Case Note

OCCUPIER'S LIABILITY AND NEGLIGENCE

Of Gordian Knots and Apron Strings

See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd [2013] 3 SLR 284

The common law rules on occupier's liability were created to determine the scope of the duty owed to entrants arising from dangers on the occupier's property. The subsequent development of the general tort of negligence based on Lord Atkin's neighbour principle created tensions between the special rules of occupier's liability and the general principles of negligence. Many jurisdictions have sought to rationalise these rules and the Singapore Court of Appeal followed suit in a recent decision. This case note examines the restated law on occupier's liability and comments briefly on the general approach to the common law of negligence in Singapore.

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I. Introduction

1 The rules governing the liability of occupiers of premises for harm caused to entrants to those premises has had a long and vexed history.[1] It should be noted at the outset that occupier's liability is not a tort in itself.[2] It merely refers to a set of rules governing the scope of the duty owed by an occupier to an entrant. While the law of negligence is generally accepted as the proper realm of occupier's liability, historically, the rules have been influenced by norms and values of property and

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1 See generally, Peter Machin North, *Occupier's Liability* (Butterworths, 1971).

2 Michael F Rutter, *Occupier's Liability in Singapore and Malaysia* (Butterworths, 1985) at p 9.

contracts,[3] which were geared toward protecting the defendant's sovereignty over property, and liberty to transact on his or her agreed terms. Thus, different duties were owed to different categories of entrants, ranging from the contractual entrant who was owed the highest duty, to the trespasser who was owed no duty of care and could only claim if he or she were deliberately or recklessly injured by the occupier.

2 These categories and technicalities surrounding occupier's liability gave rise to dissatisfaction;[4] most significantly, the rules pertaining to trespassers occasionally resulted in injustice, especially in cases involving children or other "innocent" trespassers. The advent of a general law of negligence, based on the neighbour principle articulated by Lord Atkin in *Donoghue v Stevenson*,[5] provided a strong impetus for the rationalisation of occupier's liability. Most common law jurisdictions have subjected the technical rules of occupier's liability to the general principles of negligence either through judicial activity or by legislative mandate.[6]

3 Following the Singapore Court of Appeal's decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* ("*Spandeck*"),[7] which mandated that there should be one universal test for all areas of negligence, it was arguably no longer tenable to continue having separate rules governing occupier's liability.[8] Nevertheless, the courts continued to apply the special occupier's liability rules, sometimes separately and sometimes concurrently, with the general

3 Lord Wright, "Invitation" (1953) 2 *University of Western Australia Annual Law Review* 543 at 551:

> The law of invitation would probably not have developed as more than a special branch of the law of negligence as laid down in *Heaven v Pender* and in *Donoghue v Stevenson* if it had not been so persuasively stated by Willes J not uninfluenced by views than current of contract and real property law, it in fact being always understood to be an action in tort. [references omitted]

4 The unsatisfactory nature of the law in England resulted in the appointment of a Law Reform Committee in 1952 to review and recommend changes to the law. The committee published its report in 1954, which led to the enactment of the Occupier's Liability Act 1957 (c 31), followed by the Occupier's Liability Act 1984 (c 3): Law Reform Committee, *Occupier's Liability to Invitees, Licensees and Trespassers* (Cmnd 9305, 1954). See also Australian Law Reform Commission, *Occupier's Liability* (Report No 42, 1988).

5 [1932] AC 562.

6 A helpful comparative survey is provided by V K Rajah JA in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [56]–[75].

7 [2007] 4 SLR(R) 100.

8 The point has been made earlier in Kumaralingam Amirthalingam, "Negligence and the Limits of Responsibility" in *Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu eds) (Academy Publishing, 2011) at pp 340–341.

principles of negligence.[9] The issue was finally settled by the Singapore Court of Appeal in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* ("*See Toh*"),[10] which clarified that the special rules governing occupier's liability should no longer be applied and liability should be governed by the general principles of negligence as stated in *Spandeck*. This decision brings welcome relief to the confusion that existed. However, it also leaves some questions unanswered and raises some new ones.

4 This article addresses two issues. The first, and obviously most significant, is the law on occupier's liability and its rationalisation within the general tort of negligence. Beyond the question of principle is the question of application of the law to the facts; it is not altogether clear how the *Spandeck* test is to be applied to occupier's liability, and indeed there is disagreement between the judges in *See Toh* on this point. Secondly, the case refocuses attention on the general test for duty of care crafted in *Spandeck* and the pursuit of an "autochthonous" common law of Singapore.

