subsection may be exercised by any judge of the court sitting in its Common Law Jurisdiction.

(3) Where any application under subsection two of this section is made the action shall be for the benefit of such members of the family of the person so killed, injured or put in peril as are joined by the court as plaintiffs pursuant to such application and the jury may give such damages as they may think proportion[ate] to the injury resulting to the persons joined as plaintiffs respectively, and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the persons joined as plaintiffs in such shares as the jury by their verdict find and direct.

(4) Any action in respect of a liability arising by operation of subsection one of this section shall be brought in the Supreme Court.

(5) In this section —

"Member of the family" means the husband, wife, parent, child, brother, sister, half-brother and half-sister of the person in relation to which the expression is used.

"Parent" includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another.

"Child" includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.

112 The rationale for s 4 of the 1944 NSW Act was recounted by McHugh J in the Australian High Court decision of *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 ("*Gifford*"), as follows (at [34]–[35]):

> Section 4 was a statutory response to the decision of this Court in *Chester v Waverley Corporation* [(1939) 62 CLR 1] and the decision of the House of Lords in *Bourhill v Young* [[1943] AC 92]. In *Chester*, this Court held that no action for nervous shock could be brought by a mother who had suffered shock after seeing the dead body of her missing son in a trench under the control of the council. In *Bourhill*, the House of Lords denied a right of action to a woman who suffered nervous shock after hearing a motor cyclist collide with a motor vehicle. At the time she was unloading a basket from a platform on the other side of a nearby stationary tram. In the Second Reading Speech on the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, the Minister for Justice said that s 4 was "a statutory extension of liability to meet the position created by the decision in *[Bourhill] v Young* ... It creates no new substantive right of action" [citing New South Wales (Australia), Legislative Council, *Parliamentary Debates* (8 November 1944) at 830].
>
> When s 4 was enacted, it was seen as a beneficial provision that expanded the ability of close family members to recover for nervous shock. It was a legislative response to the perceived inadequacies in the common law, as then understood, to provide compensation to family members for nervous shock suffered as the result of injury to their relatives [citing *Jaensch* ([100] *supra*) at 601–602 *per* Deane J]. It removed the need for a family member to show the existence of a duty to the family member or that psychiatric injury to that person was reasonably foreseeable. The Minister said that the [B]ill would "provide a considerable advance on the present law" [citing New South Wales (Australia), Legislative Council, *Parliamentary Debates* (5 December 1944) at 1491]. Nothing in s 4 or its history supports Strang's [the defendant's] submission that the section was intended to operate to the exclusion of the common law and cover the field in relation to claims for nervous shock by family members.

113 Section 4 of the 1944 NSW Act has since been repealed and the relevant statutory regime is now to be found in Pt 3 of the Civil Liability Act 2002 (NSW) ("the 2002 NSW Act"), which comprises a number of sections that read as follows:

27 Definitions

In this Part:

"consequential mental harm" means mental harm that is a consequence of a personal injury of any other kind.

"mental harm" means impairment of a person's mental condition.

"negligence" means failure to exercise reasonable care and skill.

"personal injury" includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

"pure mental harm" means mental harm other than consequential mental harm.

28 Application of Part

(1) This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) Section 29 applies to a claim for damages in any civil proceedings.

(3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B [relating to civil liability excluded from the provisions of this particular Act].

29 Personal injury arising from mental or nervous shock

In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock.

30 Limitation on recovery for pure mental harm arising from shock

(1) This section applies to the liability of a person ("the defendant") for pure mental harm to a person ("the plaintiff") arising wholly or partly from mental or nervous shock in connection with another person ("the victim") being killed, injured or put in peril by the act or omission of the defendant.

(2) The plaintiff is not entitled to recover damages for pure mental harm unless:

(a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or

(b) the plaintiff is a close member of the family of the victim.

(3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.

(4) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.

