(2021) 33 SAcLJ 1083
(Published on e-First 22 September 2021)

RECONCEIVING PROXIMITY IN THE DUTY TO AVOID CAUSING PURE ECONOMIC LOSS

Should the Plaintiff have Protected Himself Through Contract?

Proximity defined as "closeness/directness in the plaintiff-defendant relationship" is unhelpful in pure economic loss cases. This article argues for reconceiving proximity in pure economic loss cases in the form of the question: "should the plaintiff have protected himself through contract?" If the answer is yes, proximity is absent and no duty arises. If the answer is no, proximity is present, and a duty arises unless policy negatives it.

Justin **TAN**[1]
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Senior Lecturer, Faculty of Law, National University of Singapore.

I. Introduction

1 Proximity is a necessary condition for finding that the defendant owed a duty to avoid causing the plaintiff pure economic loss ("PEL"). Proximity refers to the closeness/directness in the relationship between the plaintiff and the defendant.[2] There are many considerations which go towards whether proximity is present in a particular case ("proximity determinants"). Our courts have thus far recognised at least eight proximity determinants, specifically three proximity concepts and five proximity factors.

2 Since (a) the proximity determinants are meant to tell us whether proximity is present in a particular case; and (b) proximity is the closeness/directness in the plaintiff-defendant relationship, we can say that the proximity determinants are meant to tell us whether there is closeness/directness in the plaintiff-defendant relationship. But this turns out to be a problem. In a PEL case, we need the proximity determinants

1 The author thanks Shawn Tan for research assistance, the anonymous reviewer who improved the article substantially, and the SAcLJ's editorial team for spotting his many careless mistakes. All remaining errors are his.

2 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [37] and [77].

to point towards or "add up" to a higher-order principle *y* so that we can say "proximity is present in this case because *y* is present" or "proximity is absent in that case because *y* is absent". The current definition of *y* as "closeness/directness in the plaintiff-defendant relationship" is unhelpful. It only begs a host of questions like "what is closeness/directness in the plaintiff-defendant relationship?" and "how much closeness/directness is required?" This article suggests that the higher-order principle *y* should be reconceived in the form of the question: "should the plaintiff have protected himself through contract?" If the answer to this question is yes, proximity is absent and no duty arises. If the answer to this question is no, proximity is present, and a duty arises unless policy negatives it. In other words, the correct proximity question in a PEL case is not "is there closeness/directness in the plaintiff-defendant relationship?" Rather, the proximity question should be: "should the plaintiff have protected himself by contract?"

3 The structure of this article is as follows. Part II[3] defines PEL. Part III[4] defines proximity as closeness/directness in the plaintiff-defendant relationship and explains its function in the duty of care analysis. Part IV[5] introduces the problem: thinking of proximity as closeness/directness in the plaintiff-defendant relationship does not help us resolve PEL cases because the proximity determinants do not point towards or "add up" to closeness/directness in the plaintiff-defendant relationship. Part V[6] starts tackling the problem by grouping the PEL cases into five categories, in order to discover a higher-order principle *y* that runs through them. Part VI[7] argues that the higher-order principle *y* that emerges from Part V is: should the plaintiff have protected himself by contract; if the answer is yes, proximity is absent, if the answer is no, proximity is present. Part VII[8] clarifies (a) the relationship between this higher-order principle and vulnerability; and (b) the relevance of insurance to this principle. Part VIII[9] concludes.

II. What is pure economic loss?

4 PEL is the plaintiff's monetary loss that flows directly from the defendant's negligence. It is not consequent upon damage to the plaintiff's

3 See paras 4–5.
4 See paras 6–8.
5 See paras 9–18.
6 See paras 19–72.
7 See paras 73–92.
8 See paras 93–94.
9 See paras 95–96.

person or property.[10] It is distinguished from consequential economic loss ("CEL"), which flows from damage to the plaintiff's person or property (and thus only indirectly from the defendant's negligence).

5 By way of illustration, consider *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd*.[11] The defendant negligently damaged an underground electric cable that it knew supplied electricity directly to the plaintiff's metal-making factory. The factory suffered a temporary loss of electricity as the electricity board cut the supply to mend the cable. The plaintiff sued for the profit it could have earned from (a) processing four additional melts but for the electricity cut; and (b) one melt that was damaged due to the electricity cut. Claim (a) failed – this lost profit was PEL as it flowed directly from the negligence. Claim (b) succeeded – this lost profit was CEL as it flowed only indirectly from the negligence (since it flowed directly from the physical damage to the melt).

III. Proximity – What it is and its function in the duty of care analysis

6 Lord Denning MR famously said that the function of the duty of care is to limit liability for negligence.[12] In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[13] ("*Spandeck*"), the Court of Appeal laid down Singapore's test for the existence of a duty of care in negligence claims. Under the *Spandeck* test, a duty of care exists if three requirements are satisfied: (a) the harm suffered by the plaintiff is foreseeable in a purely factual sense; (b) there is proximity between the plaintiff and the defendant; and (c) policy considerations do not negative a duty finding.[14] We are here concerned with requirement (b) – proximity.

10 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588.

11 [1973] QB 27.

12 *Dorset Yacht Co Ltd v Home Office* [1969] 2 QB 412 at 424. See also *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [29]–[30]; John Fleming, "Remoteness and Duty: Control Devices in Liability for Negligence" (1953) 31 Can Bar Rev 471 at 473-474 and Leon Green, "Foreseeability in Negligence Law" (1961) 61 Colum L Rev 1401 at 1408.

13 [2007] 4 SLR(R) 100.

14 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73]–[85]. Technically, factual foreseeability is not part of the *Spandeck* test; as it was viewed as almost always fulfilled, it was described as merely a "preliminary requirement" or "threshold issue": *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73] and [115]. However, the factual foreseeability requirement was not satisfied in *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674; *Man Mohan Singh s/o Jothirambal Singh v Zurich Singapore Pte Ltd* [2008] 3 SLR(R) 735; and *AYW v AYX* [2016] 1 SLR 1183. This suggests that the requirement is no less deserving of proper consideration than the *Spandeck* test's other two requirements.

7 Proximity is the closeness/directness in the relationship between the plaintiff and the defendant.[15] Proximity is meant to tell us that closeness between the defendant's conduct and the plaintiff's damage is required to found a duty, not just foreseeability.[16] The Court of Appeal in *Spandeck* said that proximity focuses on the closeness of the relationship between the plaintiff and the defendant;[17] a closer relationship means proximity is more likely to be found. Similarly, in *Anwar Patrick Adrian v Ng Chong & Hue LLC*[18] ("*Anwar*"), the Court of Appeal said that the emphasis of proximity is on the "closeness" and "directness" of the relationship between the parties.[19] As the Privy Council in *Yuen Kun Yeu v Attorney-General of Hong Kong*[20] noted, foreseeability is insufficient to found a duty (otherwise "there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning"); what is also required is proximity, which imports "the whole concept of necessary relationship between plaintiff and defendant".[21]

8 The difference between proximity and policy is that the former is only concerned with the interaction between the plaintiff and the defendant, as well as doing interpersonal justice as between them and nobody else, while the latter refers to considerations of community welfare like public morality, social philosophy and economics (*ie*, reasons that lie outside the parties).[22] The *Spandeck* test applies to all types of damage suffered by the plaintiff, whether the plaintiff suffered personal injury, psychiatric harm, property damage or PEL.[23]

---

15 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [37] and [77].

16 J F Keeler, "The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care" (1989) 12 Adel L Rev 93 at 97; Richard Kidner, "Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence" (1987) 7 LS 319 at 319; Christian Witting, "The Three Stage Test Abandoned in Australia – Or Not?" (2002) 118 Law Q Rev 214 at 218.

17 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [77]. This exact statement was repeated in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [36].

18 [2014] 3 SLR 761.

19 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [145].

20 [1987] 3 WLR 776.

21 *Yuen Kun Yeu v Attorney-General of Hong Kong* [1987] 3 WLR 776 at 783. These statements were cited with approval in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [76].

22 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at [49]; David Tan & Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half a Decade on" (2013) 25 SAcLJ 510 at 535–536.

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

IV. The problem: Proximity as "closeness/directness in the plaintiff-defendant relationship" is unhelpful in PEL cases

9 We have seen that proximity is the closeness/directness in the plaintiff-defendant relationship. There are a multitude of proximity determinants for determining whether "closeness/directness in the plaintiff-defendant relationship" is present in a PEL case.[24] The Court of Appeal has recognised at least eight proximity determinants, consisting of three proximity concepts and five proximity factors.[25] The three proximity concepts are physical proximity,[26] circumstantial proximity[27] and causal proximity.[28] The five proximity factors are assumption of responsibility,[29]

---

24 See Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in *The Law of Obligations: Essays in Celebration of John Fleming* (Peter Cane & Jane Stapleton eds) (Oxford University Press, 1998) at pp 93–95. Many of the duty of care factors in this article can be couched as proximity factors.

25 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [117] and [149]–[154].

26 Physical proximity is closeness, in the sense of space and time, between (a) the plaintiff's person or property; and (b) the defendant's person or property: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [78].

27 Circumstantial proximity is the closeness in the factual relationship between the plaintiff and defendant; thus, for example, circumstantial proximity exists in an employer-employee and professional-client relationship: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [78].

28 Causal proximity is closeness in the causal connection between the defendant's conduct and the plaintiff's damage suffered: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [78].

29 The definition of "assumption of responsibility" is notoriously unstable: Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109(3) Law Q Rev 461 at 461; Andrew Robertson & Julia Wang, "The Assumption of Responsibility" in *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Kit Barker, Ross Grantham & Warren Swain eds) (Hart Publishing, 2015) at p 49. Arguably, the Court of Appeal in 2011 provided this definition: the defendant assumes responsibility to the plaintiff when he performs an activity and (a) it is reasonable for the plaintiff to rely on him taking care in performing such activity; and (b) he knows or ought to know that the plaintiff will place reliance on him taking care: *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [35]. Recent cases confirm that the same definition applies in the UK and Canada: see *Steel v NRAM Ltd* [2018] UKSC 13 at [19] and *R v Imperial Tobacco Canada Ltd* [2011] SCC 42 at [42] respectively. This two-pronged definition of assumption of responsibility given in *Go Dante Yap* will be used throughout this article (although not all cases embrace it).