II. Facts and background

5 The claimant in *See Toh* was an engineer who was called to service the radar equipment of a tugboat, the *Fortune II*, which at the material time was being used to tow a barge, the *Namthong 27*. The vessels were located at 9/11 Tuas Basin Close ("9/11 TBC"). The first defendant, Ho Ah Lam Ferrocement (Pte) Ltd ("HAL"), had leased 9/11 TBC from Jurong Town Council. HAL had then sublet 9/11 TBC to the second defendant, Lal Offshore ("Lal"), but had reserved a portion of 9/11 TBC, including its entire shoreline for it (HAL) to carry on its business activities of repairing vessels and loading materials onto barges.[11] The third defendant, Asian Lift, had been engaged by a third party, Keppel FELS Ltd, to take delivery of living quarters fabricated by Lal at 9/11 TBC. Asian Lift used a crane barge, the *Asian Hercules*, to carry out this task.

6 During the berthing of the *Asian Hercules*, the crew used mooring ropes to tether the barge to the shore of 9/11 TBC. One of the mooring ropes fouled at the ramp of the *Namthong 27*. Despite knowing

9 See *Mohammad Nazeem bin Mustafah Kamal v Management Corporation and Strata Title Plan No 3023* [2012] SGHC 205; *Zhu Zhaopi v 1 Jian Huang Construction Co Pte Ltd 2 JH Builders Pte Ltd 3 Lin Songxian* [2010] SGDC 527; *Ma Hong Fei v U-Hin Manufacturing Pte Ltd* [2009] 4 SLR(R) 336; *Li Zhongyuan v Novena Hall Pte Ltd* [2009] SGDC 133; *Heng Lee Suan v YTC Hotels Ltd* [2008] SGHC 111; *UY v Attorney General* [2007] SGDC 255.

10 [2013] 3 SLR 284.

11 As will be discussed later, this may be relevant to whether Lal was an occupier of the site where the incident took place.

this and being aware of the risk posed by the fouling, the captain of the *Asian Hercules* continued with the mooring operation. On the day of the incident, the claimant initially went to 15 Tuas Basin Close ("15 TBC") as he had previously worked on the *Fortune II* there. He was informed that the *Fortune II* was berthed next door at 9/11 TBC. The claimant then left 15 TBC through the main gate and re-entered through a second gate. A fence separated the two locations and the claimant proceeded to the shoreline before walking across to 9/11 TBC through an open space between the end of the fence and the shoreline. This took him into the area where the mooring operation was being conducted. As he walked towards the *Namthong 27*, he was struck and injured by the mooring rope which had snapped loose.

7 The claimant sued HAL and Lal under occupier's liability and all three defendants under the tort of negligence. At trial, Woo Bih Li J found that HAL and Lal were occupiers and that the claimant was a trespasser. The judge then went on to consider whether the special rules on occupier's liability should continue to have a separate existence from the general law of negligence and concluded that the former should be subsumed under the latter, despite existing authority from the Court of Appeal that the law on occupier's liability was distinct from negligence.[12]

8 Nevertheless, Woo J held that the status of the entrant as a trespasser was relevant to whether a duty should be found. Referring to a leading textbook on torts,[13] it was held that an occupier should not be found to owe a duty to an adult trespasser who knowingly and without any reasonable excuse trespassed on the defendant's premises. The claimant was found to be such a trespasser. Woo J then went on to find that even if a duty had been found, it would not have been breached as HAL and Lal had taken reasonable care to exclude unauthorised entry onto the premises. With respect to Asian Lift, the judge found that the captain had acted negligently, but held that Asian Lift, although not an occupier, should not be in a different position *vis-à-vis* the occupier in terms of the existence of a duty.[14]

12 *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223; *Industrial Commercial Bank v Tan Swa Eng* [1995] 2 SLR(R) 385.

13 *Clerk & Lindsell on Torts* (Reginald W M Dias gen ed) (Sweet & Maxwell, 15th Ed, 1982).

14 For a different view, see Michael F Rutter, *Occupier's Liability in Singapore and Malaysia* (Butterworths, 1985) at p 43, where the author argues that occupiers and non-occupiers could owe different duties and that in fact courts often treated contractors at building sites as non-occupiers in order to avoid the restrictions of the limited duty under occupier's liability.