(5) In this section:

"close member of the family" of a victim means:

(a) a parent of the victim or other person with parental responsibility for the victim, or

(b) the spouse or partner of the victim, or

(c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or

(d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

"spouse or partner" means:

(a) a husband or wife, or

(b) the other party to a de facto relationship within the meaning of the Property (Relationships) Act 1984 [NSW],

but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

31 Pure mental harm – liability only for recognised psychiatric illness

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

32 Mental harm – duty of care

(1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:

(a) whether or not the mental harm was suffered as the result of a sudden shock,

(b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

(4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

33 Liability for economic loss for consequential mental harm

A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

114 A statutory equivalent of s 4 of the 1944 NSW Act is still to be found in the Northern Territory (see s 25 of the Law Reform (Miscellaneous Provisions) Act 1956 (NT)). In contrast, the Australian Capital Territory has replaced what used to be its statutory equivalent of s 4 of the 1944 NSW Act (*ie*, s 24 of the Law Reform (Miscellaneous Provisions) Act 1955 (ACT)) with legislation along the lines of Pt 3 of the 2002 NSW Act (see the provisions in Pt 3.2 of the Civil Law (Wrongs) Act 2002 (ACT)).

115 On a general level, it would appear that such statutory provisions (whether present or past) are in addition to, and not in derogation of, the common law (see *Gifford* ([112] *supra*) at [35]) (reproduced above at [112]).

116 Returning to the *Singapore* context, whilst we accept that there are cogent arguments for doing away with the second and third of the three factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* ([23] *supra*) (reproduced above at [38]), we are of the view that such a step ought, if at all, to be effected via *legislative reform*. The danger of a floodgate of litigation ensuing in the event that these factors are dispensed with is a very real one. The English Law Commission itself acknowledged that this would be the case, and estimated that there would be somewhere in the region of a 10% increase in the number of personal injury claims; it also observed that higher insurance premiums (in the range of 2% to 5%) would result (see *The English Law Commission Report* ([90] *supra*) at paras 1.12–1.13).

117 Prof Tan agreed with this assessment (see *Discussion Paper* ([74] *supra*) at p 10), as follows (see also, by the same author, "Liability for Psychiatric Illness" ([39] *supra*) at 176–177):

> *For every accident there will be two sets of plaintiffs: those physically injured (the immediate victims) and those close to the immediate victims in love and affection who suffer psychiatric illness as a result of this whether at or away from the accident (the related secondary victims). Psychiatric illness claims will automatically accompany the claims of those injured or killed if their loved ones can prove by expert psychiatric evidence that they actually suffered recognisable psychiatric illness as a result of the accident. Presently, with the existing common law restriction, such claims for psychiatric illness are exceptional. With the proposed legislative change [recommended by the English Law Commission] these psychiatric [illness] claims will become a regular additional feature in the relevant accident cases.* The [English Law] Commission guesstimates that extending the liability for psychiatric illness … will result in about a ten per cent increase in the number of personal injury claims and an increase of between two to five per cent in motor insurance premiums ([*The English Law Commission Report*], paras 1.12 and 1.13). *The escalation of liability may be much more than what is estimated by the [English Law] Commission as the real increase in the number of such claims, after widespread public awareness of this liability and a greater claim consciousness of it, is difficult to quantify accurately at this stage.* [emphasis added]

118 As we noted earlier (above at [111]), the Australian High Court has (in *Tame* ([111] *supra*))

effected reform in this aspect of the tort of negligence through the *common law*. However, it is interesting to note that Prof Trindade arrived at precisely the *same* conclusion, *viz*, that such reform (albeit made by way of case law as opposed to by way of legislation) would generate a similar danger of opening the floodgates to negligence litigation (see F A Trindade, "Reformulation of the Nervous Shock Rules" (2003) 119 LQR 204 at 209–210).

