THE PROMISE OF UNIVERSALITY

The *Spandeck* Formulation Half a Decade on

The landmark decision by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 undoubtedly broke new ground in Singapore by unifying inconsistent case law into a single, universal test for determining a duty of care in the law of negligence. This article surveys how the *Spandeck* formulation has been applied by the Court of Appeal in the last half decade, and evaluates its effectiveness in the determination of duty in a wide range of scenarios involving different types of harm. It aims to provide a set of practical guidelines that will benefit the legal community in advising clients, drafting pleadings, framing submissions for court, and even drafting of judgments.

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I. Introduction

1 In 2007, the Singapore Court of Appeal declared in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* ("*Spandeck*")[1] "a *single* test … to determine the imposition of a duty of care in all claims arising out of negligence, *irrespective* of the *type* of the damages claimed".[2] The preference for this two-stage test set aside other tests, such as those based on assumption of responsibility,[3] pure policy[4] or incrementalism. The court has since adhered to its bold claim of

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1 [2007] 4 SLR(R) 100.

2 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [71]. See also *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [115].

3 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181.

4 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27.

universality; a year later in *Ngiam Kong Seng v Lim Chiew Hock* ("*Ngiam*"),[5] it reiterated "the ideal envisioned in *Spandeck* of having 'a single test'" [citation omitted][6] but conceded that "in determining whether the requisite proximity is present in a particular case, much will turn on the precise factual matrix concerned".[7] The court explained there that "there must, in principle as well as in logic, justice and fairness, be a *holistic and integrated* analysis of the relevant factual matrix *both* from the perspective of *proximity* (as between *the parties*) *and* from the perspective of *public* policy (on a *broader societal* level)".[8] The elegant statement of the *Spandeck* formulation belies its doctrinal complexity.[9] Indeed, the search for a definitive test to determine whether a duty of care should be imposed for negligence liability has plagued common law jurisdictions for over half a century. From a two-stage test in *Anns v Merton London Borough Council* ("*Anns*")[10] to a three-part test in *Caparo Industries plc v Dickman* ("*Caparo*")[11] to a multi-factorial approach in *Graham Barclay Oysters v Ryan* ("*Graham Barclay Oysters*"),[12] courts have experimented with different formulations with varying degrees of success. The disparate types of harm that a claimant may suffer, coupled with the myriad factual scenarios in which the harm may arise, present significant challenges for any test that claims to be capable of being universally applied to all claims arising out of negligence.

2 This article surveys how the *Spandeck* formulation has been applied by the Singapore courts in the last half decade, and evaluates its effectiveness in the determination of the existence of a duty of care in a wide range of scenarios involving different types of harm.[13] It ultimately endeavours to provide a set of *practical* guidelines that will benefit "the daily business of advising clients, drafting pleadings, framing submissions

5 [2008] 3 SLR(R) 674.

6 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [123].

7 The different factual factors that may be relevant to evaluating whether the requisite proximity under the *Spandeck* formulation is present in particular factual scenarios have been explored in an earlier article. See David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459.

8 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [54].

9 A lengthy exposition of the allure of the two-stage test in *Anns v Merton London Borough Council* [1978] AC 728, upon which the *Spandeck* formulation is based, may be found in Andrew Phang, Saw Cheng Lim & Gary Chan, "Of Precedent, Theory and Practice – The Case for a Return to *Anns*" [2006] Sing JLS 1. See also *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73], *per* Chan Sek Keong CJ: "We would admit at this juncture that this is basically a restatement of the two-stage test in *Anns*."

10 [1978] AC 728.

11 [1990] 2 AC 605.

12 (2002) 211 CLR 540.

13 This article is not an evaluation of *Spandeck* itself, but rather an analysis of what has gone on after *Spandeck*, and how the principles enunciated in *Spandeck* have been applied and improved.

for court, and even drafting of judgments".[14] In this light, Part II considers the *Spandeck* formulation's claim of universality and the challenges of applying a "single test" to different types of harm. Drawing from the identified limitations of universality, it postulates how particular types of harm may influence the stage-wise application of the *Spandeck* test. Parts III, IV and V then discuss the role and the merits of the *Spandeck* requirements of factual foreseeability, proximity and public policy respectively, and evaluate how the Singapore courts have applied the *Spandeck* formulation to different factual scenarios.

II. Examining the universality claim

3 The *Spandeck* formulation has been referred to as a "universal" test. To understand this, it is necessary to differentiate between degrees of universality. More particularly, the *Spandeck* claim of universality is to be understood as a universal framework, and not as a universal test to be applied identically in every case. The type of harm suffered will therefore affect the factors relevant to each stage of the *Spandeck* formulation, without affecting the claim of universality.

A. Different degrees of "universality"

4 The decided cases reveal two definitions of universality. The broad definition posits that the *same* test applies in every fact situation, independent of nuanced considerations of particular facts. A narrow definition provides that the same *framework* always applies but this does not preclude consideration of factors that may not be universally applicable. This narrower sense of universality can be seen when the premise of universality is contrasted with an approach based on specific categories of people or situations.[15] Before *Heaven v Pender*[16] was decided, the existing liability was decided on the basis of fitting the relevant factual scenario into a pre-existing category where a duty of care had been held to exist.

5 The first hint of narrow universality came in *Heaven v Pender*,[17] where Brett MR, in a minority judgment, purported to find a general principle.[18] Brett MR's statement represented a departure from the category-based approach by formulating a general principle, which,

14 John Hartshorne, "Confusion, Contradiction and Chaos within the House of Lords post *Caparo v Dickman*" (2008) 16 *Tort Law Review* 8 at 9.

15 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 75. See, *eg*, *George v Shivington* (1869) LR 5 Ex 1.

16 (1883) 11 QBD 503.

17 (1883) 11 QBD 503.

18 *Heaven v Pender* (1883) 11 QBD 503 at 509.

if satisfied, would result in liability. In *Donoghue v Stevenson*,[19] this statement was to influence Lord Atkin's formulation of the "neighbour principle". While Lord Atkin thought Brett MR's statement too wide,[20] he did not disagree with the claim of generality embodied within. In fact, the main difference between the "neighbour principle" and Brett MR's statement is the addition of proximity to the statement.[21] The premise of narrow universality can be seen further in *Home Office v Dorset Yacht Co Ltd*,[22] where Lord Diplock made clear that both inductive and deductive reasoning were to be used in establishing duty. Inductive reasoning involves identifying the relevant characteristics common to the kinds of conduct and relationship between the parties, whereas deductive reasoning involves assessing whether, in all cases where the conduct and relationship possesses certain characteristics, a duty of care arises.[23] However, neither form of reasoning elevates the claim of universality to an immutable test. In fact, both mandate the need to consider past cases relative to the set of facts before the court. The claim for universality is thus a narrower one in that what is universal is only the general framework, not the test itself.

6 The broader sense of universality is usually thought to originate from *Anns*, where, amongst other things, Lord Wilberforce said that "in order to establish that a duty of care arises in a particular situation, it is *not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist*" [emphasis added].[24] This has been taken to mean that there was a "universal test which was applicable without resort to prior decisions".[25] This broader claim of universality forsakes all references to previous cases; the universality transcends being a mere framework to an *independent* and *exhaustive* test.

7 It is important to distinguish these two notions of universality. Later decisions cast doubt on the *Anns* test for suggesting too broad a sense of universality.[26] However, the error in contemporary analysis, exemplified by the House of Lords decision in *Caparo*,[27] is not distinguishing between these two versions of universality. The retreat from *Anns* went further than it needed to be. In *Caparo*, for example, Lord Bridge purported to prefer an "incremental approach"; to developing new categories of negligence via analogy to the establish

19 [1932] AC 562.
20 *Donoghue v Stevenson* [1932] AC 562 at 581.
21 *Donoghue v Stevenson* [1932] AC 562 at 581.
22 [1970] AC 1004.
23 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 76.
24 *Anns v Merton London Borough Council* [1978] AC 728 at 751.
25 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 78.
26 See, *eg*, *Caparo Industries plc v Dickman* [1990] 2 AC 605.
27 [1990] 2 AC 605.

categories instead of the general and broad formulation in *Anns*.[28] However, earlier in his speech, Lord Bridge had laid down a three-part test that seems to hint at some universality, as opposed to his call for a categorisation approach, which is antithetical to such universality. In the same case, Lord Roskill likewise preferred the "traditional categorisation of cases" as compared to the "somewhat wide generalisations that leave their practical application matters of difficulty and uncertainty".[29] These statements regard universality as only referring to the broader axiom while ignoring its narrower sense. However, the better view is that it is the test that is universal, but its application has always been particular to the facts.

8 *Spandeck* adopted the narrower concept of universality: the *Spandeck* test is to be regarded as an umbrella framework to be applied in every case, but its actual application can admit of varying considerations. Incrementalism is then employed as a methological aid *within* the *Spandeck* formulation. Indeed, on its own, incrementalism "lacks any firm legal basis but appears to reflect … the general 'common law' approach of drawing analogy from prior precedents".[30] However, to speak of drawing analogies raises a separate question: analogy with *what*? It would be wrong to draw an analogy on a composite basis with decided cases; that is, if similar facts give rise to a duty, then the current case should also give rise to duty. This nullifies the reality that the *Spandeck* test is a multi-stage test that comprises distinct elements, each to be decided separately. Incrementalism functions at each specific stage, and it entails considering different factors that inform whether that particular element has been satisfied. There should not be a presumption of *prima facie* duty simply on the basis of general similarity in facts alone. Each stage has to be considered separately with no pre-existing notion of duty.

B. The type of harm

9 The type of harm is important in adhering to incrementalism within the *Spandeck* formulation even though a "single test" is to be applied regardless of the type of harm. The latter caveat simply means that the type of harm should not dictate the applicable framework. The *Spandeck* court was clearly responding to the situation that had prevailed previously, that is, the type of harm dictated the test applicable. It is a wholly different matter if the type of harm determined the relevant

28 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 78.

29 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 623. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.

30 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 79. See also Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) TLJ 1 at 10.

factors to be considered in each stage under the *same* broad framework that is applied consistently.[31] Indeed, the cases after *Spandeck* have adopted a harm-centric analysis, that is, basing their analysis on the type of harm, while still applying the *Spandeck* formulation. Most importantly, the type of harm is not an empty concept by itself. The type of harm – which contemporary cases have divided into physical, pure economic and psychiatric – is the consequence of the negligent act. Being the consequence, it sheds light on what had gone on before and, from a broader perspective, what the relevant factors ought to be considered in that situation to determine if the *Spandeck* formulation has been satisfied.