Under this definition, the twin of assumption of responsibility, reliance, is exactly the same as element (a): James Plunkett, *The Duty of Care in Negligence* (Hart Publishing, 2018) at p 139. (Reliance as defined here is a proximity factor. Technically, actual reliance is not a proximity factor, although courts often confuse reliance with actual reliance, perhaps because they are usually both present or both absent on the facts. The plaintiff's actual reliance should only be relevant at the causation stage of the negligence action, since the defendant's carelessness would not have caused the

(cont'd on the next page)

reliance,[30] control,[31] knowledge[32] and vulnerability/dependence.[33] The three proximity concepts are called "concepts" because (a) they are types of proximity (*ie*, physical, circumstantial and causal *closeness* in the plaintiff-defendant relationship); and (b) proximity is commonly called the "concept" of proximity.[34] The five proximity factors are called "factors" because they are not types of closeness in the plaintiff-defendant relationship. Rather, they are facts that indicate closeness (and typically circumstantial closeness) in the plaintiff-defendant relationship.[35]

10 We need the proximity determinants to point towards or "add up" to something;[36] otherwise what is the point of having them? Specifically, we need the proximity determinants to point towards or "add

---

plaintiff's damage if the plaintiff did not actually rely on the defendant, even if such reliance was expected. It is proper to look at reliance at the duty stage, since we are concerned with the situation of both parties before the plaintiff actually relied on the plaintiff's conduct and suffered damage: see James Plunkett, *The Duty of Care in Negligence* (Hart Publishing, 2018) at pp 138–139.)

An assumption of responsibility is "a sufficient but not a necessary condition of liability": *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [4], *per* Lord Bingham. Indeed, it has been observed that where there is an assumption of responsibility, "questions of 'foreseeability', 'proximity' and 'fairness, justice and reasonableness' tend to answer themselves": *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [85], *per* Lord Mance.

30 Reliance is defined in the immediately preceding note.

31 Control refers to the defendant's control over the risk of harm: *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [40].

32 Knowledge refers to the defendant's actual or constructive knowledge that his conduct could lead to the plaintiff suffering harm, or that the plaintiff was dependent on him for protection from harm: *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [40].

33 Vulnerability/dependence refers to the plaintiff's dependence on the defendant to protect him from harm: *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [154]. It is to be distinguished from "vulnerability", which the Australian cases define as the plaintiff's inability to protect himself from the defendant's carelessness. In this article, "vulnerability" takes the Australian definition. See also note 84 below.

34 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [34] ("the *legal* conception of proximity" [emphasis in original]), [80] (the proximity "concept" has some substantive content and is not a mere label), and [81] (physical, causal and circumstantial proximity provide substance to the "concept" of proximity); *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 (referring to the "concepts of proximity and fairness"); *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 191 (describing proximity as "importing the whole concept of necessary relationship between plaintiff and defendant"); *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 411 (referring to the "concept" of proximity as artificial).

35 See also David Tan, "Debunking a Myth: A Rejection of the 'Assumption of Responsibility' Test for Duty of Care" (2014) 22 *Torts Law Journal* 183 at 194.

36 Christian Witting, "The Three Stage Test Abandoned in Australia – Or Not?" (2002) 118 Law Q Rev 214 at 218.

up" to a higher-order principle *y* so that we can say "proximity is present in this case because *y* is present" or "proximity is absent in that case because *y* is absent". The current definition of *y* as "closeness/directness in the plaintiff-defendant relationship" is unhelpful. It only begs a host of questions like "what is closeness/directness in the plaintiff-defendant relationship?" and "how much closeness/directness is required?"

11 The problem can be illustrated with some cases. In *Spandeck*, it was held that proximity was absent solely because there was no assumption of responsibility.[37] By contrast, in *Animal Concerns Research & Education Society v Tan Boon Kwee*[38] ("*Animal Concerns*"), it was held that proximity was present solely because there was an assumption of responsibility.[39] So it appears that the presence of an assumption of responsibility is decisive in establishing or negativing proximity. But in *Anwar*, it was held that proximity was present even though there was no assumption of responsibility, because six proximity determinants were present – physical proximity, causal proximity, circumstantial proximity, knowledge, control and vulnerability.[40] This happened again in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[41] ("*NTUC*"); although there was no finding of an assumption of responsibility, proximity was held to be present on the basis that three proximity determinants were present – physical proximity, causal proximity and knowledge.[42] How do we explain this? Relying on the definition of proximity as closeness/directness in the plaintiff-defendant relationship, we can say that (a) the court in *Spandeck* was in effect saying that there was no closeness/directness in the plaintiff-defendant relationship; while (b) the court in *Animal Concerns*, *Anwar* and *NTUC* was in effect saying that closeness/directness in the plaintiff-defendant relationship was present in each of those cases. But that only prompts more questions. What does closeness/directness in the plaintiff-defendant relationship mean in each of those four cases? How much closeness/directness is required? Why is assumption of responsibility a necessary proximity determinant in *Spandeck* but not in *Anwar* and *NTUC*? Why are the proximity-affirming proximity determinants different in *Anwar* as compared to *NTUC*? Unfortunately, we do not know the answers. What we do know, however,

37 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [81], [102] and [108].

38 [2011] 2 SLR 146.

39 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [63].

40 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [147]–[151], [154]–[155] and [157].

41 [2018] 2 SLR 588.

42 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [47]–[50].

is that proximity as closeness/directness in the plaintiff-defendant relationship is short on explanatory power – it cannot explain the cases.

12 So we need the proximity determinants to point towards or "add up" to something, a higher-order principle which we have called *y*. This principle must be able to explain the cases, in the following terms:

> In all PEL cases, proximity is a search for *y*. A helpful definition of *y* will tell us what the presence of the proximity determinants are meant to point towards; what they should 'add up' to. In some cases, *y* can only be fulfilled if proximity determinant *x* is present, and so *x* is a necessary and sufficient condition to establish proximity in those cases. In other cases, although *x* is absent, *y* can be fulfilled by the presence of other proximity determinants. For example, in *q* case, *y* can be fulfilled by the presence of *m* and *n* proximity determinants, while in *r* case, *y* can be fulfilled by the presence of *s*, *t* and *u* proximity determinants.

13 We could state the problem in another way. Suppose in a particular case the court finds that physical proximity and control are present. It then has to consider whether this is sufficient to establish proximity. The court needs to be able to say that physical proximity and control are sufficient to establish proximity because collectively they cause *y* to be fulfilled (or conversely, that physical proximity and control are insufficient to establish proximity in this case because collectively they do *not* cause *y* to be fulfilled). Currently, *y* equals closeness/directness in the plaintiff-defendant relationship. However, it is meaningless to say that physical proximity and control are sufficient (or insufficient) to establish proximity in this case because collectively they *cause (or do not cause)* "closeness/directness in the plaintiff-defendant relationship" to be fulfilled. After all, the three proximity concepts are facets of closeness/directness – physical, causal and circumstantial closeness/directness, while the five proximity factors are standalone descriptors of the plaintiff-defendant relationship and to say that any one or several of them gives rise to closeness/directness in that relationship brings us no closer to solving the problem. We are exactly where we started: physical proximity and control are present; so? Proximity as closeness/directness in the plaintiff-defendant relationship is like having a compass (the proximity determinants) without knowing our destination. As the Court of Appeal stated in *Spandeck*:[43]

> [W]e agree with Lord Bingham of Cornhill in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 ('*Customs and Excise Commissioners*'), where he observed (at [7]) that the 'incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation'.

43 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [43].

14 Lord Bingham's "test or principle which identifies the legally significant features" is precisely that elusive higher-order principle *y*. Our current "test or principle", being "proximity as closeness/directness in the plaintiff-defendant relationship", is unhelpful. We need a new definition of *y*.

15 Perhaps the English cases can help us find a new definition of *y*? Unfortunately, no. Lord Bingham has remarked that the "concept of proximity in the context of pure economic loss is notoriously elusive".[44] And the English cases bear him out. Sometimes proximity seems to be little different from foreseeability or policy, while at other times courts simply assert that proximity is present without explaining why. Let us consider the first instance – proximity seems to be little different from foreseeability or policy. This cannot be the new definition of *y* because under the *Spandeck* test foreseeability and policy are distinct from proximity.[45] *Customs and Excise Commissioners v Barclays Bank plc*[46] ("*Barclays*") illustrates. The plaintiff commissioners served on the defendant bank a freezing injunction in respect of accounts with the bank. The bank failed to comply with the injunction and payments were made out of the accounts. The commissioners were unable to recover outstanding value added tax amounts from the accounts and claimed against the bank for negligently inflicted PEL.

16 Although their Lordships unanimously held that the bank did not owe the commissioners a duty, both Lord Bingham and Lord Mance noted that proximity was fulfilled on the facts. In so doing, they relied not insignificantly on the fact that the plaintiff's loss was a foreseeable consequence of the bank's negligence. Thus, Lord Bingham noted that the bank "appreciated the risk of loss to the [plaintiff] if [the injunction] was not obeyed".[47] Likewise, Lord Mance noted that "the commissioners were obviously likely to be heavily dependent on the bank's observance of [the freezing] orders if they were to hope to satisfy any judgments they might obtain against Brightstar and Doveblue".[48]

17 Lord Walker equated proximity with the policy concern of floodgates; proximity was fulfilled on the facts, he said, because the duty contended for was not a duty leading to "liability in an indeterminate

44 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [15].
45 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73]–[86].
46 [2007] 1 AC 181.
47 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [15].
48 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [99]. Lord Mance also called proximity a "vaguer notion" than foreseeability: *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [99].

amount for an indeterminate time to an indeterminate class".[49] The other Lordships did not mention proximity.

18 Now let us turn to the second instance, where courts assert that proximity is fulfilled without telling us why. Obviously, this is of no help in defining *y*. *Spring v Guardian Assurance plc*[50] ("*Spring*") illustrates. In that case, the defendant company supplied to third parties[51] upon their request a "kiss of death" reference in respect of the plaintiff, who was its ex-staff member. The plaintiff claimed against the company for PEL stemming from the negligently prepared reference. The House of Lords held (Lord Keith dissenting) that the company owed the plaintiff a duty to prepare the reference with care. Lord Keith said, with no reasoning, that "there was proximity between [the plaintiff] and those who prepared the reference".[52] Lord Slynn asserted, again with no reasoning, that "there is as obvious a proximity of relationship in this context as can be imagined"[53]. Lord Woolf similarly provided no explanation for why he believed proximity was fulfilled, merely stating that "the required degree of foreseeability and proximity undoubtedly exists in this case".[54] It would appear, then, that the English cases do not provide us with a candidate for the higher-order principle *y*.

V. Searching for a new definition of the higher-order principle *y* – Grouping the cases

19 We have identified the problem with proximity in PEL cases: the current definition of *y* as closeness/directness in the plaintiff-defendant relationship cannot explain the cases; they are not the destination for which the compass of proximity determinants may be deployed in service of. In this Part, we search for a new definition of *y*, the higher-order principle that runs through the cases and what the proximity determinants should point towards or "add up" to.[55] Our method for defining *y* is to study the cases to see whether what the cases tell us are material facts are material because they either (a) pointed towards (or added up to) *y* and so proximity was present; or (b) pointed away from *y* and thus proximity was absent.

---

49 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [74].
50 [1995] 2 AC 296.
51 Throughout this article, a third party is someone other than the plaintiff or defendant.
52 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 307.
53 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 335.
54 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 344.
55 The words of Lord Mance come to mind: "[T]here is no single common denominator, even in cases of economic loss, by which liability may be determined": *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [93].