III. Decision of the Court of Appeal

9 The Court of Appeal unanimously dismissed the appeal against HAL and Lal but allowed the appeal against Asian Lift, holding that there was a duty of care, which had been breached. The court also agreed with the trial judge that the claimant had been contributorily negligent, reducing the defendant's share of responsibility from 65% to 50%. Although all three judges were in agreement on the essentials, there were differences of opinion on the details, resulting in three separate judgments being delivered. The leading judgment was by V K Rajah JA, who characteristically undertook a detailed historical and contextual analysis of the subject matter before holding that the complicated and archaic English common law rules of occupier's liability should no longer be applied in Singapore; to borrow his words, it was time to cut both the Gordian knot of occupier's liability and the apron strings of English common law.

A. Occupier's liability and the Gordian knot

10 Occupier's liability rules were concerned in the main with determining the liability of occupiers of premises to entrants for negligently caused harm.[15] These rules were developed in the 19th century, well before the modern law of negligence, although it is worth noting that the important 1883 decision of *Heaven v Pender*,[16] in which Lord Esher articulated the genesis of the neighbour principle, involved occupier's liability. Nevertheless, the occupier's liability regime continued on its own distinct path as a discrete subset of negligence; the fact that it warranted special treatment was not disputed in the early years: even Lord Atkin, who was at the same time advocating the neighbour principle, agreed that occupier's liability was unique.[17]

11 The rationale for occupier's liability was that the occupier was the person in control of the premises and therefore in a position to prevent harm to the entrant,[18] who typically would not be in a position

15 Where harm is intentionally inflicted, the claimant would sue in trespass or under one of the nominate torts, for example, *Wilkinson v Downton* (1897) 2 QB 571 or *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911.

16 (1883) 11 QBD 503.

17 See *Coleshill v Manchester Corp* [1928] 1 KB 776 at 791, cited in Max C Atkinson, "Occupier's Liability Law" (1968–1970) 3 *University of Tasmania Law Review* 82 at 83. See also the views of Dixon J of the High Court of Australia in the 1932 decision of *Lipman v Clendinnen* (1932) 46 CLR 550.

18 Historically, the emphasis was on exclusive possession of the premises. See D C McDonald and L H Leigh, "The Law of Occupier's Liability and the Need for Reform in Canada" (1965–1966) 55 *University of Toronto Law Journal* 55. This soon gave way to control as the basis of liability. See Michael Hwang, "Basic Definitions in the Law of Occupier's Liability" (1968) 10 MLR 58 at 69.

to detect and prevent the danger until it was too late. In modern parlance, the entrant would be considered vulnerable and reliant on the occupier who had control and could be treated as having assumed responsibility for the entrant's safety. However, there were two unique characteristics of occupier's liability that initially resisted application of a general duty of care.

12 First, liability was typically founded on some danger that was part of the static condition of the premises, that is, it was not the action of the occupier, but the state of the premises that caused the harm. This meant that liability was based on omission, which typically did not ground liability in negligence. Indeed, it may be argued that this is what distinguishes occupier's liability from ordinary negligence and that a proper interpretation of Lord Atkin's judgment would preclude liability for omissions in ordinary negligence.[19] Secondly, the occupier could potentially be liable to anyone who entered the premises, a proposition anathema to the feudal classes who wanted to enjoy both sovereignty and immunity *vis-à-vis* their own property.[20]

13 The law on occupier's liability drew a distinction between categories of entrants based on their relationship with the occupier. Five categories have been identified,[21] in descending order of priority: they are the contractual entrant,[22] the invitee,[23] the licensee,[24] entrants as of right[25] and the trespasser.[26] The law also distinguished between risks due to the static condition of the premises and activity conducted on the premises. The former was subject to the restrictive rules of occupier's liability, while the latter was governed by ordinary principles of negligence.[27]

14 The perceived unfairness to trespassers and licensees – who were owed a lower duty than invitees – resulted in courts manipulating the facts pertaining to the static or dynamic nature of the dangers on the premises, or artificially "promoting" a person from a lower category to a

19 See H K Lucke, "Towards a General Theory of Negligence and Occupier's Liability" (1959–1960) 2 *Melbourne University Law Review* 472, who argues that Lord Atkin limited his statement of principle to acts only, and it was only later that his statement was interpreted to include omissions.

20 Norman S Marsh, "The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 LQR 182 at 184.

21 For a description of these categories, see Australian Law Reform Commission, *Occupier's Liability* (Report No 42, 1988) at p 5.