III. The factual foreseeability requirement

A. *What is "factual foreseeability" under the* Spandeck *formulation?*

10 *Spandeck* laid down a threshold requirement of "factual foreseeability" before the two-stage test is applied. There has since been debate as to what "factual foreseeability" means (specifically its relationship with "reasonable foreseeability") and whether the characterisation of "factual foreseeability" as a "threshold requirement" is correct. Although much of the literature appears to address these questions as a composite one, there are in reality three separate issues. The first is whether it is necessary to have a separate "reasonable foreseeability" requirement in addition to the "factual foreseeability" requirement that exists under the *Spandeck* framework. The second is whether the *Spandeck* framework is correct in equating reasonable foreseeability with proximity, thereby negating the need for a separate reasonable foreseeability requirement. The third question concerns the content of factual foreseeability: specifically, what has to be foreseen, and what degree of foreseeability is required?

31 The authors disagree with Colin Liew's analysis in this regard when he asserts that "it is conceivable that, in a case with sufficiently extreme facts, a plaintiff may successfully sue a defendant in negligence and recover damages for personal injury, property damage, psychiatric harm and pure economic loss, but to explain the result on the basis that the defendant owes four distinct duties of care in the tort negligence to the same plaintiff, in respect of the same action, is somewhat bizarre": Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) TLJ 1 at 10. What Liew may have omitted to examine is the very nature of the universal *Spandeck* two-stage framework, which appears to have his general approval, necessitates different proximity factors to be examined for *each* different kind of harm. For example, if the damage suffered was pure economic loss, the court may use twin criteria of assumption of responsibility and reliance, and conclude that there was no proximity; in the same claim, if the other damage alleged was psychiatric harm, the court is likely to consider the *McLoughlin* factors, and may decide that there was proximity and hence a *prima facie* duty owed in respect of psychiatric harm suffered.

B. Different aspects of factual foreseeability

(1) Is it necessary to have a separate "reasonable foreseeability" requirement?

11 One critique is that reasonable foreseeability has long been at the heart of duty of care jurisprudence,[32] and should remain so. The most straightforward reply to that critique is that the *Spandeck* framework *already* encompasses reasonable foreseeability, which it *equates* with proximity in its first stage. Indeed, the Court of Appeal's view is that the concept of proximity itself represents a legal (or normative) concept of reasonable foreseeability. The two are thus equated within the *Spandeck* framework.[33] This is clear from *Ngiam*,[34] where the court said that "the concept of *proximity itself* represents a *legal (or normative)* concept of *reasonable foreseeability*".[35] A clear exposition of the two conceptions of "reasonable foreseeability" was alluded to in an earlier article, which itself formed the framework for *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*[36] and, subsequently, *Spandeck*.[37] Therefore, *Spandeck* conceives of two concepts of "reasonable foreseeability" and equates the legal conception with that of proximity. So there is actually a reasonable foreseeability requirement built into *Spandeck*. It is a quite separate issue whether the equation of reasonable foreseeability with proximity is correct.

12 A related point is that since factual foreseeability is distinct from reasonable foreseeability, why not label it as a substantive requirement, rather than a "threshold" requirement? The first point that can be made is that the factual conception of foreseeability has been regarded as being wholly "descriptive" and hence not helpful in resolving the case at hand.[38] Although there is judicial support for such a view, it is submitted that a better view is that the factual conception has *some, albeit limited, relevance* in resolving the matter at hand. Were it otherwise, then there would be no need to consider factual foreseeability at all. In fact, in both *Ngiam*[39] and *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* ("*Man Mohan Singh*"),[40] the failure to satisfy factual

32 Kumaralingam Amirthalingam, "Refining the Duty of Care in Singapore" (2008) 124 LQR 42.
33 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 82.
34 [2008] 3 SLR(R) 674.
35 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 82.
36 [2007] 3 SLR(R) 782.
37 [2007] 4 SLR(R) 100; Andrew Phang, Saw Cheng Lim & Gary Chan, "Of Precedent, Theory and Practice – The Case for a Return to *Anns*" [2006] Sing JLS 1 at 40–41.
38 Kumaralingam Amirthalingam, "Refining the Duty of Care in Singapore" (2008) 124 LQR 42.
39 [2008] 3 SLR(R) 674.
40 [2008] 3 SLR(R) 735.

foreseeability was the very reason why a duty of care was not found in those cases. It is perhaps because of this very *limited* help that factual foreseeability is regarded as a "threshold", rather than "substantive", requirement. A second, stronger, point may be that factual foreseeability is in fact replicated within the proximity requirement. Thus, where there is legal proximity, the requirement of factual foreseeability would already have been fulfilled in so far as it is a facet of the former (but not direct mirror), with the consequence that factual foreseeability serves no independent value on its own as a legal requirement.[41] As Gary Chan has put it, the process of establishing legal proximity under *Spandeck* begins with the search for factual foreseeability as a "preliminary step in that logical process of finding legal proximity".[42]

(2) Is the equation of reasonable foreseeability with proximity desirable?

13 A related critique is that treating reasonable foreseeability and proximity as equivalents is not ideal, "since reasonable foreseeability and proximity really address different issues – the former focusing on the circumstances in which a duty of care should be owed and the latter focusing on the person to whom it should be owed".[43] However, it may also be possible to see the latter as being a circumstance in which a duty of care should be owed. In other words, the focus on the person is as much a focus on the circumstance, albeit a more specific one. The distinction between circumstance and persons is thus a matter of degree, rather than kind. According to this view, proximity is a narrower conception of a legal notion of reasonable foreseeability. Thus, as Part IV will demonstrate, the focus on proximity in the *Spandeck* formulation does actually concern the circumstance in which a duty of care is owed as well. The relegation of factual foreseeability to a "threshold" requirement, thus providing "reasonable foreseeability" to be dealt with as "proximity", does not neglect an important, normative part of the search for duty of care.

(3) What is the content of factual foreseeability?

(a) What needs to be foreseen?

14 The *Spandeck* approach to factual foreseeability is a defensible one if what is to be foreseen is a broad inquiry. As Gary Chan has explained, the focus should be the foreseeability of harm *in general*, as well as the foreseeable class of persons who may be affected by the

41 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 82.
42 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 83.
43 Margaret Fordham, "The Duty of Care of a Clerk of Works" [2011] Sing JLS 260 at 267.

negligent act or omission.[44] In this regard, there is an immediate problem with foreseeability in psychiatric harm cases, which is defined in a rather specific manner similar to the test for remoteness.[45] Specifically, the Court of Appeal in *Ngiam*, on the one hand, in rejecting the dichotomy between primary and secondary victims in *Page v Smith*,[46] seemingly accepted the (narrower) view that foreseeability of psychiatric harm was required. In fact, it had referred to the need to establish factual foreseeability "in the context of *psychiatric harm*".[47] Yet, on the other hand, in applying the "factual" requirement of foreseeability in *Ngiam*, the Court of Appeal apparently adopted a wider definition of what was to be foreseen: the foreseeability of "harm" as opposed to a specific type of harm, namely psychiatric harm.[48] If the requirement of foreseeability is narrowly defined, as in the first instance, to constitute a separate legal requirement which no longer finds expression within the requirement of proximity, then it arguably should be reinstated as a separate legal requirement (subject to the problem of replicating the test for remoteness). This would occur if, for example, notwithstanding the very close relational and spatial proximity between alleged tortfeasor and victim, psychiatric harm were not reasonably foreseeable owing to the nature of the incident. In such a case, foreseeability would serve a distinct function of conditioning liability by reference to a criterion not reflected in the requirement of proximity. Accordingly, the Court of Appeal's characterisation of foreseeability as a "factual" requirement only makes sense if what is to be foreseen is defined widely.[49] In this regard, the court's narrower reading of the factual foreseeability threshold requirement in *Man Mohan Singh*[50] – finding that no duty of care arose because it was not factually foreseeable that a careless driver's deceased victims would constitute all the children of the bereaved plaintiff-parents – appears to be inconsistent with its earlier observations. A duty of care in that case could easily be denied on the grounds of insufficient proximity or on public policy considerations.

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44 Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 83.

45 See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388.

46 [1996] AC 155.

47 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [110].

48 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [132]. See also Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) TLJ 1 at 12.

49 See *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 at [32] (suggesting that what has to be factually foreseeable as a threshold question in the *Spandeck* test for duty of care is merely "harm", and the "type of injury" need only to be foreseeable at the later inquiry pertaining to remoteness of damage).

50 *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 at [48].

(b) Degree of foreseeability

15 It has been said that the interchangeable use of "factual foreseeability" and "reasonable foreseeability" is a sign that the Singapore courts are not entirely comfortable with the idea of factual foreseeability as a distinct concept.[51] However, this is not entirely true. Whether something is "factually" foreseeable is open to diverse interpretations; there is no objectively correct way of answering the question. The criterion of "reasonableness" is the anchor that determines the answer consistently across all cases. It is perhaps not fruitful to distinguish factual foreseeability too starkly from reasonable foreseeability that is being equated with proximity. Thus, insofar as the cases appear to use factual foreseeability and reasonable foreseeability interchangeably, that is simply an acknowledgement that factual foreseeability is a shorthand for reasonable foreseeability in a "factual sense". It is perhaps desirable for Singapore courts to use the expression "factual foreseeability" consistently when applying the *Spandeck* test, but even where "reasonable foreseeability" is used interchangeably with that expression, it is not wrong, and is merely a different expression for the same thing.

IV. The proximity question: Factors influencing finding of proximity

A. The Spandeck *formulation and the proximity question*[52]

16 The *Spandeck* formulation of the proximity question involves three distinct points, each already briefly discussed generally above. The first concerns the application of a "single test" regardless of the type of damage suffered by the plaintiff [citation omitted],[53] rather than develop categorical rules like the presumption against recovery for pure economic loss in English law unless the facts fall within certain narrow established categories.[54] However, as the court said in *Ngiam*, "in determining whether the requisite proximity is present in a particular case, much will turn on the precise factual matrix concerned".[55] If one were to approach proximity from the perspective of *fact*-based reasoning based on the relationship between the parties prior

51 Margaret Fordham, "The Duty of Care of a Clerk of Works" [2011] Sing JLS 260 at 267.

52 See David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459 at 461.

53 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [123].