20 After studying the PEL cases, we can group them into five categories:

(a) Category 1: the facts of the case fall within the *Hedley Byrne* principle;

(b) Category 2: the defendant produced the plaintiff's property which is later discovered to be defective;

(c) Category 3: a third party contracted with the defendant for the defendant to perform a service which if performed with care would benefit the plaintiff, but the defendant performed poorly and the plaintiff suffered PEL;

(d) Category 4: the defendant damaged a third party's property and this led to the plaintiff suffering PEL; and

(e) Category 5: residual category, where the facts of the case do not fall within Categories 1 to 4.

A. Category 1

21 Category 1 cases are those that fall within the *Hedley Byrne* principle, and falling within the principle is a sufficient reason to found a duty. The *Hedley Byrne* principle, in its original form, is found in the judgment of Lord Morris in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[56] ("*Hedley Byrne*"):[57]

> [I]f in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to … another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

22 This statement was cited with approval by the Court of Appeal in *Go Dante Yap v Bank Austria Creditanstalt AG*[58] ("*Go Dante Yap*").[59] Similarly, in *Anwar*, the Court of Appeal described the principle as follows:[60]

> [A] reasonable man who, knowing that he was being trusted or that his skill and judgment were being relied on, gives the information or advice sought without any qualification of responsibility, will be taken to have accepted some responsibility for his answer being given carefully, or to have accepted

56 [1964] AC 465.
57 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 503.
58 [2011] 4 SLR 559.
59 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [32].
60 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [68].

> a relationship with the inquirer which requires him to exercise such care as the circumstances require.

23 The original *Hedley Byrne* principle was broadened in three respects by Lord Goff (with whom Lord Browne-Wilkinson, Lord Mustill and Lord Nolan agreed) in *Henderson v Merrett Syndicates Ltd*[61] ("*Henderson*"). First, the principle extended beyond the provision of information and advice and included the performance of services generally.[62] Secondly, the defendant need not have special skill to have assumed responsibility; special knowledge was sufficient.[63] Thirdly, the defendant's alleged misconduct may be an omission and not just an act of commission.[64] Later in *White v Jones*[65] ("*White*"), Lord Browne-Wilkinson noted that *Henderson* "shows (if it was previously in doubt) that the principle … is as applicable to a case of negligent acts giving rise to pure economic loss as it is to negligent statement".[66]

24 Post-*Henderson*, then, we can restate the *Hedley Byrne* principle as such: a duty arises if there was a "holding-out-ask-and-response"; specifically – (a) the defendant held out that he would perform a task with care; (b) the plaintiff (or another person acting for the plaintiff) asked the defendant to perform the task; and (c) the defendant responded by performing the task. By way of example, Lord Goff described how the principle applied to the facts in *Henderson* as such:[67]

> The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names … The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims.

25 Five clarifications on the *Hedley Byrne* principle. First, although English courts sometimes use "*Hedley Byrne* principle" interchangeably with "assumption of responsibility",[68] the two are distinct. As noted in *Anwar*, "[t]he twin criteria for the *Hedley Byrne* principle to apply are: (a) an assumption of responsibility (sometimes referred to as voluntary

61 [1995] 2 AC 145.
62 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180.
63 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180.
64 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181.
65 [1995] 2 AC 207.
66 *White v Jones* at [1995] 2 AC 207 at 274.
67 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 182.
68 See Lord Goff's judgment in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180–181. Lord Browne-Wilkinson, Lord Mustill and Lord Nolan agreed with Lord Goff's judgment.

assumption of responsibility (although we think such terminology to be *ex abundanti cautela*)) by the defendant; and (b) reliance by the plaintiff".[69] *Anwar* thus reminds us that proximity is present in a case that falls within the *Hedley Byrne* principle, precisely because the proximity factors of assumption of responsibility and reliance are present.

26 Secondly, the *Hedley Byrne* principle covers situations where the defendant performed the task (that is the subject of the "ask") either under a contract (so that the duty runs concurrent with contractual obligations) or gratuitously. In *Midland Bank Trust C Ltd v Hett, Stubbs and Kemp*,[70] the defendant solicitor and the plaintiff were in a contractual relationship. Oliver J noted that "[t]he case of a layman consulting a solicitor for advice seems to me to be as typical a case as one could find of the sort of relationship in which the duty of care described in [*Hedley Byrne*] exists".[71] Another case where the parties were in a contractual relationship is *Go Dante Yap*. Here, the Court of Appeal held that banks owed their customers (who signed account-opening documents with them) a duty with respect to rendering services and executing instructions.[72]

27 The *Hedley Byrne* principle also covers situations where the defendant performed the task gratuitously, *ie*, situations where there is no contract between the plaintiff and defendant. Thus, in *Hedley Byrne* itself, the House of Lords was prepared to hold that, but for an express disclaimer, the defendant bank owed the plaintiff a duty when it gratuitously furnished the plaintiff a credit reference with respect to its (the bank's) customer (conveyed through another person), in response to the plaintiff's request for the reference (conveyed through that other person). The facts in *Hedley Byrne* fell within the *Hedley Byrne* principle because, as Lord Mustill noted in his dissenting judgment in *White*, there was a "bilateral relationship" between the plaintiff and defendant, "being created on the one hand by the acts of the plaintiffs in first asking for a reference in circumstances which showed that the bankers' skill and

69 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [70].

70 [1979] Ch 384.

71 *Midland Bank Trust C Ltd v Hett, Stubbs and Kemp Ibid* [1979] Ch 384 at 417. The court held that the defendant solicitor owed his client a duty to advise that it was necessary to register an option, before a third party acquired an adverse interest in the property that was the subject matter of the option.

72 The court held that the defendant owed the plaintiff an implied contractual duty of care under certain account-opening documents and this implied contractual duty was sufficient to create the necessary proximity to give rise to a duty in negligence. But the court also held that even if the account-opening documents were disregarded, there was sufficient proximity on the facts.

care would be relied upon and then subsequently relying on it; and on the other hand by the bankers' compliance with the request".[73]

28 Thirdly, to fall within the *Hedley Byrne* principle, it is not necessary that the plaintiff and defendant communicated with each other directly, or that the plaintiff knew the defendant's exact identity, or that the defendant knew the plaintiff's exact identity. This may be deduced from *Hedley Byrne* itself, where a duty would have arisen but for an express disclaimer, despite the fact that the plaintiff and defendant never communicated directly, nor did they know each other's exact identity, as the "ask" and the "response" were conveyed through another person.[74] That said, the defendant must assume responsibility to "an identifiable (although not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminable group".[75]

29 Fourthly, to fall within the *Hedley Byrne* principle, the defendant must or should have known of the purpose, whether general or specific, of the plaintiff's "ask". As Lord Bridge said in *Caparo Industries plc v Dickman*,[76] the defendant must be "fully aware of the nature of the transaction which the plaintiff had in contemplation".[77] But the defendant need not have known the details of the transaction, *ie*, it need not have known the specific purpose of the plaintiff's "ask". Thus, Lord Morris in *Hedley Byrne* said that it was sufficient (for a duty to arise) that the defendant knew that the request originated from someone who was contemplating doing business with the defendant's customer.[78] Similarly, Lord Oliver stated in *Caparo Industries plc v Dickman* that the purpose of the "ask" may be "particularly specified or generally described", as long as it is made known "either actually or inferentially" to the defendant.[79] Where the defendant had absolutely no knowledge of the purpose behind the plaintiff's "ask", there is no duty. Thus, in *Precis (521) plc v William M Mercer Ltd*,[80] the defendant upon the plaintiff's request (communicated through third parties) furnished information on a company's pension scheme to the plaintiff who was purchasing shares in the company. The

73 *White v Jones* at [1995] 2 AC 207 at 287. Lord Mustill also stated earlier: "the plaintiffs initiated the relationship by the request for a reference; the defendants acted on the request; and the plaintiffs relied on what they had done": *White v Jones* [1995] 2 AC 207 at 284.

74 The plaintiff had asked its banker to check on the financial stability of the plaintiff's client. The banker then checked with the defendant, which was the client's bank.

75 *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018] UKSC 43 at [7].

76 [1990] 2 AC 605.

77 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 620.

78 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 493–494.

79 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 638.

80 [2005] EWCA Civ 114.

court held that no duty arose because the defendant did not know the plaintiff's purpose for the request.[81]

30 Fifthly, later cases have clarified that to fall within the *Hedley Byrne* principle, the plaintiff must have changed his position in reliance on the defendant's "response" (and suffered loss as a result). This is what the High Court called "actual reliance" in *Millenia Pte Ltd v Dragages Singapore Pte Ltd*.[82] Recall that in *Barclays* the House of Lords held that the defendant bank did not owe a duty to the commissioners to comply with a freezing injunction in respect of certain bank accounts. In so holding, Lord Bingham and Lord Mance attached importance to the fact that the plaintiff commissioners did not change their position in reliance on the bank's response.[83]

31 In conclusion, the cases show that a duty arises if the facts of the case fall within the *Hedley Byrne* principle. The full principle, which is distinct from an assumption of responsibility, states that a duty arises if:

> (a) the defendant held out that he would perform a task with care;
>
> (b) the plaintiff (or another person acting for the plaintiff) asked the defendant to perform the task;
>
> (c) the defendant responded by performing the task, whether pursuant to a contract with the plaintiff or gratuitously, and with the actual knowledge or constructive knowledge of the purpose, whether general or specific, of the plaintiff's ask;
>
> (d) the plaintiff changed his position in reliance on the defendant's response; and
>
> (e) while it is not necessary that the plaintiff and defendant communicated with each other directly, or that the plaintiff knew the defendant's exact identity or *vice versa*, from the defendant's perspective the plaintiff must be a least an identifiable (*ie*, not necessarily identified) person or group.

B. Category 2

32 In Category 2 cases, the defendant produced property which was purchased by the plaintiff either directly from the defendant (in which

81 *Precis (521) plc v William M Mercer Ltd* [2005] EWCA Civ 114 at [31].

82 [2019] 4 SLR 1075 at [523]. Actual reliance is not reliance as used in this article: see n 29 above.

83 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [14] and [112].

case the plaintiff is a "direct purchaser"), or from a third party (in which case, the plaintiff is a "downstream purchaser"). Subsequently, the plaintiff discovered that the property has latent defects (*ie*, defects that existed when the property was produced and which were subsequently discovered after the plaintiff purchased it). The plaintiff then claimed against the defendant for PEL. The plaintiff suffered PEL and not property damage because he did not own (or have an interest in) the property when the defendant negligently damaged it.

33 In this type of case, this article contends that the court's instinctive reaction is that, since the plaintiff acquired the property through contract, he should have protected himself from possible latent defects through contract. The court is cautious about holding that a duty arises since this would disturb the contractual allocation of risk for latent defects. However, the court might disturb this risk allocation and hold that a duty arises if the plaintiff was unable to protect himself contractually, and if (where the plaintiff is a downstream purchaser) doing so is not inconsistent with the defendant's initial bargain with the first purchaser.

