IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 111

Civil Appeal No 39 of 2021

Between

(1) Noor Azlin bte Abdul Rahman
(2) Azmi Bin Abdul Rahman

… *Appellants*

And

Changi General Hospital Pte Ltd

… *Respondent*

In the matter of Suit No 59 of 2015

Between

(1) Noor Azlin bte Abdul Rahman
(2) Azmi Bin Abdul Rahman

… *Plaintiffs*

And

(1) Changi General Hospital Pte Ltd
(2) Imran Bin Mohamed Noor
(3) Yap Hsiang
(4) Soh Wei Wen, Jason

… *Defendants*

JUDGMENT

[Damages] — [Assessment]
[Damages] — [Quantum]
[Damages] — [Measure of damages] — [Personal injuries cases] — [Life expectancy]
[Damages] — [Measure of damages] — [Personal injuries cases] — [Pain and suffering damages]
[Damages] — [Measure of damages] — [Personal injuries cases] — [Loss of earnings]
[Damages] — [Measure of damages] — [Personal injuries cases] — [Aggravated and punitive damages]

TABLE OF CONTENTS

Noor Azlin bte Abdul Rahman and another
v
Changi General Hospital Pte Ltd

[2021] SGCA 111

Court of Appeal — Civil Appeal No 39 of 2021
Andrew Phang Boon Leong JCA and Judith Prakash JCA
12 August 2021

29 November 2021 Judgment reserved.

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

1 The appeal before us in CA/CA 39/2021 ("CA 39") is a sequel to our decision in *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2019] 1 SLR 834 ("the first CA Judgment") in which we held the respondent, Changi General Hospital Pte Ltd ("CGH"), to be in breach of its duty of care to the first appellant, Ms Noor Azlin bte Abdul Rahman ("Ms Azlin"). CGH's negligence caused a delay in diagnosing Ms Azlin with lung cancer, resulting in the progression of the cancer from stage I to stage IIA, the growth of the cancerous nodule and the subsequent metastasis of the nodule (at [96]–[101] and [115]–[123]). We remitted the question of loss and damage, including the quantum of damages to be awarded (if any), to the High Court judge ("the Judge") for her determination (at [125]).

2 A month after the release of the first CA Judgment, Ms Azlin passed away from cancer. Her brother, the second appellant, Mr Azmi bin Abdul

Rahman ("Mr Azmi"), was added as a party to the proceedings to continue with the action in his capacity as the executor of Ms Azlin's estate. Mr Azmi does not pursue any separate causes of action in his own right against CGH.

3 As will become evident in the course of our judgment, this tragic turn of events fundamentally altered the factual and evidential matrix of Ms Azlin's case against CGH. This was also, correctly, the basis upon which the Judge assessed Ms Azlin's claims in *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd and others* [2021] SGHC 10 ("the Judgment") after a six-day trial in 2020 ("the AD Hearing").

4 By way of a breviloquent overview, the Judge found that there was a causal link between CGH's negligence and Ms Azlin's death from lung cancer (see the Judgment at [89]). She awarded the appellants a sum of $326,620.61 in damages and $105,000 in costs (see the Judgment at [218] and [224]). *CA 39 concerns only the Judge's quantification of damages and costs*. *No challenge is brought against her decision on causation and liability.*

5 After carefully considering the parties' written as well as oral submissions, we allow CA 39 in part and award the appellants a sum of **$343,020.61** in damages. We affirm the Judge's award of $105,000 for the costs of the AD Hearing. We provide a breakdown of our award in the table below. The sections in blue reflect the areas in which no appeal is brought against the Judge's decision.

S/N	Head of damage	Quantum awarded by the Judge	Reference to the Judgment	Our decision
1	Pain and suffering from tumour, treatment, shock and anxiety (included in S/N 6)	$140,000.00	[100]–[114], see especially at [114]	$140,000.00
2	Psychiatric injury (included in S/N 6)	$ -	[115]–[117]	Not claimed
3	Pain and suffering from the awareness of the reduction of her life expectancy (included in S/N 6)	$80,000.00	[118]–[121]	$80,000.00
4	Loss of amenity (included in S/N 6)	$30,000.00	[122]–[124]	$30,000.00
5	Loss of marriage prospects (included in S/N 6)	$ -	[125]–[132]	$ 6,000.00
6	Total award for pain and suffering, loss of amenity and loss of marriage prospects	$250,000.00	[133]–[138], [218]	$256,000.00
7	Post-writ medical expenses (2015 to 1 April 2019)	$ -	[139]–[148]	$ -
8	Post-writ transport expenses (2015 to 1 April 2019)	$ -	[149]–[151]	$10,400.00

S/N	Head of damage	Quantum awarded by the Judge	Reference to the Judgment	Our decision
9	Post-writ costs of nursing care, domestic and auxiliary helper (2015 to 1 April 2019)	$ -	[152]–[153]	$ -
10	Loss of take home earnings: living years from 2016 to 2018	$ -	[160]–[163]	$ -
11	Loss of take home earnings: lost years from 2019 to 2044	$ -	[156]–[159]	$ -
12	Loss of Central Provident Fund ("CPF") contributions: living years from 2016 to 2018	$ -	[160]–[163]	$ -
13	Loss of CPF contributions: lost years from 2019 to 2044	$ -	[156]–[159]	$ -
14	Estate or dependency claim	$54,000.00	[164]–[181], [218]	$54,000.00
15	Aggravated or punitive damages	$ -	[183]–[201]	$ -
16	Pre-trial loss of earnings (2010 to 2015)	$ -	[203]–[208]	$ -

S/N	Head of damage	Quantum awarded by the Judge	Reference to the Judgment	Our decision
17	Pre-trial medical expenses	$19,620.61	[209]–[215], [218]	$19,620.61
18	Pre-trial transport expenses	$3,000.00	[216]–[217], [218]	$3,000.00
19	Costs for AD hearing	$105,000.00	[224]	$105,000.00
	Total (excluding the costs of the AD hearing)	**$326,620.61**		**$343,020.61**

6 In coming to our decision, we are deeply cognisant of the enormity of the loss and suffering caused to Ms Azlin and her loved ones. We are further aware that our award may seem inadequate when juxtaposed against the tragic and irreversible consequences of CGH's negligence. That said, it is axiomatic that the court is bound to adjudicate on the basis of the pleaded claims before it and the evidence adduced in respect of the same. In almost all instances, the burden of proof necessarily lies on the party seeking to vindicate his claim.

7 In this case, our award has been limited, not by the merits of Ms Azlin's case, but by the way in which her case has been advanced. As the Judge had observed at [6] and [94] of the Judgment, there exist various failures to adduce the requisite evidence necessary to support otherwise viable claims and to plead a number of the claims being advanced in submissions. Quite inexplicably, Ms Azlin's case before the Judge and on appeal is being advanced on the basis that she is alive. Consequently, the appellants have not sought leave to amend

their pleadings to reflect the heads of claim that are consonant with Ms Azlin's death (namely, a claim for loss of inheritance). Furthermore, despite our express order in the first CA Judgment that "the issue of loss and damage, ***including quantification*** (if any), be remitted to the Judge with leave for the parties to refine or revise their evidence" [emphasis added] (at [125]), the appellants confirmed that they would not need to call any witnesses to give evidence on the quantification of damages during the AD Hearing.

8 It bears noting that these deficiencies were made known to counsel for the appellants, Mr Vijay Kumar Rai ("Mr Rai"), *a year prior to the start of the AD Hearing* on 24 August 2020. At the hearing of the appellants' application for interim payment in HC/SUM 1204/2019 ("SUM 1204") on 20 August 2019 and 21 August 2019, counsel for CGH, Ms Kuah Boon Theng SC ("Ms Kuah"), alerted Mr Rai to the fact that:

(a) some of the evidence at the Original Hearing (as defined at [17] below) was insufficient to support Ms Azlin's pleaded heads of claims (for example, to show that out-of-pocket expenses for medical treatments and transport were incurred up to the time of Ms Azlin's death);

(b) some of Ms Azlin's claims would have to be amended in the light of her passing on 1 April 2019 (for example, the claims for loss of future earnings and CPF contributions); and

(c) no claim for aggravated damages had ever featured in Ms Azlin's pleadings.

9 Ms Kuah reiterated her general concern with the state of the appellants' pleadings at the Judge-led Pre-Trial Conference ("the JPTC") on 4 November 2019. In particular, she also made known her disagreement with Mr Rai's position that aggravated and punitive damages did not have to be pleaded. As will be seen during the course of our judgment, the failure to remedy the above points meant that a significant proportion of Ms Azlin's losses could not be proved, pursued, and therefore compensated.

The facts and background

10 The legal battle surrounding Ms Azlin's claim has been an acrimonious and lengthy one which began in 2015. This appeal is the fourth time that Ms Azlin's claim has come before this court, and its factual background has been well-summarised in a slew of judgments, most recently in *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 ("the Transfer Judgment"). We lay out only the most relevant facts.

11 The genesis of the dispute can be traced to 31 October 2007 when Ms Azlin visited the Accident and Emergency Department of CGH ("A&E department"), complaining of lower chest pain and shortness of breath. A chest X-ray was ordered ("the October 2007 X-ray") and an opacity in the right mid-zone of her chest was noted. Ms Azlin subsequently visited CGH three more times (see the Judgment at [10]–[13]):

> (a) On 15 November 2007, Ms Azlin went to CGH's Specialist Outpatient Clinic ("SOC") and two chest X-rays were ordered for her by Dr Imran bin Mohamed Noor (respectively, "the November 2007 X-rays" and "Dr Imran"). Dr Imran assessed that the opacity noted in the

October 2007 X-ray was resolving or had resolved on its own and gave Ms Azlin an open date for her follow-up appointment.

(b) On 29 April 2010, Ms Azlin went back to CGH's A&E department complaining of right lower chest pain. An X-ray and an electrocardiogram ("the April 2010 X-ray" and "ECG", respectively) were ordered by Dr Yap Hsiang ("Dr Yap"). Dr Yap deemed the opacity found in the right mid-zone of her lungs to be an "incidental finding" (*ie*, a finding that was not related to the patient's presenting symptoms) as its size had remained more or less the same. Dr Yap ordered that the April 2010 X-ray be reported upon and requested specifically that Ms Azlin be called back after the radiological report was out, if necessary. A radiological report was prepared and sent to the A&E department for follow-up.

(c) On 31 July 2011, Ms Azlin went back to CGH's A&E department complaining of intermittent left lower ribcage pain. Dr Soh Wei Wen Jason ("Dr Soh") ordered two chest X-rays ("the July 2011 X-rays") and an ECG. Dr Soh and his supervising consultant took the view that Ms Azlin had costochondritis, a condition which is of musculoskeletal origin. Ms Azlin was discharged with analgesics. The July 2011 X-rays were sent for reporting and the report recommended a follow-up of the opacity.

12 On 28 November 2011, Ms Azlin went to the Raffles Medical Clinic complaining of cough, breathlessness, and blood in the sputum. On 1 December 2011, Ms Azlin returned for an X-ray ("the December 2011 X-ray") which showed a lesion in the right mid-zone of the lung. Ms Azlin was referred to a respiratory physician at CGH's SOC and was seen by Adjunct Assistant

Professor Sridhar Venkateswaran ("Prof Sridhar") on 15 December 2011. Among other things, Prof Sridhar ordered a Computed Tomography ("CT") scan of Ms Azlin's chest, which revealed a nodule (see the Judgment at [16]–[17]).

13 The biopsy of the nodule was conducted on 16 February 2012 by Dr Andrew Tan ("Dr Tan"). This confirmed that the nodule was malignant and that Ms Azlin had cancer originating from it. The stage of the lung cancer was not yet known at that point in time (see the Judgment at [18]).

14 On 1 March 2012, Prof Sridhar explained to Ms Azlin that there was a good chance that she could have a complete cure with a lobectomy. Ms Azlin was clinically staged as having stage I lung cancer. On 29 March 2012, she underwent a lobectomy and one-third of her right lung was resected. The tumour measured 3.0cm and was pathologically diagnosed as stage IIA non-small cell lung cancer. Ms Azlin underwent four rounds of adjuvant chemotherapy for about three months and CT scans every four months (see the Judgment at [19]).

15 In August 2014, a recurrence of Ms Azlin's lung cancer occurred. This was discovered on a CT scan dated 26 August 2014. A biopsy confirmed that the lung cancer had progressed to stage IV. In December 2014, an analysis of the tumour that was resected via lobectomy in March 2012 was done to determine its mutation type. The resected tumour from 2012 was retrospectively found to be positive for a rare ALK-gene arrangement and Ms Azlin was retrospectively diagnosed in 2014 to have been suffering from ALK-positive lung cancer in 2012 (see the Judgment at [20]).

16 From 22 January 2015 to 8 July 2015, Ms Azlin was treated with a first-generation ALK-inhibitor, Crizotinib. In July 2015, she was placed on second-generation ALK-inhibitors, Ceritinib and Nivolumab, as part of a clinical trial. She remained on those drugs until October 2016, when the cancer progressed to her brain and mediastinal lymph node. She was then taken off the clinical trial and managed with radio surgery, chemotherapy and Ceritinib. From March 2017, Ms Azlin was treated with a third generation ALK-inhibitor, Lorlatinib (see the Judgment at [21]).

The procedural history

17 Ms Azlin commenced legal proceedings against CGH on 20 January 2015 in HC/S 59/2015 ("Suit 59"). Her claim was dismissed by the Judge in *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2019] 3 SLR 1063 ("the first HC Judgment") after a lengthy 28-day trial ("the Original Hearing").

18 Ms Azlin appealed and her appeal in CA/CA 47/2018 was allowed in part by this court in the first CA Judgment. We briefly elaborate on our most relevant holdings therein.

(a) First, Ms Azlin had shown, on a balance of probabilities, that she had lung cancer by July 2011 (see the first CA Judgment at [105] and [114]). This was for two reasons:

(i) Ms Azlin was diagnosed with stage IIA non-small cell lung cancer in March 2012 which was retrospectively determined to be ALK-positive. The cancer must have gone through stage IA and stage IB before progressing to stage IIA in

the period leading up to March 2012 (see the first CA Judgment at [106]–[107]).

(ii) It was unlikely that Ms Azlin had gone through both stage IA and stage IB during the extremely short interval of time between August 2011 (after her consultation with Dr Soh on 31 July 2011) and March 2012. It was therefore "more likely than not that [Ms Azlin] **did** have lung cancer by July 2011" [emphasis in original] (see the first CA Judgment at [109]).

(b) Second, CGH had breached its duty of care to Ms Azlin by failing to ensure that there was proper follow-up in her case when even the radiological reports from April 2010 and July 2011 recommended follow-up on the opacity in the right mid-zone of her chest. There were also serious inadequacies in CGH's patient management system (see the first CA Judgment at [96]–[101]).

(c) Third, CGH's negligence caused a delay in diagnosing Ms Azlin with lung cancer which, more likely than not, caused her to suffer from nodal metastasis and any consequences that may have followed (see the first CA Judgment at [116] and [122]).

(d) Fourth, given the abovementioned findings on CGH's liability, it was necessary for the losses occasioned by CGH's breach to be determined and assessed. As the Original Hearing was not bifurcated, the evidence led at trial, and the submissions on appeal, were not tailored or directed to the specific facts as found by this court. As such, we ordered that the "issue of loss and damage, including quantification (if any), be remitted to the Judge with leave for the parties to refine or revise

> their evidence so as to address the specific factual findings that have been made in [the first CA Judgment]" (see the first CA Judgment at [125]).

19 After Ms Azlin passed away on 1 April 2019, the appellants made an application in SUM 1204 for interim payment. The application was heard by an Assistant Registrar ("AR") who ordered a sum of $200,000 to be paid out. This decision was upheld on appeal on 3 February 2020. Leave to appeal to the Court of Appeal was not granted by either the High Court or the Court of Appeal (see the Judgment at [5]).

20 The AD Hearing took place over six days in August and September 2020. The Judgment was released on 19 January 2021. The notice of appeal in AD/CA 22/2021 was filed by the appellants on 18 February 2021. Notably, this appeal was filed by default to the Appellate Division of the High Court ("AD") (see the Transfer Judgment at [83]).

21 On 12 March 2021, the appellants took out an application to transfer the appeal from the AD to the Court of Appeal in CA/OS 9/2021. This application was granted on 9 June 2021 in the Transfer Judgment.

22 On 12 August 2021, we heard the parties in CA 39.

The decision below

23 CA 39 is a contained appeal that deals only with the *quantification of damages due to Ms Azlin, and costs.* We therefore set out only those parts of the Judgment which are relevant to CA 39.

The Judge's decision on causation

24 To understand the Judge's decision on quantum, it is necessary to first comprehend her finding of a causal link between CGH's negligence and Ms Azlin's death from lung cancer (see the Judgment at [88]), a finding which is not contested on appeal.

25 First, the Judge found that CGH's negligence likely caused Ms Azlin's death (independent of any pre-existing condition). Ms Azlin's tumour was deemed to be at pathological stage IB in July 2011. From stage IB to stage IIA, Ms Azlin's prognosis of a relapse increased by 10–15% (see the Judgment at [43]–[54]).

26 The Judge specified that the delay in diagnosis had caused the relapse, and not the delay in treatment since the nature of the treatment at stage IIA and stage I would be the same (*ie*, lobectomy and adjuvant chemotherapy). In contrast, the delay in diagnosis allowed the cancer cells to enter Ms Azlin's lymphatic system (*ie*, nodal metastasis) which resulted in a higher risk of relapse even with a lobectomy in March 2012 to remove the tumour and the affected lymph node. If Ms Azlin had been diagnosed properly when her cancer was at stage IB and if she had been treated then, it was more likely than not that she would not have suffered from microscopic node involvement. Furthermore, the fact that Ms Azlin suffered from ALK-positive cancer (generally a "more aggressive" form of cancer) meant that it was even more critical that the lobectomy be carried out earlier when Ms Azlin was at pathological stage I before the cancer cells entered her lymphatic system (see the Judgment at [57]–[73]).

27 Second, the Judge held that Ms Azlin's fate was not conclusively biologically determined when CGH breached its duty to her. Given the Judge's finding that Ms Azlin was deemed to be stage IB in July 2011, there was no microscopic node involvement which would (*before* CGH's negligence) have caused Ms Azlin's eventual relapse and death. Further, there was no evidence to suggest that Ms Azlin had a pre-existing condition or some other issue which would have caused Ms Azlin's death (see the Judgment at [74]–[75]).

28 Third, there were available treatments that could have prevented Ms Azlin from dying in the way that she did; a lobectomy and adjuvant chemotherapy would already have been available to Ms Azlin at stage I. The Judge found that Ms Azlin would have availed herself of these treatments given the danger to her health posed by the size of the nodule and her willingness to follow the recommendations of her doctors (see the Judgment at [76]–[78]).

29 Fourth, the Judge found that if Ms Azlin had availed herself of those treatments, she would have been "cured" (*ie*, a relapse of the cancer would not occur within a specific timeframe such as five, ten or 15 years after treatment) and would go on to live to her full life expectancy. This finding was, in turn, premised on the following sub-findings (see the Judgment at [79]–[89]):

> (a) Firstly, CGH's breach allowed Ms Azlin's cancer to progress from stage IB to stage IIA such that despite the lobectomy done at pathological stage IIA in March 2012, Ms Azlin's cancer had already entered her lymphatic system which increased the risk of, and caused, the relapse of the cancer just two and a half years later in August 2014. The cancer then progressed to stage IV which caused Ms Azlin's eventual death on 1 April 2019.

(b) Secondly, Ms Azlin was only 39 years old when she passed on and had no other known major illness. But for CGH's breach, Ms Azlin would not have died and would not have suffered a diminution of her full life expectancy.

The Judge's decision on quantum

30 Before the Judge, the appellants claimed a total sum of $13,464,100.75 (see the Judgment at [27]).

31 As a preliminary point, the Judge observed that the absence of evidence as to Ms Azlin's full life expectancy by having regard to her age, race, smoking habits, obesity and lifestyle was a critical gap for the purpose of quantifying Ms Azlin's loss (see the Judgment at [90]). Further, a number of claims "were not satisfactorily or adequately pleaded", such as the claim for aggravated and/or punitive damages amounting to $8,943,046.70 (see the Judgment at [6] and [94]).