54 See, generally, Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249 and Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (Carswell, 4th Ed, 2000).

55 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [123].

to the alleged damage suffered, then Singapore courts are likely to focus on different factors from case to case, depending on which are most appropriate to evaluating whether the parties were in a relationship that would trigger the imposition of a *prima facie* duty of care. The second, related, point is that the proximity question is to be decided incrementally.[56] The third point from *Spandeck* is that the proximity question must be considered separately from the policy question. This is an issue that is taken up later, but the Court of Appeal has repeatedly emphasised that while policy considerations abound in the determination of a duty of care, it is important to delineate "factors that relate to proximity between the parties … [and] residuary 'policy' factors that are, in our view, 'true' policy factors inasmuch as they relate to public policy and thus fall within the purview of the [second limb of the *Spandeck* formulation]".[57]

B. Interaction between the proximity question and the type of harm

(1) Establishing link between proximity and type of harm

17 As one of the present authors has previously argued, *Spandeck* presented the court with a factual scenario where the requisite connection between the plaintiff and the defendant may be found by examining whether the twin factors of assumption of responsibility and reliance were present. In a majority of scenarios, where the damage suffered was pure economic loss, these two factors in themselves *may* be sufficient for the examination of proximity.[58] However, in other situations involving physical injury,[59] psychiatric harm,[60] or where a statutory authority or public body is the defendant,[61] the twin factors in themselves may be insufficient for an evaluation of whether proximity was satisfied. In those situations, a court applying the *Spandeck*

56 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [82].

57 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [48].

58 There are other situations involving pure economic loss where the defendant's *knowledge* that the claimant's "economic well-being is dependent upon [the defendant's] careful conduct of [the claimant's] affairs", even in the absence of actual reliance by the claimant, may impel the court to find a duty of care. See *White v Jones* [1995] 2 AC 207 at 272.

59 For example, *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540 (where the plaintiff, who contracted hepatitis A through the consumption of contaminated oysters, sued the company which produced the oysters, the city council and the State).

60 For example, *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674.

61 For example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (where a waterside worker, who was diagnosed as suffering from mesothelioma caused by the inhalation of asbestos fibres, sued the statutory authority responsible for supervising stevedoring operations at Australian ports).

formulation will have to examine *other* factors which are relevant to the precise factual matrix; this was alluded to by the court in *Ngiam*, but without further discussion.[62]

18 In respect of the second point regarding incrementalism, one of the present authors has explained that in addition to the English and Canadian cases which have embraced similar notions of proximity, the Australian cases that have adopted the salient features approach to examining duty of care can be a valuable resource for the development of Singapore law in this area if salient features were seen as "'factual features linking the parties [which are] indicative of substantial pathways to harm between the plaintiff and defendant'[63] (informing the content of proximity in the first stage of the *Spandeck* formulation), while matters of policy should refer to normative reasoning 'about what the rights and obligations of individuals *ought to be*'[64] (the second stage of the *Spandeck* formulation)".[65] As such, perhaps the Singapore Court of Appeal's dismissal of the relevance of Australian jurisprudence,[66] while correct on a broader level, could be reconsidered for the specific purpose of considering the proximity question.

19 More specifically, the salient features approach deployed in a number of Australian High Court cases like *Crimmins v Stevedoring Industry Finance Committee*[67] and *Graham Barclay Oysters*[68] is not as schizophrenic as some of its critics have suggested.[69] On the contrary, these decisions arguably illustrate a systematic consideration of salient *factual* features present in the relationship between the parties in dispute,[70] as well as salient *normative* features involving public policy considerations. The salient features methodology for determining

62 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [123].

63 Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 *Melbourne University Law Review* 569 at 570.

64 Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 *Melbourne University Law Review* 569 at 573 (citing Peter Cane, "Another Failed Sterilisation" (2004) 120 LQR 189 at 191–192). See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) at p 263 ("[a] 'policy argument' for a given decision is an argument which shows that to decide a case in this way will tend to secure a desirable state of affairs").

65 David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459 at 465.

66 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [104].

67 (1999) 200 CLR 1.

68 *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540.

69 For example, Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 *Melbourne University Law Review* 569 at 573 and 582.

70 It should be noted that "one salient feature may be of such overwhelming importance that others are unable to dislodge its impact", but the court is nonetheless obliged to analyse this feature in the context with all others to determine its relative importance for the circumstances of the case in question. *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [137]–[139].

whether a duty of care exists has exhibited a discernible and predictable pattern of judicial analysis over the years.[71] Such a methodology shares obvious similarities with the *Spandeck* approach where Singapore courts are expected to analyse the proximity factors as between the parties based on the factual matrix, consider overriding public policy considerations that might negate a duty of care, and employ the two-stage test in the context of analogising the facts of the case at hand with those of past decided cases.[72] Thus it is possible to make a distinction between *factual* salient features and *normative* salient features – both to be examined separately under each limb of the *Spandeck* formulation.[73] Where such factual salient features are present, the parties in the dispute are brought *closer* to each other or are more *proximate*, in the sense that failure by one party to take care will increase the likelihood of harm to the other.

20 Regarding the third point on the overlap between proximity and policy, while the court in *Spandeck* emphasised that the factors for each consideration should be carefully delineated, it appears from later cases – like in *Tan Juay Pah v Kimly Construction Pte Ltd* ("*Tan Juay Pah*")[74] – that the court may not be too particular about whether a particular aspect of the factual matrix was considered under the first or second stage, or indeed both stages, of the *Spandeck* formulation, so long as courts articulate clearly their reasons for doing so.[75] In a similar vein, the Supreme Court of Canada reiterated that "policy is relevant at both the 'proximity' stage and the 'residual policy concerns' stage of the *Anns* test", explaining that "policy" is being used in different senses at each stage.[76]

71 More importantly, the New South Wales Court of Appeal has compiled a comprehensive list of factual and normative factors – the salient features – that may be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty. These factors may be easily mapped onto the different elements of the *Spandeck* test. See *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [17] and *Caltex Refineries (Queensland) Pty Ltd v Stavar* [2009] NSWCA 258 at [102]–[105].

72 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [82].

73 Lum Kit-Wye, "*Spandeck* and the Tortious Duty of Care in Singapore" [2010] 3 JBL 179 at 189 ("The Court of Appeal in *Spandeck* was firmly of the view that the different stages of the test should be looked at as separate requirements and not subsumed within each other").

74 [2012] 2 SLR 549.

75 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [72]. The applicable statutory scheme under the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed), was said to be relevant to both limbs (*ie*, both the proximity and the policy limbs) of the *Spandeck* test.

76 *Syl Apps Secure Treatment Centre v BD* [2007] 3 SCR 83 at [32] (citing *Cooper v Hobart* [2001] 3 SCR 537 at [37]).

(2) Proximity factors

21 Post-*Spandeck*, the Court of Appeal has heard fewer than ten cases where the duty of care was an issue, and the lower courts have ruled on just over a dozen cases in this area. Of these, 12 were economic loss cases, three concerned psychiatric harm and six dealt with physical injury. In the cases decided by the Court of Appeal, the court has consistently applied the proximity factors of assumption of responsibility and reliance where the damage suffered was economic loss, and the *McLoughlin* factors in psychiatric harm cases.[77] Although the Court of Appeal has steadfastly employed the phrase "twin criteria of voluntary assumption of responsibility and reliance"[78] where the defendant's knowledge of the reliance was imputed, this article argues that knowledge may also be a separate proximity factor that merits independent consideration in certain scenarios. The authors contend that the choice of the appropriate proximity factors is determined by the type of harm, for the type of harm determines the situation in which the parties find themselves. The following factors have been found to be most relevant to the examination of proximity for all kinds of damage except for psychiatric harm:[79]

(a) assumption of responsibility by the defendant to avoid harm to the claimant;

(b) reliance by the claimant on the defendant to take care;

(c) actual or constructive knowledge of the defendant of that reliance or the risk of harm.

(d) control by the defendant of the risk of harm; and

(e) vulnerability of a class of persons to which the claimant belongs – in the sense that the claimant could not reasonably be

77 *McLoughlin v O'Brian* [1983] 1 AC 410.

78 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81]; *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [100]. While the Court of Appeal did not use the phrase "twin criteria" in a few cases, it nonetheless considered only two proximity factors of voluntary assumption of responsibility and reliance where the plaintiff suffered pure economic loss. For example, *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [35] and *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [60].

79 See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39, *per* McHugh J. Christian Witting points out that "proximity factors focus on structural features that relate the parties one to the other": Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25 OxJLS 33 at 34. A more comprehensive list may be found in the decisions of the New South Wales Court of Appeal, *eg*, *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258 at [103]; *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [17] and [93]. However, it should be noted that this list combines both factual factors and policy-based reasoning indiscriminately.

expected to adequately safeguard himself or herself or those interests from harm.

22 The authors agree with the Supreme Court of Canada that there is "no definitive list" of the factors to be considered in the proximity analysis.[80] As the proximity analysis in each case depends heavily on the factual matrix, no two cases are identical. Nevertheless, cases often share similar factual features, and it is evident in the decisions across the Commonwealth common law jurisdictions surveyed that the courts invariably consider a regular set of factors. However, it appears that in scenarios where the claimant alleges to have suffered psychiatric harm as a result of a perception of the death of or injury to another individual, courts would examine an entirely different set of three proximity factors called the *McLoughlin* factors.[81] These are: (a) the class of persons whose claims should be recognised; (b) the proximity of the claimants to the accident; and (c) the means by which the shock was caused.[82]

(a) Assumption of responsibility and reliance

23 As the Court of Appeal had pointed out in *Spandeck*, these "twin criteria" are often essential factors in meeting the test of proximity.[83] They are most relevant in scenarios involving pure economic loss and physical harm.[84] For example, "a solicitor owes a duty of care in tort because, like any professional person, he or she voluntarily assumes responsibility towards an individual client".[85] Other obvious examples include adults looking after children, and schools entrusted with the care of pupils.[86] The notion of assumption of responsibility has assumed especial prominence in English jurisprudence since the House of Lords' decision in *Hedley Byrne & Co*

80 *Syl Apps Secure Treatment Centre v BD* [2007] 3 SCR 83 at [30].