34 Where the plaintiff is a direct purchaser, the contract between him and the producer allocates the risk of latent defects between them, via terms stipulating the scope and duration of warranty and/or clauses limiting the quantum of damages. Allowing the plaintiff purchaser to claim in negligence means he escapes the terms of his bargain. This seems unfair to the defendant, especially if the defendant had accepted a lower price for the transaction precisely in exchange for the plaintiff agreeing to bear more of the risk of latent defects.

35 The same concern applies where the plaintiff is a downstream purchaser. Here, the plaintiff did not purchase the property from the defendant producer; rather, there are one or more persons between the defendant and the plaintiff in the ownership chain. There are two contracts at play – the first between the defendant and the first purchaser, and the second between the plaintiff and the seller from whom he purchased the property. Again, the court is cautious about disturbing the contractual allocation of risk for latent defects. The defendant would have bargained to limit his liability to the first purchaser. It seems unfair to allow a stranger to the bargain (the plaintiff downstream purchaser) to ambush the defendant with negligence liability that exceeds those limitations. This is especially so if the defendant had accepted a lower price from his direct purchaser so as to enjoy the benefits of those limitations. Likewise, the plaintiff-seller contract would have allocated the risk of latent defects in a certain way. Allowing the plaintiff to bypass this allocation seems like an undeserved windfall.

36 The court's unwillingness to disturb the risk allocation bargained for by the plaintiff and the defendant, whether with each other (where the plaintiff is a direct purchaser) or with third parties (where the plaintiff is a downstream purchaser), probably stems from the court's respect for both parties' freedom of contract. It stands to reason, then, that if the plaintiff was *unable* to protect himself through contract, the court is more willing to hold that a duty arises, since the plaintiff never enjoyed *real* freedom of contract to begin with. The Australian courts call such a plaintiff "vulnerable", *ie*, one who does not have the ability to protect himself from the consequences of the defendant's carelessness either entirely or at least in a way that would cast the consequences of loss on the defendant.[84]

37 By way of illustration, consider first the case of *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers*[85] ("*PT Bumi*"). In *PT Bumi*, the plaintiff shipowner claimed in negligence against the ship engine producer for latent defects. The plaintiff had contracted with a ship builder to build the ship, and this contract contemplated the builder acquiring the ship engine from the defendant. The Court of Appeal held that the defendant producer did not owe a duty to the plaintiff shipowner. As a downstream purchaser of the engine, the plaintiff's natural claim was against the builder. Having committed itself to look towards the builder for redress,[86] the plaintiff should not be allowed to bypass the limitation of liability clauses in that contract. As the court observed:[87]

> It is not for the court to help a party, after the event, to improve his commercial bargain. Bumi does not deserve any help. Bumi had made its bargain and must live with it … There is every reason that the loss should fall on Bumi.

38 The plaintiff in *PT Bumi* was a sophisticated commercial party and able to protect itself through contract. It was on this basis that the court in *PT Bumi* distinguished *Bryan v Maloney*[88] ("*Bryan*"), in which the High Court of Australia held that the builder of a house owed a duty to the homeowner, who was a downstream purchaser, with respect to

84 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530, cited with approval in *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC* [2015] SGHC 146 at [540]–[542]. Sometimes, our courts use 'vulnerability' to refer to the plaintiff's dependence on the defendant to protect him from harm. See n 33 above.

85 [2004] 2 SLR(R) 300.

86 *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR(R) 300 at [48].

87 *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR(R) 300 at [53].

88 (1995) 182 CLR 609.

latent defects in the house.[89] As later noted in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[90] ("*Woolcock*"), in *Bryan* "the inability of an ordinary purchaser of a dwelling house to realistically protect him or herself against the builder's negligence influenced this Court to allow the purchaser to sue the builder in tort".[91] We could say that in Australian cases involving latent defects in buildings, vulnerability of the plaintiff is a necessary factor to establish duty.[92] In *Woolcock*, which featured an investment company downstream purchaser, the court in holding that no duty arose said:[93]

> [T]he most powerful reason for rejecting the proposed duty is that the first owners and purchasers of commercial buildings are ordinarily in a position to protect themselves from most losses that are likely to occur from defects in the construction of such buildings.

39 Plaintiff vulnerability alone may be sufficient to justify imposing a duty where the plaintiff is a direct purchaser, but not where he is a downstream purchaser. Where the plaintiff is a direct purchaser, only the plaintiff-defendant contract is relevant, and the plaintiff's vulnerability justifies a court looking behind this contract (because the plaintiff was not in a position to bargain for protection). But consider the case where the plaintiff is a downstream purchaser. Yes, the plaintiff's vulnerability taints the contract between the plaintiff and his seller. But there is still the contract between the defendant and the first purchaser. Saddling the defendant with a duty owed to the plaintiff disturbs the risk allocation contained in this contract, in effect creating a disconformity with the defendant-first-purchaser contract. Thus, in *Woolcock*, the court acknowledged the disconformity in imposing a duty the performance of which would have required the defendant to do more or different work than the contract with the original owner required or permitted.[94] As pointed out in *Woolcock*[95] and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[96] ("*Brookfield*"), the duty finding in *Bryan* was justified because no such disconformity arose; in *Bryan* the contract between the defendant and the first purchaser did not contain any exclusion of liability clause.

---

89 *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR(R) 300 at [26].
90 (2004) 216 CLR 515.
91 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [95].
92 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 313 ALR 408 at [182].
93 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [110].
94 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [28].
95 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [29].
96 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 313 ALR 408 at [28].

40 In conclusion, the cases show that a defendant producer of property does not generally owe the plaintiff owner a duty with respect to latent defects. This is because the court is reluctant to disturb the risk of latent defects picked up by the plaintiff and defendant through the relevant contract(s), which imposing a duty inevitably does. However, a duty may be imposed if (a) the plaintiff was vulnerable; and (b) (where the plaintiff is a downstream purchaser) doing so does not create a disconformity with the defendant-first-purchaser contract.

C. Category 3

41 In Category 3 cases, a third party contracted with the defendant for the defendant to perform a service which if performed with care would have benefitted the plaintiff. The defendant performed the service poorly and the plaintiff suffered and claimed against the defendant for PEL.

42 In this type of case, this article contends that the court's instinctive reaction is that the defendant owed the plaintiff a duty only if one condition, which we will call the substantial purpose condition, is fulfilled: objectively, a substantial purpose for the third party contracting with the defendant was to benefit the specific plaintiff.[97] In other words, a duty arises if a substantial reason for the third party's entry into the contract was to benefit the plaintiff. Conversely, if the third party entered into the contract mainly for reasons other than to benefit the plaintiff so that any benefit derived by the plaintiff was merely incidental, there is no duty.

43 By way of illustration, consider the solicitor-disappointed-beneficiary cases. Here, the defendant solicitor was instructed by the third-party testator to ensure that the plaintiff beneficiary received certain benefits after the testator's death. The testator died and the benefits failed to materialise due to the solicitor's negligence. The disappointed beneficiary then claimed against the solicitor in negligence. Examples of these cases include *AEL v Cheo Yeoh & Associates*,[98] *White*[99] and *Carr-Glynn v Frearsons*[100] ("*Carr-Glynn*"). In these cases, the court was keenly aware that, as Lord Goff noted in *White*, "if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in the law which needs to be

97 The benefit to the plaintiff may be in the form of monetary gain and/or the avoidance of monetary loss.

98 [2014] 3 SLR 1231 (will invalid because it was executed in the presence of one instead of two or more witnesses).

99 *White v Jones* at [1995] 2 AC 207 (solicitor delayed in changing testator's will to include plaintiff daughters as beneficiaries).

100 [1999] Ch 326 (solicitor failed to advise testatrix to sever joint tenancy with the result that testatrix's gift of property to plaintiff was ineffective).

filled".[101] This is because the only person with the claim (the estate) suffered no loss, while the only person who has suffered loss (the beneficiary) has no claim.[102] (Although the majority in *White* gave separate judgments, it was noted in *Carr-Glynn* that the reasoning that formed the majority opinion in *White* was Lord Goff's lacuna reasoning.)[103]

44 Implicit in Lord Goff's lacuna reasoning is the substantial purpose condition. There is nothing unusual in saying that a plaintiff who suffered loss arising from the defendant's negligence has no claim; indeed, we have already observed that the function of the duty of care is precisely to limit negligence liability for such losses.[104] Instead, it is the third party who stands at the heart of the lacuna reasoning. He has a claim against the defendant but, extraordinarily, he suffered no loss. In the solicitor-disappointed-beneficiary context, the person with the claim (the testator as represented by his estate) has a claim against the defendant solicitor (in both tort and contract). However, he suffered no loss. And he suffered no loss *precisely* because the substantial purpose condition is satisfied – a substantial purpose of his contract with the defendant solicitor was to benefit not himself, but the plaintiff beneficiary.

45 That Category 3 cases turn on whether the substantial purpose condition is fulfilled can be seen in *Anwar*, *Gorham v British Telecommunications plc*[105] ("*Gorham*") and *Dean v Allin & Watts*[106] ("*Dean*"). In all three cases, the court held that a duty arose because a substantial purpose of the third party contracting with the defendant was to benefit the plaintiff. Two other cases show the converse; no duty arises if the substantial purpose condition is not fulfilled.

46 In *Anwar*, the defendant solicitor was engaged to help a father restructure his debts. The father told the defendant that he did not want the plaintiffs (being his sons) to be personally liable for those debts. The father and the plaintiffs signed several agreements with the creditor bank to restructure the debts. The defendant failed to point out that the agreements contained a clause under which the plaintiffs agreed to personally guarantee the father's debts. Subsequently, the father defaulted,

101 *White v Jones* at [1995] 2 AC 207 at 260.
102 *White v Jones* at [1995] 2 AC 207 at 259–260.
103 "Both Lord Browne-Wilkinson and Lord Nolan expressed their agreement with the reasons given by Lord Goff … It must, I think, follow that it is the reasoning in Lord Goff's speech – and only that reasoning – that can be said to have received the support of the majority in the House of Lords": *Carr-Glynn v Frearsons* [1999] Ch 326 at 335.
104 See para 6 above.
105 [2000] 1 WLR 2129.
106 [2001] EWCA Civ 758.

the bank claimed against the plaintiffs under the personal guarantee clause, and the plaintiffs sued the defendant for failing to bring this clause to their attention. The Court of Appeal held that the defendant owed the plaintiffs a duty of care.[107] It was crucial to the outcome in *Anwar* that a substantial purpose of the father's contract with the defendant solicitor was to protect the plaintiffs from personal liability. In other words, the defendant owed the plaintiffs a duty because the substantial purpose condition was fulfilled. As the court noted:[108]

> Where a solicitor's instructions from a client include or has as its effect the conferment of a benefit or negativing a detriment to a third party, and the solicitor undertakes to the client to fulfil that instruction, he would have brought himself into a direct relationship with the third party, even if the latter may not have personal knowledge of the transaction or the solicitor.
>
> The [father]'s wish to benefit the [plaintiffs] can only be effected through the solicitor's careful performance of his legal services to the [father].
>
> [The solicitor] was keenly aware that at least a part of his services was retained precisely to ensure that [the plaintiffs'] interests were taken care of … He was also alive to [the father]'s concern that his sons not have to personally guarantee his debts.
>
> [emphasis removed]

An objection to viewing *Anwar* as turning on the substantial purpose condition being satisfied is this: given that the father gave a host of instructions to the defendant solicitor in relation to the debt restructuring, of which only one was to protect his sons from personal liability, how can we say that a substantial purpose for the father entering into the retainer was to protect his sons from personal liability?[109] There are two possible responses to this objection. First, a substantial purpose need not be the (or even a) main purpose for the contract, so long as it is a non-trivial purpose. Second, the above extracts from the judgment in *Anwar* show that the father's desire to protect his sons from personal liability was not a trivial purpose of the retainer.