22 See, for example, *Francis v Cockrell* (1870) LR 5 QB 501.

23 See, for example, *Indermaur v Dames* (1866) LR 1 CP 274.

24 See, for example, *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398.

25 This is a less common category. See, generally, F R Barker & N D M Parry, "Private Property, Public Access and Occupier's Liability" (1995) 15 *Legal Studies* 335.

26 *R Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

27 John G Fleming, *The Law of Torts* (The Law Book Co Ltd, 9th Ed, 1998) at p 506.

higher one in order to enjoy better protection.[28] These distortions brought the law into a state of disarray and ultimately led to legislative and judicial intervention. In England, the Occupier's Liability Act 1957[29] effectively abolished the distinction between invitees and licensees, providing that the occupier owed a common duty of care to all lawful entrants.[30] Trespassers remained unprotected and the common law attempted to redress this by providing for a duty of common humanity.[31] This development was overtaken by legislation with the Occupier's Liability Act 1984,[32] which imposed a duty, albeit one that was less onerous than that under the 1957 Act.[33]

15 The Australian High Court remains the beacon on subsuming occupier's liability within the general tort of negligence. In the 1987 decision of *Australian Safeway Stores v Zaluzna* ("*Zaluzna*"),[34] the court in a 6-1 majority decision swept away the old rules of occupier's liability.[35] *Zaluzna* was not an unexpected outcome given the period in which it was decided coincided with the Mason court championing the development of an Australian common law with the tort of negligence as its Chariot of Jagannath.[36] *Zaluna*'s assimilation of occupier's liability was total: all categories of entrants were dealt with under the general principles of negligence. While *See Toh* relied extensively on *Zaluzna*, there may be some differences in approach, which will be discussed below.

28 See Max C Atkinson, "Occupier's Liability Law" (1968–1970) 3 *University of Tasmania Law Review* 82 at 107–108.

29 c 31.

30 This included contractual entrants, who were owed a higher duty at common law. The position with respect to contractual entrants in Singapore remains unclear.

31 *British Railway Board v Herrington* [1972] AC 877.

32 c 3.

33 Occupier's Liability Act (1984) (c 3) (UK) s1(3).

34 (1987) 162 CLR 479.

35 It should be noted that the High Court of Australia had long been championing the idea that ordinary principles of negligence should apply in cases of occupier's liability. See *Rich v Commissioner for Railways* (1959) 101 CLR 135; *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274; *Commissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42 and *Voli v Inglewood Shire Council* (1963) 110 CLR 74; see also *Hackshaw v Shaw* (1984) 155 CLR 614 and *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7.

36 An Asian homage to the Greek Ship of Theseus referred to in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284. Lord Jagannath is worshipped as the Lord of the Universe in Hinduism and during the annual Ratha Yatra festival in India, a huge chariot bearing an icon of Lord Jagannath embarks on a journey. The English word juggernaut is derived from Jagannath and refers to "a massive inexorable force, campaign, movement or object that crushes whatever is in its path", definition from Merriam-Webster online dictionary <http://www.merriam-webster.com/dictionary/juggernaut> (accessed 16 May 2013).

16 Before analysing the Court of Appeal's reasoning in *See Toh*, a brief overview of the Singaporean position prior to *See Toh* may be helpful at this point.[37] The leading Court of Appeal authority is *Industrial Commercial Bank v Tan Swa Eng* ("*Tan Swa Eng*"),[38] the facts of which are eerily reminiscent of the recent tragedy in Bangladesh where a building collapsed and killed over a thousand people.[39] In *Tan Swa Eng*, the appellant bank was the tenant of a building which collapsed shortly after cracks appeared. The appellant's officers had inspected the cracks but decided that no further action was necessary.

17 The Court of Appeal, in reversing the High Court's finding of liability, applied the occupier's liability test in *Indermaur v Dames* ("*Indermaur*"),[40] which it summed up in this manner: "In short, the duty of an occupier to an invitee would be to prevent damage or injury from any *unusual dangers on the premises he knows or ought to know* and which the invitee *does not know about*." [emphasis in original][41] The *Indermaur* test was confirmed in two other Court of Appeal decisions delivered within two years of *Tan Swa Eng*,[42] and the issue never reached the Court of Appeal again until *See Toh*.