32 The Judge awarded $326,620.61 in damages, consisting of the following (see the Judgment at [218]):

S/N	Head of damage	Quantum awarded by the Judge	Reference to the Judgment
1	Pain and suffering for cancer tumour, treatment and shock and anxiety	$140,000	[100]–[114], see especially at [114]
2	Pain and suffering from the awareness of the reduction of her life expectancy	$80,000	[118]–[121]

S/N	Head of damage	Quantum awarded by the Judge	Reference to the Judgment
3	Loss of amenity	$30,000	[122]–[124]
4	Estate or dependency claim	$54,000	[164]–[181], [218]
Total award for general damages		$304,000	[133]–[138], [218]
5	Special damages – medical expenses pre-trial (*ie*, 6 March 2012 to 22 January 2015)	$19,620.61	[209]–[215], [218]
6	Special damages – transport expenses pre-trial (*ie*, 6 March 2012 to 22 January 2015)	$3,000	[216]–[217], [218]
Total award for special damages		$22,620.61	[218]
Total award (combined)		**$326,620.61**	**[218]**

33 The Judge also awarded $105,000 in costs to the appellants (see the Judgment at [224]). We examine her reasoning in greater detail when we consider the various heads of claim in the sections below.

The parties' positions on appeal

34 Mr Rai submits that the Judge's award is manifestly inadequate and avers that the Judge had erred in six main respects.

(a) "[R]equiring the [appellants] to prove average life expectancy", when this should simply be taken as 86 years.

(b) Dismissing Ms Azlin's claim for loss of earnings and CPF contributions during her living years (*ie*, 2016 to 2018) and lost years (*ie*, 2019 to 2044), when this should be awarded in the amount of $819,179.76.

(c) Awarding Ms Azlin only $250,000 for pain and suffering and loss of amenity, and disallowing her claim for loss of marriage prospects, when this should have been granted in the amount of $1,051,000.

(d) Disallowing Ms Azlin's claims for medical expenses, transport expenses as well as expenses for nursing care and a domestic and auxiliary helper from 2015 to 1 April 2019, when this should have been granted in the amounts of $1,226,885.56 (or $1,148,361.50 being $353,342 per year for 3 years and 3 months), $118,617.50 and $35,700, respectively.

(e) Disallowing Ms Azlin's claims for punitive and/or aggravated damages which should have been awarded at twice that of the general damages awarded.

(f) Awarding costs of only $105,000, when this should be granted in the amount of $258,600.

35 We pause at this juncture to state that there is some ambiguity as to the global sum that Mr Rai claims on behalf of the appellants as this figure was not stated anywhere in the Appellants' Case, Appellants' Reply or Appellants' Skeletal Submissions (collectively, "the Appellants' Submissions"). When we queried Mr Rai on this during the hearing of CA 39, Mr Rai informed us that

the appellants are maintaining their claim for a global sum of $13,464,100.75 (*ie*, the same sum that they had sought before the Judge which consisted of $4,471,523.35 in general damages, $8,943,046.70 in aggravated and/or punitive damages and $49,530.70 in special damages). Mr Rai confirmed that the sum as well as the calculations from which it was derived can be found in the appellants' closing submissions before the Judge. Mr Rai explained that no concrete figure had been put forth in respect of the claim for aggravated and/or punitive damages because this should be quantified at twice the sum of general damages awarded.

36 Notwithstanding Mr Rai's clarification, there remain two residual ambiguities in relation to the global sum claimed by the appellants. The first stems from the fact that Mr Rai has not raised any challenge against the Judge's quantification of two individual heads of damages (as tabulated below) in the Appellants' Submissions despite the Judge's quantification being $170,910.09 lower than the amounts sought in the closing submissions before the Judge. This being the case, the appellants are taken to be content to accept the Judge's quantification. Consequently, in so far as Mr Rai states that the global award claimed in the closing submissions represents the appellants' position on appeal, this does not, with respect, make sense mathematically.

Head of claim	Appellants' quantification in the closing submissions	The Judge's quantification in the Judgment at [218]
Estate or dependency claim	$198,000.00	$54,000.00
Pre-trial loss of earnings (2010 to 2015)	$26,910.09	$ -
Total	$224,910.09	$54,000
Difference between the two sets of quantification		$170,910.09

37 The second ambiguity stems from the fact that certain figures, as quantified in the Appellants' Submissions, differ from the figures set forth in the appellants' closing submissions before the Judge. For instance, the claim for Ms Azlin's medical expenses from 2015 to 1 April 2019 is stated to be $1,501,703.50 in the appellants' closing submissions before the Judge, but is expressly stated to be $1,226,885.56 at para 86(d)(i) of the Appellants' Case.

38 These ambiguities concerning core aspects of the appellants' case do not help this court in its inquiry in CA 39. It is a fundamental requirement for parties to specifically quantify the exact figures that they themselves wish to claim before the court, and to include them in their written Cases on appeal. As we made clear to Mr Rai during the hearing, it is unsatisfactory that this court must resort to the parties' cases *at trial in the court below* by referencing numerous disjointed sections of the *Record of Appeal* in order to just obtain an understanding of a simple and basic point, that is, what the appellants are seeking to claim *on appeal*.

39 To cut through the thicket of these uncertainties, we adopt the following approach. The global figure claimed by the appellants will be taken to be $13,464,100.75 because this was expressly confirmed to us by Mr Rai during the hearing. The appellants' positions on the individual heads of claim will be taken to be those stated in the Appellants' Submissions. In so far as the Appellants' Submissions are silent as to the quantification of the individual heads of claim, we refer to their closing submissions before the Judge.

40 On behalf of the respondent, Ms Kuah submits that the Judge was overly generous in her award of damages and costs, but nonetheless aligns herself with the decision of the Judge.

The issues on appeal

41 The issues on appeal are as follows:

(a) Issue 1: How should life expectancy be determined?

(b) Issue 2: What should the award for pain and suffering be?

(c) Issue 3: For the period from 2014 to 1 April 2019, should an award be made for Ms Azlin's medical expenses, transport expenses and costs of nursing care, a domestic and auxiliary helper?

(d) Issue 4: Should an award be made for loss of earnings and CPF contributions for the period from 2016 to 2018 ("living years") and the period from 2019 to 2044 ("lost years")?

(e) Issue 5: Should aggravated and punitive damages be awarded?

(f) Issue 6: What is the appropriate order of costs for the AD Hearing?

A preliminary point on appeals and O 57 r 9A of the Rules of Court

42 Before turning to the appeal proper, we consider the import of O 57 r 9A of the Rules of Court (2014 Rev Ed) ("ROC") and its impact on the position of a respondent who has not filed any cross-appeal against a trial judge's decision on the quantum of an award.

43 In the Respondent's Case and Respondent's Skeletal Submissions (collectively, the "Respondent's Submissions"), Ms Kuah argues that:

(a) The award of $140,000 for pain and suffering from the cancer tumour, treatment, shock and anxiety "was actually on the high side".

(b) The award of $30,000 for loss of amenity is "on the high side".

(c) The award for Ms Azlin's pain and suffering due to her awareness of the reduction in her life expectancy "should be significantly less than the [$]80,000 awarded". Ms Kuah then puts forward a "far more modest sum" of $10,000 and "ask[s] this Honourable Court to ***consider a variation*** of this portion of the award for general damages for pain and suffering and loss of amenities, which the Court is at liberty to do pursuant to ***Order 57 rule 9A(5) of the ROC***" [emphasis added].

44 In our judgment, by virtue of the fact that CGH has not filed any cross-appeal against the Judge's decision, Ms Kuah is precluded from submitting for a reduction of the Judge's award in CA 39. This is because O 57 r 9A of

the ROC only permits a respondent to mount a case to affirm the ultimate decision of the lower court. The rule does not permit a respondent to challenge the decision without filing a cross-appeal.

45 Order 57 r 9A(5) of the ROC states as follows:

> **Preparation of Cases (O. 57, r. 9A)**
>
> …
>
> (5) A respondent who, *not having appealed from the decision of the Court below*, desires to contend on the appeal that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or *that the decision of that Court should be affirmed on grounds* other than those relied upon by that Court, must state so in his Case, specifying the grounds of that contention.
>
> [emphasis added]

46 The provision was considered recently in the decision of this court in *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 ("*Reputation*"). There, the appellant sought to stay a suit pending before the High Court on the basis that the appellant had signed a contract with the respondent which contained an exclusive jurisdiction clause conferring jurisdiction over disputes between the parties on the Courts of England and Wales. The appellant's application for a stay was dismissed by the High Court judge who found that (a) the appellant did not unequivocally submit to the Singapore court's jurisdiction, but that (b) the appellant did not show a good arguable case that the exclusive jurisdiction clause covered the pending suit (see *Reputation* at [14]).

47 Taking reference from its previous decision in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 ("*L Capital*"), this court noted (at [15]–[16]) that while the respondent had not filed a separate notice of appeal, it

was entitled to argue that the judge below had erred on the issue of submission because the respondent had raised the point in its Respondent's Case and had therefore brought itself within the ambit of O 57 r 9A(5) of the ROC.

48 At first glance, *Reputation* appears to support the argument that a respondent who does not file a cross-appeal is nonetheless at liberty to contend that an award of damages ought to be reduced. However, *Reputation* must be read as applying the prevailing law as laid down in *L Capital*. This points firmly towards the opposite conclusion than that put forward by Ms Kuah.

49 *L Capital* involved a minority oppression action by the respondent against the appellants, seeking relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The appellants applied for a stay in favour of arbitration, which was dismissed by the High Court on the sole ground that minority oppression claims were not arbitrable. The appellants appealed against the High Court's finding on arbitrability. The respondent did not file a cross-appeal but sought to rely on O 57 r 9A(5) of the ROC to challenge the High Court's findings which were adverse to it, namely that: (a) the appellants had not taken a step in the proceedings; and (b) the dispute fell within the scope of the arbitration agreement. In response, the appellants contended that O 57 r 9A(5) of the ROC did not assist the respondent given that the refusal of the stay was not a "decision" within the meaning of the provision. In doing so, the appellants relied on the decision of this court in *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 331 ("*Peter Lim*") which laid down the proposition that a "decision" within the meaning of O 57 r 9A(5) of the ROC referred to a "separate and independent decision" and not to a decision on the outcome of the case as a whole as the latter was merely a consequence of the former (see *L Capital* at [33]–[36]).

50 This court overruled the previous approach to O 57 r 9A(5) of the ROC in *Peter Lim*, reasoning (at [65]–[67]) as follows:

> 65 In our judgment, given all that we have said, we are satisfied that a departure from *Peter Lim* is necessary and justified. A broader interpretation of what counts as a 'decision' under O 57 r 9A(5) should be adopted such that the court's ultimate decision on the claim or application falls within the meaning of 'decision'. ***This would allow successful respondents to mount a case to affirm the judge's ultimate decision by raising other arguments which did not find favour with the court below, without needing to file a cross-appeal.*** While our reasons for reaching this conclusion should be evident from the discussion above, we briefly summarise our reasons for departing from *Peter Lim.*
>
> 66 First, we think that the approach that underlies *Peter Lim* runs *contrary* to the intent behind the introduction of O 57 r 9A(5), ***which was to simplify procedures by doing away even with the relatively uncomplicated requirement of filing a respondent's notice.*** The introduction of the more onerous requirement of filing a cross-appeal would all the more run contrary to that intent. Further, the amendment to the Rules of Court was not intended to change the definition of a 'decision' that may be varied or affirmed on other grounds without an appeal. It was only intended to change the *mechanism* through which a respondent gives notice to the appellant of its intention to contend that the decision below should be varied or affirmed on grounds not relied upon by the judge. Indeed, it seems to us that *Peter Lim* departed from the prevailing understanding of the position without fully appreciating the history that preceded O 57 r 9A(5).
>
> 67 Second, a broader interpretation of what counts as a 'decision' would obviate many of the practical and logical difficulties that have arisen as a consequence of *Peter Lim*, as we have noted. Successful respondents would not have to apply for an extension of time to file a cross-appeal out of time after receiving notice of the appellant's intention to appeal. Further, the parties and the court will not be faced with the difficulty of trying to distinguish between findings that are 'merely a consequence' of the judge's anterior findings on logically prior sub-issues, and findings that can properly be characterised as 'separate and independent decision[s]'. ***Simply put, under O 57 r 9A(5), a respondent is entitled, without filing a cross-appeal, to seek to persuade this court either to vary (in the event of a successful appeal) or otherwise to affirm the decision of the court below, relying on grounds that***

> ***that court did not accept or rely on in reaching its ultimate decision.*** It is not helpful in this context to distinguish between a decision on a sub-issue from one on the main issue, or, for that matter, from the final outcome of the case. It follows, therefore, that there is no need to distinguish where in the logical hierarchy a decision or finding stands; nor is there a need to distinguish a 'finding of law or fact' from a consequence of those findings.
>
> 68 While it is true that the approach in *Peter Lim* has been applied by this court on a number of occasions, we reiterate that the holding in *Peter Lim* would have made no difference to the outcome in most, if not all, of those cases (see [38] above). We repeat that in none of those decisions applying *Peter Lim* did the court critically evaluate the reasoning behind the decision. *Peter Lim* was simply applied as a relevant precedent, without further interrogation of its merits.
>
> [emphasis in original in italics; emphasis added in bold italics and bold underlined italics]

51 The passages above (especially the portions emphasised in bold italics and bold underlined italics) suggest that while the term "decision" in O 57 r 9A(5) of the ROC should be interpreted broadly so as to allow a respondent to raise arguments in relation to the lower court's ultimate decision on the claim or application pursuant to the provision (without filing a cross-appeal), *the rule only applies if the purpose of the respondent doing so is to mount a case* ***to affirm*** *the lower court's ultimate decision (or to vary the decision of the lower court, in the event of a successful appeal).* If, however, the respondent is dissatisfied with the lower court's decision and wishes to convince the appellate court that the lower court's ultimate decision should be overturned in some way or another, then the proper approach would be to file a cross-appeal and to comply with the relevant procedures for doing so. This would include, for example, depositing security for the other party's costs. Put another way, O 57 r 9A(5) of the ROC "does not permit [a party] to mount what is essentially a backdoor appeal against the decision of the [lower court] without following the

proper procedure for an appeal" (see the recent decision of this court in *TQU v TQT* [2020] SGCA 8 ("*TQU*") at [18]).

52 Our decision in *TQU* is particularly apt for present purposes. It concerned a matrimonial matter in which only the appellant-husband filed an appeal. This court held that in the absence of a cross-appeal, the respondent-wife was precluded from raising new issues on appeal by relying on O 57 r 9A(5) of the ROC which, if successful, would have the effect of increasing her share of the matrimonial assets and the quantum of her maintenance (at [18] and [24]).

53 Our decision in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 is to similar effect. In that case, the Attorney-General sought to argue that O 57 r 9A(5) of the ROC allowed new arguments to be made on appeal – namely, that s 15 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) could be introduced as a new basis for the High Court's contempt jurisdiction. We disagreed, on the basis that the purpose and scope of the provision was to (at [46]):

> … permit a respondent to argue that the decision on appeal *should be affirmed* on grounds other than those relied upon by the court below without having to file a cross-appeal provided that the new grounds arise from the pleadings and neither party needs to adduce fresh evidence to address the new grounds. … [emphasis in original omitted; emphasis added in italics].

54 Returning to CA 39, in so far as the Respondent's Submissions suggest that the amounts awarded in respect of the three heads of claim listed at [43] above ought to be reduced, we are of the view that this would constitute an active challenge to reduce the Judge's ultimate award. This is impermissible given that CGH has not filed any cross-appeal. Order 57 r 9A(5) of the ROC

cannot assist Ms Kuah because it applies only if CGH is seeking to *affirm* the decision of the Judge.

55 At the hearing, Ms Kuah accepted that as CGH had not filed a cross-appeal, the Judge's decision on the quantum of damages and costs could not be altered in CGH's favour. Ms Kuah also clarified that while CGH is of the opinion that the Judge was overly generous towards the appellants, it is prepared to accept the Judge's decision in its entirety. We therefore construe Ms Kuah's arguments as advancing the position that CA 39 ought to be dismissed as the Judge's award of damages and costs cannot be said to be inadequate.

The general law on tortious damages

56 We turn now to the appeal proper. Compensatory damages for personal injuries can be divided into two categories, *viz*, general damages and special damages. General damages have two major components: (a) pain and suffering and loss of amenity; and (b) post-trial pecuniary losses such as the loss of future earnings. Special damages, on the other hand, compensate for pre-trial pecuniary losses and include: (a) pre-trial out-of-pocket expenses such as medical, nursing and supportive care expenses, transportation and household expenses; and (b) pre-trial loss of earnings or profits.

57 If death ensues, the tortious cause of action of the deceased survives for the benefit of the estate. In so far as the claims of the estate of a deceased person are concerned, an estate may not recover from the tortfeasor damages for: (a) exemplary damages; and (b) any damages for loss of income in respect of any period after death (see ss 10(3)(*a*)(i) and 10(3)(*a*)(ii) of the Civil Law Act (Cap 43, 1999 Rev Ed)) ("CLA"). However, in assessing damages in respect of pain and suffering, the court is entitled to consider any suffering likely to have

been caused to the claimant as a result of his or her awareness that his or her expectation of life had been reduced (see s 11(1) of the CLA).

58 It is well-established that the aim of an award of damages is to restore a plaintiff to the same position as if the tortious wrong had not been committed (see the decisions of this court in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 at [14] and *Lua Bee Kiang (administrator of the estate of Chew Kong Seng, deceased) v Yeo Chee Siong* [2019] 1 SLR 145 ("*Lua Bee Kiang*") at [9]).

59 It is fundamental and trite that a plaintiff claiming damages must prove his or her damage – the fact of damage and the quantum of loss. If he or she satisfies the court on neither, his or her action will fail, or at the most, he or she will be awarded nominal damages where it is clear that a legal right has been infringed. If the fact of damage is shown, but no evidence is given as to its amount such that it is virtually impossible to assess the quantum of loss, this will generally permit only an award of nominal damages. That said, given the myriad of factual matrices which may give rise to a claim for damages, the law does not *always* demand that the plaintiff prove with complete certainty the exact amount of damage that he or she has suffered, although he or she must do his or her "level best" (see the decision of this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [27]–[29] and [31]).

60 The court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the precise circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is

possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (*ie*, expenses incurred between the time of accrual of the cause of action and the time of trial) or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss, such as the loss of prospective earnings or loss of profit (see *Robertson Quay* at [30]).

61 To summarise, a plaintiff cannot make a claim for damages without placing before the court sufficient evidence of the loss that he or she has suffered, even if he or she is otherwise entitled in principle to recover damages. On the other hand, the court must also adopt a flexible approach and allow for the fact that, in some cases, absolute certainty and precision is impossible to achieve. Where specific evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can to assess the plaintiff's loss (see *Robertson Quay* at [30]–[31]; see also James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) ("*McGregor*") at para 3-003 (reproduced below at [257])).

Issue 1: Life expectancy

62 We allow the appellants' appeal in respect of Issue 1 and find that but for CGH's negligence, Ms Azlin could be expected to live up to 85.5 years old, in line with the average life expectancy of a female Singapore citizen.

The Judge's decision

63 The Judge characterised the lack of evidence on Ms Azlin's life expectancy and that of her mother, Mdm Azizah bt Yahya ("Mdm Azizah"), as a "critical gap in the evidence for the purpose of quantification of her loss" (see the Judgment at [90] and [177]). The Judge found this omission to be relevant to the dependency claim, albeit in relation to Mdm Azizah's life expectancy (see the Judgment at [90] and [177]–[180]). This omission was also considered in the context of (a) the claim for pain and suffering on the basis of Ms Azlin's awareness of her shortened life expectancy; and (b) the claim for loss of amenity (see the Judgment at [121] and [124]).

64 The Judge observed that in *Seto Wei Meng (suing as the administrator of the estate and on behalf of the dependants of Yeong Soek Mun, deceased) and another v Foo Chee Boon Edward and others (Singapore General Hospital Pte Ltd, third party)* [2020] SGHC 260 ("*Seto Wei Meng*") at [49], the High Court noted that the average life expectancy of a female in Singapore is about 86 years. This figure was then used by the High Court in *Seto Wei Meng* to calculate various damages owed to the deceased's dependents in the dependency claim (see the Judgment at [177]). We note that while the appeal against the High Court's decision in *Seto Wei Meng* was recently allowed in part in *Foo Chee Boon Edward v Seto Wei Meng (suing as the administrator of the estate and on behalf of the dependants of Yeong Soek Mun, deceased) and another* [2021] SGCA 92, the appeal did not touch on the deceased's life expectancy.

