

Case Note

ESTABLISHING A DUTY OF CARE: SINGAPORE'S SINGLE, TWO-STAGE TEST

Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency
[2007] 4 SLR 100

In this case the Chief Justice concluded that, in Singapore, there should be a single test to determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of the damages claimed including claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions; and that the single test shall be a two-stage test, comprising of, first, proximity and, second, policy considerations. Regrettably, however, the judgment clings too heavily to the discredited and discarded notion of proximity as a legal doctrine and an underpinning which has, elsewhere, been relegated to the position of a mere label and artificial tag of convenience, inhabiting more appropriately the realm of questions of fact.

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I. Introduction

1 In the recent judgment of the Singapore Court of Appeal¹ in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*,² Chan Sek Keong CJ concluded two significant matters in respect of the law of negligence as it applies to Singapore:

A single test is preferable in order to determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of

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1 Hereinafter, reference to "Court of Appeal", unless otherwise stated, shall be to the Singapore Court of Appeal and "Chief Justice" to the Singapore Chief Justice.

2 [2007] 4 SLR 100 ("*Spandeck Engineering*").

the damages claimed [including] claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions.³

...

The single test shall be a two-stage test, comprising of, first, proximity and, second, policy considerations.⁴

2 In a wide-ranging and in-depth judgment that traversed the law of negligence and specifically the test to be applied to determine whether a defendant owed a claimant a duty of care, Chan CJ extensively surveyed the development of this area of the common law in England (and to some extent Australia) and authoritatively propounded the law as it should apply in Singapore. In respect of the development in England, His Honour observed that “the search for clarity and certainty in a single formula has proved to be elusive even some 60 years after the first articulation of the ‘neighbour’ principle in *Donoghue v Stevenson*”^{5,6}.

3 His Honour also found that the common law of negligence as it applied in Singapore, as regards both liability in negligence for pure economic loss and physical damage, was “not entirely satisfactory”.⁷ It is, nevertheless interesting⁸ that the Court of Appeal preferred a test akin to the two-stage test as enunciated by Lord Wilberforce in *Anns v Merton London Borough Council*⁹ (and indeed Chan CJ reinterpreted it contextually¹⁰ which itself has been overruled by the House of Lords in *Murphy v Brentwood District Council*¹¹).

4 There is so much meat in the judgment of Chan CJ in *Spandeck Engineering* that generations of law students and practitioners of the law

3 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [71].

4 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [73].

5 [1932] AC 562.

6 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [46].

7 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [27].

8 But perhaps not so remarkable in the light of the persuasive views contained in Andrew Phang, Saw Cheng Lim & Gary Chan, “Of Precedent, Theory and Practice – The Case for a Return to *Anns*” [2006] Sing JLS 1.

9 [1978] AC 728 (“*Anns*”).

10 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [35]. The very ingenuity that went into reinterpreting and contextualising Lord Wilberforce’s much maligned statement in *Anns* alone makes this judgment worth reading. For another such reassessment of what Lord Wilberforce really meant, see Sykes Ag J in *S&T Distributors Limited v CIBC Jamaica Limited* (24 September, 12 and 19 November 2004) <http://www.sc.gov.jm/Judgments/sc/CLS222_1999.pdf> (accessed 20 August 2007) at paras 41–42.

11 [1991] 1 AC 398 (“*Murphy*”).

of negligence (especially in Singapore) can munch on it for a long time to come. Significantly, the judgment answers the central question of how duty of care can be found to exist between defendants and claimants who do not have contractual or other legal connection. Even so, it invites the criticism that it clings too heavily to the discredited and discarded notion of proximity as a legal doctrine and an underpinning, which leading members of the House of Lords and the High Court of Australia over the last two decades have relegated to the position of a mere label and artificial tag of convenience, inhabiting more appropriately the realm of questions of fact. Accordingly, it is appropriate that this important judgment needs to be reviewed which is the purpose of this case note.

II. Physical damage and pure economic loss

5 Whether any real distinction of substance (other than policy) can be made between what is referred to as physical damage, on the one hand, and “pure” economic loss, on the other, is debatable. Nevertheless, it is possible to describe them differently. In *D’Amato v Badger*,¹² the Supreme Court of Canada described pure economic loss as “loss suffered by an individual that is not accompanied by physical or property damage”.¹³ In other words, pure economic loss generally refers to damages other than physical damage to persons or property. It follows, therefore, that physical damage can simply be described as cases involving claims of personal injuries and physical damage.