81 *McLoughlin v O'Brian* [1983] 1 AC 410 at 420–422; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [57].

82 Since the *McLoughlin* factors are applicable in the evaluation of proximity between the parties in a narrow range of scenarios where the claimant has suffered only psychiatric harm upon witnessing death or injury to another individual, they will not be examined in this article. However, it should be noted that the *McLoughlin* factors are not universally suited to be employed in the evaluation of every scenario involving psychiatric harm. For instance, the High Court of Australia has considered factors of control, vulnerability, assumption of responsibility, reliance and knowledge to be relevant in a recent case. See *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.

83 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81].

84 For example, William Norris, "The Duty of Care to Prevent Personal Injury" [2009] 2 *Journal of Personal Injury Law* 114 at 115.

85 *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598 at [57].

86 For example, *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

Ltd v Heller & Partners Ltd ("*Hedley Byrne*"),[87] which held that there could be liability in negligence in respect of carelessly produced statements resulting in pure economic loss.[88]

24 The reasoning in English cases like *White v Jones*[89] suggest that assumption of responsibility is likely to be a more important proximity factor than reliance; however, courts should be wary of focusing too much attention on the *voluntary* assumption of responsibility as a factor as the touchstone of duty of care and ultimately liability is not the state of mind of the defendant and the focus ought to be on things done by the defendant.[90] As John Murphy has alluded to, the defendant often does not voluntarily undertake a responsibility for the well-being or safety of another individual; one must examine the factual matrix to ascertain if the defendant has created an exceptional risk or increased the risk of harm such that it would "justify the imputation to the defendant of an 'assumed' responsibility".[91] As for reliance, Lord Nicholls in *Stovin v Wise*[92] has observed that "[r]eliance may be actual, in the case of a particular plaintiff, or more general, in the sense that persons in the position of the plaintiff may be expected to act in reliance on the [defendant]".[93] The decisions of the Canadian courts, in eschewing the *Hedley Byrne* assumption-of-responsibility principle in favour of a broad reasonable reliance test, may also be useful for analogy purposes in terms of how reliance may be considered a proximity factor in its own right.[94] Furthermore, the notion of reliance may be intertwined with the proximity factor of *knowledge* of that reliance by the defendant,[95] or with *control* of the premises on which the risk of harm was present.[96] It is important to note that usually when the proximity factors of control and vulnerability are present, a duty of care is likely to be imposed even

87 [1964] AC 465.
88 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
89 [1995] 2 AC 207.
90 *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 at 835.
91 John Murphy, "Juridical Foundations of Common Law Non-Delegable Duties" in *Emerging Issues in Tort Law* (Jason W Neyers, Erika Chamberlain & Stephen G A Pitel eds) (Hart Publishing, 2007) at p 386.
92 [1996] AC 923.
93 *Stovin v Wise* [1996] AC 923 at 937. See also *Perrett v Collins* [1998] 2 Lloyd's Rep 255 at 272.
94 For example, *R v Imperial Tobacco Canada Ltd* [2011] 3 SCR 45 at [58]–[59]; *Fullowka v Pinkerton's of Canada Ltd* [2010] 1 SCR 132 at [31].
95 For example, *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [26]; *Bhamra v Dubb t/a Lucky Caterers* [2010] EWCA Civ 13 at [25].
96 For example, *Everett v Comojo (UK) Ltd t/a The Metropolitan* [2011] EWCA Civ 13 at [31]: "The management is in control of the premises. It can regulate who enters, who is refused entry and who is to be removed after entry. The guest comes to the night club to relax and enjoy himself and for that prospect relies on the competence and prudence of its management."

though assumption of responsibility by the defendant or reliance on the part of the plaintiff may be "completely absent".[97]

25 In the handful of cases decided by the Court of Appeal applying the *Spandeck* test, the Court had not strayed beyond the twin factors of assumption of responsibility and reliance first articulated in *Spandeck*.[98] In *Animal Concerns Research & Education Society v Tan Boon Kwee* ("*Animal Concerns*"),[99] whether there had been "an assumption of responsibility by the clerk of works concerned *vis-à-vis* the client … and a corresponding reliance" were key proximity factors.[100] Similarly, in rejecting the finding of a *prima facie* duty of care in *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* ("*Skandinaviska*"),[101] the Court of Appeal held that Asia Pacific Breweries ("APB") did not assume any responsibility to the plaintiff in relation to APB's internal controls and APB's supervision of its finance manager.[102] In *Tan Juay Pah*,[103] proximity was not established as the court found that the office of the authorised examiner under the Workplace Safety and Health Act[104] was not intended to protect the safety of either the contractor and/or the subcontractor from financial risk, but was instead intended to protect workers and members of the public present at workplaces.[105] The court also emphasised that a close consideration of the facts of each case is paramount to the assessment of whether an assumption of responsibility was indeed present, and that "[c]are must be taken not to apply cases from other jurisdictions – or, for that matter, even Singapore cases involving different statutory regimes – without a proper appreciation of their context, both legal and factual".[106] Although the court has rightly maintained a tight rein on these two factors as the paramount considerations for the determination of proximity, the authors respectfully submit that future occasions with different factual scenarios – for example, when a claimant alleges that a statutory authority owes a duty of care for physical injuries sustained in a public recreational space under the care, control and management of the authority or when an occupier alleges no knowledge of a non-lawful

97 *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [21] (referring to *Perre v Apand* (1999) 198 CLR 180). See also *Stovin v Wise* [1996] AC 923 at 938, *per* Lord Nicholls: "reliance [is not] a necessary ingredient in all cases".

98 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81].

99 [2011] 2 SLR 146.

100 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [60].

101 [2011] 3 SLR 540.

102 *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [99].

103 [2012] 2 SLR 549.

104 Cap 354A, 2009 Rev Ed.

105 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [73].

106 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [82].

entrant – will require Singapore courts to step outside this familiar terrain to explore other proximity factors.

(b) Knowledge

26 The two factors of assumption of responsibility and reliance are interrelated and they are usually considered together.[107] While the factor of knowledge also appears in the famous *Hedley Byrne* passage,[108] it is usually overlooked by the courts. For example, the *Spandeck* court used the phrase the "twin criteria of voluntary assumption of responsibility and reliance"[109] when citing Deane J's judgment in *Sutherland Shire Council v Heyman*[110] with approval: "[i]t may reflect *an assumption by one party of a responsibility* to take care to avoid or prevent injury, loss or damage to the person or property of another or *reliance* by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance."[111] By including knowledge as a factor to be considered in the proximity analysis, Deane J's more nuanced approach is arguably a more sophisticated revision of the *Hedley Byrne* principle. It is the authors' contention that knowledge may in certain circumstances – like in *White v Jones*[112] where the solicitor knew that intended beneficiaries under a proposed will would be harmed by his negligence – be valuable as a standalone proximity factor to be considered. The proximity factor of knowledge is a more open-ended factual inquiry. It appears to be most relevant in economic loss scenarios, but has also been considered in physical damage cases. In *Perre v Apand*,[113] McHugh J observed that "[t]he cases have recognised that knowledge, actual or constructive, of the defendant that its act will harm the plaintiff is virtually a prerequisite of a duty of care in cases of pure economic loss".[114]

107 For example, *Watson v British Boxing Board of Control Ltd* [2001] 2 WLR 1256 at [43]; *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283 at 289 and *Capital & Counties plc v Hampshire County Council* [1997] QB 1004 at 1034–1038.

108 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486.

109 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81].

110 (1985) 60 ALR 1.

111 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [78], citing *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 56.

112 *White v Jones* [1995] 2 AC 207 at 276.

113 (1999) 198 CLR 180.

114 *Perre v Apand* (1999) 198 CLR 180 at 230. See also *Perre v Apand* (1999) 198 CLR 180 at 282 (Kirby J); *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555 (Gibbs CJ).

27 The Court of Appeal did not evaluate knowledge as a separate factor in *Spandeck*, but referred to it in conjunction with reliance.[115] In *Skandinaviska*, however, the Court of Appeal referred with approval to the decision of the High Court where Belinda Ang J considered the element of knowledge (or more specifically, the absence of knowledge on the part of APB that loans might be made), in addition to assumption of responsibility and reliance, in finding that no common law duty of care existed between APB and the plaintiff bank,[116] but without further discussion. In *Go Dante Yap v Bank Austria Creditanstalt AG* ("*Go Dante Yap*"),[117] while the twin factors of assumption of responsibility and reliance were clearly relevant in the court's examination of proximity, the court also mentioned that the respondent bank "well knew" that the appellant businessman placed "implicit reliance" upon the exercise of special skill by the bank in handling his investment portfolio.[118] Likewise, in *Animal Concerns*, the court, when considering whether there was reliance by the appellant on care being taken by the respondent clerk of works, found it relevant to examine this in the context of whether the respondent "*knew or ought to have known* of such reliance".[119]

28 In *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* ("*See Toh Siew Kee*"),[120] the Court of Appeal unanimously decided that the law on occupiers' liability in Singapore should be subsumed under the general law of negligence,[121] and hence the *Spandeck* formulation should be applied to evaluate whether a duty of care arises in scenarios where it is alleged that an occupier ought to be legally responsible for the harm to an entrant. However, the court did not explore the elements of legal proximity in greater detail. In finding that Asian Lift, one of the defendants, owed a duty of care to the plaintiff who was injured by its mooring operations, it was implicit from the judgments of V K Rajah JA[122] and Sundaresh Menon CJ[123] that knowledge of the risk of

115 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [78] and [81].

116 *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [99]. See *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* [2009] 4 SLR(R) 788 at [237] (Belinda Ang J).

117 [2011] 4 SLR 559.

118 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [35].

119 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [64].

120 [2013] 3 SLR 284. For an analysis of this case, see David Tan, 'The Phoenix Rises: Resurrecting Occupiers' Liability within the Negligence Framework' (2013) 21 TLJ 59.

121 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [113], [132] and [143].

122 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [108] (Captain Hamid "was aware that part of *Asian Hercules*'s starboard mooring wire

(*cont'd on the next page*)

harm was a key proximity factor, but they did not elaborate how knowledge was related to the twin criteria of assumption of responsibility and reliance. For instance, for the class of residual entrants – that is, non-lawful entrants – the knowledge on the part of the occupier of the possibility of "the innocent toddler who wanders into a space he should not be in [or] the good Samaritan who runs into another's premises seeking help on behalf of an injured third party [or] the thrill-seeking adventurer who goes onto land *because* it is dangerous and promises an adrenaline rush"[124] would be relevant to establishing proximity.