65 The Judge preferred not to adopt the approach in *Seto Wei Meng* and instead required the appellants to prove the average life expectancy of Ms Azlin and Mdm Azizah (see the Judgment at [179]), citing this court's decision in *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and*

on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals [2020] 1 SLR 133 ("*Carol Ann Armstrong*").

The parties' arguments

66 Mr Rai accepts that no evidence had been adduced to cast light upon Mdm Azizah's or Ms Azlin's life expectancy. Focussing only on the latter, he contends that the Judge had "erred in requiring the [a]ppellants to prove average life expectancy" and should have simply taken Ms Azlin's life expectancy to be 86 years in accordance with the approach taken in *Seto Wei Meng*.

67 Ms Kuah aligns herself with the Judge. She points out that the question of life expectancy has no major impact on the outcome of CA 39 given that it was primarily relevant to the Judge's determination on the dependency claim, against which no appeal is brought.

Our decision

68 In our judgment, Ms Azlin's life expectancy ought to have been derived from the average life expectancy of a female Singapore citizen, *ie*, 85.5 years.

69 As a preliminary point, we do not agree with Ms Kuah that the question of life expectancy has no bearing on the outcome of CA 39. While Mdm Azizah's life expectancy is of limited relevance because no appeal is brought against the Judge's decision on the dependency claim, Ms Azlin's life expectancy remains a live issue because it has the potential to impact Ms Azlin's claims for: (a) pain and suffering due to an awareness of the reduction in her life expectancy; and (b) future losses of earnings and CPF contributions.

70 We also take this opportunity to clarify the proper approach to determining life expectancy as this is an issue that features in almost every personal injury claim which encompasses loss linked to the remainder of an injured plaintiff's life.

71 The starting point of our analysis is necessarily the rich jurisprudence of our courts. As Mr Rai points out, there is clear *and established* authority for the following propositions:

(a) The life expectancy of a plaintiff can be established with reference to existing precedents (see the decision of this court in *Quek Yen Fei Kenneth (by his litigation representative Pang Choy Chun) v Yeo Chye Huat and another appeal* [2017] 2 SLR 229 ("*Kenneth Quek*") at [68]–[69]).

(b) Absent evidence that a plaintiff's lifespan differs from that of the national average male or female, his or her remaining life expectancy may be calculated by subtracting his or her age from the average male or female life expectancy in Singapore at the time of the assessment of damages (see *Kenneth Quek* at [68], citing the decision of this court in *Lee Wei Kong (by his litigation representative Lee Swee Chit) v Ng Siok Tong* [2012] 2 SLR 85 ("*Lee Wei Kong*") at [52]; see also the decisions of the High Court in *Lee Mui Yeng v Ng Tong Yoo* [2016] SGHC 46 ("*Lee Mui Yeng*") at [105] and *Tan Hun Boon v Rui Feng Travel Pte Ltd and another* [2018] 3 SLR 244 at [46]–[47]).

While the above cases concern living plaintiffs, the propositions laid down in them are broadly worded and apply across the spectrum of all personal injury claims involving future losses linked to life expectancy.

72 As mentioned above, the Judge eschewed the approach in the above cases and focussed on the decision of *Carol Ann Armstrong*. In that case, the negligent misdiagnosis of a malignant melanoma led to one Mr Peter Traynor's ("Mr Traynor's") death. Mr Traynor was a Canadian national and his widow, the appellant, called an accounting expert who exhibited life expectancy tables provided by Statistics Canada to show that a Canadian male aged 49 in 2013 would be expected to live till 81.7 years of age (at [180]). The trial judge rejected this piece of evidence, finding that Mr Traynor would only have lost four years of life expectancy. This finding was reversed on appeal as this court was of the view that damages should be calculated on the basis of Mr Traynor's full life expectancy (at [191]).

73 This court remitted the question of Mr Traynor's life expectancy to the trial judge, stating that (at [197]):

> We deal first with the preliminary issue of what Mr Traynor's full life expectancy would have been. *As we indicated at [180] above, Mr Abu, the Appellant's expert accountant, had given evidence that Mr Traynor would have lived until the age of 82.* Because the learned Judge found that Mr Traynor would have only lived for four more years, *he rejected the Appellant's claim* (see the Judgment ([2] *supra*) at [19]). *We have reversed the Judge's finding in this regard inasmuch as the award should be calculated to Mr Traynor's full life expectancy. However, we note that the Judge did not reject Mr Abu's evidence* (or avert to the Respondents' submissions in this regard), although we also note that, given his decision, there was no need for him to ultimately make a finding on what Mr Traynor's full life expectancy would have been. In the circumstances, we remit this matter of Mr Traynor's life expectancy to the Judge for his determination – *bearing in mind, however, the fact that the Respondents did not appear to controvert Mr Abu's evidence in the court below.* [emphasis added]

74 At first glance, it would appear as though there are two conflicting approaches to the determination of an average plaintiff's life expectancy in the

case law (see the Judgment at [179]). Upon closer inspection, however, the approach in *Carol Ann Armstrong* applies in a very specific situation – one which is entirely distinguishable from the case before us in CA 39. In *Carol Ann Armstrong*, the question of life expectancy was remitted because (as stated at [197]):

> (a) First, there was *already expert evidence before the trial judge* as to Mr Traynor's life expectancy (*ie*, up till 82 years) which the trial judge did not reject.
>
> (b) Second, *this court had overturned the trial judge's finding that Mr Traynor only had four years to live* because it found that "the award should be calculated to Mr Traynor's full life expectancy".
>
> (c) Third, the respondents did not challenge the abovementioned expert evidence.

Furthermore, it is implicit in the judgment that Singapore's demographic data could not apply to gauge Mr Traynor's life expectancy because he was a Canadian national (see *Carol Ann Armstrong* at [180]).

75 In other words, given that this court had disagreed with the trial judge's finding of fact, and found that the trial judge had not dealt sufficiently with the unchallenged expert evidence before him, it was necessary to remit the case so that the appellant could prove Mr Traynor's life expectancy.

76 In our judgment, the appropriate approach for determining Ms Azlin's life expectancy is by reference to evidence on the average life expectancies for

females in Singapore as a *proxy* per the authorities listed at [71(b)] above and the relevant precedents. We say this for three reasons:

(a) First, Ms Azlin was a Singapore citizen and none of the parties contends that her life expectancy would have significantly deviated from the norm in Singapore.

(b) Second, while the burden lies on the plaintiff to prove, on a balance of probabilities, the facts that he or she wishes to rely on, it is difficult to expect every plaintiff in a personal injury case to be able to adduce expert evidence as to life expectancy (especially for plaintiffs who are of limited means, see above at [60]). Singapore's demographic data and past precedents thus serve as a good proxy in the absence of individualised actuarial data.

(c) Third, employing Singapore's demographic data to estimate life expectancy is in line with the courts' approach for determining working life expectancy, *ie*, by using the minimum statutory age of retirement or the mandatory re-employment age in ss 4, 7 and 7A of the Retirement and Re-employment Act (Cap 274A, 2012 Rev Ed) in the absence of any particular characteristics of the claimant and the nature of the work which might cause some deviation from the norm (see *Kenneth Quek* at [92]–[93]).

77 In our view, given the Judge's finding that "but for CGH's breach, Ms Azlin would not have suffered a diminution of *her full life expectancy*" [emphasis added] (see the Judgment at [89]), the Judge ought to have considered Singapore's demographic data on the average life expectancies of females in Singapore. Ms Azlin was born on 25 June 1979. On 20 January 2015 (the date

on which Suit 59 was commenced), she was 35 years old. Data from the Singapore Department of Statistics ("DOS") show that Ms Azlin could then have expected to live till 85.5 years, and would have had a remaining life expectancy of 50.5 years.

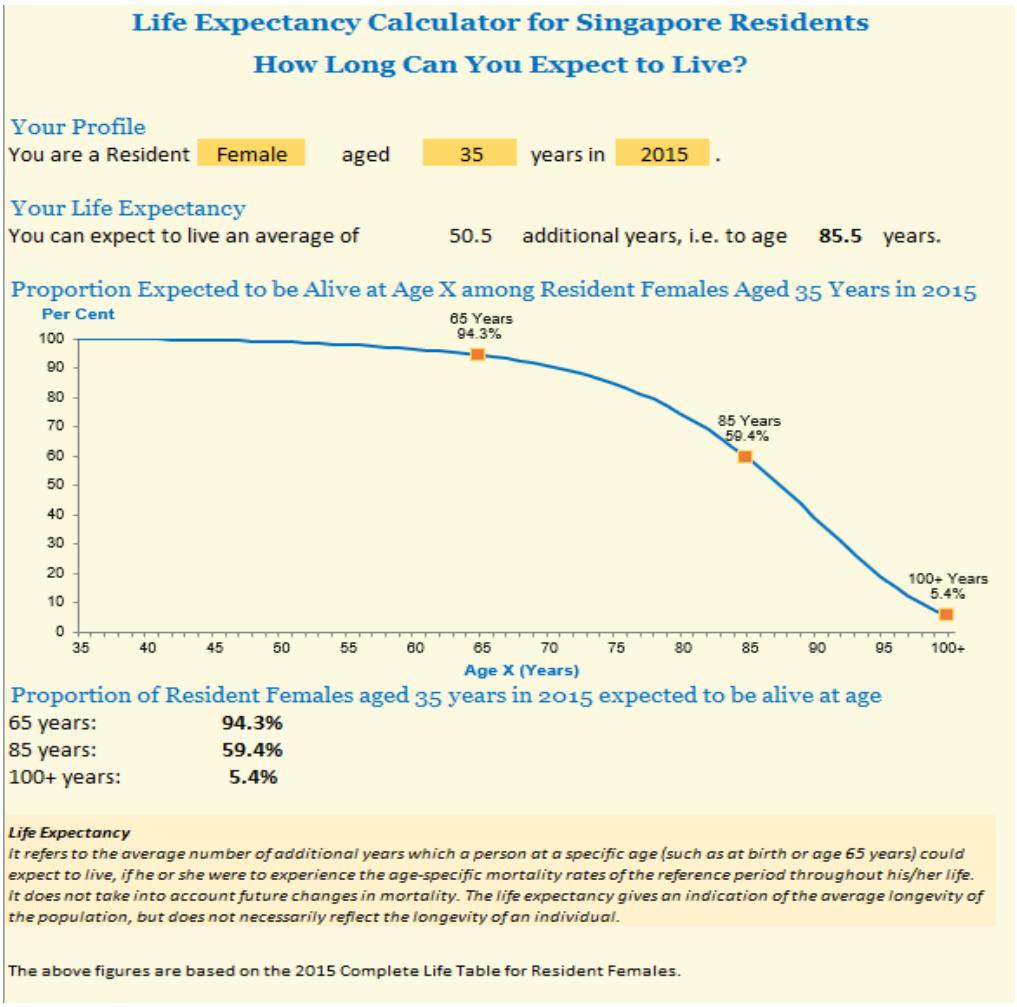

Figure 1: Life Tables and Life Expectancy Calculator from 2003 obtained from the DOS

78 From the case precedents, the average life expectancies for females in Singapore are as follows:

S/N	Case	Life expectancy of females in Singapore	Reference in judgment	Comments
1	*TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 ("*TV Media*")	80 years	[182]	There was no analysis of how this figure was derived by the Court of Appeal.
2	*Lee Mui Yeng*	85.1 years	[105]	This figure was said to be the "legitimate life expectancy of women in Singapore".
3	*Seto Wei Meng*	86 years	[49]	There was no analysis of this figure, but it appears that this is the life expectancy of a Singaporean female born in 2019.

79 While we note that the figure of 80 years in *TV Media* is significantly lower than that in the rest of the precedents and the data from the DOS, this can be explained on the basis that the case was decided more than 15 years ago and the average life expectancy in Singapore has certainly increased since 2004. The life expectancy figures from the DOS are in line with the precedents and can be used to approximate Ms Azlin's life expectancy.

80 But for CGH's negligence, Ms Azlin's life expectancy would therefore have been 85.5 years and we allow the appellants' appeal in respect of this issue.

Issue 2: Pain and suffering, loss of amenity and loss of marriage prospects

81 We affirm the Judge's decision on Issue 2, save that we allow Ms Azlin's claim for loss of marriage prospects and award the appellants a sum of $6,000. The total award for pain and suffering, loss of amenity and loss of marriage prospects is thus $256,000.

The general law on pain and suffering

82 "Pain and suffering" refers to the physical pain and emotional and intellectual suffering arising from the injury (see the High Court decision of *Au Yeong Wing Loong v Chew Hai Ban and another* [1993] 2 SLR(R) 290 ("*Au Yeong Wing Loong*") at [11]), while "loss of amenity" refers to the loss of the ability to enjoy life to its fullest (see *Halsbury's Laws of Singapore – Civil Procedure*, vol 4 (LexisNexis, 2016 Reissue) at para 50.387). Whether there is loss of amenity is an objective fact that does not depend on an appreciation of the loss by the victim (see the decision of this court in *Tan Kok Lam (next friend to Teng Eng) v Hong Choon Peng* [2001] 1 SLR(R) 786 ("*Tan Kok Lam*") at [28]).

83 Where non-pecuniary loss – such as pain and suffering and loss of amenity – is concerned, the guiding principle is that of "fair compensation". This means that compensation ought to be reasonable and just, and need not be "absolute" or "perfect" (see *Lua Bee Kiang* at [9]).

84 There are two methods to determine what is "fair compensation". The first is the component method, by which the loss arising from each item of injury is individually quantified and then added up to estimate the overall loss that the claimant has suffered. The second is the global method, by which all the injuries

sustained by the claimant are considered holistically to arrive at an estimation of his or her overall loss (see *Lua Bee Kiang* at [10]).

85 The principle behind the component method is that damages should be awarded for losses that may properly be regarded as distinct or discrete. However, a concern regarding the component method is that the overall quantum must be a reasonable sum that reflects the totality of the claimant's injuries. This latter point is the principle which animates the global method. The two methods are complementary rather than mutually exclusive because they are simply different practical modes of producing a fair estimate of the claimant's loss. The application of both methods proceeds in two stages. The court should first apply the component method to ensure that the loss arising from each distinct injury suffered is accounted for and quantified. The court should then apply the global method to ensure that the overall award is reasonable and neither excessive nor inadequate (see *Lua Bee Kiang* at [11]–[13]).

The Judge's decision

86 The Judge granted a global award of $250,000 for pain and suffering as well as loss of amenity.

87 The Judge granted a component award of $140,000 for the pain and suffering due to the tumour, treatment as well as shock and anxiety. She found that an award of damages for pain and suffering due to a delay in treatment caused by a tortfeasor's breach was not novel (see the Judgment at [101]). Further, if Ms Azlin had been treated earlier, prior to the inevitable onset of symptoms such as cough, breathlessness and blood in the sputum exhibited in November 2011, Ms Azlin would have felt considerably better. Additionally,

Ms Azlin's associated pain and suffering reflected the characteristic progress of lung cancer, *ie*, the greater the progress of the cancer, the more pain it causes, with consequently more pain that is the result of the treatment administered (see the Judgment at [102]).

88 The Judge agreed with the observations of Baroness Hale in the House of Lords decision of *Gregg v Scott* [2005] 2 AC 176 at [205]–[206], that a tortfeasor is liable for any *additional* pain, suffering, loss of amenity, financial loss and loss of expectation of life which may have resulted from the delay. On the evidence, the Judge held that Ms Azlin suffered: (a) extra pain and suffering *from the medical treatment due to CGH's delay* in detecting her cancer, this being associated with disease progression; (b) physically, and experienced significant discomfort from the *relapse of the cancer*; and (c) *significant distress and anxiety* (see the Judgment at [105] and [107]).

89 The Judge considered the assessment guidelines in Charlene Chee *et al*, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010) ("Personal Injury 2010 Guidelines"), but noted that it did not contain guidelines for pain and suffering from cancer and its treatment. Having regard to various precedent cases, the Judge provisionally took the view that an agglomerated award of $140,000 was warranted for the above three forms of pain and suffering (see the Judgment at [108]–[114]).

90 The Judge disallowed the claim for psychiatric injury as there was no supporting evidence to show that Ms Azlin suffered from any recognisable psychiatric illness (see the Judgment at [115]–[117]).

91 The Judge considered that Ms Azlin had sufficient awareness that the length of her life had been reduced. The Judge noted that based on the Statement of Claim Amendment No 2 ("SOC 2"), Ms Azlin was looking at a life expectancy of ten more years as of 2015. While the Judge did not place a concrete figure on how many years Ms Azlin had lost, she thought it must be substantially more than the three years suggested by CGH (see the Judgment at [118]–[121]).

92 Crucially, in arriving at her award of $80,000 for pain and suffering due to Ms Azlin's awareness of reduced life expectancy, the Judge stated (at [121]) that:

> As regards the Estate's claim figure of $185,000, the Estate has not cited any precedent on quantum in support. There is also no evidence on Ms Azlin's full life expectancy … to extrapolate precisely from CGH's figure of $10,000. At this juncture, I find that a sum of $80,000 is appropriate.

93 In relation to the claim for loss of amenity, the Judge considered it clear that Ms Azlin suffered a significant reduction in life expectancy due to CGH's breach even though it was unclear what her full life expectancy was. The Judge recognised that Ms Azlin had to undergo extensive medical treatment after her relapse which hampered her ability to enjoy life to its fullest. This was balanced against the fact that the ALK-inhibitors significantly improved her quality of life. Having regard to the case of *Tan Kok Lam*, the Judge considered an award of $30,000 to be appropriate for Ms Azlin's loss of amenity (see the Judgment at [122]–[124]).

94 The Judge disagreed with the appellants that Ms Azlin had lost her marriage prospects and therefore disallowed this claim (see the Judgment at [125]–[132]).

95 The Judge was of the view that the above sums already excluded compensation for overlapping injuries and held that the global award of $250,000 was a reasonable estimate in respect of Ms Azlin's pain and suffering and loss of amenity (see the Judgment at [133]–[138]).

The parties' arguments

96 Mr Rai argues that the Judge's global award of $250,000 was manifestly inadequate and that it should be increased to $1,051,000. A breakdown of the components of the proposed sum are provided below at [98]. In particular, he argues that the Judge had erred in amalgamating the awards for pain and suffering for the tumour, the treatment as well as the shock and anxiety.

97 Ms Kuah, on the other hand, agrees with the Judge's approach to amalgamate the claim for pain and suffering in respect of the tumour, treatment and shock and anxiety. She takes the view that there is no merit to Mr Rai's submission as the Judge had been overly generous, but nevertheless stands by the Judge's decision on quantum for the purposes of the present appeal (see above at [55]).

98 The parties' positions can be tabulated as follows:

Individual limbs of pain and suffering and loss of amenities	Mr Rai's position	Ms Kuah's position and the Judge's decision
Pain and suffering from treatment	$300,000	$140,000
Pain and suffering from tumor	$300,000	
Pain and suffering from shock and anxiety	$200,000	
Pain and suffering from her awareness of reduction of life expectancy	$185,000	$80,000
Loss of amenities	$60,000	$30,000
Loss of marriage prospects	$6,000	Disallow
Psychiatric injuries	Unquantified	Disallow

Our decision

99 We grant Ms Azlin a sum of $256,000 for pain and suffering, loss of amenity and loss of marriage prospects.

100 Before turning to consider the Judge's decision on each individual head of claim, we make two points which pertain generally to the claim for pain and suffering, loss of amenity and loss of marriage prospects as a whole.

101 First, it is of the utmost importance to bear in mind the basis upon which the abovementioned damages are to be awarded. As no appeal has been brought against the Judge's decision on causation, the parties must be taken to have

accepted the Judge's finding that CGH's negligence allowed Ms Azlin's cancer to progress from stage IB to stage IIA with a corresponding 10-15% increase in her prognosis of a relapse (see above at [25] and the Judgment at [44] and [54]). As a result of this delay, microscopic cancer cells entered Ms Azlin's lymphatic system resulting in a higher risk of relapse *even with* a lobectomy that removed both the tumour and the affected lymph node (see above at [26] and the Judgment at [60]). This, in turn, led to Ms Azlin's relapse in August 2014 and eventual death (see above at [29] and the Judgement at [84]–[85]). During the hearing before us, Ms Kuah expressly confirmed, correctly in our view, that CGH would abide by these factual findings and that all her arguments in CA 39 proceeded on this basis.