(1) The court's approach to occupier's liability

18 The two issues before the Court of Appeal in *See Toh* were, first, whether the law on occupier's liability in Singapore should be subsumed under the general law of negligence; and secondly, whether the defendants owed a duty to the claimant who was a trespasser.[43] V K Rajah JA was critical of the artificial distinctions between categories of entrants as well as the distinction between static and dynamic conditions. The former was attributed to the feudal ethos of 19th century England which favoured the interests of the landed class.[44] By controlling

37 A useful survey of case law until 2006 is found in Daniel Yan Wen Tan & Deepak Raja, "A Summary of the Law of Occupier's Liability in Singapore" (March 2007) *Singapore Law Gazette* <http://www.lawgazette.com.sg/2007-3/> (accessed 20 May 2013).

38 [1995] 2 SLR(R) 385.

39 Ruma Paul & Serajul Quadir, "Bangladesh Rescue Operation Near End; Collapse Death Toll at 1,127" *Reuters* (13 May 2013) <http://www.reuters.com/article/2013/05/13/us-bangladesh-building-idUSBRE94C0BL20130513> (accessed 18 July 2013).

40 (1866) LR 1 CP 274.

41 *Indermaur v Dames* (1866) LR 1 CP 274 at 389.

42 *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223; *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 2 SLR(R) 746.

43 It may be helpful to clarify that although the Court of Appeal focused on the mode of entry which was unauthorised, the High Court judgment made clear that it was not just the mode of entry that was unlawful but the actual presence of the claimant at the premises was also most likely unauthorised. This was on the basis that had the claimant gone to the main office, permission to enter the premises during the operation would have been denied.

44 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [33].

occupier's liability through refusal to recognise the existence of a duty of care – which was a question of law – courts were, in many cases, able to avoid the involvement of juries, who were presumed to be more sympathetic to injured entrants.

19 The latter distinction between static and dynamic was dismissed as illogical and likely to result in injustice as "the static-dynamic dichotomy obscure[d] the ultimate question of whether a particular occupier ought to be liable in tort to a particular entrant."[45] Rajah JA noted that courts had two options which he described as either disjunctive or conjunctive. Under the former, courts would have to resolve the distinction arbitrarily and apply either occupier's liability or negligence. Under the latter, courts could find that a particular factual scenario could be classified as either static or dynamic and therefore expose the defendant to liability under two regimes, namely occupier's liability and ordinary negligence. In Rajah JA's view, neither approach was satisfactory; his preferred option was to subsume occupier's liability under negligence as was done in the Australian decision of *Zaluzna*.

20 However, whereas the Australian approach was a simple one of discarding the old rules in favour of the general principles of negligence, the position under *See Toh* is less clear. Rajah JA was not wholly at ease with the idea of jettisoning the occupier's liability principles *in toto*, holding that in cases of lawful entrants the occupier would *de jure* owe a duty of care. *Spandeck* thus had limited application with respect to lawful entrants. As long as the entrant was lawfully on the premises, the parties would be regarded as proximate,[46] giving rise to a *prima facie* duty of care. For all other entrants – essentially trespassers – the court would apply the two-stage *Spandeck* test to determine whether a duty should be found on the facts.

21 This reintroduces the classification problem which Rajah JA was at pains to abolish. He reiterated that this was "not a return to the old common law *de jure* 'categorisation' approach",[47] but at the same time conceded, "I am alive to the fact that there remains a species of Gordian knot …"[48] What Rajah JA appears to have intended was to import the English position after the 1957 and 1984 Acts, whereby the starting point for lawful entrants is the existence of a duty and that for trespassers is the absence of a duty.[49] Sundaresh Menon CJ, while generally concurring with Rajah JA, differed on this particular point,

45 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [47].
46 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [80] and [82].
47 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [82]
48 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [81].
49 *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 at [38], *per* Lord Hoffmann.

rejecting the argument that a *de jure* duty existed with respect to all lawful entrants:[50]

> Rajah JA has said at [80] above that in so far as *lawful* entrants are concerned in ordinary circumstances, subject to the element of control, occupiers will *de jure* owe them a *prima facie* duty of care as there will be sufficient legal proximity between occupiers and lawful entrants. While this may well be correct as a matter of how the great majority of cases will *in fact* be resolved, I prefer to leave this as something to be worked out by reference to the specific facts that will arise on future occasions, rather than by articulating any legal rule or principle to this effect. [emphasis in original]

22 Chao Hick Tin JA, in a brief concurring judgment, expressed his preference for Rajah JA's *de jure* duty approach to lawful entrants, but noted that as the issue was not alive in the present case (See Toh not being a lawful entrant) it should be left for decision in a future case. While the law with respect to trespassers was settled in *See Toh*, the same cannot be said with respect to lawful entrants; Rajah JA and Menon CJ disagreed on the critical test and Chao JA left the question open. It may also be noted that Rajah JA was of the view that See Toh belonged to the more "innocent" category to whom a *prima facie* duty could be owed,[51] while Menon CJ treated See Toh more as a "wilful" trespasser who could not fairly be regarded as satisfying the proximity requirement in *Spandeck*.[52] Both judges agreed that on the facts, no duty was owed to See Toh by either HAL or Lal.