119 On a more *general* level, it is interesting that Prof Tan was also of the view that legislative reform in the *Singapore* context was *not* necessary. In his view (see *Discussion Paper* at p 11):

> Legislative reform of the law, at this stage of its development, when the medical and legal knowledge is not sufficiently mature, may interrupt the proper development of the law on an incremental case-by-case basis and may give rise to legislative recovery in certain areas of psychiatric illness that could, on implementation, prove to be more generous than envisaged. The latter could be a more serious problem for Singapore given that … accident victims are already preferred as a class and are in many ways better catered for compared to … others who suffer similar hardship from non-accident circumstances as a consequence of socio-economic insecurity or natural misfortunes. This is not to say that the common law liability for psychiatric illness, at this juncture, is satisfactory. Indeed, parts of the development are clearly controversial, but they are not so problematic or unsatisfactory as to require urgent legislative change.

120 Prof Tan's *Discussion Paper* was accepted by the then Law Reform Committee of the Singapore Academy of Law. Some years have passed since it was considered, but the general arguments still appear to hold good even today. What is important for present purposes, however, is that whether or not reform of this area of the tort of negligence is to be effected is one that is best left to the *Legislature*. Indeed, many of the imponderables referred to above lie wholly outside the expertise of the court and relate to policy matters which require the *Legislature's* consideration (see also above at [116]). One might add that another issue *not* hitherto considered in the present judgment that might require legislative attention is the common law requirement prescribing the need for sudden shock as one of the prerequisites to recovery (this requirement has already been departed from in the Australian context as a result of the Australian High Court's decision in *Tame* and, presumably, also in the South African context (see "Damages for Negligently Inflicted Psychological Harm" ([111] *supra*) and "Personal Perception of Trauma and Sudden Shock" ([111] *supra*)); its abolition was also advocated by the English Law Commission (see *The English Law Commission Report* ([90] *supra*)).

Summary of the applicable law relating to claims in negligence for psychiatric harm in Singapore

121 It will be seen – primarily from our analysis of *McLoughlin* ([23] *supra*) as well as the position in the Singapore context above (see, especially, above at [57]) – that the present legal position on liability in negligence for psychiatric harm in the local context (assuming, of course, that there is the existence of a recognisable psychiatric illness to begin with) is *wholly consistent with* the two-stage approach adopted by this court in *Spandeck* ([2] *supra*). This is especially the case once it is accepted (as we pointed out above at [100]–[103]) that the three factors propounded by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* (reproduced above at [38]) fall within the *first* stage of this two-stage approach (and are, hence, an integral part of the inquiry as to whether there is sufficient (legal) *proximity* between the plaintiff and the defendant). We would reiterate that these three factors lend themselves to general application, regardless of whether the claimant was in the position of, say, Mr Page (the plaintiff motorist) in *Page* ([23] *supra*) or Mrs McLoughlin (the plaintiff mother) in *McLoughlin*. Within this framework, the primary victim/secondary victim dichotomy established in *Page* is no longer relevant for the reasons set out earlier (above at [66]–[91]).

122 The *second* stage of the two-stage approach laid down in *Spandeck* involves considering whether, in the specific context and factual matrix of a given case, there are public policy factors that would entail the courts not imposing a duty of care even if there is otherwise sufficient proximity between the plaintiff and the defendant pursuant to the analysis carried out under the first stage. If, there are no applicable policy factors to negate the existence of a duty of care, then the courts will find a duty of care established on the part of the defendant, the breach of which would result in liability and the awarding of damages (subject, of course, to the established constraints on recovery of damages, including the doctrines of remoteness of damage, mitigation of damage as well as contributory negligence).

123 With this decision, therefore, this court has moved towards the ideal envisioned in *Spandeck* (at [71]) of having "a *single* test … to determine the imposition of a duty of care in all claims arising out of negligence, *irrespective* of the *type* of the damages claimed" [emphasis in original]. It is true that the three factors set out by Lord Wilberforce in *Part 3* of his judgment in *McLoughlin* relating to the ascertainment of whether there is sufficient proximity between the parties appear to differ somewhat from, for example, the factors highlighted in *Spandeck*, where the focus was on the twin criteria of the voluntary assumption of responsibility and reliance (*id* at [81], reproduced above at [99]). However, this difference is more apparent than real. As we pointed out earlier (above at [100]–[103]), the *general rationale underlying as well as the categories relating to the concept of proximity* are *common.* More importantly, we also pointed out (above at [108]) that in determining whether the requisite proximity is present in a particular case, much will turn on the precise factual matrix concerned. In the particular context of psychiatric illness or nervous shock, it is not surprising that Lord Wilberforce framed the three factors in the way which he did. Even then, the *application* of these factors to the facts of the case concerned will, as just mentioned, be all-important. Looked at in this light, it would be very rare to find a case which could be said to constitute a precedent that is directly on point and, hence, conclusive. This is not, of course, to state that prior precedents (especially those that emanate from Singapore) are never helpful; on the contrary, many precedents may (and often do) assist in elucidating the applicable law and may even assist the courts in deciding on certain specific issues (where the comparative factual matrices, at least for those particular issues, are factually and/or legally the same).