102 In other words, the damages for pain and suffering, loss of amenity and loss of marriage prospects are to be awarded on the basis that CGH's negligence had caused a delay in Ms Azlin's diagnosis of lung cancer which eventually led to her death. However, as the Judge recognised at [103]–[105] of the Judgment, CGH cannot be said to be responsible for the initial development of lung cancer in Ms Azlin's body and only the *extra pain and suffering* thrust upon Ms Azlin as a result of the delay (and its eventual consequences including death) are compensable.

103 Second, and more specifically, we deal with Mr Rai's general submission that the overall award of $1,051,000 for pain and suffering, loss of amenities and loss of marriage prospects is justifiable taking reference from the Irish decision of *Morrissey & anor v Health Service Executive & ors* [2019] IEHC 268 ("*Morrissey HC*"). Much like the present case, *Morrissey HC* involved a situation where the negligence of the defendants allowed for the untreated development of cancer in the first plaintiff, one Ms Ruth Morrissey

("Ms Morrissey"), who became terminally ill. Ms Morrissey had undergone screening in accordance with the National Cervical Screening Programme ("Cervical Check") in August 2009 and August 2012. In both instances, her smear test was reported as negative for abnormalities and she was provided with a clear result. In 2014, however, she was found to have cervical cancer. Following this, an audit was conducted on the smears that she had provided in 2009 and 2012, which revealed that the original results in respect of both tests were incorrect. By 2015, the results of the audit were communicated to Cervical Check, but not to Ms Morrissey who only found out in mid-2018, after she had made inquiries, about the presence of errors in her case.

104 The Irish High Court found that as a result of the negligence of the defendants in failing to recognise that the original cervical smear sample was inadequate, Ms Morrissey had not been asked to undergo a new cervical smear test which would, as a matter of probability, have allowed the cancer which was certainly developing in 2012 to be identified and treated (see *Morrissey HC* at [141] and [224]). In turn, Ms Morrissey would never have contracted cancer in 2014 and, as the court observed (at [224]):

> … She would have been spared the pain and distress of what followed and in particular, the cancer would not, as a matter of probability have recurred. She would not have been subjected to the radium or chemotherapy treatment. She would not have suffered all her pain and distress that she has undergone so far. She would not have been left in the knowledge that she has only, at most, two years to live, her career would not have been interpreted. Her [marital] relations would not have ended with her husband. She would have, as a matter of likelihood, had at least one further addition to her family. She would have been spared the prospect and the knowledge that her daughter and her husband will have to go through life without her care and guidance and in particular, she will not live to see her daughter make her way through life and probably start her own family and of most and more importance, her life would not have been so tragically cut off.

105 The Irish High Court awarded her a sum of €500,000 for the pain and suffering detailed above (approximately $800,000 in Singapore dollars). This decision was upheld on appeal to the Irish Supreme Court which held that €500,000 "now represents the appropriate maximum damages to be awarded for pain and suffering in personal injury cases" and that it was an appropriate means of compensating Ms Morrissey (see *Morrissey & anor v Health Service Executive & ors* [2020] IESC 6 at [16.9]).

106 In our view, Mr Rai's reference to *Morrissey HC* is entirely misconceived. In arriving at the award of €500,000, the Irish High Court considered whether "these general damages are to be limited in accordance with 'the cap' on general damages … [which] was most recently fixed by Quirke J. in *Yun v. MIBI* [2009] 1EHC 318, at €500,000" [emphasis in original omitted] (see *Morrissey HC* at [227]–[228]). As the Irish High Court was of the view that the injury to Ms Morrissey was "indeed at the most extreme" and the "cap on general damages" applied, it awarded her a sum of €500,000 (see *Morrissey HC* at [232], as affirmed on appeal). Unlike Ireland, Singapore does not have a "cap" on general damages. More importantly, given that no case in Singapore has come anywhere close to granting an award of $800,000 (much less $1,051,000) for pain and suffering and loss of amenity, the application of *Morrissey HC* would be a stark and abrupt departure from the established case law of our courts. Apart from the analogous context of cancer in *Morrissey HC*, Mr Rai has not provided us with any reason to embark on such a drastic path and we therefore decline to consider it.

Pain and suffering from the tumour, treatment and shock and anxiety.

107 In our judgment, the Judge's amalgamated award of $140,000 for Ms Azlin's pain and suffering from the tumour, treatment and shock and anxiety is eminently reasonable.

108 First, we do not agree with Mr Rai's contention that the Judge had erred in applying the component approach because she had amalgamated three "incompatible" claims. As the Judge correctly pointed out, the claims for pain and suffering due to the tumour, treatment and shock and anxiety are not standalone claims and overlap to some degree. It is difficult to divorce the first two forms of pain and suffering because the treatment under consideration was targeted specifically at the lung cancer in Ms Azlin's body, which was itself the tumour. Further, as Mr Rai impressed upon us during the hearing, Ms Azlin's shock and anxiety were certainly linked to the repeated bad news she was receiving in relation to the progression of her cancer, the malignancy of her tumour and the fact that all this had gone undiscovered for years.

109 Mr Rai does not explain why these claims are "incompatible" and appears to be content to simply recite the facts which, in his view, constitute each claim. In doing so, however, he directly proves the Judge's point that the claims are overlapping.

(a) Mr Rai claims that the pain and suffering due to the tumour included Ms Azlin "having fluid in her lungs and being unable to breathe, causing her to believe that she '*would not survive the ordeal*'" [emphasis in original]. The words that Mr Rai italicised pertain to Ms Azlin's *shock and anxiety*.

(b) Mr Rai argues that in quantifying Ms Azlin's pain and suffering due to the tumour, the Judge had not considered that Ms Azlin had spent a total of 664 days on hospitalisation leave from 26 August 2014 to 30 June 2016 and "had undergone 10 rounds of *chemotherapy*" [emphasis added]. Chemotherapy, by its very definition, is a medical intervention aimed at treating Ms Azlin's cancer.

(c) In elucidating Ms Azlin's shock and anxiety, Mr Rai relies upon the testimony of Mr Moore Alexander @ Mustaffa Bin Mohamed ("Mr Moore"), her then boyfriend. Specifically, Mr Moore stated that Ms Azlin "was often bedbound and unable to go out" and was "nauseated and threw up several times a day". Mr Moore's observations pertain to *physical symptoms*.

This being the case, the Judge had not erred in amalgamating Ms Azlin's claims for pain and suffering due to the tumour, treatment and shock and anxiety.

110 Second, we are of the view that the Judge's award of $140,000 is amply justified. While the Judge was unable to find any local precedents quantifying the pain and suffering due to cancer, its treatment or its psychological effects, the Judge considered three precedents.

111 First, in *TV Media*, this court granted an award of $150,000 for pain and suffering *as well as loss of amenity*. The respondent in that case suffered liver damage allegedly due to her consumption of the slimming drug, "Slim 10". She was hospitalised for 36 days; had undergone numerous blood tests, a liver biopsy and a liver transplant; and had suffered from lethargy, jaundice, hallucinations as well as bouts of vomiting. Her future suffering was also taken into account. This included a restriction of her physical activities and food

preferences, a nagging fear of liver failure or that her weakened body would succumb to disease, risks to her and her foetus if she became pregnant, an increased risk of renal failure and skin cancer so that she would have to cover up when she went out under the sun, thus affecting her social and working life, the fact that visits to hospital had become a way of life for her and that she had to remain on immunosuppressant medication for the rest of her life, as well as the fact that she had been made uninsurable.

112 Secondly, in *Ramesh s/o Ayakanno (suing by the committee of the person and the estate, Ramiah Naragatha Vally) v Chua Gim Hock* [2008] SGHC 33 ("*Ramesh*"), the 26-year-old victim sustained multiple injuries including: severe head injuries to both sides of the brain; bilateral cord palsy; difficulty in swallowing; deranged liver functions and sepsis; left iliac bone fracture; disc protrusions; and contractures of the lower limb. As a result of the injuries, he was declared mentally disabled. He could no longer move or talk and required life-long medication for epileptic seizures. The victim was left with a shortened life expectancy of ten years. The High Court, after reviewing various precedents, awarded the victim $185,000 for pain and suffering *and loss of amenity*.

113 Thirdly, in *Tan Juay Mui (by his next friend Chew Chwee Kim) v Sher Kuan Hock and another (Liberty Insurance Pte Ltd, co-defendant; Liberty Insurance Pte Ltd and another, third parties)* [2012] 3 SLR 496 ("*Tan Juay Mui*"), the 47-year-old plaintiff was knocked down by a bus and suffered severe injury to her left foot and brain. Her left leg below the knee was amputated and she lost her ability to manage herself and her affairs. During recovery, the plaintiff suffered complications resulting in loss of vision and paralysis of her left side. She suffered a new onset of type 2 diabetes mellitus in October 2007.

She fell into a diabetic coma in 2010 and required insulin injections thereafter. The High Court held that the amount of $170,000 awarded for the head injuries (including paralysis and loss of vision and amenity) was neither clearly inadequate nor clearly excessive, though it could have been adjusted upwards because the AR had wrongly concluded that the award for pain and suffering and loss of amenity in respect of a person not in a vegetative state had to always be for less than the amount awarded to an unconscious victim (at [30]–[36]). The High Court held that the award of $60,000 for the plaintiff's leg injury was also neither clearly inadequate nor clearly excessive (at [54]). In addition, the High Court awarded the sum of $20,000 for pain and suffering and loss of amenity from the plaintiff's diabetes because it was reasonably foreseeable that the serious injuries sustained by the plaintiff could cause her to develop conditions like diabetes (at [42]–[49]). Thus, in total, the plaintiff received $250,000 for pain and suffering *and loss of amenity*.

114 Additionally, it is helpful to have regard to the decision of this court in *Lee Wei Kong*. In that case, the plaintiff was 18 years old at the time of the accident and his remaining life expectancy was 53 years. He was in a coma for 17 days and stayed at the Tan Tock Seng Rehabilitation Centre from 15 February 2005 to 10 June 2005. Four years after the accident, he had recovered exceptionally well and had returned to his studies. However, his speech remained impaired with dysphasia and dysarthria; he had also acquired a left lateral squint, had developed increased impulsivity and gave in to occasional temper outbursts, and had lost some sphincteric control resulting in urinary and bowel urgency. His injuries after the accident included fractures of the cheekbone and the left temporal bone, a large haematoma with severe mass effect which caused a midline shift of the brain, and fracture of the sixth cervical vertebra. This court affirmed the High Court's award of $160,000 for pain and

suffering *and loss of amenity* arising from all these head and bodily injuries. Pertinently, this court stated (at [16]) that "[t]here has not been any case where, for pain and suffering, an award close to $285,000 had been made".

115 Apart from reiterating the various forms of Ms Azlin's suffering (large portions of which were copied directly off the Judgment at [107] and [118]), Mr Rai does not explain how he arrived at the individual figures of $300,000 for pain and suffering due to treatment, $300,000 for pain and suffering due to the tumour and $200,000 for shock and anxiety. Having regard to the precedents above and *Lee Wei Kong* at [16], we agree with the Judge that the total figure of $800,000 sought in the present case is astronomical and "indubitably too high" (see the Judgment at [114]), even if one were to ignore the fact that the awards of $150,000, $185,000 and $250,000 in the first three precedent cases *already included an award for loss of amenity* (see also the Judgment at [113]).

116 In our judgment, the award of $140,000 is aligned with the precedents (especially once one considers the award of $30,000 for loss of amenity as analysed below at [140] onwards). We have no doubt that Ms Azlin has suffered greatly. However, it must also be considered that unlike the plaintiffs in *Ramesh* and *Tan Juay Mui*, Ms Azlin had minimal symptoms after her relapse in August 2014, and was able to perform her activities of daily living unassisted. She remained independent and was able to go to work, gather with friends for meals, and attend chemotherapy alone. She was able to cook, socialise and shop, even as of January 2017 (see the Judgment at [106] and [161]). Ms Azlin was also given the third-generation ALK-inhibitor, Lorlatinib, in March 2017, which prolonged her life for another two years (see the Judgment at [106]). Ms Azlin's situation was more similar to that of the plaintiffs in *TV Media* and *Lee Wei Kong* who had to undergo numerous medical procedures and suffered from

serious injuries and/or diseases, but who nevertheless managed to regain some independence in their lives.

117 For completeness, we make two final points. First, we reject Ms Kuah's argument that the Judge's award for pain and suffering for the tumour, treatment as well as shock and anxiety was on the "high side". To make good her point, Ms Kuah submits that the Judge had failed to consider:

(a) The experts' evidence that the extent of the surgery carried out on Ms Azlin would be the same whether her cancer was at stage I or stage IIA. This is because at both stages, a lobectomy would have been carried out and this would normally entail the removal of the entire lobe of the lung in which the tumour is located (the lobe being larger than a cancerous tumour at both stage I and stage IIA) as well as the dissection of the lymph nodes in the areas surrounding the tumour (see the Judgment at [39]).

(b) The experts' evidence that Ms Azlin would have been treated with adjuvant chemotherapy whether her cancer was at stage I or stage IIA because both stages are considered "early stage[s]" and "some cancers even at the early stage may have had some micro-metastasis" such that there may be "cancer cells that may have spread outside of the confines of the tumour that's beyond what [the doctors] can visualise on usual imaging". Adjuvant chemotherapy would therefore have been ordered even if Ms Azlin's cancer had been discovered at stage IB so as to "improve the chances that any microscopic traces of cancer can be … eradicated".

(c) The experts' evidence that early stage lung cancer is usually silent and asymptomatic.

118 In so far as Ms Kuah seeks a reduction of the Judge's award of $140,000, she is precluded from doing so for the reasons stated at [44]–[55] above. In any event, even if CGH had filed a cross-appeal, we do not think that the reasons above justify a reduction of the Judge's award. This is because all three points, even if taken to be true, ignore the fact that the bulk of Ms Azlin's pain and suffering due to the tumour, its treatment and her consequent shock and anxiety, stems not from the immediate consequences of the tumour's delayed discovery in March 2012 (at stage IIA), but rather from the increased risk of relapse due to the progression of the lung cancer to stage IIA which eventually led to Ms Azlin's relapse in August 2014 and the painful symptoms and consequences that followed, including her eventual death on 1 April 2019 (see above at [101]–[102]). The various consequences suffered by Ms Azlin after the relapse are detailed in the Judgment at [107].

119 Our second and final point concerns the claim for pain and suffering due to psychiatric injury. The Judge considered this to be a distinct claim from the claim for pain and suffering from shock and anxiety and thus considered it separately (see the Judgment at [115]–[117]). Before us, Mr Rai clarified that the two claims as elucidated in the Appellants' Submissions are one and the same and the term "psychiatric injuries" is a misnomer. We agree with the Judge that pain and suffering from "psychiatric injury" is not the same as pain and suffering from "shock and anxiety" (see the Judgment at [117]), but we say no more on this as no claim is brought in respect of the latter.

120 To conclude, we affirm the Judge's component award of $140,000 for Ms Azlin's pain and suffering due to the tumour, treatment and shock and anxiety.

Pain and suffering due to awareness of reduction in life expectancy

121 We dismiss the appeal in respect of the Judge's award for Ms Azlin's pain and suffering due to the awareness of her reduction in life expectancy. In our view, the award of $80,000 is more than generous to the appellants.

122 It is common ground between the parties that *some damages* ought to be awarded to Ms Azlin under this head. The dispute centres on quantum – Mr Rai proposes a figure of $185,000 while Ms Kuah submits that $10,000 is a "far more modest sum". For the reasons stated at [44]–[55] above, in so far as Ms Kuah's arguments suggest that a reduction in the Judge's award is warranted, we disregard them. We therefore consider only whether the Judge's award ought to be *increased*.

123 The claim for pain and suffering due to an awareness of a reduction in life expectancy is an established one (see the High Court decision of *Cheng Chay Choo (Spinster) v Wong Meng Tuck and Another* [1992] SGHC 133 ("*Cheng Chay Choo*"), as cited in *Au Yeong Wing Loong* at [15]). As this claim does not appear to have featured in the recent jurisprudence of our courts, we take some time to consider the applicable principles.

124 As a starting point, s 11(1) of the CLA provides that no damages are to be recoverable in respect of any loss of expectation of life, except that the court "shall take into account any suffering caused or likely to be caused to [the injured person] by ***awareness*** that his expectation of life has been so reduced"

[emphasis added]. It is plain that a plaintiff must have the *awareness* that his or her life expectancy has been reduced (see *Au Yeong Wing Long* at [15], citing *Cheng Chay Moo*).

125 At present, it is not entirely clear from the precedent cases (see below at [132] onwards) whether it is also necessary for a plaintiff to show the extent of the reduction in life expectancy because some awards have been made without a specific elucidation of the extent of the reduction in years (see for example, the High Court decisions in *Ng Ah Lek v The Personal Representatives of Low Keng Suang @ Low Tai Kheng, deceased* [2003] SGHC 310 ("*Ng Ah Lek*") and *Cheng Chay Moo* at [132] and [134] below). Ms Kuah implicitly accepts that evidence on the specific reduction in overall survival would be useful to the quantification of damages. She states that even in the absence of this, an award can still be made. This was also the approach taken by the Judge (see the Judgment at [121]).

126 We agree. It may not always be possible to concretely ascertain what the specific reduction in life expectancy is. In such cases, the court should still make a general award in relation to a plaintiff's awareness of a reduction in life expectancy. After all, the news that one's days are numbered would almost certainly cause indescribable anguish. It would be a difficult pill to swallow even for the most resilient of individuals.

127 We take the view that the exact reduction in life expectancy should be seen as a matter going towards the quantification of the pain and suffering. It is logical that a plaintiff who suffers due to an awareness of a 50% decrease in life expectancy ought to receive more than a plaintiff who is aware of a 10% decrease or a plaintiff who only knows of an amorphous, undetermined decrease

in life expectancy. Much would depend on the precise facts and circumstances of the case concerned.

128 Returning to the facts of CA 39, the Judge's award of $80,000 is in no way inadequate to compensate Ms Azlin for her loss. On the contrary, it may well be described as generous.

129 The Judge recognised that a concrete figure as to Ms Azlin's life expectancy would have been useful for the purposes of extrapolating the quantum of damages due to Ms Azlin (see the Judgment at [121]). Given that the Judge was of the view that Mr Rai had failed to establish Ms Azlin's life expectancy, the Judge referred instead to: (a) Ms Kuah's submission that Ms Azlin had lost only three years of life which would entitle her to only $10,000; and (b) the Judge's own view that the actual reduction in overall survival could only be three years because, but for CGH's negligence, Ms Azlin would have enjoyed her full life expectancy (see the Judgment at [119]–[120]). Exercising her discretion, she found that "a sum of $80,000 is appropriate" (see the Judgment at [121]).

130 With respect, we find it difficult to understand how the Judge arrived at the concrete sum of $80,000. Intuitively, the figure seems to be more than generous given that the pain and suffering due to such awareness is likely to be psychological or psychiatric in nature, but even the most serious psychiatric injuries in the "Severe" range of psychiatric disorders in the Personal Injuries 2010 Guidelines attract an award ranging from $25,000 to $55,000.

131 Further, as will be seen from our analysis of the precedents, an $80,000 award is far higher than any of the existing awards for pain and suffering due to

a plaintiff's awareness of the reduction in life expectancy. It follows from this that Mr Rai's proposed award of $185,000 is wholly astronomical as well as unreasonable.

132 In *Ng Ah Lek*, the AR granted a global award of $105,000 for pain and suffering (*ie*, $80,000 for paralysis and lower limb weakness, $13,000 for injuries to her left arm and $12,000 for other minor injuries such as chest inflammation, facial swelling, *etc*). In making this award of $105,000, the AR simply said that she had "factored in the fact that [the plaintiff's] life expectancy has been reduced by the injuries and she was aware of that" (at [7]). There was no analysis of the exact sum accorded for pain and suffering due to an awareness of a reduction in life expectancy.

133 In *Au Yeong Wing Loong*, a road accident left the plaintiff severely disabled due to motor paralysis in four limbs with partial but functionally inadequate recovery in the upper limbs. The parties agreed that the damages for pain and suffering were $145,000 but left the court to assess the award for loss of life expectancy. The evidence before the High Court was that the plaintiff had his lifespan reduced by ten to 15 years and was aware of this. After considering the cases of *Cheng Chay Choo* and *Tan Teck Chye v Chia Mee Sieng* [1988] 2 MLJ xxvi ("*Tan Teck Chye*") (both considered below), the court awarded the plaintiff $6,500 for loss of expectation of life.