47 The importance of the substantial purpose condition in *Anwar* can also be seen from academic commentary that *Anwar* should have been distinguished from the solicitor-disappointed-beneficiary cases on the basis that (a) in *Anwar* the plaintiffs' interests were not fully aligned with their father's (as the plaintiffs were offering properties as security for their father's loan); whereas (b) in the solicitor-disappointed beneficiary cases, the interests of the testator and the disappointed beneficiary were fully

107 The court also held that the defendant was liable under an implied retainer.
108 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 at [146]–[148].
109 The author thanks the anonymous reviewer for this astute objection.

aligned.[110] Whether or not we agree with this comment is irrelevant. The point is that this comment takes for granted that the substantial purpose condition is a necessary condition for a duty to arise in a Category 2 case.

48 In *Gorham*, an insurer was held to have owed a duty to disappointed beneficiaries not to give negligent advice to the customer which adversely affected the disappointed beneficiaries' interests as the customer intended them to be. Pill LJ (with whom Schiemann LJ agreed) said:[111]

> It is fundamental to the giving of advice upon a scheme for pension provision and life insurance that the interests of the customer's dependants will arise for consideration. In my judgment, practical justice requires that disappointed beneficiaries should have a remedy against an insurance company in circumstances such as the present. On the facts, [the insurer] can have been in no doubt about his customer's concern for [the plaintiffs]. First amongst [the customer]'s list of priorities was 'provision for family.' … Advice was expected and was directed not only to the interests of [the customer] but to the interests of his dependants should he predecease them. The advice was given on the assumption that their interests were involved. Moreover, the provision for them was not merely a windfall in the sense that a legacy may be a windfall: it was central to the purpose of the venture into insurance.

49 In *Dean*, a borrower's solicitor was held to have owed a duty to the plaintiff lender to ensure the effectiveness of the security for the loan (being a property owned by a business partner of the borrower). This was because the borrower had instructed the defendant solicitor to ensure that the plaintiff lender obtained effective security. As the court noted: "the provision of effective security was of fundamental importance to [the plaintiff], and there was on this point a sufficient identity of interest between [the plaintiff] and [the defendant]".[112] The substantial purpose condition was thus fulfilled.

50 Conversely, where a third party contracted with the defendant to perform a service which may only incidentally have benefitted the plaintiff, the defendant does not owe a duty to the plaintiff to perform that service carefully. In *X (Minors) v Bedfordshire County Council*,[113] the local authority in discharging its statutory functions engaged social workers and psychiatrists who were then brought into contact with the

110 Leong Wai Kum, Alexander Loke & Burton Ong, "The Conceptual Basis of the Solicitor's Liability to a Third Party Related to the Client: Reconstructing the *White v Jones* Principle in Singapore" (2016) 32(1) *Journal of Professional Negligence* 30 at 35–37.

111 *Gorham v British Telecommunications plc* [2000] 1 WLR 2129 at 2141–2142.

112 *Dean v Allin & Watts* [2001] EWCA Civ 758 at [69].

113 [1995] 2 AC 633.

plaintiffs. A majority of the House of Lords held that the social workers and psychiatrists owed no duty to the plaintiffs. The substantial purpose condition was not fulfilled because the services of the social workers and psychiatrists were performed primarily for the local authority and any benefit that accrued to the plaintiffs was purely incidental. Lord Browne-Wilkinson, with whom the other members of the House agreed, said:[114]

> The social workers and psychiatrists were retained by the local authority to advise the local authority, not the plaintiffs. The subject matter of the advice and activities of the professionals is the child. Moreover the tendering of any advice will in many cases involve interviewing and, in the case of doctors, examining the child. But the fact that the carrying out of the retainer involves contact with and relationship with the child cannot alter the extent of duty owed by the professionals under the retainer from the local authority. The Court of Appeal drew a correct analogy with the doctor instructed by an insurance company to examine an applicant for life insurance. The doctor does not, by examining the applicant, come under any general duty of medical care to the applicant. He is under a duty not to damage the applicant in the course of the examination: but beyond that his duties are owed to the insurance company and not to the applicant.

51 Although Lord Browne-Wilkinson's comments were with respect to claims for physical damage suffered by the plaintiffs (child abuse), they were subsequently applied in the PEL case of *Kapfunde v Abbey National plc*.[115] There, the plaintiff tried to obtain a permanent job with a company and declared his pre-existing medical conditions on a standard questionnaire to the defendant doctor, who was the company's chief medical adviser in charge of medical screening of potential staff. The doctor recommended that the plaintiff was unsuitable for employment and the plaintiff claimed unsuccessfully against the doctor for PEL. It was held that the defendant doctor owed no duty to the plaintiff. The substantial purpose condition was not fulfilled since the doctor's position was "plainly comparable with that of the social workers and doctors in [the *Bedfordshire* case], or with that of a doctor examining for the purposes of life insurance".[116]

---

114 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 752–753.

115 [1999] ICR 1.

116 *Kapfunde v Abbey National plc* [1999] ICR 1 at 11. See also *Briscoe v Lubrizol Ltd* [2000] ICR 694 (no duty owed by insurers underwriting the employer's scheme, under which the employer was liable to the plaintiff employee if he became disabled, when assessing the validity of the plaintiff employee's claim under the scheme); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortensen v Laing* [1992] NZLR 282 (NZCA) (an investigator reporting on the causes of a fire to an insurance company owed no duty of care to the insured whose claim was rejected because of the allegedly inaccurate investigator's report).

52 The substantial purpose condition also helps explain why an auditor generally does not owe a duty to persons other than the company it is auditing with respect to the accuracy of the accounts. In such cases, a third-party company contracted with the defendant auditor to perform auditing services. The result of those services, audited accounts (or accounts "blessed" by the auditor), benefitted other persons that deal with the company. But this benefit was only incidental; in most cases the company contracted with the auditor substantially for its own benefit. Thus, the case law is replete with pronouncements that an auditor owed no duty to (a) buyers of the company's shares;[117] (b) the company's creditors;[118] (c) creditors of the company's related companies with the company as guarantor;[119] and (d) the company's guarantors.[120]

53 In conclusion, the cases show that where a third party contracted with the defendant for the defendant to perform a service which if performed with care would have benefitted the plaintiff, whether the defendant owed a duty to the plaintiff turns on whether the substantial purpose condition is fulfilled. If objectively a substantial (meaning non-trivial) purpose for the third party contracting with the defendant was to benefit the specific plaintiff, a duty arises. Conversely, if objectively the third party entered into the contract mainly for reasons other than to benefit the plaintiff, so that any benefit derived by the plaintiff would be merely incidental, there is no duty.

D. Category 4

54 In Category 4 cases (also called relational economic loss cases), the defendant damaged a third party's property and this led to the plaintiff suffering PEL. In this type of case, the court's main concern is that allowing the plaintiff's claim would result in liability to an indeterminate class (which we will call the "indeterminacy problem").[121]

---

117 *Caparo Industries plc v Dickman* [1990] 2 AC 605; *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113.

118 *Al-Saudi Banque v Clarke Pixley* [1990] Ch 313; *R Lowe Lippmann Figdor and Franck v AGC (Advances) Ltd* [1992] VicRp 93.

119 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

120 *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 2 SLR(R) 480.

121 As noted in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [66], PEL is not limited by the laws of nature, as a negligent act can cause ripple-on economic losses through a complex web of human links. In contrast, CEL is contingent on physical damage, which is subject to the laws of nature. A negligently driven lorry's impact zone is always delimited by the laws of physics; a negligently prepared financial report of a foreign-listed corporation respects no such laws.

55 There is only one Singapore case in this category: *NTUC*. It tells us that a duty may arise in a relational economic loss case only if the indeterminacy problem is satisfactorily addressed. This problem will be satisfactorily addressed (and thus a duty will arise) if (a) the third party's property damage was caused by the defendant's powerful heavy vehicle;[122] (b) the plaintiff's premises were within the theatre of operations of that heavy vehicle; and (c) this theatre of operations was a very restricted area.

56 In *NTUC*, a driver carelessly drove his heavy vehicle into the pillar of a third party's building (Changi Airport). The pillar supported the floor of the plaintiff's café, which was in the airport lounge. The café did not sustain any property damage but for safety reasons the public authority ordered a temporary closure of the café. The Court of Appeal held that the driver owed a duty to the café in respect of lost profits during its closure.[123] The court was willing to do so because on the facts of *NTUC* a duty finding would not lead to liability to an indeterminate class in future cases. This can be deduced for three reasons.

57 First, the court identified the indeterminacy problem as the main issue in relational economic loss cases. It noted very early in the judgment that "unlike physical damage, economic losses are not constrained by the laws of nature: they often ripple out from a negligent act".[124] Later on, the court explained:[125]

> The critical concern about indeterminacy … is in relation to liability to an indeterminate class.
>
> The problem of liability to an indeterminate class arises where the basis on which the law permits recovery for losses would entitle an unascertainable class of parties to recover for their loss. The concern therefore does not arise if the basis on which the law permits recovery restricts recovery to a reasonably determinate class of victims.

58 Secondly, and following from the extracts above, the basis on which the court allowed the plaintiff to recover demonstrated its commitment to defining a reasonably determinate class of victims. As noted above,[126] the court held that the driver in *NTUC* owed a duty because of the presence of three proximity determinants – physical

122 In this article, "heavy vehicle" is used as shorthand for any massive property, *ie*, an aircraft and a ship will be "heavy vehicles".

123 Given the driver's liability in negligence, the defendant in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588, as the driver's employer, was vicariously liable.

124 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [2].

125 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [42]–[43].

126 See para 11 above.

proximity, causal proximity and knowledge. More specifically, a duty was owed because (a) the driver was driving a powerful heavy vehicle (this contributed to the finding of causal proximity and knowledge);[127] (b) the plaintiff's premises were within the driver's theatre of operations (this contributed to the finding of physical proximity and knowledge);[128] and (c) this theatre of operations was a very restricted area (this contributed to the finding of physical proximity).[129] Thus, where a defendant damaged a third party's property and this led to the plaintiff suffering PEL, the defendant owed the plaintiff a duty with respect to the latter's PEL only if these three conditions are fulfilled.