Our decision with regard to the second appellant's case on appeal

124 Having covered the law applicable to the second appellant's claim against the respondent, we now turn to consider the merits of the second appellant's arguments before this court (on the assumption that she suffered a recognisable psychiatric illness). The second appellant essentially blamed the respondent's deceitful conduct for her plight. This conduct included, *inter alia*, the fact that the respondent had informed the second appellant that the physical condition of the first appellant was not serious when it was (in reality) quite the opposite, as well as the fact that the respondent had failed or neglected to tell the second appellant that the Taxi had collided into the rear of the Motorcycle.

The second appellant's allegations against the respondent

125 With respect to the allegation that the respondent had lied to the second appellant about the physical condition of the first appellant, the Judge made the following findings (see the GD at [62]–[63]):

> 62 As the second plaintiff [*ie*, the second appellant] rightly conceded under cross-examination, if the second defendant [*ie*, the respondent] proved that he did not lie to her, her claim would and must fail.

> 63 On her first allegation, the second plaintiff had conceded during cross-examination as well as on questioning by the court … that the second defendant [had] not lie[d] to her. It was the first plaintiff's [*ie*, the first appellant's] own evidence that he was wearing a helmet and a raincoat at the material time, that apart from his spinal injuries, he suffered no visible injuries other than bruises to his face and hands. Therefore, when the second defendant saw the first plaintiff lying on the road, the former could only see the latter's superficial injuries. Hence, the second defendant described to the second [plaintiff] what he actually saw. The second defendant would not know at that point of time, that the first plaintiff's other injuries were so serious as to render him a tetraplegic.

126 It was the second appellant's submission that the fact that the first appellant was immobile meant that the respondent should have known that something was seriously wrong with the first appellant, even if the respondent did not have prior knowledge of the injuries incurred. The Judge rejected this argument for the reasons set out at [63] of the GD (see the passage reproduced in the preceding paragraph). We agreed with the Judge and found no merit in this submission.

127 We also rejected the allegation that the respondent had failed or neglected to tell the second appellant that the Taxi had collided into the rear of the Motorcycle, as this was precisely one of the major issues that had to be decided by the court; in respect of this particular question, we had earlier found (for the reasons set out above at [14]–[18]) that the Motorcycle had self-skidded and that there had therefore been no collision between the two vehicles, contrary to what the appellants alleged.

128 What remained was the respondent's alleged failure to be more candid with the second appellant *vis-à-vis* his involvement in the Accident. In so far as this was concerned, the Judge observed as follows (see the GD at [85]):

> I would stress that I do not for a moment condone the second defendant's actions subsequent to the [A]ccident. His conduct was reprehensible; he should have been more candid in his telephone conversations and subsequent personal contacts with the second plaintiff. He should have disclosed to her that the [T]axi was involved in the [A]ccident, even if it meant facing the wrath of the [plaintiffs'] family, as the plaintiffs and their sons would undoubtedly blame him for the first plaintiff's plight. I believe the second defendant genuinely feared (however unfounded) that he would be charged by the Traffic Police over the accident. His anxiety to find out from the second plaintiff whether the first plaintiff had implicated him in anyway in my view far outweighed his expressed concern for the wellbeing of the first plaintiff.