134 In *Cheng Chay Choo*, the AR awarded $120,000 for pain and suffering and loss of amenities, including a loss of expectation of life (*ie*, there was no separate award for the awareness of a reduction in life expectancy) to the plaintiff-respondent who became a paraplegic as a result of a road accident. The question before the High Court was whether the claim for loss of expectation of

life had been made out and whether the respondent was aware that her life expectancy had been reduced. The High Court held that it was clear that the respondent knew, and dismissed the appeal on this point. Again, there was no analysis on the exact sum accorded for the pain and suffering due to an awareness of a reduction in life expectancy. The High Court also considered the cases of:

(a) *Tan Teck Chye*, where the plaintiff was left with paralysis below his waist and a neurogenic bladder. His paraplegia was likely to remain permanent. He was 22 years old at the time of the accident. He received $6,500 for loss of expectation of life. It is unclear by how much his life expectancy had been reduced.

(b) *Au Kee Tuang v Lightweight Concrete Pte Ltd* [1984] 2 MLJ xxix, where a 32-year-old foreman was totally paralysed from his waist down amongst other injuries. His life expectancy was reduced by 10%. He received $6,500 for loss of expectation of life.

(c) *Ariraman Pornga v Sincere Construction Co & Anor* (Suit No 9322 of 1985), where the 36-year-old plaintiff (as of the date of trial) became a paraplegic. He was granted $7,000 for loss of expectation of life. It is unclear by how much his life expectancy had been reduced.

135 It can be seen from the precedents above that awards of between $6,500 and $7,000 have been made for pain and suffering due to an awareness of a reduction in life expectancy, even in cases where the specific reduction is unclear. Further, the court will utilise evidence or information of the specific reduction when it is available (see *Au Yeong Wing Loong* as summarised above at [133]).

136 At this juncture, it is necessary for us to state that while the above precedents provide a degree of guidance, they must be read with caution. First, the precedents are extremely dated, with the most recent precedent being almost 20 years old. As such, if they are to be relied upon, significant allowances for inflation and the corresponding decreases in the value of money will have to made.

137 Second, the longest period of reduction in life expectancy in the precedents is between ten and 15 years. In contrast, given (a) our conclusion above that Ms Azlin's remaining life expectancy when she commenced legal proceedings against CGH was 50.5 years; and (b) the Judge's finding that when she commenced legal proceedings in 2015, Ms Azlin was "already looking at a life expectancy of ten more years" (see also the Judgment at [118]), it is reasonable to assume that Ms Azlin was aware that she had lost approximately half her natural lifespan (*ie*, 40.5 years), especially as she approached her final days. The anguish and despair that undoubtedly followed should not be underestimated.

138 Third, unlike the plaintiffs in the precedents who remained alive at the time of legal proceedings, Ms Azlin has passed on. While we do not purport to guess at Ms Azlin's mental state as she came ever closer to her death, the anguish and distress accompanying one's awareness that he or she has a few years left to live would certainly pale in comparison to the depth of suffering thrust upon one who faces the imminent end of her days.

139 Bearing in mind that the court in *Au Yeong Wing Loong* awarded a sum of $6,500 for the plaintiff's awareness of a 12.5-year decrease in life expectancy in 1993 (*ie*, the average of ten and 15 years), a sum of $10,000 would be

reasonable in present times for a 12.5-year reduction. Extrapolating from this, a 40.5-year reduction would attract an award of $32,500. Even factoring in our consideration at [138], a sum of $80,000 would be more than generous. However, as CGH has not brought an appeal in this regard, we say no more on this.

Loss of amenity (excluding loss of marriage prospects)

140 In our judgment, the Judge's award of $30,000 for loss of amenity is reasonable.

141 In quantifying this claim, the Judge considered that Ms Azlin had suffered a substantial reduction in life expectancy because she was 39 years old when she died, and 35 years old when she suffered a relapse in August 2014 and had to go through extensive medical treatment after her relapse which significantly hampered her ability to enjoy life to its fullest. The Judge balanced this against the fact that Ms Azlin's quality of life had been significantly improved by the ALK-inhibitors which were given to her for the specific purposes of prolonging her life and improving her quality of life at the terminal stages of her cancer (see the Judgment at [58] and [124]).

142 The Judge also had regard to the decision of this court in *Tan Kok Lam,* in which a 67-year-old victim was placed into a persistent vegetative state and had her life expectancy reduced (to five years) after being knocked down in an accident. This court restored the decision of the AR and awarded the victim $80,000 for loss of amenity. A critical consideration was that the victim was precluded from pain and suffering damages because she was unconscious. It is clear from the judgment that the court was deeply concerned with ensuring that the "ends of justice" be met given that "there is no greater injury or loss, as far

as a living person is concerned, than to be turned into a cabbage" (see *Tan Kok Lam* at [27]–[28]). To do so, the court granted a substantial award for loss of amenity (see *Tan Kok Lam* at [33]).

143 The Judge held that as her award of $220,000 for pain and suffering due to the tumour, treatment and shock and anxiety, as well as for pain and suffering due to the awareness of the reduction in life expectancy, was not so low as to require a higher award for loss of amenity, a sum of $30,000 (*ie*, slightly less than half of the sum awarded in *Tan Kok Lam*) would be appropriate (see the Judgment at [124]).

144 Mr Rai puts forth two reasons as to why the Judge's award was manifestly inadequate. First, Mr Rai submits that the Judge had ignored the fact that the ALK-inhibitors had prolonged Ms Azlin's life, "which in turn meant that [Ms Azlin] was required to undergo more treatments more regularly thereby translating to lesser opportunity and ability to go about enjoying her life to its fullest". Second, Mr Rai claims that the Judge had ignored the fact that Ms Azlin had suffered pain in her arms, nausea, weakness, joint pains, body aches and chest pains with limitation of movement since 28 January 2016 and was on hospitalisation leave for 664 days between 26 August 2014 and 30 June 2016.

145 We find it difficult to understand Mr Rai's first reason which suggests that Ms Azlin would have been able to enjoy life more fully if she had refused to take drugs which the appellants' own expert witness, Dr David Breen, had testified were aimed at improving her quality of life.

146 His second reason can be rejected out of hand. The Judge had expressly considered that Ms Azlin had "to go through extensive medical treatment following her relapse" (of which Ms Azlin's hospitalisation was but one aspect) and that she had to give up physical activities that she enjoyed due to her cancer (see the Judgment at [124]). In quantifying Ms Azlin's loss of amenity, the court takes a broad-brush approach. It is not obliged to list out every single fact that is relevant – this would be an overly pedantic approach to quantifying damages, and would, indeed, be one that is entirely unrealistic. In harping on facts that the Judge did not mention, rather than actual flaws in her reasoning, it appears to us that the appellants had little basis to appeal against the Judge's award for loss of amenity.

147 Given our view that the Judge's award for pain and suffering for the tumour, treatment, and shock and anxiety is eminently reasonable and that her award for Ms Azlin's awareness of the reduction in her life expectancy is more than generous, we do not think that a higher award for loss of amenity is warranted. We affirm the Judge's award of $30,000.

Loss of marriage prospects

148 We allow the appellants' appeal and award Ms Azlin $6,000 for the loss of her marriage prospects.

149 A claim for loss of marriage prospects is rare and the most recent authority on it is our decision in *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng*"). In that case, the respondent suffered from the following permanent disabilities as a result of an industrial accident: (a) paralysis of his lower limbs such that he was permanently wheelchair-bound; (b) absence of sensation below the groin and

absence of control over his bowels and bladder; (c) erectile dysfunction; and (d) infertility (at [4]). He was engaged to be married prior to the accident but his fiancée's parents called it off. This court upheld the AR's award of $6,000 for loss of marriage prospects, reasoning (at [37]) that:

> It is true that the Respondent estimated that there was a 50% chance that his ex-fiancée's parents might well change their minds and agree to his marrying his ex-fiancée. We must bear in mind that the Respondent had been engaged to be married prior to the Accident. *Marriage was clearly on the cards and it was just a matter of time*. However, according to the Respondent, after the Accident, he heard from his friends that his former fiancée's parents were adamant that the marriage was not to take place. *Having regard to the Respondent's physical state after the Accident, it is not difficult to understand the position taken by the parents of his ex-fiancée*. If the Respondent's ex-fiancée were to proceed to marry the Respondent, *she would, to all intents and purposes, be not a wife, but a lifetime maid to him*. In our view, the Respondent's estimate of a 50% chance of eventually being able to marry his ex-fiancée is no more than wishful thinking on his part. *Objectively*, we are unable to disagree with the AR's finding that the Respondent has lost his marriage prospects. In this regard, we draw attention to the Respondent's uncontradicted oral evidence that *his marriage had been well in sight prior to the Accident, but that prospect was lost as a result of the Accident*. What the Respondent now has is no more than a hope of eventually marrying his ex-fiancée. To award him nothing for the loss of his marriage prospects just because of the dimness of his hope would be harsh and unreasonable. [emphasis added].

150 Having regard to the extract above, the Judge held that the test is whether, objectively, the tortfeasor's negligence caused the victim to lose his or her marriage prospects (and not simply loss of marriage). The court may take into account whether marriage had been "well in sight" or "on the cards" prior to the negligence, which might be the case if the victim was already engaged (as in *Poh Huat Heng*), and whether the damage suffered by the victim will render him or her incapable of being a spouse (as in *Poh Huat Heng*, where the

ex-fiancée would "be not a wife, but a lifetime maid" to the respondent) (see the Judgment at [128]).

151 We agree. In our view, the issue of whether marriage is "well in sight" or "on the cards" should be seen as going only to the *quantum* of damages. This is because a person can lose his or her marriage prospects even if no marriage was planned, and correspondingly, should be compensated for the loss. This was precisely the situation in *Au Yeong Wing Loong*. In that case, the High Court awarded the plaintiff $2,500 after finding that his physical and medical problems would not allow him to lead a normal sex life and that he would be wheelchair-bound for life (at [20], [22]–[24]). There was no mention of any girlfriend, fiancée, or any relationship with a woman. Conversely, damages should be enhanced if a relationship progressing towards marriage had been derailed due to the plaintiff's injuries and/or disease, because the loss of the planned marriage would make the loss of marriage prospects all the more painful and would be an added blow to an already suffering plaintiff.

152 The Judge gave three reasons for finding that Ms Azlin should not get damages for loss of marriage prospects. First, it is not unheard of for couples to tie the knot before one partner dies from a serious illness like cancer. Second, Mr Moore had testified that while Ms Azlin had raised the topic of marriage a few times in 2013 and early 2014, nothing had been planned "because of [the] instability of [his] work". This rendered Ms Azlin's situation different from that of the plaintiff in *Poh Huat Heng* where marriage was clearly on the cards. Third, Ms Azlin's quality of life was sustained by ALK-inhibitors and her degree of disability did not rise to the degree of disability seen in *Poh Huat Heng*.

153 We do not think that these three reasons preclude an award for loss of marriage prospects in the present case. While it is not unheard of for people to marry just before a partner dies of a serious medical illness, such cases are exceptional and rare. Taken to its logical conclusion, the Judge's first reason would mean that so long as there are some cases in which individuals wish to tie the knot with their partners who suffer from serious and debilitating disabilities, injured claimants (which will include the plaintiff in *Poh Huat Heng*) will not be entitled to damages for loss of marriage prospects. Further, it should be noted that the test is *not* that there is absolutely no prospect of the plaintiff ever marrying, but whether the plaintiff can prove on a balance of probabilities that he or she has no prospect of ever marrying. The present case is unique. Ms Azlin did not merely "suffer from a serious illness like cancer"; rather, she suffered from a rare genetic mutation and the delay occasioned by CGH's negligence resulted in *stage IV lung cancer* which is generally considered to be incurable. Early death is inevitable – much like the plaintiff in *Poh Huat Heng* (at [37]), any hopes of being able to find someone to marry in such a situation, especially in the last days of Ms Azlin's life would be no more than "wishful thinking". In our view, the inevitability of Ms Azlin's early and imminent death when her cancer reached stage IV makes it reasonable to say that she had lost all prospects of marriage as a result of CGH's negligence.

154 In a similar vein as the above, we are, with respect, unable to agree with the Judge's third reason. The fact that the ALK-inhibitors helped Ms Azlin to sustain her quality of life in her dying days does not change the reality that she was dying.

155 In so far as the second reason is concerned, we agree with the Judge that this meant that "marriage was not on the cards" and this distinguished

Ms Azlin's case from that of the plaintiff in *Poh Huat Heng*. However, as mentioned above, this is a matter that should go towards the quantum of damages to be awarded.

156 Bearing in mind inflation and the decreased value of money in the years since *Au Yeong Wing Loong* and *Poh Huat Heng*, we award the claimed sum of $6,000 for Ms Azlin's loss of marriage prospects.

The global award

157 At the second stage of the analysis, one must consider if the global award is manifestly excessive or inadequate. There are two important considerations at the second stage. The first is whether there are "overlapping" injuries, *ie*, injuries which either: (a) together result in pain that would not have been differentially felt by the claimant; or (b) together give rise to only a single disability. In such circumstances, compensating for each distinct injury would likely result in an excessive award. The second consideration is precedent, which should be referenced to assist in arriving at a fair estimate of loss and to ensure that like cases are treated alike (see *Lua Bee Kiang* at [17]–[18]).

158 In considering the aggregate award for pain and suffering as well as loss of amenity, the Judge took the view that any overlaps between the pain and suffering due to the tumour, treatment as well as shock and anxiety had already been accounted for in the award of $140,000 for all three heads of claim. She did not think that there were any further overlaps between the claims for pain and suffering due to awareness of a reduction in life expectancy, loss of amenity and loss of marriage prospects. We have previously rejected Mr Rai's contention that the Judge had wrongly amalgamated three "incompatible" claims for pain and suffering. As none of the parties submits that there is any

further overlap which the Judge had failed to account for, the Judge's finding that there are four non-overlapping heads of claim is not being challenged on appeal.

159 Based on the component awards as quantified above, the initial global sum is $256,000 (*ie*, the abovementioned $140,000, $80,000 for pain and suffering due to Ms Azlin's awareness of the reduction in her life expectancy, $30,000 for loss of amenity and $6,000 for loss of marriage prospects).

160 We have previously considered four precedents in respect of the $140,000 award for pain and suffering due to the tumour, treatment and shock and anxiety at [111]–[114] above. In our view, these precedents also demonstrate that an overall award of $256,000 would be a fair and reasonable sum to compensate for Ms Azlin's pain and suffering and loss of amenity. As the Judge pointed out, reference ought to be made to the case of *Tan Juay Mui* in which the first respondent's negligence caused the plaintiff to later develop severe medical conditions including diabetes. While the plaintiff there lost her ability to manage herself and her affairs unlike Ms Azlin who was able to work up till February 2019 (see below at [198]), it must be recalled that Ms Azlin eventually passed away due to lung cancer and that its symptoms had intensified in the months leading up to her death.

161 The following table summarises our decision in respect of the individual awards and the global award for pain and suffering, loss of amenities and loss of marriage prospects.

General damages	Our decision
Pain and suffering due to tumour, treatment and shock and anxiety	$140,000
Pain and suffering due to awareness of reduction of life expectancy	$80,000
Loss of amenity	$30,000
Loss of marriage prospects	$6,000
Total	$256,000

Issue 3: Ms Azlin's expenses from 2014 to 1 April 2019 (post-writ)

162 We dismiss the appeal in respect of the appellants' claim for Ms Azlin's expenses from 2014 to 1 April 2019, save for the claim in respect of post-writ transport expenses which we allow in part.

The Judge's decision

163 The Judge disallowed all of Ms Azlin's claims for expenses incurred from 2014 to 1 April 2019 (*ie*, the date of her death).

164 The amount of $1,501,703.50 which was claimed for medical expenses incurred from 2015 to 1 April 2019 was disallowed because this was the cost of drugs that Ms Azlin received free of charge as a patient undergoing clinical trials. The Judge found that the clinical trial costs are akin to "hospital and pharmaceutical benefits" which lighten the monetary burden of illness and not

money received due to the benevolence of third parties or charity (which is a well-established exception to the basic rule against double recovery) (see the Judgment at [139]–[148]).

165 The $37,500 claim for transport expenses incurred from January 2015 to 31 March 2019 was disallowed as there was no explanation as to how Mr Rai had arrived at this figure and no evidence to support it (see the Judgment at [149]–[151]).

166 The $118,617.50 claim for nursing care and a domestic and auxiliary helper for the period starting from late 2014 to 1 April 2019 was disallowed because no supporting evidence had been adduced to show that these expenses had been incurred (see the Judgment at [152]–[153]).

The parties' arguments

167 Mr Rai's position is that the Judge had erred in requiring that Ms Azlin's expenses from 2014 to 1 April 2019 be proved on a balance of probabilities. In his view, these are "future losses" and the appellants should not be faulted for being unable to establish an assumption about a future event as true on a balance of probabilities, citing *Lua Bee Kiang* at [65] and [72]. As Mr Rai's use of the term "future losses" is incorrect and misleading, we refer to the claims as "post-writ claims" or "post-writ expenses".

168 As we mentioned at [37] above, there is residual ambiguity in the sum that Mr Rai claims on behalf of the appellants in respect of post-writ medical expenses. This claim is quantified as $1,226,885.56 at para 86(d)(i) of the Appellants' Case. During the hearing, however, Mr Rai expressly confirmed before us that the appellants maintain their position in their closing submissions

before the Judge. There, the claim for post-writ medical expenses was for a sum of $1,501,703.50.

169 Putting aside the ambiguity in the exact sum claimed for post-writ medical expenses, Mr Rai's main lines of argument against the Judge's decision appear to be that:

(a) it is unreasonable to expect the appellants to prove expenses that were incurred post-discovery, and up to and beyond trial;

(b) the Judge's finding that the entire claim for post-writ medical expenses was for expenses that were sponsored due to the clinical trials that Ms Azlin had been part of was wrong because the Judge had found that Ms Azlin had been taken off clinical trials after October 2016; and

(c) the costs covered by the clinical trial are akin to charity so as to be compensable.

170 In relation to the $118,617.50 claim for post-writ expenses related to nursing care and a domestic and auxiliary helper, Mr Rai concedes that "[a]t the material time … [Ms Azlin] did not engage any nurse and/or domestic helper because she was unable to afford the same" and that "she was assisted by her mother who looked after her". Nonetheless, he avers that "[g]iven that the claim was for general damages dependent on future events, the … Judge erred by assessing the damages on the basis of evidence as to whether [Ms Azlin] had in fact incurred [such] expenses".

171 In relation to the claim for post-writ expenses related to transport expenses, Mr Rai accepts that the claimed sum of $37,500 (*ie*, $700 per month)

is an *estimate.* He claims that the appellants should not have been put to "strict proof" as "claims for estimates of future losses can never be substantiated by documents".

172 Ms Kuah, on the other hand, aligns herself with the Judge.

Our decision

173 We make two broad observations about Ms Azlin's post-writ claims.

174 First, we cannot understand how Ms Azlin's post-writ expenses incurred from late 2014 or 2015 to 1 April 2019 constitute "future losses", given that this particular time period had passed by the date of assessment and any claimable expenses would certainly have already been incurred by then. As we made unequivocally clear to Mr Rai, these post-writ expenses were no longer future expenses at the time of the hearing for the assessment of damages and, in accordance with the law on special damages, had to be specifically proved.

175 In response to this, Mr Rai emphasised that the present case is different because Ms Azlin "was afflicted with cancer [in] 2012 and she was dying from August 2014". She "passed away on [1] April [2019] and it is not possible … for her to produce [the relevant documentary evidence] because she was in and out of hospital, if not being downright hospitalised … and [was] not in any condition to do that".

176 We recognise and fully acknowledge the difficult and agonising circumstances that Ms Azlin and her family members had endured after August 2014. However, as we stated during the hearing and also above at [59]–[61], the court cannot award sums in a vacuum when these pertain to special damages.

The surrounding circumstances do not dispense with the appellants' burden to prove the claims which they bring to this court. Ms Azlin had been continuously represented by counsel since the commencement of legal proceedings in 2015 and, as Ms Kuah aptly pointed out, even if Ms Azlin and her family were in no state to keep records of Ms Azlin's post-writ expenses or to request the relevant supporting documents from the various service providers, their counsel was certainly in a position to do so on their behalf.