59 In relation to the significance of the driver driving a powerful heavy vehicle, the court said:[130]

> 7 … [The driver] operated airtugs for 'aircraft towing and pushback operations'. It is important to note that these airtugs were heavy vehicles powerful enough to move an aircraft. …
>
> …
>
> [48] … we reiterate that the Airtug was a *heavy vehicle powerful enough to move an aircraft* … It was the natural and direct consequence of such a vehicle colliding into a structure supporting the floor of the Lounge that the floor or part thereof would become unsafe for occupation. …
>
> [emphasis in original]

60 In relation to the plaintiff's premises being within the driver's theatre of operations and that theatre being a very restricted area, the court said:[131]

> [The driver] operated airtugs in close propinquity to the [plaintiff's premises]: the [plaintiff's premises were] located directly above the UBHA, which formed part of [the driver's] theatre of operations … [The driver] carried out his

127 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [48a] and [50].

128 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [47] and [50].

129 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [47]. The finding of causal proximity was also justified at [49] on the basis that, although it could be argued that the building authority's closure order instead of the accident was the direct cause of the plaintiff's lost profits, it was eminently foreseeable and a natural consequence of the accident that the building authority would issue a closure order. This seems to suggest that causal proximity is not difficult to satisfy in a Category 4 case.

130 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [7] and [48(a)].

131 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [47]. See also *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [71].

> operations within a very restricted area, the airside area of Changi Airport. It is essential to stress that we are not concerned with a case involving a driver of a heavy vehicle negligently colliding into a pillar supporting the floor of a shopping mall along a public road, causing tenants on that floor to suffer loss of profits when the floor is closed. In such a case, there would be insufficient physical proximity between the driver and the tenants, because the driver would have been carrying out his operations over a much wider public area, unlike the present case where [the driver] was operating within a much more restricted area, giving rise to the requisite physical proximity between [the driver] and the [plaintiff].

61 Thirdly, although the court categorised the above three conditions under the proximity limb of the *Spandeck* test,[132] it is clear that the three conditions were formulated in order to deal with the indeterminacy problem. The court acknowledged as much when it said:[133]

> [T]he proximity requirement adequately addresses the concern of liability to an indeterminate class. In this context, it ensures that [the driver] is only liable for the pure economic loss suffered by a determinate class, namely, the operators of businesses in the affected area of the Lounge.

62 In conclusion, we can say that in a Category 4 case, a duty will arise if the indeterminacy problem is satisfactorily addressed. *NTUC* tells us that this indeterminacy problem is satisfactorily addressed if the three conditions are fulfilled.

E. Category 5

63 Category 5 cases are those that do not fall within Categories 1 to 4. This residual category contains several types of cases.

64 One type of Category 5 case concerns employment references. Here, the court has to decide whether the defendant, who on request by a third party provided a reference in respect of the plaintiff who was formerly engaged by him as a member of his staff, is liable to the plaintiff for PEL by reason of negligence in preparing the reference. This is not a Category 2, 3 or 4 case for obvious reasons. It is also not a Category 1 case for at least two reasons. First, there is no "ask and response" – the plaintiff does not ask the defendant for the reference; rather the "ask" comes from a potential new employer of the plaintiff. Secondly, the plaintiff does not change his position in reliance on the reference.

---

132 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [46]–[51].

133 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [52].

65 *Spring* and *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*[134] ("*Ramesh*") are employment reference cases where the court held that the defendant owed the plaintiff a duty. We have seen that the court's proximity reasoning in *Spring* is sparse and unhelpful.[135] Indeed, their Lordships focused on justifying why a duty would not be inconsistent with defamation law,[136] and occasionally observed that on the facts of the case a carelessly prepared reference would irretrievably damage the plaintiff's "entire future prosperity and happiness".[137] In *Ramesh*, the court acknowledged that the plaintiff did not change his position in reliance on the reference. The court instead based its duty finding on the fact that the plaintiff expected the defendant to take care in the circumstances of the case, calling this "attenuated reliance", or reliance in a "broad and loose sense".[138]

66 A second type of Category 5 case involves valuers or surveyors of houses. Here, the court has to decide whether the defendant valuer or surveyor, who valued a house for the purpose of a mortgage, owed a duty to the plaintiff mortgagor in the absence of a contractual relationship between themselves, the plaintiff having suffered PEL when it relied on the overstated valuation in purchasing the house. The outcome of these valuation cases turns on whether the plaintiff can show that most people in his position would rely on the valuation without independent inquiry. Thus, in *Smith v Eric S Bush*[139] ("*Eric Bush*"), Lord Griffiths held that a duty arose because the "overwhelming probability" was that the plaintiff would rely on the valuation; in his Lordship's words, "the evidence was that surveyors knew that approximately 90 per cent. of purchasers did so".[140] Similarly, Lord Jauncey identified as critical to his duty finding the fact that the defendant knew that the plaintiff would "probably rely on the valuation … in deciding whether to buy the house without obtaining an independent valuation".[141]

134 [2015] 4 SLR 1.
135 See para 18 above.
136 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 325, 334 and 350–351. Only Lord Goff said that this case fell within the *Hedley Byrne* principle: *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 319.
137 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 326, *per* Lord Lowry and 342, *per* Lord Woolf.
138 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 at [251] and [255]. The court also found that there was causal and circumstantial proximity on the facts: *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 at [252]–[254].
139 [1990] 1 AC 831.
140 *Smith v Eric S Bush* [1990] 1 AC 831 at 865.
141 *Smith v Eric S Bush* [1990] 1 AC 831 at 871.

67 Although the House of Lords in *Eric Bush* also attached significance to the fact that the plaintiff had paid (whether directly or indirectly) for the valuation,[142] it was later shown in *Scullion v Bank of Scotland plc*[143] ("*Scullion*") that this is not essential to a duty finding. The material facts of *Scullion* and *Eric Bush* are similar in all respects but one – the plaintiff purchaser in *Scullion* was not a homeowner but an investor who was buying to let. The plaintiff in *Scullion* also paid for the valuation.[144] Yet the Court of Appeal held that no duty arose because (a) people who buy to let are "more likely to obtain, and more able to afford, an independent valuation or survey";[145] and (b) unlike *Eric Bush*, "there was no evidence to support the proposition that anything like 90% of those people who bought to let in 2002 relied only on valuations prepared by a valuer instructed by their mortgagees, rather than obtaining their own valuation".[146] Indeed, judicial reluctance to impose a duty where the plaintiff is wealthy is found in *Eric Bush* itself, with Lord Templeman expressly reserving his position in respect of "valuations of quite different types of property for mortgage purposes, such as industrial property, large blocks of flats or very expensive houses", as "[w]ith very large sums of money at stake prudence would seem to demand that the purchaser obtain his own structural survey to guide him in his purchase".[147]

68 A third type of Category 5 case concerns a defendant who is a certifier of works. Here, the court has to decide whether a certifier of works performed for a third party owes a duty to the person performing those works. Cases of this type include *Spandeck*, *Pacific Associates Inc v Baxter*[148] ("*Pacific Associates*") and *Animal Concerns*. They turn on whether a duty finding would be inconsistent with the contractual matrix.

69 *Spandeck* and *Pacific Associates* both involved a defendant who was appointed by a third party to supervise and certify work performed by the plaintiff. The plaintiff performed that work (redevelopment of a medical facility in *Spandeck* and dredging and reclamation work in *Pacific Associates*) pursuant to a contract between the plaintiff and the third party, and the contract specified that (a) the defendant's duties were owed to the third party; and (b) any dispute between the plaintiff and the third party as to the defendant's certification was to be resolved by arbitration between the plaintiff and the third party. The plaintiff alleged

142 *Smith v Eric S Bush* [1990] 1 AC 831 at 848 and 852, *per* Lord Templeman; 865, *per* Lord Griffiths and 871, *per* Lord Jauncey.
143 [2011] 1 WLR 3212; [2011] EWCA Civ 693.
144 *Scullion v Bank of Scotland plc* [2011] 1 WLR 3212; [2011] EWCA Civ 693 at [16].
145 *Scullion v Bank of Scotland plc* [2011] 1 WLR 3212; [2011] EWCA Civ 693 at [49].
146 *Scullion v Bank of Scotland plc* [2011] 1 WLR 3212; [2011] EWCA Civ 693 at [50].
147 *Smith v Eric S Bush* [1990] 1 AC 831 at 859.
148 [1990] 1 QB 993.

that it suffered PEL arising from its work having been under-certified by the defendant. In both cases, the court held that there was no duty because (i) the plaintiff could have protected itself by contracting directly with the defendant but did not do so; and (ii) imposing a duty would be inconsistent with the plaintiff's contract with the third party.

70 In contrast with *Spandeck* and *Pacific Associates*, the Court of Appeal reached a duty finding in *Animal Concerns*. Here, a contractor was engaged by the plaintiff to construct an animal shelter. The contractor appointed the defendant as the clerk of works (*ie*, site supervisor) for the construction project. The contractor negligently used inferior materials for backfilling, causing the plaintiff to suffer PEL to repair the environmental damage. The plaintiff claimed successfully against the defendant for negligent supervision of the contractor. Unlike in *Spandeck* and *Pacific Associates*, there was nothing in the plaintiff-third party contract to preclude the imposition of a duty.[149]

71 A fourth type of Category 5 case involves defendants who would be in a conflict of interest position if the alleged duty were imposed. Unsurprisingly, courts are reluctant to impose a duty on defendants if that would cause them to be in a conflict of interest position,[150] and this intuition cuts across all duty cases, not just PEL cases.[151] Thus, a solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party in respect of PEL suffered by that other party.[152] The result in *Animal Concerns* can also be justified on the basis that imposing a duty would not cause the defendant to be in a conflict of interest position, because industry practice mandated that the defendant advance the plaintiff's interests.[153]

---

149 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [71]–[74].

150 *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 1 SLR 1166 at [17(a)].

151 See *James-Bowen v Commissioner of Police for Metropolis* [2018] UKSC 40 at [30]–[33] (Commissioner of Police did not owe a duty to her officers, in the conduct of proceedings against her based on those officers' alleged misconduct, to take reasonable care to protect them from reputational harm, because the Commissioner's public duties were inconsistent with protecting the reputational interests of her officers); and *SXH v Crown Prosecution Service* [2017] UKSC 30 at [38] (Crown Prosecution Service owed no duty to asylum seeker complaining of excessive detention because such a duty would conflict with its public duty).

152 *Steel v NRAM Ltd* [2018] UKSC 13 at [25].