29 Elsewhere, courts have explicitly examined the defendant's knowledge of the risk of harm (which include knowledge of the physical state or condition of premises or land under the defendant's care, control and management),[125] the defendant's knowledge of the reliance of a class of persons on the defendant to take reasonable care for their safety,[126] and the defendant's knowledge of the plaintiff's vulnerability.[127] The comparative knowledge on the part of the defendant – especially if the defendant was a professional exercising some special skill – of the risks of a course of conduct or a procedure is a significant proximity factor; it is usually examined together with the comparative ignorance of those risks and consequent vulnerability to harm on the part of the claimant. It has been observed that actual knowledge and consequent vulnerability will not always be adequate in themselves to establish the requisite proximity between the parties,[128] but they are often found in conjunction with other proximity factors like control and reliance. For example, in *Stovin v Wise*, Lord Nicholls considered a number of factual factors which his Lordship held that "in combination" pointed to the existence of a duty of care; one of the key factors was knowledge: "When an authority is aware of a danger it has knowledge road users may not have. It is aware of a risk of which road users may be ignorant."[129] In *Bhamra v Dubb*,[130] the defendant food caterer knew that it was providing food for a Sikh wedding. The deceased consumed food at the wedding and had a fatal allergic reaction to egg; Sikh religion prohibited,

lay on the ramp" … [and] "knowingly ran the risk of that mooring wire being fouled").

123 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [141] (concurring with VK Rajah JA's observations on this point).

124 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [129].

125 For example, *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 461 and *Commissioner for Railways v McDermott* [1967] 1 AC 169 at 186.

126 For example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 264 and *Bhamra v Dubb* [2010] EWCA Civ 13 at [25].

127 For example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 41.

128 Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25 OxJLS 33 at 50; *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540 at 580 and 596.

129 *Stovin v Wise* [1996] AC 923 at 940.

130 [2010] EWCA Civ 13.

inter alia, the consumption of eggs. The English Court of Appeal held that in those circumstances, the defendant "was certainly under a duty to take reasonable care not to serve dishes containing egg in order to avoid offending against Sikh religious principles" and found imputed knowledge on the part of the caterer that "some people are allergic to eggs and that any such person would suffer illness or more serious injury if he ate food containing eggs".[131] At the end of the day, the case for imposing a duty of care "is always strengthened if the defendant actually knew of the risk" and "is strengthened further if the defendant knew the magnitude of the risk".[132] In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* ("*Modbury Triangle*"),[133] Gleeson CJ (with whom Gaudron and Hayne JJ agreed), refusing to impose a duty on a suburban shopping centre for the physical safety of shop employees in the car park at night, held that the "control and *knowledge* which form the basis of an occupier's liability in relation to the physical state or condition of the land are absent when one considers the possibility of criminal behaviour on the land by a stranger" [emphasis added].[134]

(c) Control

30 The Singapore Court of Appeal has yet to examine the proximity factor of control in any detail. Although the Court in *See Toh Siew Kee* referred extensively to the importance of the element of control when assessing whether a duty of care in negligence could be imposed in occupiers' liability-type scenarios,[135] surprisingly none of the judges explicitly expressed "control" as a proximity factor. V K Rajah JA stated emphatically that "in the vast majority of cases, control of the premises concerned is a sufficient foundation *per se* for imposing on an occupier a *prima facie* duty of care under the *Spandeck* approach".[136] Rajah JA also commented in *dicta* that "had the point on control been pursued on appeal [by the other two defendants], it bears mention that neither [defendants] had control of the relevant activity that resulted in [the plaintiff's] injury … therefore, on the facts, no *prima facie* duty of care would have arisen on their part".[137]

31 A survey of the cases from Australia, England and Canada reveals that the element of control appears to be less significant for pure economic loss scenarios, as the factors of assumption of responsibility, reliance, knowledge and vulnerability of the claimant play a more

131 *Bhamra v Dubb* [2010] EWCA Civ 13 at [25].
132 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 550.
133 (2000) 205 CLR 254.
134 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 266.
135 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [80], [98], [100], [104] and [130].
136 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [100].
137 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [104].

critical role in the evaluation of the factual matrix. In scenarios where physical damage was suffered by the claimant, the element of control can be the most significant factor in determining the duty of care issue; this should be especially pertinent in the application of the *Spandeck* formulation to occupiers' liability scenarios where the occupier's control over the static condition of the premises or the dynamic activities on it could be dispositive of the duty of care issue.[138] Control is often discussed in relation to the defendant's control over the source of the risk of harm to the claimant or a class of individuals of which the claimant is a member.[139] For example, in scenarios where one serves alcohol to an individual, with the result that either the intoxicated individual subsequently injures himself/herself or someone else, courts may focus their inquiry on whether the server had control over the risk of harm (a first-stage *Spandeck* proximity issue) or whether public policy reasons of indeterminate liability or personal autonomy/responsibility exist to negate the finding of duty (a second-stage *Spandeck* public policy issue) or both.[140] Similarly, in prison scenarios where an inmate commits suicide or intentionally cause bodily harm to another, courts may also assess whether the prison authorities had control over the risk of harm, including other proximity factors like knowledge of the risk of harm and special vulnerability.[141] The *capacity* of the defendant to control the situation that might give rise to the risk of harm is a critical consideration. In *Modbury Triangle*, a clear absence of the ability of the defendant to control the risk of harm to the plaintiff led the High Court of Australia to find that there was no duty of care owed.[142] Hayne J emphasised that "a duty to take steps to control [a particular hazard]

138 For example, *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [80], [82], [130] and [144].

139 For example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [114]–[116]; *Sydney Water Corp v Turano* (2009) 239 CLR 51 at [52]–[53] and *Perre v Apand* (1999) 198 CLR 180 at [14]–[15] and [127]–[129].

140 For example, *Childs v Desormeaux* [2006] 1 SCR 643; *Cole v South Tweed Heads Rugby League Club Ltd* (2004) 217 CLR 469 and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390. See also Ian Malkin & Tania Voon, "Social Hosts' Responsibility for their Intoxicated Guests: Where Courts Fear to Tread" (2007) 15 TLJ 62.

141 Although the Commissioner had conceded the duty issue, Lord Hoffmann commented that those entrusted with the custody of prisoners had a duty to take reasonable care for their safety, and thought that "[t]he duty … is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives": *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 369.

142 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 and 292–293. The plaintiff, who was employed by a tenant of the defendant shopping centre, was attacked by three assailants in a poorly lit outdoor car park of a shopping centre at night and suffered serious injuries.

should not be found if the person said to owe the duty has not the capacity to fulfil it".[143]

32 The House of Lords in a recent decision commented that, in cases of conduct causing physical injury, there "must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation",[144] a feature which was lacking in that case. In physical injury cases, more recent decisions by the English Court of Appeal found that control of the premises, including the conduct of patrons, by the management of a nightclub was a pertinent consideration (*Everett v Comojo*)[145] as well as control by the defendant over the preparation of food (*Bhamra v Dubb*)[146] were important proximity factors that impelled the finding of a duty of care. On the other hand, an absence of control was a paramount consideration in the refusal to find a non-delegable duty of care in *Woodland v The Swimming Teachers' Association*.[147]

33 Thus when confronted with a novel situation, Singapore courts may by analogous reasoning, and in an incremental fashion, legitimately compare the degree of control that the defendant has in those factual circumstances with the kind of control present in these decided cases. There were hints in *See Toh Siew Kee*[148] that the Court of Appeal was willing to engage in such an analysis in the future when the court cited the High Court of Australia's decision in *Australian Safeway Stores Proprietary Ltd v Zaluzna*.[149] Nonetheless, the capacity of the defendant to control or the actual control exercised by the defendant over the risk of harm to the claimant may not of itself be sufficient to establish a *prima facie* duty, and control has to be assessed in the light of other proximity factors. For example, the greater the degree of exclusive control over the risk of harm by the defendant may indicate a corresponding increased vulnerability on the part of the claimant. These considerations appear especially important in non-delegable duty scenarios as they are the hallmark factual features of such special limited relationships.[150]

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143 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 293.

144 *Sutradhar v Natural Environment Research Council* [2006] 4 All ER 490 at [38].

145 [2011] EWCA Civ 13; [2012] 1 WLR 150 at [31].

146 [2010] EWCA Civ 13 at [25].

147 [2012] EWCA Civ 239 at [44] and [71]–[73].

148 [2013] 3 SLR 284 at [44], [62]–[65], [98], [100], [130] and [144].

149 (1987) 162 CLR 479.

150 For an excellent exegesis of the authorities in respect of the imposition of a non-delegable duty of care, see *Woodland v The Swimming Teachers' Association* [2012] EWHC 2631 (QB). In particular, Langstaff J commented that "[f]actors which support the existence of the duty include whether the relationship is one where the defendant has a high degree of control, the claimant is vulnerable, or the claimant has a special dependence on the defendant": *Woodland v The Swimming*

(*cont'd on the next page*)

(d) Vulnerability

34 The proximity factor of vulnerability on the part of the plaintiff has not been explored by the Singapore Court of Appeal, but it has been well canvassed in a number of recent cases in Australia and the UK in respect of physical injury and pure economic loss. It is particularly important when considering whether or not to impose a non-delegable duty,[151] and is implicitly present in numerous established categories of duty of care. It is important to note that vulnerability is usually considered with the element of control. In their joint judgment in *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*,[152] Gummow, Heydon and Crennan JJ explained that a duty of care is often imposed where some control must be exercised by the defendant over another person who either was vulnerable before the control was first exercised, or has become vulnerable by reason of the control having begun to be exercised.[153] Examples given include pupils in relation to their teachers, wards in relation to their guardians, patients in relation to hospitals, prisoners in relation to gaolers and employees in relation to their employers.[154] In novel factual scenarios where the claimant has suffered physical damage, courts invariably examine whether the claimant belonged to a vulnerable class of persons or possessed a special vulnerability known to the defendant, making comparisons with such established categories. It has been canvassed that vulnerability, together with control, especially where the presence of a special risk was known to the defendant, is an important consideration when imposing a duty of care for omissions by public authorities.[155]

35 However, the examination of the factor of vulnerability can be more controversial in a pure economic loss claim. In *Woolcock Street Investments v CDG Pty Ltd* ("*Woolcock*"),[156] a case involving economic loss as a consequence of structural distress to a building, the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ held that vulnerability is "to be understood as a reference to the plaintiff's

Teachers' Association [2012] EWHC 2631 (QB) at [51] (citing *Fitzgerald v Hill* [2008] QCA 283 at [67]).