177 Second, and as will be seen in the paragraphs below, the mischaracterisation of the post-writ expenses as "future loss" is detrimental to Ms Azlin's case and has the effect of nipping otherwise viable post-writ claims in the bud. We have no doubt that at least *some* post-writ expenses had been incurred by Ms Azlin and her family as a result of CGH's negligence, all of which (if proved) ought to be compensated (see also above at [7]–[8]). However, the Appellants' Submissions do not contain any breakdown of the various post-writ expenses claimed, nor do they point us to any supporting documentary evidence in respect of the same. In fact, in relation to the expenses for nursing care and an auxiliary and domestic helper, Mr Rai candidly admits that *no such expenses were incurred.*

178 With respect, we find it hard to understand why the appellants did not seek to adduce further evidence at the AD Hearing in respect of the post-writ expenses. In the first CA Judgment, we had already contemplated that some degree of new evidence would be necessary and had made this explicit in our order remitting the "issue of loss and damage, including ***quantification*** (if any)" [emphasis added] to the Judge. We simultaneously granted leave for the parties to "refine or revise their evidence so as to address the specific factual findings that have been made in this judgment" (at [125]).

179 The appellants' omission is made all the more glaring when one considers that, at the hearing of SUM 1204, Ms Kuah had alerted Mr Rai to the fact that the claims for "future medical expenses" as well as other "out-of-pocket expenses" ought to be re-quantified as special damages or as dependency claims in the light of Ms Azlin's demise and that "particulars need to be provided". The deficiencies and evidential gaps in Ms Azlin's case were once again highlighted to Mr Rai during the JPTC by Ms Kuah who stated that she had "asked [Mr Rai] to amend [the SOC 2] and for documents like further expenses". This being the case, there has been more than ample opportunity to vindicate Ms Azlin's claim for post-writ expenses, an opportunity which has neither been seized nor recognised.

180 With this, we turn to deal with the impact of our observations above on the individual heads of post-writ claims.

Post-writ medical expenses

181 We have previously alluded to the ambiguity in terms of the sum that the appellants claim in respect of the post-writ medical expenses from 2015 to 1 April 2019 at [168] above. We take this to be the amount of $1,226,885.56 as this is the final figure expressly stated in the Appellants' Case.

182 There are further difficulties which stand in the way of the assessment of the post-writ medical expenses. In the Appellants' Submissions, the only available clue as to how this figure could have been derived is the sentence "$353,342 per year for 3 years and 3 months for the period from 28 July 2015 to November 2018". This, however, leads to a sum of $1,148,361.50.

183 Furthermore, the only supporting calculation given by Mr Rai in respect of the amount of $353,342 is in a reference to the Record of Appeal Volume III(I) at pages 60 to 62. These pages are extracts from Ms Azlin's Affidavit of Evidence-in-Chief ("AEIC") dated 20 September 2016 and the relevant sections read as follows:

> … These Estimated Future Medical Expenses are for 3 years 3 months from 28th July 2015 – November 2018 – @ **$353,342 per year** based on the following:
>
> (a) My latest clinical trial treatment had commenced on 28th July 2015. The 2 clinical trial drugs if obtained commercially, would cost $29,131.50 per month.
>
> (i) Ceritinib 150mg (oral): $50.35 per tab
>
> *I take 3 tabs (450mg) each day so the monthly cost would be estimated at $4,682.55 (based on 31 days).
>
> (ii) Nivolumab (infusion): $4,100 per 100mg
>
> *As per clinical trial coordinator, I am given 300mg per infusion (3mg/kg) based on my weight (100kg).
>
> Infusion once every *2 weeks. The estimated annual cost based on 52 weeks would be $319,800.
>
> (iii) medical cost per year would be:
>
> - Ceritinib: $(50.35 x 3 x 365 days) = $55,133.25
> - Nivolumab: $(4,100 x 3 x 52 weeks) = $319,800
>
> Grand total per year is **$374,933.25 per year**
>
> (iv) I incur Medical Consultations approximating $78 per month which amount to **$936 per year.**
>
> (v) I need to standby Oxygen averaging
>
> $11.17 every month ie **$134 per year**
>
> …

> (vi) I need to undergo CT Scans averaging $250 every 2 months … **$1,500 per year**
>
> …
>
> For 3 years 3 months, the costs would add up to **$1,226,885.56.** As I am currently participating in a clinical trial of the combination of ceritinib and nivolumab, the cost of both drugs, consultations and investigations are covered by the pharmaceutical company.
>
> [emphasis in original]

184 The appellants' calculations in the quoted paragraph do not add up. As mentioned above, it is not clear how Mr Rai arrives at a figure of $1,226,885.56 (as stated in para 86(d)(i) of the Appellants' Case) when Ms Azlin explicitly stated that the expenses were calculated at "**$353,342 per year**" [emphasis in original] for three years and three months. Further, the cost of Ceritinib and Nivolumab, *if obtained commercially*, is stated above to be $374,933.25 per year. The above breakdown of Ms Azlin's post-writ medical expenses was the only one highlighted to us in the Appellants' Submissions. As we have stated above, the burden lies upon the appellants to make good their claim for past medical expenses. In circumstances where even the method by which the appellants' claim is quantified is unclear to the court, their claim must be dismissed.

185 Our point as set out above suffices to dispose of the appeal in respect of the post-writ medical expenses. Nonetheless, we take the additional step of also considering Mr Rai's argument that the Judge had erred by refusing to compensate Ms Azlin for her medical costs which were covered by the clinical trial.

186 It is not disputed that Ms Azlin was subject to the clinical trial from July 2015 to October 2016 and that the costs of the medical treatments given to her were covered by the pharmaceutical company (see the excerpt from Ms Azlin's AEIC quoted above). In so far as Ms Azlin's claim of $1,226,885.56 is based on the costs incurred during the clinical trial, we are in full agreement with the Judge's reasoning at [142]–[147] of the Judgment. Ms Azlin should not be allowed to recover damages for losses that she did not suffer given the basic rule that a plaintiff cannot recover more by way of damages than his or her actual loss. The benefits given to Ms Azlin by way of the clinical trial are akin to hospital and pharmaceutical benefits which simply lighten the monetary burden of her treatment and can be distinguished from moneys received due to the benevolence and charity of others (*ie*, an exception to the basic rule of double recovery).

187 We therefore hold that the Judge had not erred in deciding that no damages are to be awarded for post-writ medical expenses. In coming to this conclusion, we have also considered Mr Rai's argument that Ms Azlin was taken off the clinical trial after October 2016 and that there is no evidence that her further medical treatment after that point (*ie*, by way of radio surgery, chemotherapy, Ceritinib and Lorlatinib (see the Judgment at [141])) was sponsored and so it is likely that she incurred those expenses personally. While such expenses would normally be claimable as they stem from CGH's negligence, we are unable to award any sum for them given that the Appellants' Submissions have not pointed us to: (a) evidence of the existence of these medical expenses; and (b) evidence as to their quantum.

188 We therefore dismiss the appellants' appeal in respect of Ms Azlin's post-writ medical expenses.

Post-writ transport expenses

189 We allow the appellants' appeal and grant them a sum of $10,400 in respect of Ms Azlin's transport expenses.

190 The Judge had rightly observed that there was no evidence to show that Ms Azlin had incurred the claimed sum of $37,500 in transport expenses from January 2015 to March 2019. That said, logic and common sense would suggest that *some* transport expenses must have been incurred, and unlike the claims for post-writ medical expenses and post-writ nursing care and domestic and auxiliary helper expenses, the Judge had made *unchallenged* findings of fact which provide a basis upon which post-writ medical expenses may be calculated.

(a) First, at [21] and [141] of the Judgment, the Judge found that after Ms Azlin was taken off the clinical trial in October 2016, she was managed with radio surgery, chemotherapy, Ceritinib and Lorlatinib. This same point was expressly made to us by Mr Rai, who added that there was absolutely no evidence that Ms Azlin's medical expenses after October 2016 had been sponsored.

(b) Second, at [107] of the Judgment, it is expressly stated that "[s]ince the relapse in August 2014 until her demise, Ms Azlin had to attend National Cancer Centre Singapore ('NCCS') and Singapore General Hospital ('SGH') twice a week".

(c) Third, at [216]–[217] of the Judgment, the Judge stated that "[a] sum of $40 for two-way taxi fare from Ms Azlin's home in Changi to NCCS and SGH is not unreasonable" and granted Ms Azlin a sum of $3,000 in respect of her transport expenses from 6 March 2012 to

22 January 2015. Crucially, this was *after* the Judge had recognised that the appellants had failed to provide any documentary evidence to substantiate the claim for transport expenses in respect of this period.

191 In the circumstances, we award Ms Azlin a sum of $10,400 for transport expenses beginning from October 2016 when the clinical trial ended, till the date of her death on 1 April 2019 (*ie*, $40 x two times a week x 52 weeks a year x two years and six months).

Post-writ expenses for nursing care, domestic and auxiliary helper

192 We agree with the Judge that these expenses cannot be claimed for the simple reason that they had never been incurred. Mr Rai candidly accepted that no nurse and/or domestic helper had been engaged. Therefore, Ms Azlin had not incurred any proven loss that warrants compensation.

193 That said, it has not escaped our attention that Mr Rai claims that Mdm Azizah had looked after Ms Azlin for at least some periods of time because the family could not afford a domestic helper or a nurse. While we appreciate the difficult financial circumstances faced by Ms Azlin and her family, it was open to the appellants to claim for Mdm Azizah's expended time and effort in looking after Ms Azlin by exploring the fair value of the nursing and caring services which Ms Azlin had received from Mdm Azizah, and/or whether Mdm Azizah had suffered any loss of income from 2014 to 1 April 2019 (for example, if she had to forgo certain employment opportunities) because she was looking after Ms Azlin. As this was not done, no further losses can be claimed.

Conclusion on post-writ expenses

194 In conclusion, we affirm the Judge's decision not to award any damages for post-writ expenses, save that we award Ms Azlin a sum of $10,400 for transport expenses incurred from October 2016 to 1 April 2019.

Issue 4: Ms Azlin's loss of earnings and CPF contributions

195 We affirm the Judge's decision not to award any damages for Ms Azlin's loss of earnings and CPF contributions from 2016 to 2044.

The Judge's decision

196 The Judge declined to grant any award for loss of earnings and CPF contributions in respect of the living years (*ie*, 2016 to 2018) or the lost years (*ie*, 2019 to 2044).

197 In respect of the lost years, the Judge found that s 10(3)(*a*)(ii) of the CLA bars the recovery of loss of income for any period after the person's death. Ms Azlin died before the AD Hearing, and the claim for loss of income for 2019 to 2044 (*ie*, essentially a claim for loss of future income) should have been converted to a claim for loss of inheritance. As Mr Rai had expressly disavowed any claim for loss of inheritance, no damages could be awarded for this claim (see the Judgment at [156]–[158]).

198 In respect of the living years, the Judge found that Ms Azlin had suffered no loss because Ms Azlin had continued to work during all those years. The Judge referred specifically to an interview of Ms Azlin by *The Straits Times* on 28 February 2019 ("the 28 Feb 2019 Interview") that stated that Ms Azlin was still employed as of February 2019. The Judge noted that: (a) Ms Azlin's salary

from 2013 to 2016 was actually higher than her salary prior to 2013; (b) Ms Azlin's tax returns showed that she was employed every single year up to 2016; and (c) the appellants did not challenge the information in the 28 Feb 2019 Interview. The Judge therefore held that the appellants had not shown that there was any decrease in income or CPF contributions from 2016 to 2018 (see the Judgment at [160]–[163]).

The parties' arguments

199 Mr Rai maintains his position at the AD Hearing and submits that the following sums ought to be awarded to Ms Azlin:

(a) Loss of income for:

(i) Living years (*ie*, 2016 to 2018): $142,265.13.

(ii) Lost years (*ie*, 2019 to 2044): $605,057.46.

(b) Loss of CPF contributions for:

(i) Living years (*ie*, 2016 to 2018): $128,488.47.

(ii) Lost years (*ie*, 2019 to 2044): $690,691.29.

200 Mr Rai characterises the claims for loss of income and CPF contributions during the living years as claims for "future losses" which "by their very definition, cannot be documented". He therefore takes Ms Azlin's annual salary in 2015 (*ie*, $53,723.48 in year of assessment 2016) and applies a 5% increment year-on-year for her salary for the subsequent years from 2016 to 2018. This multiplicand is then multiplied by three years. As such, he arrives at a figure of $177,831.41 (including CPF contributions) for the living years. After

deducting the 20% employee CPF contribution, he is left with a figure of $142,265.13.

201 For the lost years, Mr Rai argues that damages should be assessed as if Ms Azlin was still alive, *ie*, as she was at the time of the filing of the writ.

202 First, given that the first CA Judgment had determined the issue of liability when Ms Azlin was still alive, the cause of action had been resolved and no longer "survived for the benefit of the estate". As this was a prerequisite for ss 10(1) and 10(3)(*a*)(ii) of the CLA to apply, both provisions were inapplicable on the facts of this case.

203 Second, flowing from the fact that the cause of action was resolved, it could no longer be a "continuing cause of action" which would attract the application of O 37 r 6 of the ROC. This rule states that where damages are to be assessed in respect of any *continuing cause of action*, *they are to be* ***assessed down to the time of the assessment***. As O 37 r 6 of the ROC does not apply, damages had to be assessed based on the cause of action at the time of the filing of the writ brought by the then-living Ms Azlin.

204 Third, Mr Rai claims that the Judge had erred when she stated that Ms Azlin's claims for loss of future earnings and CPF contributions for 2019 to 2044 should be reconstituted as a claim for loss of inheritance.

205 Mr Rai reiterates that the proper plaintiff in Suit 59 is Ms Azlin, and Mr Azmi was added purely to facilitate the conduct of the litigation under O 15 r 7 of the ROC.

206 Mr Rai employs the same method for quantifying Ms Azlin's loss of income for her lost years. To determine the multiplicand, he takes Ms Azlin's retirement age to be 65 and submits that she would have been gainfully employed for 26 years from 2019 to 2044. He submits that the appropriate multiplier is 15 years by analogy to the High Court decisions of *AOD (a minor suing by his litigation representative) v AOE* [2016] 1 SLR 217 ("*AOD*") and *Siew Pick Chiang v Hyundai Engineering and Construction Co Ltd and another* [2016] SGHC 266. After deducting the 20% employee CPF contribution, 35% for her estimated personal expenses and applying the appropriate multiplier, he is left with $605,057.46. The same approach is used to quantify the losses of CPF contributions.

207 Ms Kuah, on the other hand, largely aligns her position with that of the Judge.

Our decision

Loss of earnings and CPF contributions for living years (2016 to 2018)

208 We agree with the Judge that no damages ought to be claimable at all for loss of earnings and CPF contributions for the living years. These are claims for loss of earnings and CPF contributions post-writ.

209 For the reasons stated at [174], Mr Rai's claim that the losses suffered during this period are "future losses" and therefore need not be proved is rejected.

210 Mr Rai's next argument is that the Judge had erred in refusing to award Ms Azlin any damages for loss of income during the living years because the Judge had implicitly recognised that Ms Azlin was unable to work from 2016

onwards. At [107] of the Judgment, the Judge stated that "Ms Azlin had to attend [NCCS] and [SGH] twice a week and was on continual hospitalisation leave". Mr Rai further avers that the fact that Ms Azlin had (a) tendered her resignation with effect from 31 October 2015; and (b) spent 664 days out of 675 days on hospitalisation leave from 26 August 2014 to 30 June 2016 "is sufficient evidence to prove that [Ms Azlin] could not work during this period and that any sums received were purely charity by her employers".

211 These two points, even if taken as true, do not take Mr Rai's case very far. The mere fact that she had tendered her resignation does not mean that Ms Azlin could not have found employment later during the three-year period from 2016 to 2018. Further, the hospitalisation leave was from August 2014 to June 2016. This is not the same period as the living years for which loss of income and CPF contributions is being claimed. In contrast, the unchallenged evidence on appeal is that:

> (a) Ms Azlin had admitted during the Original Hearing on 17 January 2017 that she was still working as a corporate secretarial services supervisor, albeit on a part-time basis.
>
> (b) Ms Azlin then affirmed in the 28 Feb 2019 Interview that she "*continues working at her job in the corporate secretariat sector* helping new companies set up offices. Iyer Practice Advisers, where she works, allows her to work part-time so she can continue with her treatment. She gets $22 an hour." [emphasis added]

212 Furthermore, Ms Azlin's tax statements show that she continued to be employed every single year up till 2016 when she filed her AEIC for the Original Hearing. As the Judge astutely observed, these statements show that

Ms Azlin's salary did not suffer any significant decrease after her diagnosis in February 2012, and she actually received a higher annual salary in assessment years 2013 to 2016, than in the years prior to 2013 (see the Judgment at [160] and [162]). Taken in the round, the documentary evidence and Ms Azlin's own unchallenged account show that she continued to be gainfully employed even up to two months prior to her passing.

213 It was well within the appellants' abilities to provide evidence to show that Ms Azlin was unemployed from 2016 to 2018 or had suffered a reduction in her income. This could have been done by simply exhibiting Ms Azlin's updated tax returns, or by simply calling Mr Shanker Iyer, her employer to the stand. As this was not done, we agree with the Judge that it is not possible to award damages for loss of earnings and CPF contributions for 2016 to 2018 when it has not been established that there was loss.

Loss of earnings and CPF contributions for lost years (2019 to 2044)

214 In our view, the Judge correctly rejected the claim for loss of earnings during the lost years.

215 We are unable to accept the fundamental premise underlying all of Mr Rai's three arguments in respect of the lost years. Namely, that this court, in assessing damages and considering all the facts relevant to these damages, ought to take a blinkered approach to exclude from consideration the event of Ms Azlin's passing – when, as we had made clear at the outset of this judgment at [3] above, this same event is hugely significant for the purpose of quantifying the nature of her losses and thus her damages.

216 More specifically, we consider each of Mr Rai's three arguments in turn.

217 Mr Rai's first argument that ss 10(1) and 10(3)(*a*) of the CLA do not apply to this case is a non-starter because the mere fact that Ms Azlin was alive at the time of the filing of the writ or the first CA Judgment does not render the provisions inapplicable. In our judgment, s 10(3)(*a*) of the CLA is a complete bar to any claim for loss of future earnings in all circumstances where a claimant or would-be claimant has passed away. Section 10 of the CLA provides as follows:

> **Effect of death on certain causes of action**
>
> **10.**—(1) Subject to this section, ***on the death of any person***, *all causes of action subsisting against or vested in him shall survive against,* or, as the case may be, for the benefit of his estate.
>
> (2) Subsection (1) shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.
>
> (3) Where a cause of action survives as specified under subsection (1) for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —
>
> ***(a) shall not include —***
>
> (i) any exemplary damages; and
>
> ***(ii) any damages for loss of income in respect of any period after that person's death;***
>
> …
>
> [emphasis added in italics and bold italics]

218 The wording of ss 10(1) and 10(3)(*a*) of the CLA is ***clear***. Damages for loss of income "in respect of any period after that person's death" are disallowed (see the Transfer Judgment at [92]–[93]). The provisions do not place any qualification or restriction upon the time period in which death needs to occur

before they come into play. This indicates that they come into play the moment a claimant or would-be claimant has passed away.

219 As was explained at [92] of the Transfer Judgment, this approach makes sense when one considers the purpose of the provision which was explained by the then Second Minister for Law, Professor S Jayakumar, on 4 March 1987 (see *Singapore Parliamentary Debates, Official Report* (4 March 1987) vol 49 at col 67). In gist, Parliament was concerned that double compensation may be payable in cases where the deceased claimant's dependents are not beneficiaries of the deceased's estate. In such cases the wrongdoer may have to pay damages both to the deceased's estate for lost years and to his or her dependents for loss of dependency. Parliament was aware that the claim for "lost years" (*ie*, loss of income and CPF contributions) "is often higher than the 'loss of dependency claim'" and that "[i]n some cases, dependents may obtain damages which are more than their actual loss of dependency". However, the enactment of the provision was prompted by the need to eliminate the potential overlap between the two claims (see also the decision of the High Court in *China Taiping Insurance (Singapore) Pte Ltd and another v Low Yi Lian Cindy and others* [2018] 4 SLR 523 ("*China Taiping*") at [53] and [55]).