23 Both Menon CJ and Rajah JA referred briefly to the defence of voluntarily assuming a risk (*volenti non fit injuria*) as one of the reasons for denying a duty of care to trespassers.[53] It bears noting that the denial of a duty at either the proximity or policy stages of *Spandeck* on the one hand, or on the basis of *volenti* on the other, involves different considerations. The proximity inquiry focuses on the parties to determine whether they can fairly be held to be neighbours in the legal sense; the policy inquiry goes beyond the two parties and inquiries at a general level whether a duty of care ought to be recognised.[54] *Volenti* focuses on the claimant and it requires the claimant to have "freely and

50 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [130].
51 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [85].
52 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [135]–[136].
53 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [85], *per* V K Rajah JA and at [139], *per* Sundaresh Menon CJ.
54 See Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing JLS 350 at 357–358.

voluntarily with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it".[55]

24 There is a distinction between *volenti non fit injuria* and *scienti non fit injuria*.[56] The latter only requires knowledge, not consent; prior to the reforms of occupier's liability, *volenti* was required for lawful entrants whereas *scienti* sufficed for trespassers.[57] Now that the distinctions between categories of entrants have been abolished, arguably only *volenti* should suffice for trespassers. On that basis, there may be a question whether See Toh could fairly be said to have voluntarily assumed the risk of negligent activity when he entered the premises for a routine job. Lord Denning, in an occupier's liability case where a claimant walking along a railway track was hit by a train negligently driven by the driver, noted:[58]

> It seems to me that when this lady walked in the tunnel, though it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver.

25 While *See Toh* considered the position of the troika of invitees, licensees and trespassers, it did not deal with the position of the contractual entrant, who under the common law was owed a higher duty of care than that owed to other lawful entrants.[59] Nor did the court address the liability of an occupier for the torts of an independent contractor, in particular, the circumstances under which the occupier might be held to owe a personal, non-delegable duty.[60] As these were not issues that arose on the facts, it is probably right that the court did not

55 *Letang v Ottawa Electric Railway Co* [1926] AC 725 at 731. See R A Buckley, "Occupier's Liability in England and Canada" (2006) 35 *Common Law World Review* 197 at 204–205.

56 See, generally, Lord Wright, "Invitation" (1953) 2 *University of Western Australia Annual Law Review* 543, who critically analyses the case of *London Graving Dock Co Ltd v Horton* [1951] AC 737.

57 For example, see *South Australian Co v Richardson* (1915) 20 CLR 181 at 190, where Lord Atkin applied the *scienti* defence. The Privy Council in *Letang v Ottawa Electric Railway Co* [1926] AC 725 clearly distinguished between *scienti* and *volenti*.

58 *Slater v Clay Cross Co Ltd* [1956] 2 QB 264 at 271.

59 *Francis v Cockrell* (1870) LR 5 QB 501; *Maclenan v Segar* [1917] 2 KB 325.

60 The common law in England, prior to the Occupier's Liability Act 1957 (c 31) may have recognised a personal non-delegable duty with respect to wrongs by an independent contractor on the occupier's premises. See *Thomson v Cremin* [1956] 1 WLR 103n; [1953] 2 All ER 1185 (case decided in 1941). The non-delegable duty in *Thomson v Cremin* was implicitly approved in *Wheat v E Lacon & Co Ltd* [1966] AC 552 and left open by the Court of Appeal in *Fairchild v Glenhaven* [2002] 1 WLR 1052 at [120]. See also, Robert H Stevens, "Non-Delegable Duties and Vicarious Liability" in *Emerging Issues in Tort Law* (Jason W Neyers, Erika Chamberlain & Stephen GA Pitel eds) (Hart Publishing, 2007) at pp 357–358, who argues that a non-delegable duty remains in common law jurisdictions applying English common law prior to the Occupier's Liability Act 1957.