151 For example, *Commonwealth v Introvigne* (1982) 150 CLR 258 at 271 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551.

152 (2009) 239 CLR 390.

153 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 406.

154 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 406. See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 41; *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161 at 175; *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871 at 884 and *Oberoi Imperial Hotel v Tan Kiah Eng* [1992] 1 SLR 380 at 388.

155 Hanna Wilberg, "In Defence of the Omissions Rule in Public Authority Negligence Claims" (2011) 19 TLJ 159 at 179–181.

156 (2004) 216 CLR 515.

inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[157] The plaintiff, a subsequent purchaser of a commercial building with latent structural defects, did not engage an expert to inspect the building and did not inquire whether the premises was free of defects. The building consisted of warehouses and offices, and had no dwellings. The majority found that, on the facts, the plaintiff failed to show that it was vulnerable to the economic consequences of any negligence of the defendants in their design of the foundations of the building, and could not have protected itself against the economic losses it alleged.[158] In the same case, McHugh J was open to adopting a broader interpretation of vulnerability to include situations where "by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury".[159] Kirby J was of the view that vulnerability should:[160]

> … not [be] confined to cases of poverty, disability, social disadvantage or relative economic power … but extend[ed] to those who like the plaintiffs in *Perre*, might be carrying on a profitable economic enterprise but who are exposed to an insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves.

36 In contrast to the homeowners in *Bryan v Maloney*[161] and *RSP Architects Planners & Engineers v MCST Plan No 1075*,[162] where the individuals were arguably more vulnerable because of a lack of means to discover the inherent structural defects, a commercial purchaser of a commercial building for commercial purposes may be presumed to be less vulnerable and to possess the ability to protect itself from economic harm.[163] In *Hill v Van Erp*,[164] a duty of care was found when the intended beneficiary plaintiff depended entirely on the solicitor defendant performing the client's retainer properly and the beneficiary could do nothing to ensure that this was competently performed. However, in *Esanda Finance Corp Ltd v Peat Marwick Hungerfords*,[165] there was no vulnerability as the financier itself could have made inquiries regarding the financial health of the company to which it was to lend money, rather than depend on the auditor's certification or accounts of the company. In a recent Singapore High Court decision, however, the judge

157 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530.
158 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 533.
159 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 549.
160 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 575–576.
161 (1995) 182 CLR 609.
162 [1999] 2 SLR(R) 134.
163 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 533.
164 (1997) 188 CLR 159.
165 (1997) 188 CLR 241.

appeared not to place any significance on the lack of vulnerability on the part of the commercial plaintiffs when it was found that the consultant structural engineer owed a duty of care to the management corporation of an industrial development in respect of defects arising from inadequacies in the design.[166] The Court of Appeal has not had the opportunity to consider the proximity factor of vulnerability in any meaningful detail but it is worthwhile noting that it has made a passing reference in *Skandinaviska*[167] regarding the lack of vulnerability on the part of the banks who were suing to recover moneys they had lost as a result of fraud committed by the employee of a company to which they had extended unsecured credit facilities. In denying the finding of a duty of care, the court remarked that the plaintiff bank in that case had "the ability to prevent … fraud by using reasonable means of verification" and that it was "relatively easy" for the bank to do so.[168] From the comments of Sundaresh Menon CJ in *See Toh Siew Kee*[169] that the plaintiff was "experienced in this type of work", and that he was "familiar with shipyards … as well as with the safety concerns that prompted the imposition of access restrictions", it appears that the lack of vulnerability could be a significant proximity factor in denying the imposition of a duty of care on two of the defendants.[170]

V. The policy question: Factors determining public policy

A. The Spandeck *formulation and the policy question*

37 It is not controversial that factors relating to the proximity limb of the *Spandeck* formulation may also be relevant in the public policy stage of the inquiry when courts weigh policy considerations that may negate the finding of a duty of care against policy factors that compel a recognition of duty.[171] It has been previously explained that the second stage of *Spandeck* requires an examination of normative factors beyond the relationship of the parties in dispute – as opposed to the factual features linking the parties that are indicative of substantial pathways to harm. The second stage of *Spandeck* involves "value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals".[172] At this stage, the court is expected to

166 *MCST Plan No 2757 v Lee Mow Woo* [2011] SGHC 112.
167 [2011] 3 SLR 540.
168 *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [103].
169 [2013] 3 SLR 284.
170 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [137].
171 For example, *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146.
172 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [85].

evaluate the anticipated impact of a holding of a duty of care upon a diverse range of legal persons, including persons who will, in future, occupy positions similar to the claimant and defendant, and those who will be indirectly affected by the rule applicable as between the present parties in dispute. Witting succinctly states that the policy stage is:[173]

> … concerned with the imposition of appropriate norms rather than with the evaluation of factual states … [The courts'] concern is with the potential impact that the recognition of a duty might have upon a number (if not innumerable) parties who are *not before the court*.

38 Andrew Robertson posits that a narrower sense of "policy" can operate in two principal but overlapping ways in the duty of care context: as "interpersonal justice" between the parties in the proximity inquiry and as "community welfare" considerations in a different stage of the duty formulation.[174] These observations were referred to with approval by the Court of Appeal in *See Toh Siew Kee*.[175]

39 However, what might be frustrating for academics, practitioners and lower courts is the difficulty in determining *when* a particular factor ought to be considered at the proximity or policy stage or both. The judicial reasoning in Canadian cases that apply the *Anns/Cooper* test akin to the *Spandeck* formulation tend to proceed in a more predictable fashion that considers factual (proximity) and normative (public policy) factors in different stages. The Australian cases that employ the salient features methodology combine both factual and normative factors into a laundry list of factors to be balanced or weighed before deciding if a duty of care should be imposed. The English decisions unfortunately do not apply the *Caparo* test consistently, and frequently skip the proximity analysis and have relied almost solely on community welfare arguments to determine the duty issue. Cases like *McFarlane v Tayside Health Board*,[176] *Rees v Darlington Memorial Hospital NHS Trust*,[177] *Mitchell v Glasgow City Council*,[178] *Jain v Trent Strategic Health Authority*[179] and *Van Colle v Chief Constable of Hertfordshire Police*[180] have resorted to overt considerations of notions of distributive justice and defensive decision-making by public authorities to militate against imposing a duty of

173 Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25 OxJLS 33 at 38.

174 Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 121–124; Andrew Robertson, "On the Function of the Law of Negligence" (2013) 33 OxJLS 31 at 32.

175 [2013] 3 SLR 284 at [87].

176 [2000] 2 AC 59.

177 [2004] 1 AC 309.

178 [2009] 1 AC 874.

179 [2009] 1 AC 853.

180 [2009] 1 AC 225.

care.[181] Swati Jhaveri astutely points out that "discrete and systemic cases ultimately raise separate issues and therefore call for the application of different approaches to decide on the duty of care question".[182]

40 There is an important point of distinction between the policy limb in *Spandeck* and in *Caparo*. In *Animal Concerns*, the Singapore Court of Appeal explained that:[183]

> The second limb of the *Spandeck* test is essentially *negative* in nature. Put simply, the court, having determined that a *prima facie* duty of care has been established, applies policy considerations to the factual matrix to decide whether that *prima facie* duty is *negated or limited*. In contrast, the third limb of the *Caparo* test is a *positive* one: notwithstanding the existence of sufficient foreseeability of damage and proximity between the parties, a duty of care nonetheless cannot arise unless and until the factual matrix is 'one in which the court considers it fair, just and reasonable' to *impose* a duty.

41 The *Spandeck* two-stage test is sequential. This means that policy considerations become relevant only where doing interpersonal justice at the proximity stage poses a threat to the community welfare. Just like the Canadian approach in the *Anns/Cooper* test, where a duty cannot be justified on interpersonal justice grounds, there is no such threat and so the community welfare interests protected at the second stage are not enlivened.[184] However, when Canadian courts conclude that the proximity requirement is not satisfied, they often continue to consider whether the denial of duty is nonetheless also justified on policy grounds.[185] In Singapore, the Court of Appeal has adopted a similar approach as evident in cases like *Spandeck*,[186] *Ngiam*,[187] *Man Mohan Singh*[188] and *Tan Juay Pah*.[189]

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181 Andrew Robertson also observed that in the English and Canadian decisions surveyed, community welfare considerations were primarily to be found in cases brought against public authorities. Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 137.

182 Swati Jhaveri, "Constructing a Framework for Assessing Public Authority Liability in Negligence: The Role of Public Law Norms, Private Law Norms and Policy Arguments" (2011) 19 *Tort Law Review* 3 at 12.

183 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [77].

184 Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 137; Andrew Robertson, "On the Function of the Law of Negligence" (2013) 33 OxJLS 31 at 44.

185 Andrew Robertson, "On the Function of the Law of Negligence" (2013) 33 OxJLS 31 at 48.

186 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [111]–[114].

187 *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [143]–[145].

188 *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 at [49]–[52].

189 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [75]–[85].

42 While examining English cases through the lens of analogous reasoning, one must be aware of the fact that unlike the third limb of the *Caparo* test, the second limb of the *Spandeck* test does not require the presence of policy considerations marshalling in favour of the imposition of a duty of care ("positive policy considerations"), it merely requires the absence of policy considerations militating against the imposition of such a duty ("negative policy considerations").[190] The presence of proximity – or as Witting puts it, "substantial factual features linking the parties [that] is indicative of substantial pathways to harm"[191] – compels the acceptance of an internal logic or the "golden rule of negligence"[192] that where such factual features are present, the assumption must be that a duty arises. Although the Singapore courts have not faced any formidable challenge in having to balance positive *and* negative policy considerations in the second stage of the *Spandeck* formulation,[193] factual scenarios like those in *Sullivan v Moody* (duty of those investigating allegations of sexual abuse),[194] *Harriton v Stephens* (duty of doctor to inform mother that she had contracted rubella as the child would be born with profound deformities),[195] *NSW v Lepore* (duty of educational authority in respect of sexual abuse by school employees),[196] *Leichhardt Municipal Council v Montgomery* (duty of roads authority in respect of physical injury suffered when walking on public footpath where repair works were being carried out)[197] and *Cole v South Tweed Heads Rugby League Football Club* (duty of those serving alcohol *vis-à-vis* intoxicated patrons)[198] would require courts to engage in a more complex balancing exercise of competing policy objectives.