6 In 1931, in *Ultramares Corporation v Touche*,¹⁴ Cardozo CJ warned of the dangers of there arising “liability in an indeterminate amount for an indeterminate time to an indeterminate class”.¹⁵ This warning has haunted courts throughout the common law world in the area of the law of negligence ever since. And the fear of imposing indeterminate liability and the consequential effect of that on the economy has been the perennial problem associated with pure economic loss, not that the amount of economic loss cannot be determined. It is the fear that “... a decision to allow recovery for [pure economic] loss can create huge potential liability. The problem is conceptual, rather than factual, indeterminacy. The question is how to draw the line in a principled way”.¹⁶ The competing interests, in this connection are, on the one hand, the proper desire of the courts to want to do justice to the claimant in a particular case and, on the other, to avoid any unforeseen

12 (1996) 137 DLR (4th) 129 (SCC).

13 (1996) 137 DLR (4th) 129 (SCC) at 132.

14 (1931) 174 NE 441.

15 (1931) 174 NE 441 at 444.

16 See Daniel Kalderimis in the Victoria University of Wellington Law Review <<http://www.austlii.edu.au/nz/journals/VUWLR/1999/16.html#fnB1>> (accessed 20 August 2007).

economic cost to the public.¹⁷ And so in few other areas of the law has policy played such an important part in judicial decisions.

7 In 2002, Laws LJ¹⁸ said that the position of the common law development then, in this connection, was that where damage is carelessly caused to another's person or property, as a matter of pragmatic reality, the rule (not the exception) where there is no third agency which constitutes the immediate cause of the damage, there will be recovery. However, where there is such a third agency (for example, the acts or omissions of another person or something less specific like the movements of markets), recovery is the exception not the rule. His Lordship also observed:¹⁹

In the latter class of case, where a third agency is the immediate cause of the damage, the act or omission of the defendant is by definition at one removed (at least one, maybe more) from the outturn events of which the claimant comes to complain. A duty of care imposed on the defendant in those circumstances would be very open-ended.

8 It is for this reason (that is, the "very open-endedness" of liability or, put another way, "liability in an indeterminate amount for an indeterminate time to an indeterminate class"²⁰) that in cases of pure economic loss, the courts have consistently demanded more stringent substantiation of causative link between the defendant and claimant.

9 Nonetheless, it has long been recognised that there was no real or logical distinction between physical damage and pure economic loss. In duty terms, it became that the defendant owes the claimant a duty of care with regard to damage to property but not in respect of unconnected loss of profit. In some respects, this is absurd, as was pointed out by Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,²¹ when his Lordship observed that:

This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this.

10 That being so, the Court of Appeal brought rationality and logic into this area of the law by decreeing that henceforth there will be a single test to determine the imposition of a duty of care in all claims arising out

17 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [27].

18 See *K v The Secretary of State for the Home Department* [2002] EWCA Civ 775 at [16].

19 *K v The Secretary of State for the Home Department* [2002] EWCA Civ 775 at [17].

20 *Ultramares Corporation v Touche* (1931) 174 NE 441.

21 [1964] AC 465 at 516.

of negligence, irrespective of the type of the damages claimed including claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions.²²

11 As to the role of the court in this regard, Chan CJ confirmed that, Like in England,²³ liability for pure economic loss is a matter “that imposes on the courts a great responsibility as this is an area of law where the determination of liability has been and will continue to be ... the exclusive domain of the Judiciary”.²⁴ So it is incumbent on the courts to ensure that they keep within the bounds of what is proper recovery that can be had for claims of pure economic loss and the courts have done this by introducing control mechanisms – like reasonable foreseeability, proximity and policy – the purpose of which is limitation of liability.²⁵ These control mechanisms were clearly artificial in creation primarily to put hurdles (even though not insuperable, in appropriate circumstances) even before a claimant goes past stage one of his litigation journey.²⁶

III. The position in England

A. The pre-Anns position

12 The early days of negligence liability following *Donoghue v Stevenson* was premised, for the purposes of exerting control over too wide an expansion of the recovery field, on the adherence to the foreseeability doctrine. That is to say, a claim could succeed only if it is

22 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [71].

23 In *Donoghue v Stevenson* ([1932] AC 562 at 583–584), Lord Atkins said that this “... branch of the law which deals with civil wrongs, [is] dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges ...”.

24 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [27].

25 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100. In reality it is not true that the scope of negligence is restrictive of recovery of liability, the opposite is the case. As Lord Goff observed in *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 280:

[T]he broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not.

And, thus, the need for the courts to introduce control mechanisms.