pronounce on these. However, given that the court did set out to clarify the law on occupier's liability, some observations on these matters would have been welcome.[61]

26 Another issue which was not canvassed in the Court of Appeal but dealt with in the High Court concerned the test for an occupier. Woo Bih Li J reaffirmed the control test articulated in *Wheat v E Lacon & Co Ltd*,[62] which had been adopted locally in *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*.[63] An occupier was a person who had "a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there."[64] On the facts, HAL was the lessee of the 9/11 TBC and had control over the premises. HAL had sublet part of 9/11 TBC to Lal and arguably shared control with Lal over that part of the premises. However, the shoreline of TBC where the incident occurred had not been sublet to Lal and only HAL had control of that part of the premises.

27 Woo J found that Lal was an occupier because its project manager had instructed employees of HAL and Lal to stay behind the barricade. The project manager gave evidence that he was acting under the instructions of HAL's consultant.[65] Thus, there is a question whether Lal was indeed an occupier. The issue was not contested on appeal and thus the Court of Appeal had no reason to consider it. However, V K Rajah JA noted that "had the point on control been pursued on appeal, it bears mention that neither HAL nor Lal Offshore had control of the relevant activity that resulted in See Toh's injury"[66] and, therefore, no *prima facie* duty would have arisen. While this observation may be apposite on the facts, the distinguishing feature of occupier's liability is that the duty arises from the defendant's control of the premises; whether the particular risk arises from an activity or the static condition of the premises is not necessarily germane to the control test. Where the occupier has control over the activity, liability has always been a matter for ordinary negligence.

61 Perhaps the court was mindful of the risk that to do so might attract the attention of academics eagerly waiting for an opportunity to criticise the court for going beyond the confines of the matters before it!

62 [1966] AC 552.

63 [1997] 2 SLR(R) 746.

64 *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 578, *per* Lord Denning.

65 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2012] 3 SLR 227 at [19]–[20].

66 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2012] 3 SLR 227 at [104].

B. Spandeck *and the apron strings of the common law*

28 *Spandeck* was an illuminating judgment for its exposition of duty of care, but perhaps it is becoming a victim of its own success. There is a tendency to expect too much of it, as exemplified in this statement in *See Toh*:[67]

> It is also indisputable that in the context of the law of negligence in Singapore, the *Spandeck* test is the Grundnorm – the sole, ultimate set of principles upon which a duty to take reasonable care under the law of negligence rests.

29 Clearly, the term *Grundnorm* was being used figuratively and not in its technical sense.[68] However, this allegory in itself is problematic because it may engender an approach to negligence that is unduly delineated. The common law of negligence has a long pedigree and is now informed by a diverse range of views from around the world. Judgments from, among others, England, Canada, Australia, New Zealand, Singapore and Malaysia form the DNA of this transnational, organic system. *Spandeck* is simply the authoritative Singaporean statement of the duty of care test. If *Spandeck* were to be regarded as the *Grundnorm* for the law of negligence in Singapore, this would render obsolete all Singaporean jurisprudence prior to 2007 and the entire *corpus* of the common law outside Singapore.

30 The context in which the duty of care test in *Spandeck* was articulated should not be forgotten. The case was heard at a time when there was considerable confusion in the relevant duty of care test in Singapore with regard to economic loss cases and physical damage cases.[69] *Spandeck*, along with its forerunner in terms of the duty of care test, *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*,[70] was also reacting to the English Court of Appeal decision of *Customs and Excise Commissioners v Barclays*,[71] where Longmore LJ had endorsed a pluralist approach to duty, accepting that there could be several different tests that could be employed, depending on the circumstances.[72] Finally, the

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67 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2012] 3 SLR 227 at [54].

68 The concept of the *Grundnorm* was developed by Hans Kelsen as part of his legal theory of law. See Hans Kelsen, "The Pure Theory of Law – Part I" (1934) 50 LQR 474; Hans Kelsen, "The Pure Theory of Law – Part II" (1935) 51 LQR 517.

69 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [27]. See also Kumaralingam Amirthalingam, "*The Sunrise Crane* – Shedding New Light of Casting Old Shadows on Duty of Care?" [2004] Sing JLS 551.

70 [2007] 1 SLR(R) 853.

71 [2005] 1 WLR 2082.

72 The tests included the three-state test of reasonable foreseeability, proximity and policy; the assumption of responsibility test and the incremental test. See criticism of this pluralist approach in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [65]–[79].