190 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [75]–[85].

191 Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 *Melbourne University Law Review* 569 at 570.

192 Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 *Melbourne University Law Review* 569 at 576 ("*the presence of substantial pathways to harm between person ought, ordinarily, to ground a duty of care* … the law's default position (as a normative proposition) should be that an obligation arises to exercise reasonable care." [emphasis in original])

193 In *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [75]–[88], the Court of Appeal arguably engaged in a simple balancing exercise when examining two negative public policy considerations (both of which were not persuasive in denying the finding of duty) and a positive public policy consideration that pointed in favour of finding a duty of care (that clerks of works should not be allowed to flout the system of checks and balances envisioned by the Act, to the detriment of their clients, without the latter having some form of recourse).

194 (2001) 207 CLR 562.

195 (2006) 226 CLR 52.

196 (2003) 212 CLR 511.

197 (2007) 230 CLR 22.

198 (2004) 217 CLR 469.

B. Policy factors

(1) Indeterminate liability

43 Indeterminate liability is the most common public policy factor that has been addressed over the years in the common law jurisdictions like Australia, Canada, Singapore and the UK. The renowned quote from Cardozo CJ in *Ultramares Corp v Touche, Niven & Co*[199] most aptly captures this concern: the imposition of "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[200] The concern of the courts "is with the unfairness involved in holding defendants liable to an indeterminate number of claimants and/or for claims of indeterminate size".[201] This judicial fear of indeterminate liability for a class of persons as a result of imposing a duty of care on the defendant in question has been expressed unequivocally by the Singapore Court of Appeal in recent years.[202] For example, the Court of Appeal has highlighted the relevance of this public policy consideration in *Go Dante Yap* when it held that "if the law has seen fit to imply a contractual duty of care into the banker-customer relationship, a tortious duty of care with the same scope and content was unlikely to run afoul of policy considerations such as … the avoidance of indeterminate liability".[203] In *Tan Juay Pah*, while it was not a key consideration, the court commented that if a duty were imposed, "the cascading effects of consequential economic loss can be enormous".[204] It is probably one of the most pertinent policy considerations that has resulted in English courts precluding recovery for pure economic loss,[205] and is also referred to as "the 'floodgates' argument of the impossibility of containing liability within any acceptable bounds if the law were to permit such claims to succeed".[206] The unanimous *Spandeck* court held that "there is no justification for a *general* exclusionary rule against

199 255 NY 170 (1931)

200 *Ultramares Corp v Touche, Niven & Co* 255 NY 170 (1931) at 179.

201 Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249 at 254.

202 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [29]; *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [143]–[145]; *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 at [52]; *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [101]; *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [75].

203 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [41].

204 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [75]

205 See also *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at [36] and *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [68].

206 *Murphy v Brentwood District Council* [1991] 1 AC 398 at 485.

recovery of all economic losses"[207] and preferred to address each case according to its relevant proximity and public policy considerations.

44 The indeterminate liability argument is often raised, but the Commonwealth courts have not provided clear guidance in the terms of how one ought to balance competing policy considerations. A possible framework might be Swati Jhaveri's analytical framework, which posits that "discrete" cases of negligence (where the complaint relates to a discrete act or omission that was not directly the result of any feature of institutional design or the content of the statutory or regulatory framework or of a general policy of the relevant public authority) do not necessarily raise policy concerns of indeterminate liability or floodgates risks;[208] it is only in "systemic" cases (where misfeasance or nonfeasance is a direct result of aspects of the institutional design of the public authority or of the statutory framework relating to the authority) that "the floodgates argument may be a real concern" as the "recognition of a duty of care in one case will lead to a proliferation of claims that arise from similar defects in institutional design".[209] Thus it is unsurprising that, besides scenarios where pure economic loss is alleged, the primacy of indeterminate liability as a negative policy consideration is most obvious in physical harm cases involving statutory authorities like the police force or a public/institutional authority defendant[210] or where psychiatric harm is suffered.[211]

207 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [69]. The court was of the view that "there is no reason not to extend liability for pure economic loss to other situations, provided that the issues of indeterminate liability and policy can be adequately dealt with. In this connection, the incremental approach would provide a necessary safeguard against the unintended consequence of indeterminate liability as well as discourage arbitrariness in determining liability".

208 Swati Jhaveri, "Constructing a Framework for Assessing Public Authority Liability in Negligence: The Role of Public Law Norms, Private Law Norms and Policy Arguments" (2011) 19 *Tort Law Review* 3 at 7.

209 Swati Jhaveri, "Constructing a Framework for Assessing Public Authority Liability in Negligence: The Role of Public Law Norms, Private Law Norms and Policy Arguments" (2011) 19 *Tort Law Review* 3 at 8.

210 For example, *McKay v Essex Area Health Authority* [1982] 1 QB 1166; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Stovin v Wise* [1996] AC 923; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; *Barrett v Enfield London Borough Council* [2001] 2 AC 550; *D v East Berkshire Community NHS Trust* [2005] 2 AC 373 and *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225.

211 Although the courts are concerned about indeterminate liability, the proximity stage – with rigorous requirements to be satisfied – is usually employed as the limiting mechanism in psychiatric harm cases. For example, *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674.

(2) Conflict/Coherence with contractual and other tortious frameworks

45 This broad policy consideration of coherence with other common law duties/torts can have a significant negating effect on the finding of a duty of care. The High Court of Australia emphasised that problems in determining duty "may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".[212] Generally, the imposition of a common law duty of care must be evaluated against the "existence of conflicting duties arising from other principles of law" and "the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law".[213] Robertson contends that "the precise nature of the concern has been underexplored"[214] and highlights a number of scenarios in which a conflict of duties may potentially have adverse behavioural effects on the community.[215] However, one should note that conflicts of private law duties do not always present the threat of adverse community welfare consequences sufficient in itself to negate the finding of a duty of care.[216]

46 In *Spandeck*, the Court of Appeal relied on the reasoning in *Pacific Associates Inc v Baxter* ("*Pacific Associates*")[217] and held that a duty of care should not be superimposed on a contractual framework;[218] in particular, the court observed that in *Pacific Associates*, the parties "having sought to regulate their relationships by contract, the law

212 *Sullivan v Moody* (2001) 207 CLR 562 at 580, *per* Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ. See also Ernest J Weinrib, "The Disintegration of Duty" in *Exploring Tort Law* (M Stuart Madden ed) (Cambridge University Press, 2005) at p 182.

213 *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412 at [17]; *Caltex Refineries (Queensland) Pty Ltd v Stavar* [2009] NSWCA 258 at [103].

214 Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 124.

215 Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 125.

216 For example, *Hibbert Pownall & Newton (A Firm) v Whitehead* [2008] EWCA Civ 285; [2009] 1 WLR 549 at [42]; *Kapfunde v Abbey National plc* [1999] 1 ICR 1 at [12]; *Paxton v Ramji* [2008] ONCA 697; 92 OR (3d) 401 at [71]–[76].

217 [1990] 1 QB 993. This case has been followed in the Australian case of *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd* (2000) 16 Const LJ 114. Byrne J thought that the lowest common denominator in *Pacific Associates*, which prevented the court from finding a duty, was the arbitration clause. *Pacific Associates* has also been followed in the Hong Kong decision of *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* (1989) 47 BLR 139, where the court refused to impose a duty on the professional on the ground that there was an adequate machinery under the contract for the contractor to pursue grievances, including those relating to under-certification, against the employer.

218 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [114].

should be very cautious before grafting onto the contractual relationship what might be terms of a parasitic duty unnecessary for the parties' protection".[219] In *Go Dante Yap*, the Court of Appeal held that where "the parties have expressly or impliedly negotiated an obligation on one of them to exercise care and skill in the exercise of his rights or duties under the contract, it is entirely possible that an identical duty of care could exist in the tort of negligence".[220] There were no such policy considerations in *Go Dante Yap* "militating against the imposition of a duty of care in the tort of negligence on a private bank that was concurrent and co-extensive with the implied contractual duty of care and skill owed to its customers",[221] but in *Animal Concerns*, it was found that the contractual framework may be so structured as to demonstrate that the parties intended thereby to exclude the imposition of a tortious duty of care.[222] Generally, in Singapore it would be "always open to banks and other providers of financial services to exclude or limit their duty of care via disclaimers or exclusion clauses, subject of course to the controls of the UCTA and/or the common law".[223]

(3) Conflict/Coherence with statutory frameworks, institutional duties and public functions and justiciability

47 This category of public policy considerations is especially relevant when a public authority – like a government agency, the police or prison authorities – is being sued for negligence. These considerations are pertinent regardless of whether misfeasance or nonfeasance is alleged, and are often the dispositive considerations in English cases. In *Tan Juay Pah*, the Court of Appeal cited English authorities with approval when it stated that "the imposition of the alleged common law duty of care *should not be inconsistent with the statutory scheme concerned and the statutory duties owed under that scheme* (emphasis in original)".[224] The court has been concerned that the imposition of a duty

219 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [101].

220 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [20]. This was also a position shared by the House of Lords, *eg*, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 194–195.

221 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [41].

222 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [71].

223 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [44]. In *PC Connect Pte Ltd v HSBC Institutional Trust Services (Singapore) Ltd* [2010] SGHC 154 at [35], Kan J of the Singapore High Court found that a contractual clause excluded proximity between the two parties.