129 The Judge's remarks were, with respect, misdirected. At that point in time, given the circumstances of the Accident, it would not be surprising that the respondent, as a layperson, would have been fearful of being somehow implicated in the Accident. Given the circumstances, he could not be seriously faulted for trying to find out whether he had been implicated by the first appellant. He might have taken advantage of the emotional state of the second appellant for his own benefit, but the question which the court has to ask itself is: However morally reprehensible his conduct might have been, was the respondent guilty of conduct that was tortious in law?

130 The only possible conduct in respect of which the respondent could arguably be said to owe a duty of care to the second appellant would be his communication of matters relating to the Accident to the second appellant. For the sake of completeness, and giving due consideration to the seriousness of the appellants' plight, we decided to consider whether such a duty did of care did indeed exist on the facts of this case, applying the test laid down in *Spandeck* ([2] *supra*).

Foreseeability of damage

131 As stated earlier (above at [21] and [104]), reasonable foreseeability – in the factual sense – of the damage or injury suffered is a preliminary threshold requirement which a plaintiff in a negligence action must satisfy. This requirement is almost always satisfied. As was stated in the Singapore High Court decision of *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 (at [55]):

> [T]he requirement of reasonable foreseeability from a *factual* perspective will *almost always be satisfied*, simply because of its very nature and the very wide nature of the "net" it necessarily casts. There is therefore *no practical need* to include such a *factual* element within a *legal* formulation such as exists with regard to the existence (or otherwise) of *a duty of care*. … This is not to state that this last-mentioned (*factual*) element is to be discarded. As I have already mentioned, it will *almost always* be satisfied. [emphasis in original]

132 However, even allowing for the naturally wide ambit of (factual) foreseeability, it was our view that this requirement was not satisfied in the present case in relation to the second appellant. To 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. We did (with great hesitation) acknowledge, however, that certain situations where information was communicated might, perhaps, result in the foreseeability of harm. But, this was not such a case. Nevertheless, on the assumption that the second appellant could establish the requisite factual foreseeability, we proceeded to consider the three factors set out in *Part 3* of Lord Wilberforce's judgment in *McLoughlin* ([23] *supra*) (see the passage reproduced at [38] above) in relation to the issue of (legal) proximity, which constitutes the first stage of the two-stage approach adopted in *Spandeck*.

Proximity

The class of persons whose claims should be recognised

133 The presence of a spousal relationship between the first appellant and the second appellant was a factor in favour of finding that the respondent did owe the second appellant a duty of care on the facts of the present appeal. As Lord Wilberforce stated in *McLoughlin* (at 422):

> As regards the class of persons [whose claims should be recognised], the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first …

It is therefore clear, on the facts of the present appeal, that the requisite relational proximity existed.

Proximity to the tortious event

134 In general, claims in negligence for damages for psychiatric harm usually arise in accident situations (*ie*, an accident is said to be the tortious event which caused the claimant to suffer psychiatric harm). In the present appeal, however, the alleged tortious event was the communication of information from the respondent to the second appellant, and not the Accident itself. If it were the latter, it was clear that the second appellant was not physically proximate to the alleged tortious event.

The means by which psychiatric harm is caused

135 The traditional view in relation to causal proximity (*ie*, the means by which psychiatric harm is caused) was stated by Lord Wilberforce in *McLoughlin*, as follows (at 422–423):

> [T]here is no case in which the law has compensated shock brought about by communication by a third party … The shock must come through sight or hearing of the event or of its immediate aftermath.

This traditional focus of the common law on direct physical perception is also reflected in the following statement of Windeyer J in the Australian High Court decision of *Mount Isa Mines Limited v Pusey* (1970) 125 CLR 383 (at 407):

> If the sole cause of shock be what is told or read of some happening then I think it is correctly said that, unless there be an intention to cause a nervous shock, no action lies against either the bearer of bad tidings or the person who caused the event of which [he] tell[s]. There is no duty in law to break bad news gently or to do nothing which creates bad news.

136 With this as a starting point, we turn to consider cases where the courts have departed from the traditional view *vis-à-vis* situations where the communication of information led to psychiatric harm.