220 Further, as set out at [93] of the Transfer Judgment, the established case law also makes clear that s 10(3)(*a*)(ii) of the CLA excludes an estate's claim for loss of income in respect of *any period after the death* of the claimant (see the decisions of the High Court in *Lassiter Ann Masters (suing as the widow and dependant of Lassiter Henry Adolphus, deceased) v To Keng Lam (alias Toh Jeanette)* [2005] 2 SLR(R) 8 at [11] and [28]; *China Taiping* at [54]; as well as *AOD* at [192]). While the cases do not make a distinction between a claimant who passes away prior to the bringing of the action and a claimant who

passes away in the process of vindicating his or her claim, this is unsurprising given the clear and express words of the statutory provision as well as Parliament's expressed concern regarding double recovery.

221 Mr Rai's response to this is that ss 10(1) and 10(3)(*a*)(ii) of the CLA are precluded from applying to the AD Hearing and CA 39 in the first place. He submits that the question of liability had been completely resolved by this court in the first CA Judgment and, therefore, the *cause of action* had been resolved and was no longer surviving. Consequently, in Mr Rai's view, s 10(1) of the CLA is inapplicable to the present case.

222 In support of this point, Mr Rai cites the High Court decision of *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1992] 2 SLR(R) 382 ("*Multi-Pak*") (affirmed by this court in *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd* [1993] 1 SLR(R) 220) for two definitions set out by G P Selvam JC (as he then was) of what constitutes a "cause of action": (a) the facts which the plaintiff must prove in order to get a decision in his favour; and (b) the legal basis which entitles the plaintiff to succeed (at [29]–[30]). He claims that "the plaintiff" must refer to the living Ms Azlin because Ms Azlin's estate was not in existence at the time of the first CA Judgment. In his words "[t]he cause of action did not apply to the Estate because the Estate was not even the plaintiff".

223 We do not agree. While the first CA Judgment established that CGH was liable for the delay in diagnosis, Ms Azlin's cause of action in negligence is not simply extinguished once a conclusive finding of a breach of duty of care is made. Such a finding, on its own, does not entitle a plaintiff to damages or reliefs. Indeed, if it did, CA 39 would not exist in the first place. As Ms Kuah

points out, it is necessary for the court to also determine the extent of the injuries caused by the delayed diagnosis and the appropriate quantum of damages that can compensate for them.

224 The reference to *Multi-Pak* illustrates our point. The appellants cannot be said to have succeeded and/or received a decision in their favour if they have received none of the damages that they had sought against CGH in their SOC 2. Consequently, there is no merit in Mr Rai's submission that the cause of action no longer survives such that ss 10(1) and 10(3)(*a*)(ii) of the CLA do not apply. This being the case, s 10(3)(*a*)(ii) of the CLA statutorily bars the claim for loss of earnings and CPF contributions for the lost years.

225 Mr Rai's second argument that there is no "continuing cause of action" such that O 37 r 6 of the ROC cannot apply to the facts at hand must necessarily fail for the same reason that the first argument failed. Order 37 r 6 of the ROC requires that the damages due to the appellants be assessed on the basis of facts that are before the court at the time of the assessment (*ie*, the AD Hearing). Any other result would be illogical. As we explained to Mr Rai, the court cannot assess damages on the basis of a hypothetical situation, in a hypothetical world where Ms Azlin is both hypothetically alive and hypothetically unable to work.

226 Mr Rai's third argument that the Judge had erred in commenting that the appellants ought to have reconstituted their claim for loss of earnings and CPF contributions during the lost years as a claim for loss of inheritance must likewise fail in the light of our decision that the former claim is statutorily barred. The claim for loss of inheritance is an established one that applies precisely to compensate dependents for the moneys or other benefits that they stand to inherit from a plaintiff if the plaintiff had lived past the date of the

wrongful death (see s 22(1A) of the CLA). The Judge had therefore not erred in her comments.

227 We pause briefly to make some observations regarding Mr Rai's conduct of the appeal. During the hearing, after realising that the appellants' claim for loss of earnings and CPF contributions during the lost years was completely barred by virtue of s 10(3)(*a*) of the CLA, Mr Rai stated for ***the first time*** that the Judge had erred because the Judge had not granted the appellants an award for loss of inheritance which "[Ms Azlin] was still entitled to" and that the same evidence and pleadings that grounded her barred claim could and should be used to support a claim for loss of inheritance. In his words:

> Yes. So even if one takes the position that 10(1), 10(3) did kick in and apply, the outcome as per the judgment below is still wrong Your Honour, and I will say this because the essential difference between a claim by a living plaintiff as opposed to a claim by the estate under 10---under Section 10 and 20 is this, Your Honour. The law depends for there not to be a double recovery by a dependent, Your Honour, or a dependent. So what we have done, Your Honour, in this case we foresaw that – in fact I've been doing this for 30 years – and we foresaw that because---and what we have done is in the pleadings we actually gave a separate breakdown of the claim for the dependent and the only difference between the claim that is awarded to a living plaintiff as opposed to that of an estate is the wages, the day to day living expenses, and those usually are pegged at a sum of some 35%. ***So those facts were actually before the Court and they were also in evidence before the Court. So all the---and in fact in my submissions, although we didn't call it a 'loss of inheritance claim', we called it a 'claim by living plaintiff', the calculations did not differ because, essentially, what we did was, of course, CPF the figures didn't change.*** Of course, *we are not saying that she should receive an award for post-death, but the loss of inheritance part would still have been covered and she was still entitled to that, Your Honour.* And that, Your Honour, the only difference is that one takes out the day to day living expenses which we pegged at 35%. … [emphasis added in italics and bold italics]

In response to our queries on whether a claim for inheritance had ever been pleaded, Mr Rai stated that:

> … But even if Your Honours are of the view, and I take it Your Honours have formed the view that 10(1) and 10(3) did kick in to prevent because the legislation is quite clear on the face of it, even in that kind of situation, the---a plain by---***a loss for---a loss of inheritance and dependency were actually there on the pleadings. They were there.*** If I can just refer Your Honours to *volume 2, sub-volume 1 at page 34* of the bundle, Your Honour would see what I mean. It's under paragraph 16 of the pleadings, the statement of claim. [emphasis added in italics and bold italics]

228 Mr Rai's submissions were startling, to say the least. Before the Judge, Mr Rai had expressly disavowed any suggestion that the appellants wished to pursue a claim based on loss of inheritance (as is recorded in no unclear terms at [158] of the Judgment). Mr Rai takes the exact same position in the Appellants' Submissions and even uses it as a basis to attack the Judge's reasoning. Paragraph 17 of the Appellants' Case reads as follows:

> The Learned Judge erred by finding that the appropriate claim was for loss of inheritance under section 22(1A) of the CLA instead of one for loss of earnings (including CPF) for both [Ms Azlin's] living years and lost years. …

We find it to be entirely inapposite for Mr Rai to now turn around, do a *volte-face*, and cast blame upon the Judge for not adjudicating upon a claim that he himself had asked the Judge not to consider.

229 Furthermore, even if the facts and evidence which originally grounded the then living Ms Azlin's claim for future losses of income and CPF contributions could similarly ground a claim for loss of inheritance, the fact remains that *this head of claim had never been pleaded* – a fact that the Judge had expressly pointed out at [158] of the Judgment. Mr Rai's reference

to para 16 of SOC 2 to prove that a loss of inheritance claim had been pleaded was deeply misleading. What had been pleaded there was a claim for "Special Damages" and the particulars that were provided under para 16 were "Particulars of Loss of Future Earnings and or Loss of Earning Capacity" [emphasis in original omitted]. The two claims are different, not least because a loss of inheritance claim focuses on the *savings* of the deceased which would have been passed on to his or her dependents, while a claim for lost earnings focuses on the *earnings* of a living individual. From the standpoint of the quantum of damages, the former will necessarily be lower because it would, at the very least, have to factor in the deceased's expenses and may even include those of his or her dependents across the years (see the decision of this court in *Zhu Xiu Chun (alias Myint Myint Kyi) v Rockwills Trustee Ltd (administrators of the estate of and on behalf of the dependants of Heng Ang Tee Franklin, deceased) and other appeals* [2016] 5 SLR 412 at [125(a)] and [131]).

230 As we had observed during the hearing, Mr Rai's attempt to cobble together a claim for loss of inheritance from the pleadings on loss of future earnings and CPF contributions to make good his argument that "if [ss 10(1) and 10(3) of the CLA] kicked in, then what the learned Judge ought to have done was to then go ahead to consider whether the facts forming the basis for a loss of inheritance claim [existed]", was tantamount to an attempt to reconstruct the appellants' case *at the final stage of an oral hearing of an appeal*. This is impermissible.

231 It bears reiterating that the appellants had ample opportunity to amend their pleadings to alter their claim for loss of future earnings and CPF contributions or to plead a loss of inheritance claim as an *alternative claim* to loss of future income and CPF contributions, and to seek leave to adduce new

evidence to make good such a claim (for example, to prove the quantum of Ms Azlin's general monthly savings or her post-retirement expenses). Leave to refine or revise their evidence had been given to them *prior* to Ms Azlin's death at [125] of the first CA Judgment. *After* Ms Azlin's death, Mr Rai had been repeatedly alerted to the need to reconsider the appellants' pleadings. This was most explicit during the hearing of SUM 1204 on 20 August 2019 when Ms Kuah had specifically informed Mr Rai that there would be a need to re-quantify the claim for loss of future income and CPF contributions. Again, during the JPTC on 4 November 2019, Ms Kuah repeated her general concern with the state of appellants' pleadings.

232 The appellants have chosen not to avail themselves of any of the above-mentioned opportunities to advance an otherwise viable claim for loss of inheritance. Unfortunately, they must now live with the consequences of their choice. We affirm the Judge's decision to dismiss the claim for loss of earnings and CPF contributions during the lost years.

Issue 5: Aggravated and punitive damages

233 We affirm the Judge's decision on aggravated and punitive damages, and decline to award any damages for this particular claim to the appellants.

234 Punitive damages (also termed exemplary damages) are "meant to punish, deter, and condemn" and may be awarded "where the totality of the defendant's conduct is *so outrageous* that it *warrants punishment, deterrence, and condemnation*" [emphasis added] (see the decision of this court in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 ("*ACB*") at [156] and [176]).

235 On the other hand, aggravated damages are distinct from punitive damages and are awarded to *augment* a sum awarded in general damages to compensate for the enhanced hurt suffered by the plaintiff due to the aggravation of the injury by the manner in which the defendant committed the wrong or by his motive in so doing, either or both of which might have caused further injury to the plaintiff's dignity and pride (see *ACB* at [156]). In other words, aggravated damages are distinctly *compensatory* in nature (see the decision of this court in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629 ("*Freddie Koh*") at [75] and that of the High Court in *Lee Hsien Loong v Xu Yuan Chen and another suit* [2021] SGHC 206 at [68]) and are "parasitic" on the award of general damages (see the High Court decision of *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667 ("*Li Siu Lun*") at [156]).

The Judge's decision

236 The Judge dismissed the claims on the basis that the appellants had failed to plead any claim for aggravated or punitive damages despite their counsel, Mr Rai being alerted to this omission by the Judge (see the Judgment at [188]–[192]). The Judge was also of the view that the claims were "contrived" and "nothing more than an attempt to increase the quantum of the recoverable damages for the Estate" (see the Judgment at [193]).

237 In any event, the Judge found no evidence of any contumelious or exceptional conduct or motive on CGH's part in inflicting the injury on Ms Azlin (see the Judgment at [194]–[195]). The Judge also did not think that the sum awarded in general damages was strikingly inadequate so as to require augmentation by way of aggravated damages (see the Judgment at [193]). As for punitive damages, the Judge held that there was no basis to award this given

that s 10(3)(*a*)(i) of the CLA statutorily outlaws such a claim. Even if this was not the case, CGH's conduct was not so outrageous as to warrant an award of punitive damages (see the Judgment at [196]–[201]).

The parties' arguments

238 Mr Rai submits that aggravated and/or punitive damages should be granted at twice the amount of general damages awarded in this case. CGH acted reprehensibly by: (a) concealing the flaws in its system and disputing the appellants' claim since January 2015, putting them "to strict proof on all issues at trial, at the [Court of Appeal] and throughout the [AD Hearing]"; (b) withholding the discovery of important evidence and engaging "hired gun[s]" such as Dr Lynette Teo "to come up with dubious readings of the nodule" and who even "whitewashed the evidence"; and (c) refusing to explore a settlement with the appellants. Mr Rai alleged that the "high-handedness of [CGH] towards [Ms Azlin] … was calculated to aggravate her stress and to incur the expense of having to engage experts to prove her case" and even put "[Ms Azlin] through the rigours of a full and prolonged trial and subjected her to the worst humiliation conceivable".

239 During the hearing, Mr Rai raised a new instance of alleged misconduct on the part of CGH – namely, that it had sought to vacate the trial that was originally fixed in March 2016 such that the Original Hearing only occurred in 2017. This delay prejudiced the conduct of the appellants' case because Ms Azlin's condition had deteriorated by the time of trial, which in turn hampered her ability to gather and collect the relevant documentary evidence in readiness for trial. This was the first time an argument had been raised to the effect that CGH's application to vacate trial in 2016 warranted an award of aggravated damages (albeit that Mr Rai had previously taken issue with CGH's

alleged "attempts to delay proceedings" generally). Mr Rai also referred us to his reply submissions before the Judge which repeated many of the same points in the Appellants' Submissions (see above at [238]).

240 Mr Rai submits that the award of general damages is strikingly inadequate given that Ms Azlin died, and aggravated damages are necessary because of the allegedly reprehensible conduct detailed above.

241 Mr Rai claims that punitive damages should be awarded because: (a) there is a strong impetus to deter similar conduct by other healthcare providers; (b) CGH's conduct was outrageous; (c) CGH displayed a sustained pattern of indifference and deceit and (d) its conduct showed a sustained pattern of systemic errors which were life threatening and did, in fact, led to death.

242 In response to the Judge's point that aggravated and punitive damages must be specifically pleaded, Mr Rai states that it is unreasonable to expect this as CGH's reprehensible conduct could not have been foreseen at the commencement of the action in 2015. Even if aggravated and punitive damages must be pleaded, the court is seised of jurisdiction by virtue of O 33 r 2 of the ROC to award such damages, even if they are not pleaded. Mr Rai adds that CGH was not prejudiced as it had been notified of the appellants' intention to claim aggravated and punitive damages as far back as 8 March 2019.

243 Ms Kuah aligns herself with the Judge.

Our decision

244 While CGH did not contest the availability of aggravated damages in cases of medical negligence (see the Judgment at [190]), Ms Azlin's claim for

aggravated and/or punitive damages suffers from a number of fundamental difficulties. These include: (a) the statutory bar under s 10(3)(*a*)(i) of the CLA in respect of any claim for punitive damages after a claimant's death; (b) the absence of any pleading in support of a claim for aggravated and/or punitive damages (see also the Judgment at [188])*;* and (c) the fact that no evidence had ever been led whether at the Original Hearing or at the AD Hearing as to these two heads of claim.

245 Chief amongst these various difficulties is the fact that Ms Azlin's pleadings are bereft of any mention of aggravated and/or punitive damages and therefore provide no indication that a claim quantified at twice the sum of general damages awarded is being brought against CGH. The claim for general damages already stood at $4,471,523.35 – no paltry sum by any measure (see above at [35]). It was therefore curious that the claimed sum for aggravated and/or punitive damages, a staggering sum of $8,943,046.70, found no foothold whatsoever in the pleadings.

246 As a result of this anomalous state of affairs before us, it is necessary for us to answer the anterior question of whether it is open to the appellants to seek aggravated and/or punitive damages, in circumstances where no such claim had ever been pleaded, before we can consider whether such damages can and ought to be awarded in the present case. In other words, the question is *whether aggravated and punitive damages must be specifically pleaded in order for them to be claimed and granted*.

247 We answer this question in *the affirmative* as such a requirement is in line with the general rules concerning the necessity of pleadings, the "exceptional" nature of both forms of damages as well as the purpose and object

of pleadings. As this is a point of law which has witnessed conflicting opinions from various decisions of the High Court, we take some time to lay out our analysis in detail.

The general rules on pleadings and the "exceptional" nature of aggravated and punitive damages

248 We begin by considering the procedural rules governing pleadings as set out in the ROC.

249 As a starting point, the relevant provisions concerning the general rules on pleadings, and in particular statements of claim, contained within O 18 of the ROC, do not provide any specific guidance as to whether a claim for punitive or aggravated damages must be pleaded specifically, nor have the parties pointed us to any rules to this effect. The relevant provisions read as follows:

> **Facts, not evidence, to be pleaded (O. 18, r. 7)**
>
> **7**.—(1) Subject to this Rule and Rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
>
> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.
>
> (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

…

Particulars of pleading (O. 18, r. 12)

12.—(1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —

(*a*) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(*b*) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(1A) Subject to paragraph (1B), a plaintiff in an action for personal injuries shall serve with his statement of claim —

(*a*) a medical report; and

(*b*) a statement of the special damages claimed.

…

Statement of claim (O. 18, r. 15)

15.—(1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the endorsement of the writ without amending the endorsement.

250 Order 78 r 3(3A) of the ROC makes mention of the need to specifically plead aggravated damages in stating that:

Obligation to give particulars (O. 78 r. 3)

…

> (3A) *Without prejudice to Order 18, Rule 12*, the plaintiff must give full particulars in the statement of claim of the facts and matters on which he relies in support of his claim for damages, including details of any conduct by the defendant which it is alleged has increased the loss suffered and of any loss which is peculiar to the plaintiff's own circumstances. [emphasis added]

However, this provision applies specifically to defamation actions and cannot simply be extrapolated to a claim for aggravated damages *generally* − a point made patently clear by the words italicised above. In addition, O 78 r 1 of the ROC states unequivocally that the rules contained within O 78 of the ROC only "apply to actions for libel or slander".

251 In the absence of specific provision(s) in the ROC, the general rules must apply, in particular, O 18 rr 7 and 15 of the ROC (which have been reproduced above).

252 Order 18 r 15 of the ROC is of the greatest relevance to the present case as it pertains specifically to Statements of Claim (and also counterclaims by virtue of O 18 r 18(*a*) of the ROC), the pleading in which a plaintiff's claim for aggravated or punitive damages is usually found. It requires the plaintiff to "state specifically the relief or remedy which the plaintiff claims". As a matter of practice, the plaintiff will generally have the prayer for relief or remedy at the end of the statement of facts where he sets out separately and distinctly in numbered paragraphs the items of relief or remedy which are claimed (see *Singapore Civil Procedure 2021: Volume I* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure*") at para 18/15/1) .

253 In the event that the relief or remedy claimed is general and non-specific, for example, a claim for general damages, the plaintiff need only state that he claims damages. A simple, "the plaintiff claims damages" will suffice. Further

particularity is not necessary because the law *presumes* damage which is the natural and probable consequence of the wrong suffered (see Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2021) ("*Singapore Court Practice*") at para 18/15/1).

254 Conversely, where special damages or specific remedies are sought, such relief must be set out separately (see *Singapore Civil Procedure* at para 18/15/1 and *Singapore Court Practice* at para 18/15/1). As stated by Chao Hick Tin J (as he then was) in *The "Shravan"* [1999] 2 SLR(R) 713 at [77]:

> … Special damage … is such a loss as the law will not presume to be the consequence of the defendant's act, but such as depends in part, at least on the special circumstances of the particular case. It must therefore be always explicitly claimed on the pleading, as otherwise the defendant would have no notice that such items of damage would be claimed from him at the trial.

The above passage remains good law and was recently cited with approval by this court in *Crest Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals* [2021] 1 SLR 1337 at [211].

255 Despite the different rules in respect of different *types* of relief and remedies under O 18 r 15(1) of the ROC, one point is clear. Even in respect of the most uncontroversial head of damage which the law is prepared to presume as arising out of the wrong suffered, there remains a requirement to state the relief claimed. The question here is whether the words "AND the Plaintiff claims … Damages to be assessed" [emphasis in original omitted] in Ms Azlin's SOC 2 dated 8 January 2016, suffice to enable a claim for ***aggravated and punitive*** *damages*.