224 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [53] (citing *Harris v Evans* [1998] 1 WLR 1285 at 1297, applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633). The general principles that govern the policy considerations in this area are set out by the court in a lengthy paragraph: *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [54].

of care is compatible with the statutory framework in place, *irrespective of whether the defendant was a public authority*. In *Animal Concerns*, the court considered whether the duties of a site supervisor as set out in s 10 of the Building Control Act[225] "might indicate that the Legislature did not intend for them to owe any duties in respect of such actions, and that the courts should not therefore seek to superimpose a common law duty of care wider than the statutory duty imposed by s 10".[226]

48 If the defendant was a public authority, a plethora of policy considerations abound: from the nature and exercise of the statutory power to the range of statutory responsibilities conferred upon the public body, from the budgetary constraints of the government department to the entire statutory regime that governs a particular area of activity. The public law notion of justiciability has also been invoked in cases of systemic negligence.[227] Many of the significant decisions of the High Court of Australia in the field of negligence, particularly in the last 15 years, have concerned alleged liability for failure to take preventative action, in particular, the failure of public authorities to exercise their legislatively based powers to regulate or to control human activity, or to attempt to do so.[228] For example, the High Court of Australia held that "where those powers of management may be said to be quasi-legislative in nature, their exercise cannot be compelled or constrained by a common law duty of care".[229] The kaleidoscope of responsibilities that a statutory authority has been entrusted with, coupled with the fact that it is often faced with resource constraints and a tight budget, are also paramount considerations for the courts. In England, Lord Hoffmann held that the recognition of a duty of care *vis-à-vis* the highway authority would distort the spending priorities of the local authorities by "increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services".[230] Several Australian state jurisdictions like Victoria and New South Wales have passed legislation to make it mandatory for courts, when determining whether a duty of care should be imposed on public authorities, to:[231]

225 Cap 29, 1999 Rev Ed.

226 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [79]. Such an argument found favour with the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 at 457, 472, 482, 491–492 and 498.

227 Swati Jhaveri, "Constructing a Framework for Assessing Public Authority Liability in Negligence: The Role of Public Law Norms, Private Law Norms and Policy Arguments" (2011) 19 *Tort Law Review* 3 at 10–12 and 15–16.

228 For a list of some of the key cases, see *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486 at 497, *per* Gummow J.

229 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 450. See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 20–21, 39, 62 and 101.

230 *Stovin v Wise* [1996] AC 923 at 958.

231 Wrongs Act 1958 (Vic) s 83. The New South Wales and Queensland legislation has similar provisions, with an additional clause that "the general allocation of those

(*cont'd on the next page*)

> … consider the following principles (amongst other relevant things) – (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions; (b) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates) …

49 There are also judicial observations that a duty of care should not be recognised where it would "distort [the] focus" of the statutory decision-making process.[232] From the preponderance of foreign case law in this area, and the more recent analysis undertaken by the Court of Appeal in *Tan Juay Pah*, it appears that the presence of a statutory regime governing the sphere of activities of the defendant in the dispute will remain one of the key factors to be taken into account in the determination of a tortious duty of care.

(4) Personal autonomy, self-determination and personal responsibility

50 The notion of personal autonomy means that "every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death".[233] The broader community welfare consideration here is that the law should not be overly paternalistic in imposing a common law duty of care on defendants to take precautions for the safety of adult individuals who voluntarily perform acts or engage in activities which may result in harm to themselves. In denying the imposition of a duty of care, courts have interchangeably used terms like "personal autonomy" to signify the autonomous will of individuals to participate in potentially harmful activities and "personal responsibility" to highlight the importance of individuals taking care for their own safety when they engage in risky activities. For instance, Spigelman CJ of the New South Wales Court of Appeal has observed that:[234]

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resources by the authority is not open to challenge". See s 42 of the Civil Liability Act 2002 (NSW) and s 35 of the Civil Liability Act 2003 (Qld).

232 For example, *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; [2005] NSWCA 33 at [21]. *Cf* Des Butler, Ben Mathews, Ann Farrell and Kerryann Walsh, "Teachers' Duties to Report Suspected Child Abuse and Tortious Liability" (2009) 17 TLJ 1 at 17 (highlighting that in certain scenarios, the imposition of a tortious duty of care "would promote rather than undermine the mandatory statutory duty"); *Attorney-General v Prince* [1998] 1 NZLR 262 at 284 (the tortious duty does not conflict with the statutory duty but "enhances" it).

233 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 369, *per* Lord Hoffmann.

234 *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; [2001] NSWCA 234 at [26]. See also Margaret Fordham, "Saving Us from Ourselves – The Duty of Care in Negligence to Prevent Self-inflicted Harm" (2010) 18 TLJ 22 at 40.

> In many respects, the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of the duty of care for the purposes of the law of negligence.

51 Such public policy considerations have played a significant role in scenarios where the governing rulemaking body was held not liable for injuries sustained in sporting activities,[235] where the statutory authority was not responsible for physical harm resulting from dangerous recreational activities voluntarily undertaken by the plaintiff,[236] where a club was not responsible for a plaintiff's excessive gambling losses despite possessing knowledge of the plaintiff's gambling addiction and cashing his cheques,[237] and where a club serving alcohol was held not to owe a duty to an intoxicated patron who was injured as a consequence of consuming excessive alcohol.[238]

52 The respect for an individual's autonomy as a policy consideration against imposing a duty of care applies not only to the plaintiff's actions but also extends to the conduct of the defendant. In *Woolcock*, the High Court of Australia was anxious that the finding of a duty should not unduly interfere with commercial freedom of the defendant.[239] The Singapore Court of Appeal has yet to consider these community welfare concerns, although the notion that a tortious duty of care should not "run afoul of policy considerations such as … undue interference with market activity" was alluded to in *Go Dante Yap*.[240]

(5) Distributive and corrective justice

53 The amorphous concepts of distributive and corrective justice can be powerful, albeit unpredictable, policy arguments, and have been the target of much academic criticism.[241] Lord Steyn has commented that there is no right answer to the dilemmas of distributive justice.[242] The systemic denial of compensation to the innocent victims of

235 For example, *Agar v Hyde* (2000) 201 CLR 552.

236 For example, *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486 and *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330.

237 For example, *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 53 NSWLR 43; [2001] NSWCA 234.

238 For example, *Cole v South Tweed Heads Rugby League Club Ltd* (2004) 217 CLR 469 and *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390.

239 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 548, 575 and 586.

240 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [41].

241 For example, Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119.

242 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 326–327.

negligence and loss distribution amongst repeat institutional players can be compelling reasons for courts to find a duty of care. For example, in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*[243] and *Smith v Eric S Bush*,[244] the House of Lords have opined that liability should more readily be recognised where defendants, who are usually large corporations, are able to pass on the costs of liability to a wide range of individuals either through an increase in the costs of goods and services or through insurance. On the other hand, the policy consideration of corrective justice can militate *against* the finding of duty as it "includes an element of 'proportionality between the wrongdoing and the loss suffered thereby'".[245] The tension between distributive and corrective justice was discussed in *Tan Puay Jah*,[246] where the court considered how the English decisions like *Lamb v Camden London Borough Council*[247] and *Morgan Crucible Co plc v Hill Samuel & Co Ltd*[248] approached economic considerations, such as the availability of insurance coverage, which relevant policy factors in the second stage of the *Spandeck* test. However, loss-spreading should not be achieved at the expense of doctrinal integrity and in applying the *Spandeck* formulation, courts should preserve the "priority of proximity" and *only* impose a duty of care if the parties in the dispute are sufficiently connected to one another because of the presence of particular factual/structural factors.[249]

54 Although such notions of distributive and corrective justice may appear to be attractive arguments weighing in favour of imposing a duty of care, it was observed that in recent years, none of the English cases and only one of the Canadian cases mentioned the community welfare benefits of recognising the duty.[250] Unlike the Australian salient features approach which simultaneously considers all relevant factors, it appears that pro-duty community welfare considerations are relevant under the Canadian *Anns/Cooper* test – and also under the *Spandeck* test – only if

243 [1996] 2 AC 211 at 236, *per* Lord Steyn.

244 [1990] 1 AC 831 at 858, *per* Lord Griffiths.

245 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [84] (citing *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 106A, *per* Lord Clyde).

246 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [85]–[87].

247 [1981] QB 625.

248 [1991] Ch 295.

249 *Contra* Jane Stapleton, "Comparative Economic Loss: Lessons from Case-law-focused 'Middle Theory'" (2002) 50 *UCLA Law Review* 531 at 542; Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249 at 285–286. Note also Witting's response to Stapleton's advocacy of a more policy-oriented approach: Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25 OxJLS 33 at 42–46.

250 Andrew Robertson, "Policy-based Reasoning in Duty of Care Cases" (2013) 33 *Legal Studies* 119 at 131.

there are community welfare reasons for denying a duty which must be balanced against the countervailing benefits of imposing a duty.[251]

VI. Conclusions

55 *Spandeck* undoubtedly broke new ground in Singapore by unifying inconsistent case law into a single, universal test. The test has been described as "the *Grundnorm* – the sole, ultimate set of principles upon which a duty to take reasonable care under the law of negligence rests".[252] Continued refinement, however, is necessary. Such continued refinement will require, first, an examination of the claim of universality. In this regard, this article has argued that the universality goes only towards the framework to be applied, which maintains the relevance of facts particular to each case, as aided by the methodology of incrementalism.[253] Second, this article has argued that factual foreseeability, while not completely devoid of substantive value, is not by itself objectionable. The key is to recognise its relationship with the proximity requirement and also its broader content as compared with a narrower requirement in remoteness. Third, this article has surveyed a number of relevant proximity factors to supplement the more frequently invoked notions of assumption of responsibility and reliance, and has proposed that other factors like control, vulnerability and knowledge will also be relevant in a plethora of scenarios. To preserve its claim to universality, Singapore courts when applying the *Spandeck* test must look beyond the "twin criteria" at the proximity stage, or otherwise risk inadvertently elevating the twin criteria to a *de facto* status of legal proximity. Finally, this article has offered an organised grouping of policy factors that are intended to provide a more structured analysis at the policy stage, which in turn avoids the criticism that policy considerations muddle, rather than clarify, the duty question. As we look forward to the next decade of judicial decisions that continue to develop a cohesive body of jurisprudence in this difficult area of negligence law in Singapore, it is hoped that this article has helped to provide a practical understanding and application of the *Spandeck* formulation.

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251 Andrew Robertson, "Justice, Community Welfare and the Duty of Care" (2011) 127 LQR 370 at 393–394. See also *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [77].

252 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [54].

253 See, *eg*, Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) TLJ 1 at 25 (the "incremental approach" in *Spandeck* means that "the *Spandeck* test must *always* be applied when the existence of care is in dispute, regardless of whether a duty of care has been found in that 'category'").