137 The position of the second appellant was analogous to that of the plaintiff in cases such as the English High Court decisions of *Farrell v Avon Heath Authority* [2001] 1 Lloyd's Rep Med 458 ("*Farrell*") and *Wilkinson v Downton* [1897] 2 QB 57 ("*Wilkinson*"), which she relied on. In *Farrell*, the plaintiff, who had fathered a son out of wedlock, was told to go to the hospital to see his newborn child. He was very excited at the prospect of fatherhood, but, upon arrival, was told that his son had died. He was asked whether he would like to see the dead baby. He replied in the affirmative and proceeded to kiss and cuddle the dead baby. A few minutes later, the nurses informed him that there had been a mistake and that his baby was alive. The plaintiff developed post-traumatic stress disorder as a result of this ordeal and sued for damages. Bursell J held that the claimant could recover damages for the psychiatric harm suffered.

138 In *Wilkinson*, the defendant falsely and maliciously represented to the plaintiff that her husband had been seriously injured. The plaintiff developed psychiatric harm and sued for damages for the injury to her health. Wright J held that the plaintiff should succeed in her claim. In our view, *Wilkinson* is authority for the principle that wilfully communicating false information is actionable if it causes physical, including psychiatric, harm. In the present case, however, there was no intention to cause harm, much less the type of harm that the second appellant complained of.

139 In so far as the decision in *Farrell* is concerned, it extended – erroneously, in our view – the boundaries of recovery for psychiatric harm and therefore ought not to be followed. As Gummow and Kirby JJ stated in the Australian High Court decision of *Tame* ([111] *supra* at 395):

> [I]n the absence of a malign intention, no action lies against the bearer of bad news for psychiatric harm caused by the manner in which the news is conveyed or, if the news be true, for psychiatric harm caused by the fact of its conveyance. The discharge of the responsibility to impart bad news fully and frankly would be inhibited by the imposition in those circumstances of a duty of care to avoid causing distress to the recipient of the news. There can be no legal duty to break bad news gently. This is so even if degrees of tact and diplomacy were capable of objective identification and assessment, which manifestly they are not. Neither carelessness nor insensitivity in presentation will found an action in negligence against the messenger.

140 The court should be slow to allow recovery for psychiatric harm arising from the communication of information in cases where no "malign intention" (*Tame* at 395) on the part of the person communicating the information is present. This is clearly indicated by *Wilkinson* ([137] *supra*) (see above at [138]), as well as the English Court of Appeal decision of *Janvier v Sweeney* [1919] 2 KB 316, which relates, in fact, to a special species of *intentional* torts, where the defendant wilfully does an act calculated to cause physical harm to the plaintiff (see also the Singapore High Court decision of *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 4 SLR 454 at [46]–[48]). In those circumstances, that more harm than was anticipated resulted is immaterial. As we have already pointed out earlier (above at [138]), however, the present appeal did *not* involve an intentional tort in that the respondent had no intention to cause the second appellant harm.

141 We would also note that case law indicates that a possible remedy for psychiatric harm resulting from the communication of information could exist in situations where there is a professional relationship between the parties. For example, in the Supreme Court of South Australia decision of *Brown v The Mount Barker Soldiers' Hospital Incorporated* [1934] SASR 128, the defendant hospital negligently burnt a newborn baby out of sight of the mother, who suffered shock when told of her child's injury. The mother, who was a patient of the hospital at the material time, sued the hospital for the psychiatric illness suffered. Piper J held that the hospital owed the mother a duty of care. In a similar vein, in *Furniss v Fitchett* [1958] NZLR 396, the Supreme Court of New Zealand allowed a plaintiff to succeed in an action against her doctor for nervous shock caused by his negligent disclosure to her husband of his opinion as to her mental stability.

142 No such professional relationship existed between the second appellant and the respondent in the present appeal. More generally and importantly, it is clear, in our view, that the second appellant did not satisfy the requirement of legal proximity which constitutes the first stage of the two-stage approach adopted in *Spandeck* (which approach, as we held earlier, likewise applies to cases of psychiatric harm).