Spandeck judgment coincided with a domestic initiative to develop an "autochthonous" common law.[73]

31 The term "autochthonous" may not be entirely inappropriate, at least with respect to the common law of negligence, as the term refers to something whose origin is purely indigenous. Few legal systems in the modern world can claim to be autochthonous. Even the late Professor Geoffrey Bartholomew, who introduced the concept to Singapore's legal discourse,[74] later downplayed it in an interview with students, preferring to use the term independent or autonomous, acknowledging that no system could truly be autochthonous.[75] His view was that after a very long period of independence and indigenous development of the law, for example over 400 years in Germany, one could say that the jurisdiction's legal roots had disappeared into history and thus the modern legal system was autochthonous.[76] The common law of negligence, however, can never truly claim to be autochthonous in Singapore. It may eventually become autonomous or independent, but its roots will always be clearly traceable to England. Indeed for post-colonial states, autonomy may be a preferred option as it retains continuity while asserting independence.[77]

32 Returning to *Spandeck*, the reasonable foreseeability test, central to the duty concept in all other common law jurisdictions, was stripped of content in *Spandeck*, rendering it unnecessarily over-inclusive. This is evident in the observation in *See Toh* that it "is eminently foreseeable that entrants will suffer damage if occupiers do not take reasonable care to eliminate danger".[78] This is merely to state a truism; the real question is whether it was foreseeable that the claimant, as a member of a general class, could be affected by the defendant's conduct. Applied in this manner, there may be instances where a lawful entrant would not be foreseeable, and *vice versa*, where an unlawful entrant would.

73 See Goh Yihan & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 SAcLJ 176, referring to "the ambition to develop an autochthonous jurisprudence" in Singapore and the references therein at fn 4. See also Andrew Phang Boon Leong, "Of Generality and Specificity – A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System" (1989) 1 SAcLJ 68.

74 Geoffrey Wilson Bartholomew, "The Singapore Legal System" in *Singapore: Society in Transition* (Riaz Hassan ed) (Oxford University Press, 1976) at p 84.

75 "In Conversation: Prof GW Bartholomew" (1985) 6 Sing L Rev 56 at 67.

76 "In Conversation: Prof GW Bartholomew" (1985) 6 Sing L Rev 56 at 67.

77 See Anthony Dillon, "A Turtle by Any Other Name: The Legal Basis of the Australian Constitution" (2001) 29 *Federal Law Review* 241 at 242–243.

78 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [77].

33 Similarly, the proximity test should be applied in a normative rather than descriptive manner.[79] *Spandeck* removed policy questions from the proximity test and relegated them to the second limb,[80] thus reducing proximity to a more clinical examination of the relationship between the parties. The question should not be whether there was a particular relationship between the parties – in this case, that of a lawful entrant and occupier.[81] This reverts to the pre-*Donoghue* categorical approach where duties were based on pre-existing relationships. The question is whether the parties ought to be treated as neighbours in the Atkinian sense. The lawfulness of the entry is simply one of the myriad factors that should be taken into account to determine whether it would be fair and just to find that the parties were in a proximate relationship giving rise to a duty of care owed by the one to the other.

IV. Conclusion

34 *See Toh* is a decision that will be greatly welcomed by the legal fraternity in Singapore both for the richness of the individual judgments and the formal rejection of the archaic occupier's liability rules inherited from England. The Court of Appeal has more or less adopted the Australian approach in *Zaluzna* and subsumed occupier's liability under the tort of negligence. However, the court was not unanimous on the actual test to be applied, with V K Rajah JA favouring a *de jure* duty in cases of lawful entrants and Sundaresh Menon CJ preferring to apply the general principles of negligence in all cases. Other issues pertinent to occupier's liability which were not directly relevant to this case, and thus were not pronounced upon, include the duty to contractual entrants, liability for independent contractors and the relevance of the occupier's control over premises to proximity. These matters will require future clarification when the opportunities arise. Beyond its significance for rationalising occupier's liability, *See Toh* is an important decision on the application of *Spandeck*, and it will stand tall as another landmark decision contributing to the development of a Singaporean common law.

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79 *Cf* David Tan, "The Salient Feature of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459.

80 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [85].

81 In fact, the Singapore Court of Appeal had earlier explicitly rejected the argument that an occupier-invitee relationship was sufficient to give rise to a *prima facie* duty of care in negligence. See *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223 at [49], noted by V K Rajah JA in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [99].