153 The Court of Appeal noted that a clerk of works would ordinarily owe a duty to persons commissioning the construction works because "as a matter of industry practice, … [t]he clerk of works protects the interests of the [commissioner] against the builder, by inspecting and supervising the works to ensure that they conform to the [commissioner]'s budget, standards and specifications, and that the [commissioner] is getting value for money and proper workmanship": *Animal*

(cont'd on the next page)

72 *West Bromwich Albion Football Club Ltd v El-Safty*[154] ("*WBA*") is another conflict of interest case. The plaintiff football club suffered PEL when its football player had to retire prematurely following a surgery which the defendant consultant surgeon had recommended. The court refused to impose a duty. It was concerned that a duty finding would put the defendant in an impossible situation, since the interests of the plaintiff may conflict with those of the player – the former may want the player to be able to play again in the shortest possible time and this may lead it to support medical decisions that may adversely affect the player's long-term health.

VI. Reconceiving proximity: Defining the higher-order principle *y* as "whether we can say that the plaintiff should have protected himself through contract"

73 Recall that *y* is the higher-order principle that the proximity determinants should point towards or "add up" to, so that we may determine whether proximity is present in a particular PEL case. Recall further that we need a new definition of *y* because the current definition of *y* as "closeness/directness in the plaintiff-defendant relationship" does not explain the cases. In this Part, we propose that *y* be reconceived: *y* should be defined as "whether the plaintiff should have protected himself through contract" ("Proposed Definition"). If the answer is yes, proximity is absent. If the answer is no, proximity is present. In other words, to continue the earlier example,[155] a court can say that physical proximity and control are insufficient to establish proximity in *j* case because in *j* case the plaintiff *should have protected himself through contract*. Conversely, a court can say that physical proximity and control are sufficient to establish proximity in *k* case because in *k* case *we cannot say that the plaintiff should have protected himself through contract*. How did we arrive at the Proposed Definition as the higher-order principle *y*? In other words, how does the Proposed Definition explain the cases?

74 First, we observe that the Proposed Definition explains why courts generally reach a no-duty outcome in cases which involved a defendant producer of property and a direct purchaser plaintiff or a downstream purchaser plaintiff who later discovered that the property had latent defects (*ie*, Category 2 cases). As shown in *PT Bumi* and *Woolcock*, the court is reluctant to disturb the contractual allocation of risks for latent defects as agreed by the plaintiff and the defendant, whether as

Concerns Research & Education Society v Tan Boon Kwee [2011] 2 SLR 146 at [51] and [60].

154 [2005] EWHC 2866 (QB).

155 See para 12 above.

between themselves (where the plaintiff was a direct purchaser) or with third parties (where the plaintiff was a downstream purchaser). Another way of expressing this reluctance to disturb this risk allocation is to say that the plaintiff should have protected himself through contract, *ie*, he should have bargained for a more favourable risk allocation. Thus, we can say that a court generally reaches a no-duty outcome in Category 2 cases, because it believes that Category 2 facts invite the rejoinder: "Why are you suing the producer in negligence? You should have contracted for more protection!"

75 Secondly, the exception to the no-duty outcome in Category 2 cases can be explained by the Proposed Definition. The exception, following *Woolcock* and *Brookfield*, states that a duty may arise in a Category 2 case if the court is satisfied that (a) the plaintiff was unable to protect himself contractually; and (b) (where the plaintiff was a downstream purchaser) doing so does not create a disconformity with the defendant-first-purchaser contract. The Proposed Definition explains why proximity is present when (a) and (b) are present. Regarding (a), the plaintiff who is unable to protect himself contractually (*vis-à-vis* either the defendant producer or the seller) should not be expected to protect himself contractually. Regarding (b), if imposing a duty does not create additional potential liability for the defendant than that already existing under the defendant-first-purchaser contract, then we can reasonably say that the plaintiff should not be expected to protect himself through contract. Thus, we can say that a court may hold that a duty arises in one type of Category 2 case, specifically where it cannot say that the plaintiff should have protected himself through contract. It cannot say so because (i) it was impossible for the plaintiff to protect himself (since he was vulnerable); and (ii) if the plaintiff was a downstream purchaser, the defendant was not assuming any liability other than that which it had already assumed under the defendant-first-purchaser contract (for otherwise the defendant would reasonably expect to be paid for incurring that additional potential liability).

76 We now deal with two potential objections to the explanatory power of the Proposed Definition in Category 2 cases. First, our courts have held that developers and architects owed duties to management corporations of condominiums with respect to latent defects in the common property.[156] How do we explain this duty being owed to presumably non-vulnerable management corporations? The answer is

156 *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] 3 SLR(R) 653; *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR(R) 134. A management corporation brings the claim on behalf of the owners, since the owners collectively own the common property.

that a management corporation *is actually vulnerable*. A management corporation has no ability to protect itself through contract because it does not purchase the common property from the developer (let alone the architect). Instead, it is a "successor to the developers with respect to the common property".[157] As explained in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd*:[158]

> Under s 33(1) of the Strata Act the subsidiary proprietors from time to time of the lots in a subdivided building comprised in a strata plan constitute the body corporate, the management corporation. Hence, the management corporation at the time of its creation was, in fact, the developers themselves who alone constituted the management corporation. At that stage, the management corporation was the developers' alter ego. It is only at a later stage as and when the developers completed the sales of the various lots to purchasers that the constitution of the management corporation changed and subsidiary proprietors other than the developers then constituted the management corporation.

77 The second objection is: how do we explain the Canadian case of *Winnipeg Condominium Corporation No 36 v Bird Construction Co*[159] ("*Winnipeg*")? Here, the defendant main contractor was engaged to build an apartment by a developer. Later on, a section of cladding fell and inspections revealed dangerous defects in the masonry work which the defendant was responsible for. The Canadian Supreme Court held that the defendant main contractor owed a duty to the plaintiff condominium corporation[160] in respect of work that was dangerously defective. The court reasoned that if recovery was barred, the incentives facing the plaintiff would be skewed: economically it would be preferable for the plaintiff to wait till the dangerous defect caused physical injury (to person or property) rather than fix the defect, because only in the former case would it be able to claim damages. The court did not consider the plaintiff's ability to protect itself through contract. But this can be explained – the test for duty that was applied in *Winnipeg* did not contain a proximity limb; instead, it contained only two limbs, foreseeability and policy.

78 We move on. The third reason in support of the Proposed Definition is that it explains cases that fall within the *Hedley Byrne* principle (*ie*, Category 1 cases) like *Hedley Byrne* and *Go Dante Yap*. Recall that the full principle, which is distinct from an assumption of responsibility, states that a duty arises if:

---

157 *RSP Architects Planners & Engineers v Management Corporation Strata Title Plan No 1075* [1999] 2 SLR(R) 134 at [38].

158 [1995] 3 SLR(R) 653 at [70].

159 [1995] 1 SCR 85.

160 The equivalent of our management corporation. The apartment was later converted into a condominium.

(a) the defendant held out that he would perform a task with care;

(b) the plaintiff (or another person acting for the plaintiff) asked the defendant to perform the task;

(c) the defendant responded by performing the task, whether pursuant to a contract with the plaintiff or gratuitously, and with the actual knowledge or constructive knowledge of the purpose, whether general or specific, of the plaintiff's ask;

(d) the plaintiff changed his position in reliance on the defendant's response; and

(e) while it is not necessary that the plaintiff and defendant communicated with each other directly, or that the plaintiff knew the defendant's exact identity or *vice versa*, from the defendant's perspective the plaintiff must be a least an identifiable (*ie*, not necessarily identified) person or group of persons.

79 A duty arises in Category 1 cases because here we cannot say that the plaintiff should have protected himself through contract. We cannot say this because *there should have been no need for a Category 1 plaintiff to contract to protect himself*. The underlying rationale is that Category 1 facts point to the objective conclusion that the defendant should have taken care not to have caused the plaintiff PEL, even if the plaintiff did not pay him. Another way of putting it is that we expect the defendant in Category 1 circumstances to have undertaken the task with care. As Lord Devlin put it, a case that falls within the *Hedley Byrne* principle is one where the plaintiff-defendant relationship is "equivalent to contract" but for the absence of consideration.[161] In other words, the plaintiff in a Category 1 case need not have contracted to protect himself because the relationship is already almost contractual.

80 Indeed, in one of the earliest comments on *Hedley Byrne*, Tony Weir expressed the view that the plaintiff in that case should have protected himself by contract. In Weir's memorable words:[162]

> They [the claimants] made bad business deals, having taken only a free opinion before hazarding their wealth in the hope of profit, no part of which, had it eventuated, would they have transferred to the honest person whom they now seek to saddle with their loss. … [T]he plaintiffs here could have found a credit investigation agency; had they done so, the system would have afforded them a remedy, through the appropriately commercial institution of contract, against such of their advisers as were careless; the risk on the adviser would be justified

161 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 529 and 530.
162 A J Weir, "Liability for Syntax" [1963] CLJ 216 at 218–219.

> by the fee … A free tip is relevantly distinguishable from a remunerated opinion, as social practice shows; the guest thanks the hostess, but the hostess chides the cook.

81 The point is that very early on, it was recognised that whether a duty arises turns on whether the plaintiff should have protected himself through contract. Weir disagreed with the House of Lords as to the answer, but he recognised that that was the correct question. Similarly, courts may disagree as to the answer to the question "should the plaintiff have protected himself through contract", but they would be asking the correct question.

82 The fourth reason for adopting the Proposed Definition is that it explains the Category 3 "lacuna" cases like *White* and *Anwar*. These cases show that where a third party contracted with the defendant for the defendant to perform a service which if performed with care would have benefitted the plaintiff, whether the defendant owed a duty to the plaintiff turns on whether the substantial purpose condition is fulfilled. If objectively a substantial (meaning non-trivial) purpose for the third party contracting with the defendant was to benefit the specific plaintiff, a duty arises because there is objectively no need for the plaintiff to have contracted to protect himself; somebody else (the third party) had already contracted for his protection. Conversely, no duty arises if objectively the third party contracted with the defendant mainly for reasons other than to benefit the plaintiff, so that any benefit derived by the plaintiff was merely incidental. In this instance, the plaintiff should have protected himself by contract.

83 The fifth reason for adopting the Proposed Definition is that it explains why proximity is satisfied in relational economic loss (*ie*, Category 4) cases: it is generally difficult for a plaintiff to have contracted to protect himself under Category 4 circumstances. There is an infinite number of potential defendants (any driver, ship master, pilot, *etc*) who could have damaged a third party's property leading to the plaintiff suffering PEL. It is generally difficult for any Category 4 plaintiff to have protected himself through contract. Thus, a *prima facie* duty arises, unless it is negatived by policy. And *NTUC* shows that the policy issue here is the indeterminacy problem (*ie*, the concern that allowing the plaintiff's claim would result in liability to an indeterminate class). Recall that to deal with the indeterminacy problem, the court in *NTUC* devised three conditions for a duty to arise: (a) the third party's property damage must be caused by the defendant's powerful heavy vehicle; (b) the plaintiff's premises must be within the theatre of operations of that heavy vehicle; and (c) this theatre of operations must be a very restricted area.

84 A potential objection: *NTUC* did not explicitly say that proximity is satisfied in relational economic loss cases. *NTUC* actually fashioned the three conditions under the proximity and not the policy limb of the *Spandeck* test. This means that, contrary to what was stated in the immediately preceding paragraph, not *all* plaintiffs in relational economic loss cases can fulfil proximity; only those who fulfil the three conditions can.