Public policy

143 Having regard to our conclusion (as just stated in the preceding paragraph) in relation to the issue of legal proximity on the facts of the present appeal, it was, strictly speaking, unnecessary for this court to proceed to consider the second stage of the two-stage test laid down in *Spandeck* ([2] *supra*), which centres on public policy. However, as we shall elaborate upon in a moment, a consideration of the latter serves to underscore the conclusion that was reached at the first stage of this two-stage test. More specifically, it will be seen that considerations of public policy militate against the finding of a duty of care where communication of information is concerned, even assuming that legal proximity can be established at the first stage of the two-stage approach adopted in *Spandeck*, except in situations where a "malign intention" (*Tame* ([111] *supra*) at 395) on the part of the person communicating the information is present.

144 Uppermost in our minds were the potential ramifications to the commonplace activity of communicating news, and, in particular, the communication of bad news. In *Alcock* ([23] *supra*), Parker LJ observed (when the case was before the English Court of Appeal) as follows (at 363):

> It appears to me that if it can be reasonably foreseen that psychiatric illness can result from the shock of being told what has happened but the defendant is not liable, so also the defendant is not liable if the injury results from information conveyed by means of television and its commentary. If this is not correct it would, as it seems to me, follow that anyone who reports, at any rate promptly, the fact of death or serious injury would be liable for psychiatric illness resulting, as would the television company.

145 It can be expected that a decision to allow recovery in all situations where communication of information results in psychiatric harm would result in a changed (and more constrained) approach towards the communication of bad news. As Gummow and Kirby JJ opined in *Tame* at 395 (in a passage which was set out earlier at [139] above), recovery for psychiatric harm caused by the communication of information should be limited to situations where a "malign intention" (*Tame* at 395) on the part of the person communicating the information is present in order to prevent the inhibition of full and frank disclosure of news.

Other observations

146 In order for a plaintiff to succeed in a claim founded on the tort of negligence, the following must be established:

(a) the defendant owes the plaintiff a duty of care;

(b) the defendant breached that duty of care by acting (or omitting to act) below the standard of care required of it;

(c) the defendant's breach caused the plaintiff damage;

(d) the plaintiff's losses arising from the defendant's breach are not too remote; and

(e) such losses can be adequately proved and quantified.

In so far as the issue of *liability* is concerned, the plaintiff is only required to establish that a duty of care was owed and that a breach of such duty occurred. The other requirements listed above are, strictly speaking, concerned with the assessment of damages and *not* with liability (see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 1–019, where the learned author emphasises the distinction between the *existence* of liability and the *extent and measurement* of liability *once it has been established*).

147 While the Judge purported to deal solely with the issue of liability, she expressly dealt with issues of remoteness and causation *vis-à-vis* the second appellant, which issues, in the analysis of the learned author of *McGregor on Damages*, relate to the extent of liability (*viz*, the assessment of damages) and *not* the existence of liability. For the sake of completeness, however, we would express our agreement with the reasoning of the Judge with regard to both of these issues (as set out at [87] and [90] of the GD).

Conclusion

148 Our consideration of the evidence and the parties' arguments demonstrated that the Judge was not plainly wrong in arriving at her decision that the respondent was not responsible for the first appellant's injuries. In so far as the second appellant was concerned, we found that there was no duty of care owed by the respondent to her. In the circumstances, we dismissed the appeal with costs and the usual consequential orders.

149 That the Accident was a tragic one is undeniable, and we have the utmost sympathy for the very real plight of both the appellants. In this regard, we must commend Mr Quentin Loh SC, who was lead counsel for the respondent. At the conclusion of this appeal, he not only expressed his sympathy for the appellants, but also assured the court that, although he had no instructions as to costs, he would consult with his client and recommend that costs not be enforced against the appellants. He

added that, if necessary, his own costs would be reduced.

[note: 1] See para 3 of the defence filed on 17 October 2005.

[note: 2] See para 9 of the appellants' skeletal submissions filed on 26 September 2007.