256 It may be recalled that we had provided an overview of the two categories of compensatory damages in personal injury cases – *ie*, general damages and special damages, at [56] above. Punitive damages are awarded when conduct is "so outrageous that it warrants punishment, deterrence, and condemnation". This being the case, it is clear that punitive damages fall *outside* these categories of *compensatory* damages (see *ACB* at [176]). Aggravated damages are *compensatory* in nature. However, they too fall *outside* these categories because they are awarded *over and above* general compensatory damages (see, for example, the decision of this court in *Freddie Koh* at [75]–[77] which draws the distinction between general damages and aggravated damages, as cited with approval in *ACB* at [156] and in *Li Siu Lun* at [151]). The sense in which "general damages" and "special damages" are used at [56] above, is not, however, the same sense in which those exact words are used in relation to O 18 r 15(1) of the ROC.

257 We pause briefly at this juncture to unpack the meaning of the terms "general damages" and "special damages" as used above at [252]–[254]. These words are used in a variety of different, albeit legitimate, senses in the law and are apt to cause confusion if not properly contextualised and identified. A helpful guide to this is found in *McGregor* at paras 3-002–3-006, as follows:

> [3-002] The first meaning of general and special damage concerns liability: it relates principally to contract, coinciding with the distinction between the well-known first and second rules in *Hadley v Baxendale* which are dealt with later. It is best expressed by Lord Wright in *Monarch SS Co v Karlshamns Oliefabriker,* where he said:
>
> > 'The distinction there drawn [in *Hadley v Baxendale*] is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties. In the latter event it is laid down that the special facts must be

> communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages.'

…

[3-003] The second meaning of general and special damage concerns proof: it has more connection with tort, but the clearest statement comes in a contract case, *Prehn v Royal Bank of Liverpool,* where Martin B put the distinction thus:

> 'General damages … are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man. Special damages are given in respect of any consequences reasonably and probably arising from the breach complained of.'

This type of general damage is usually concerned with non-pecuniary losses, which are difficult to estimate, the principal examples being the injury to reputation in defamation and the pain and suffering in cases of personal injury. Pecuniary loss is also to be found as general damage within this meaning, both in contract and in tort. In tort there is the loss of business profits caused by the defendant's inducement of breach of contract or passing off or the defendant's libelling of the claimant. So too in the event of a person's goods being tortiously damaged, whereas a claim for the cost of replacement goods hired during the goods' repair requires proof of special damage, in the absence of a hiring of replacement goods, or of a liability for such, a claimed loss of use has to be proved as general damage. In contract there is injury to credit and reputation caused by the defendant's failure to pay the claimant's cheques or honour their drafts. These are pecuniary losses which it is difficult to estimate at all accurately.

…

[3-005] The third meaning of general and special damage concerns pleading. The distinction here is put thus by Lord Dunedin in *The Susquehanna*:

> 'If there be any special damage which is attributable to the wrongful act that *special damage must be averred and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question.*'

And in *Ströms Bruks Aktie Bolag v Hutchinson* Lord Macnaghten, after stating that he thought the division into general and special damages was more appropriate to tort than contract, said:

> *'"General damages" … are such as the law will presume to be the direct natural or probable consequence of the action complained of. "Special damages", on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly.'*

Here, in pleading, general damage is wider than its second meaning, for it includes losses the amount of which the law will not presume since this is capable of calculation, and therefore evidence to assist the court in doing the calculation must be given if the claimant wishes to obtain substantial damages on the general head. Thus, in a personal injury case, loss of future earning capacity and future expenses are general damage in pleading but the claimant must clearly give evidence of amount. On the other hand, general damage in pleading tends to be narrower than its first meaning. Thus, in a personal injury case again, the loss of earnings and the expenses incurred between injury and trial must be pleaded as special damage; yet they are ordinary foreseeable consequences. The present distinction is set out in regard to personal injury cases by Lord Goddard in *British Transport Commission v Gourley* where he said:

> 'In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.'

…

[3-006] The fourth meaning is a meaning of special damage only. To the rule that when a tort is actionable upon proof of damage not all damage is special damage, there are two clear exceptions: the case of most slanders and the case of public nuisance. Since no action lies in respect of general damage to reputation in the first case, all damage is called special; and

> since in the second case no action is available to an individual for damage which is to the public generally, all damage, again, is called special. The last meaning touches upon both liability and pleading: liability depends upon the existence of the special damage, and the action will fail if the special damage is not pleaded.
>
> [emphasis added]

258 The third meaning of "general damages" and "special damages" is specific to pleadings and is squarely applicable to our analysis on whether aggravated and punitive damages must be specifically pleaded. As stated in *McGregor* and as laid out above at [253]–[254], the core distinction between "general damages" and "specific damages" in the context of pleadings is that only the latter must be specifically pleaded. This is for two reasons. First, facts warranting the grant of special damages are not those that the law will presume to be the natural, direct or probable consequences of the action complained of. They do not follow from the action complained of in the ordinary course. Second, and as a corollary to the first reason, they are exceptional in character.

259 In our judgment, it follows inexorably from the above distinction that aggravated and punitive damages constitute "special damages" for the purpose of pleadings. Neither follow in the ordinary course and both are exceptional in character. Let us explain.

260 Punitive damages are wholly anomalous and therefore awarded only exceptionally. First, they are a "response to conduct which is beyond the pale and therefore deserving of special condemnation" (see *ACB* at [176]). Such conduct is necessarily rare – it does not follow in the ordinary course. Second, they are exceptional in nature because they represent a *departure* from the general rule that damages in tort are awarded to *compensate* a plaintiff for wrongs suffered and to place him back in the same position as if the tortious

wrong had not been committed (see above at [58]). The law therefore does not and cannot presume that conduct giving rise to or arising in connection with a tort is "outrageous" or deserving of "punishment, deterrence, and condemnation". Such conduct must be pleaded and proved to the satisfaction of the court. We therefore agree with the approach taken by the Judge at [192] of the Judgment, as well as in cases such as *AKRO Group DMCC v Discovery Drilling Pte Ltd* [2019] 4 SLR 222 at [164]–[165] that punitive damages must be specifically pleaded and particularised.

261 In a similar vein, aggravated damages are awarded only when the plaintiff is able to show that there is "contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress, as the case may be" (see *Li Siu Lun* at [138], citing the High Court decision of *Tan Harry and another v Teo Chee Yeow Aloysius and another* [2004] 1 SLR(R) 513 ("*Tan Harry*") (affirmed by this court in *Teo Chee Yeow Aloysius and another v Tan Harry and another* [2004] 3 SLR(R) 588) at [82])). Furthermore, aggravated damages are unique because they are awarded for the *aggravation of injury* by the manner in which the defendant committed the wrong or by his motive in doing so, either or both of which might have caused further injury to the plaintiff's dignity and pride (see *ACB* at [156], citing *Freddie Koh* at [75]–[77] with approval). Crucially, this occurs in circumstances where the normal measure of general compensatory damages, *which is usually sufficient to compensate plaintiffs for their loss*, is insufficient so as to require a *further* compensatory award, *over and above* an award of general compensatory damages. This enhanced hurt must therefore be proved specifically by the plaintiff to the satisfaction of the court. In short, there is nothing ordinary about aggravated damages, and nothing for the law to presume. It is for this reason that there is a long line of cases in support of the

proposition that aggravated damages must be pleaded specifically and with particularity (see, for example, *Li Siu Lun* at [163] and *Tan Harry* at [83]). As succinctly put by the authors of *Bullen & Leake & Jacob's Singapore Precedents of Pleadings* (Jeffrey Pinsler SC gen ed) (Sweet & Maxwell, 2016):

> **25.08** In *special circumstances*, the court may grant additional damages as aggravated damages. *The facts which 'aggravate' the plaintiff's loss must be pleaded*, for example exception or contumelious conduct or motive, and malice. [emphasis added]

This same point was also made by the authors of *Singapore Civil Procedure* at para 18/12/13 as follows:

> *The facts relied on to support a claim for aggravated damages should be specifically pleaded* (*Perestrello e Companhia Limitada v. United Paint Co. Ltd.* [1969] 1 W.L.R. 570; [1969] 3 All E.R. 479, CA (Eng), *Rookes v. Barnard* [1964] A.C. 1129; [1964] 1 All E.R. 367). Where the facts relied on do not support such a claim, the claim may be struck out (*A.B. v. South West Water Services Ltd.* [1993] Q.B. 507; [1993] 2 W.L.R. 507; [1993] 1 All E.R. 609, CA (Eng)). [emphasis added]

262 In so far as the High Court decision of *Lee Kuan Yew and another v Vinocur John and others and another suit* [1995] 3 SLR(R) 38 ("*Vinocur John*") stands for the proposition that aggravated damages do not need to be specifically pleaded (at [37]), we do not, with respect, think that this case ought to be followed.

263 First, the case must be understood in its specific context as distinguished from the case before us in CA 39 which concerns aggravated damages generally. *Vinocur John* concerned two defamation suits in which an issue before the court was "whether aggravated damages on grounds of malice and for injury to feelings were *encompassed* within the plaintiffs' pleadings" [emphasis added]. Crucially, this particular issue was raised in circumstances where the statements of claim had already alleged that the plaintiffs had "been

gravely injured in [their/his] character, credit and reputation" and had been brought "into public scandal, odium and contempt" (at [29]).

264 The High Court held that the latter set of words were similar to the ancient formula of "hatred, ridicule and contempt" and a plea containing this ancient formula would already include a claim for mental distress, which is a claim for injury to feelings. Furthermore, the claim for aggravated damages for injury to feelings would, in any event, have fallen within the ambit of what had already been pleaded in the plaintiffs' statements of claim (as quoted above at [263]).

265 In arriving at the above conclusion, the High Court was influenced in no small part by the unique features of the case as *a defamation suit*. At [47], the court held that "injury to the feelings of the plaintiffs … must be the ***necessary and immediate consequence*** of the injury to their character, credit and reputation and their being brought into public scandal, odium and contempt" [emphasis added]. In other words, the court appears to have viewed aggravated damages in the context of a defamation suit as a part of "general damages" and, in so far as they are the necessary and immediate consequences of the defendant's wrong, they could be encompassed in a claim for general damages such that a specific plea would not be necessary. Indeed, this is the way in which *Vinocur John* has been interpreted (see *Singapore Civil Procedure* at paras 18/8/14 and 18/12/13 and *Singapore Court Practice* at para 18/15/3). An award of aggravated damages in a defamation action is however distinguishable from an award of aggravated damages generally, as the latter requires contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress.

266 Second, the proposition in *Vinocur John* that aggravated damages do not need to be specifically pleaded is no longer good law *even in the specific context of defamation*. After the release of the judgment in August 1995, the then existing Rules of Court (Cap 322, R 5, 1990 Ed) were amended in 1997 to include a new O 78 r 3(3A) of the ROC which presently states as follows:

> Without prejudice to Order 18, Rule 12, the plaintiff must give full particulars in the statement of claim of the facts and matters on which he relies in support of his claim for damages, including details of any conduct by the defendant which it is alleged has *increased the loss suffered* and of any loss which is peculiar to the plaintiff's own circumstances. [emphasis added]

The incontrovertible position following the introduction of O 78 r 3(3A) of the ROC is this: aggravated damages in the context of defamation actions must be specifically pleaded and accompanied by full particulars of the facts or matters upon which the plaintiff relies upon in support of such a claim (see *Singapore Court Practice* at para 18/12/5). The proposition in *Vinocur John* that aggravated damages do not need to be specifically pleaded is now dated and is, with respect, no longer good law. In so far as it pertains to aggravated damages generally, it has been superseded by developments in the law which emphasise the exceptional nature of aggravated damages generally. In so far as it pertains to aggravated damages in the context of defamation actions which frequently feature before our courts, the position has since been modified by O 78 r 3(3A) of the ROC.

267 To summarise, aggravated and punitive damages are exceptional in character and do not follow in the ordinary course. As such, they can rightly be characterised as special damages in the third sense elucidated in *McGregor* and pursuant to O 18 r 15(1) of the ROC, must be specifically pleaded, with particularity.

268 Our conclusion above can be further supported by the ordinary application of O 18 r 7(1) of the ROC which requires that every pleading contain a statement in a summary form of the "material facts on which the party pleading relies for his claim or defence". As explained by the High Court in *Kalzip Asia Pte Ltd v BFG International Ltd* [2018] SGHC 152 at [106], material facts refer to "all the facts which constitute a cause of action or defence so that [the party] will be in a position to offer evidence of them at trial". However, as stated in *Singapore Court Practice* at para 18/7/2:

> … [T]he pleader is not limited to facts which establish a cause of action or defence. The scope of materiality extends to any fact that may be proved by evidence at the trial. …
>
> The point is that there may be many facts which are not material to the cause of action but which ought to be pleaded because they will be in issue at the trial, and the parties ought to be notified of them to avoid surprise at the trial. …

269 As Lord Selbourne LC observed in *Millington v Loring* (1880) 6 QBD 190 (cited in *Singapore Court Practice* at para 18/7/2):

> The rule provides that, 'Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies'. If those words, 'material facts', are to be confined to matters which are material to the cause of action, that is to say, facts which must be proved in order to establish the existence of the cause of action, then no doubt the facts in this paragraph were not properly pleaded. *But in my opinion those words are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial.* … [emphasis added]

270 If punitive damages are sought, the material facts would presumably include some elaboration of the "outrageous conduct" that would have to be proven for such damages to be awarded. Likewise, if aggravated damages are sought, the material facts would presumably include some allegation of the manner of, or motive behind, the offending conduct, which resulted in enhanced

losses that justify an award of aggravated damages above the usual measure of compensatory damages. These are the types of material facts which should have been pleaded.

271 To summarise, we hold that aggravated and punitive damages must be pleaded specifically and with particularity, in line with the general rules concerning pleadings in the ROC and the "exceptional" nature of an award made in respect of such damages.

The purpose and object of pleadings

272 The purpose and object of pleadings was succinctly explained in the decision of this court in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") as follows (at [36]−[38]):

> 36 … [P]leadings delineate the parameters of the case and shape the course of the trial. They define the issues before the court and inform the parties of the case that they have to meet. They set out the allegations of fact which the party asserting has to prove to the satisfaction of the court and on which they are entitled to relief under the law. Adherence to the rules of pleadings promotes good case management and results in cost and time saving efficiencies. In an age of burgeoning volume and complexity of modern litigation, adequate pleadings are necessary to reduce inefficiencies in the dispute resolution process, and they tend to increase the productivity of lawyers and courts alike.
>
> 37 Equally important to the principle of fairness, pleadings also serve to uphold the rules of natural justice (*Sheagar s/o TM Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ('*Sheagar*') at [94]). Parties are expected to keep to their pleadings because it is only fair and just that they do so – to permit otherwise is to have a trial by ambush. Every litigant is entitled as a matter of procedural fairness to be informed of his opponent's case in advance and to challenge his veracity in cross-examination at the trial. …

> 38 Thus, the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. …
>
> [emphasis in original omitted]

273 In our judgment, the reasons elucidated above apply with especial force in the context of aggravated and punitive damages so as to require the claim for such damages to be specifically pleaded and particularised. As the Judge rightly observed at [192] of the Judgment, a claim for aggravated damages must be pleaded because the defendant ought to be given full and early notice that the plaintiff is pursuing a claim for aggravated damages so as to have adequate opportunity to adduce evidence to respond to the plaintiff's claim that the defendant had aggravated the plaintiff's injury by the manner in which the defendant committed the wrong or by his motive in so doing. This consideration applies with even greater force to punitive damages. It is absolutely critical, and a matter of justice, that would-be defendants be given an adequate opportunity to respond to a claim that they had acted in an outrageous fashion, not least because an award of punitive damages by the court serves a condemnatory function in respect of defendants, and takes the further step of making an example out of them.

274 All this, however, is subject to an important caveat: important as pleadings are, the court should not adopt an overly formalistic and inflexibly rule-bound approach which might result in substantive injustice (see the decision of this court in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 at [46]). In the same vein, this court observed in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 at [16] that "[t]he entire spirit underlying the regime of pleadings is that each party is aware of the

respective arguments against it and that neither is therefore taken by surprise". In cases where no party is taken by surprise and no party will be prejudiced irremediably by the raising of unpleaded claims or arguments (for example, in cases where the objecting party can be adequately compensated with costs (see the decision of this court in *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [35])), the court *may* allow the raising of unpleaded claims and arguments. That said, we reiterate that cases where it is clear that no prejudice will be caused by the reliance on an unpleaded cause of action or issue that has not been examined at the trial are likely to be uncommon (see *V Nithia* at [41]). Given the nature of aggravated and punitive damages and the manner in which they are awarded, the threshold that must be crossed before the court is satisfied that it is permissible to consider such unpleaded and unparticularised claims will be high and will rarely, if ever, be crossed.

Application

275 Given our conclusion on the relevant principles of pleadings governing claims for aggravated as well as punitive damages above, Ms Azlin's claim for aggravated and/or punitive damages fails at the outset for want of pleading.

276 We do not see any compelling reason that would warrant a departure from the rule that aggravated and punitive damages must be specifically pleaded and particularised, or for us to exercise our power under O 33 r 2 of the ROC to broaden the damages assessment inquiry before us to also consider these unpleaded claims (see *ACB* at [22]). The appellants had been informed as early as August and November 2019 that there were various deficiencies in their pleadings, including the complete absence of any pleaded claim for aggravated or punitive damages. If, as Mr Rai claims, the appellants fully intended to claim aggravated and punitive damages at an "early" stage and went so far as to notify

CGH by way of Ms Azlin's affidavit dated 8 March 2019, they had ample time and opportunity to amend their pleadings. Having chosen their course of action, the appellants must now abide by it and accept the logical consequences flowing from it. The claim for aggravated and/or punitive damages is dismissed.

277 We add that even if aggravated and/or punitive damages are claimable notwithstanding the failure to plead such damages, the appellants' claim is bound to fail for the simple reason that CGH's conduct is self-evidently not "reprehensible". We do not doubt that Ms Azlin and her family have suffered greatly from the pressures of litigation. However, being required to prove their claims on the stand and having their claims contested by CGH is part and parcel of the ordinary process of litigation in the courts.

278 As for Mr Rai's new argument that aggravated damages are warranted as CGH had vacated the trial in 2016, Ms Kuah has clarified that CGH's application to vacate the trial in HC/SUM 454/2016 ("SUM 454") was pursued on the basis that the appellants had decided to "put in very substantial amendments to their pleadings" which CGH required time to analyse and take follow-up action for. Indeed, these very same points were made in an affidavit filed by Ms Kuah in support of SUM 454 on 29 January 2016. The more fundamental point, however, is this – parties are not allowed to raise new *factual* arguments on appeal without leave of court, and certainly not for the first time at the very belated stage of the oral arguments.

279 We therefore agree with the Judge that no aggravated or punitive damages are claimable on the facts of this case.

Issue 6: Costs for the AD Hearing

280 The Judge took the view that not all the costs incurred by the winning party (*ie*, the appellants) were incurred in pursuing claims bearing a reasonable relationship to the dispute. As such, she awarded the appellants $105,000 in costs (see the Judgment at [224]).

281 Mr Rai submits that the costs award was "manifestly low" because the AD Hearing spanned two weeks from 24 August 2020 to 4 September 2020 and there were three rounds of written submissions. The costs award ought to be increased to $258,600.

282 We do not agree with Mr Rai. As Ms Kuah points out, Appendix G of the Supreme Court Practice Directions states that party-to-party costs for assessment of damages trials attract a daily tariff of $8,000–$12,000, with 80% of the tariff to be applied from the sixth to tenth day of trial. Even if one were to apply the highest end of the range, party-to-party costs would only come up to $69,600. We add that Mr Rai does not provide any breakdown or explanation for his figure of $258,600 which is 4.1 times the highest reasonable estimate in Appendix G.

283 To sum up, the Judge's award of costs for the AD Hearing is not "manifestly low". It in fact inclines towards the high side.

Conclusion

284 We award the appellants a combined sum of **$343,020.61** in damages and $105,000 in costs for the AD Hearing, the breakdown of which can be found at [5] above. The appellants' appeal is allowed in part.

285 In so far as the question of the costs of this appeal are concerned, we note that the appellants have, to some extent, succeeded on a number of points in this appeal. That said, the appellants have also raised a number of points which were unsuccessful. In all the circumstances, we think the fairest order would be to make no order as to the costs for CA 39 save for disbursements which we fix at $12,890.13 (as quantified by the appellants) to be paid by the respondent to the appellants.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Vijay Kumar Rai and Jasleen Kaur (Arbiters Inc Law Corporation) for the appellants;
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