85 The answer to the above objection is that the three conditions can more properly be understood as going towards policy and not proximity. Recall that policy is concerned with considerations that lie outside the parties like public morality, social philosophy and economics, while proximity is concerned with doing interpersonal justice as between the plaintiff and the defendant and nobody else. The three conditions are not sensitive to considerations of interpersonal justice. As a matter of interpersonal justice, it is difficult to see why the hypothetical shopping mall tenant mentioned in *NTUC* has a less deserving claim than the plaintiff in *NTUC*.[163] The tenant would be understandably aggrieved at not being able to claim because the defendant (a) was not driving a powerful or heavy enough vehicle; and/or (b) was not driving within his theatre of operations when the accident occurred; and/or (c) had a wide theatre of operations. The fact that the three conditions operate almost arbitrarily in treating differently the hypothetical shopping mall tenant and the plaintiff in *NTUC* supports the conclusion that they reflect considerations outside the parties, *ie*, policy considerations. Further, as shown above,[164] the three conditions were fashioned to resolve the indeterminacy problem, and since indeterminacy is a policy problem, the three conditions should be categorised under the policy limb. After all, another way to state the indeterminacy problem is to say that the court needs to draw clear boundaries, however arbitrary, to avoid a flood of litigation. Clearly, this is a consideration that lies outside the parties. It has nothing to do with interpersonal justice as between the plaintiff and defendant. For the above reasons, the three conditions go towards policy rather than proximity, and we should recognise them as such, as *Spandeck* exhorts us to.[165]

163 See para 60 above.

164 See paras 57–61 above.

165 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [85]: "If there is truly a pertinent and relevant policy consideration involving value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals, we feel that it would be better if the courts were to articulate these concerns under the requirement of policy considerations, rather than subsume those concerns within the proximity requirement …".

86 The sixth reason for adopting the Proposed Definition is that it explains the residual (Category 5) cases. The duty findings in the employer reference cases are justified because in those cases we cannot say that the plaintiff should have protected himself through contract. Given (a) the "irretrievable damage" to the plaintiff's "entire future prosperity and happiness" that may result from a negligently prepared reference;[166] and (b) the fact that the plaintiff is often vulnerable (*ie*, unable to protect himself from a negligently prepared reference after his employment with the defendant had ended), it should be taken as understood that the defendant would exercise care in preparing the reference. *Ramesh* comes close to saying the exact same thing when it held that a duty arose because *on the facts the plaintiff expected the defendant to take care*.[167] Indeed, three of their Lordships in *Spring* also held that the plaintiff succeeded based on an *implied term in the employment contract* that reasonable care would be taken by the defendant in giving references to potential employers.[168]

87 Regarding the mortgage valuation cases, they can be explained as follows. A duty arose in *Eric Bush* because the plaintiff adduced evidence that most people in his position would not have protected themselves through contract (*ie*, they would have relied on the defendant's valuation without independent inquiry). In other words, proximity was present in *Eric Bush* because the homeowner plaintiff should not be expected to protect himself through contract, and *he should not be expected to protect himself through contract because as a matter of fact most people in his position would not have done so*. Conversely, the no-duty finding in *Scullion* is justified because the plaintiff in that case did not adduce similar evidence, and this left the way open for the court to say that no duty arose because the investor plaintiff should have obtained his own valuation.

88 The Proposed Definition also explains the cases that involved the defendant as a certifier of works. We have seen that these cases turn on whether a duty finding would be inconsistent with the contractual matrix. To say that the alleged duty is inconsistent with the contractual matrix, *ie*, because the plaintiff's contract with the third party stipulated that disagreements regarding the defendant's certification should be settled by arbitration as in *Spandeck* and *Pacific Associates*, necessarily implies that the plaintiff should have contracted with the defendant to protect himself.

166 See para 65 above.
167 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 at [255].
168 *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 320, *per* Lord Goff; 340, *per* Lord Slynn and 353–354, *per* Lord Woolf.

89 Further, the Proposed Definition explains the conflict of interest cases like *WBA*. Obviously, if the defendant may be in a position of conflict as between benefitting the plaintiff or a third party, there is an even greater need for contracts to clearly demarcate where the defendant's obligations begin and end. Specifically, this would entail the plaintiff contracting with the defendant to advance the plaintiff's interests, possibly at the expense of the third party's interests.

90 Lastly, the Proposed Definition should be adopted because it reflects a general community expectation that one should contract to protect oneself from monetary loss. Community expectations are highly relevant to proximity; indeed, proximity has been described as a conduit for the application of the community's expectations about responsibility.[169] In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*,[170] the High Court of Australia noted that reasonableness is judged in light of current community standards.[171] In *Bryan*, Mason CJ, Deane J and Gaudron J said:[172]

> Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the courts' assessment of community standards and demands.

91 So community expectations are highly relevant to proximity. And in relation to PEL, one could make the case that the community expectation is that the plaintiff who wants to protect himself from PEL should do so contractually. Our common experience is that wealth is generally lost when something is done with money. This means that the plaintiff could have paid someone, around the time he did that something, to minimise his risk of losing money. Since the plaintiff could have reduced the risk of losing money through contracting, the community expectation is that he should have protected himself through contract, and so no duty arises, unless the plaintiff had a good reason for not contracting (*ie*, there was no need for him to do so, or it was impossible for him to do so, as shown above.) Indeed, it was noted in *Spandeck* that

169 See generally Adam Kramer, "Proximity as Principles: Directness, Community Norms and the Tort of Negligence" (2003) 11 Tort L Rev 70. Cristina Tilley also observed that tort is a vehicle through which a community perpetually considers, reconsiders and communicates its values: Cristina Carmody Tilley, "Tort Law Inside Out" (2017) 126 Yale LJ 1321.

170 [2002] HCA 35.

171 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35 at [14].

172 *Bryan v Maloney* (1995) 182 CLR 609 at 618.

negligence law does not readily allow claims for PEL because plaintiffs have a greater opportunity to use contracts to protect against PEL.[173]

92 For the reasons above, proximity should be reconceived; *y* should be defined as "whether the plaintiff should have protected himself through contract". We can thus say:

> In all PEL cases, proximity poses the question of whether the plaintiff should have protected himself through contract; if yes, proximity is absent and no duty arises; if no, proximity is present and a duty arises unless negatived by policy. Proximity determinants are meant to answer this question; they point towards or 'add up to' the answer. In some cases, we need proximity determinant *x* to be present before we can answer 'no', and so *x* is a necessary and sufficient condition to establish duty in those cases. In other cases, although *x* is absent, we can answer 'no' if other proximity determinants are present; thus, in *q* case, we can answer 'no' if *m* and *n* proximity determinants are present, while in *r* case, we can answer 'no' if *s*, *t* and *u* proximity determinants are present.

VII. Two clarifications[174]

93 A clarification is in order regarding whether the Proposed Definition takes insurance into account. The availability of protection through insurance was recognised as a duty of care factor in *Tan Juay Pah v Kimly Construction Pte Ltd*.[175] Although this recognition was as a factor going towards the policy stage of the *Spandeck* test for duty and not as a factor going towards proximity,[176] proximity and policy sometimes overlap, as the Court of Appeal in *Animal Concerns* noted.[177] It should thus be open to a court in an appropriate case to consider insurance at the proximity stage. Therefore, when we ask whether the plaintiff should have protected himself through contract, it may also be relevant to consider the plaintiff's insurance position, if protection through insurance is a reasonable option for the plaintiff. This is analogous to considering

173 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [66]. Conversely, this issue does not arise for CEL: we do not generally have the opportunity to obtain contractual protection from physical damage. People and their property are generally free to move around our person and property. Accompanying this freedom is the risk of negligently-inflicted physical damage to our person and property.

174 The author thanks the anonymous reviewer for these two insights.

175 [2012] 2 SLR 549.

176 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 at [84]–[87]. See also *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [55]–[56] and *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485 at [88]–[92].

177 *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [66]–[68].

whether the plaintiffs in *Eric Bush* and *Scullion* should reasonably have obtained an independent valuation to protect themselves.

94 Another clarification relates to the relationship between the Proposed Definition and vulnerability. We may make the argument: by asking whether the plaintiff should have protected himself by contract, are we not merely asking whether the plaintiff is vulnerable? And if so, the Proposed Definition is superfluous, because vulnerability is already a proximity determinant, and so it is already accounted for in the proximity analysis. The response: asking whether the plaintiff should have protected himself by contract encompasses and includes asking whether the plaintiff is vulnerable, but it is also more than that. We answer "no" to "should the plaintiff have protected himself through contract" (and so proximity is present) in two situations. The first situation is where the plaintiff is unable to protect himself through contract (*ie*, where the plaintiff is vulnerable). A case that falls within the exception to Category 2, like *Bryan*, is a first situation case.[178] So is a Category 4 (relational economic loss) case like *NTUC*. The second situation is where the plaintiff *need not* have protected himself through contract, because the factual matrix gives rise to the expectation that the defendant will take care of the plaintiff's economic interest notwithstanding there being no contract between the two. This logic explains the Category 1 "*Hedley Byrne* principle" cases, the Category 3 cases that fulfil the substantial purpose condition, and also why a duty is found in some but not all of the Category 5 "residual" cases. Vulnerability is unable to explain all these cases; the Proposed Definition is.

VIII. Conclusion

95 This article identifies a problem with the current definition of proximity in PEL cases: proximity as closeness/directness in the plaintiff-defendant relationship is like having a compass (the proximity determinants) without knowing our destination. In a PEL case, we need the proximity determinants to point towards or "add up" to a higher-order principle *y* so that we can say "proximity is present in this case because *y* is present" or "proximity is absent in that case because *y* is absent". The current definition of *y* as "closeness/directness in the plaintiff-defendant

178 As discussed at para 75 above, where the plaintiff is a downstream purchaser, vulnerability alone is insufficient to found proximity. In that scenario another condition must be satisfied: the alleged duty cannot create a disconformity with the defendant-first-purchaser contract. The presence of this condition tracks the Proposed Definition: the plaintiff should not be expected to protect himself contractually if the alleged duty does not create additional potential liability for the defendant than that which already exists under the defendant-first-purchaser contract.

relationship" is unhelpful. It only begs a host of questions like "what is closeness/directness in the plaintiff-defendant relationship?" and "how much closeness/directness is required?"

96 This article suggests that the higher-order principle *y* should be reconceived in the form of the question: "should the plaintiff have protected himself through contract?" If the answer to this question is yes, proximity is absent and no duty arises. If the answer to this question is no, proximity is present, and a duty arises unless policy negatives it. In other words, the correct proximity question in a PEL case is not "is there closeness/directness in the plaintiff-defendant relationship?"; rather, the proximity question should be: "should the plaintiff have protected himself by contract?" This new conception of proximity can serve as the destination for which our compass of proximity determinants may be deployed in service of.