26 As to this, Lord Denning MR observed in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* ([1972] 3 All ER 557 at 562) that the “more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: ‘There was no duty.’ In others I say: ‘The damage was too remote.’ So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.”

sufficiently foreseeable and not too remote, which was a *sine qua non* to the establishment of a duty of care.²⁷ The doctrine of reasonable foreseeability was always a forced concept with conceptual and intellectual limitations. It was the mechanism by which the area of liability in negligence was generally limited, for it was always absolutely necessary to limit potentially unlimited liability, even though such limits needed to be transparent and reasonably certain.

13 The context in which the tort of negligence operates is the same as all torts, that is, it determines, where a loss has befallen a person, whether that loss should be left where it fell or shifted to someone else. The reasonable foreseeability concept declared that if the loss suffered by the claimant was caused by an act or omission of the defendant and that loss was reasonably foreseeable by the defendant, it should be shifted to be borne by the latter. Lord Denning MR always agreed with this aspect of loss shifting in the tort of negligence, but where he disagreed was in respect of whether the way to do it was actually to investigate whether there was reasonable foreseeability. Thus, he declared in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*,²⁸ “At bottom ... the question of recovering economic loss is one of policy.” So for Lord Denning, the problem was not which legal rule applied but where (and whether) loss is shifted eventually. And that to him was the business of public policy and not legal doctrine.

14 As Chan CJ observed in *Spandeck Engineering*, the preference of choice between whether the true test to ascertain whether the defendant owed the claimant a duty of care is reasonable foresight (and so legal doctrine) or policy, swung from one to the other for a while after *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*.²⁹ His Honour said:³⁰

The pendulum which swung between foreseeability and policy as the determinant of duty showed signs of resting in *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, in which Lord Simon of Glaisdale appeared to endorse the idea that where Lord Atkin’s neighbour principle was seen as fixing the defendant with responsibility for the claimant’s damage, liability should follow, save where there was some good reason why it should not, and identified ‘public policy’ as the

27 “To make out a case against a defendant in the tort of negligence, a [claimant] must establish four ingredients. First, he must show that he was owed a duty by the defendant to take reasonable care; Second, that the defendant breached that duty; Third, that the resultant breach caused the harm in question; and Fourth that he (the [claimant]) suffered damage that is not too remote”: *Arab-Malaysian Finance Bhd v Steven Phoa* [2003] 1 MLJ 567 at [16] *per* Gopal Sri Ram JCA in the Malaysian Court of Appeal.

28 [1973] QB 27 at 36.

29 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557.

30 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [33].

qualifying factor (at 419). That pendulum finally became stationary in favour of an approach which meshed foreseeability with public policy in *Anns*³¹ ...

B. The position in *Anns*

15 In *Anns*,³² Lord Wilberforce proposed a comprehensive single general principle. His Lordship declared:³³

Through the trilogy of cases in this House – *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Dorset Yacht Co Ltd v Home Office*, the position has now been reached that *in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist*. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the *damages* to which a breach of it may give rise. [emphasis added]

16 The *Anns* principle suggested that a single general principle could provide a practical test which can be applied to every situation to determine whether a duty of care is owed.³⁴ The problem with that (specifically with reference to the words emphasised in the above passage) was that it was in danger of becoming treated as “a universally applicable test of the existence and scope of a duty of care in the law of negligence”.³⁵

17 It was the fear of the same danger that led Brennan J (as he then was) in the High Court of Australia in *Sutherland Shire Council v Heyman*³⁶ to reject *Anns* as follows:

It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care

31 *Anns v Merton London Borough Council* [1978] AC 728.

32 *Anns v Merton London Borough Council* [1978] AC 728.

33 *Anns v Merton London Borough Council* [1978] AC 728 at 751–752.

34 See *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617G *per* Lord Bridge of Harwich.

35 See *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 815 *per* Lord Brandon of Oakbrook.

36 (1985) 60 ALR 1 at 43–44.

restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'.

18 In *Rowling v Takaro Properties Ltd*,³⁷ in the Judicial Committee of the Privy Council, Lord Keith of Kinkel³⁸ spoke of the necessity, before concluding that a duty of care should be imposed, of considering all the relevant circumstances, and opined that to take Lord Wilberforce in *Anns* too literally may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed.

19 Chan CJ in *Spandek Engineering* felt that the *Anns* principle was "not only significant for the elucidation of a two-stage test to determine duty, it also introduced the concept of a truly 'universal' test in that it could be applied without reference to previous decisions where the duty might or might not have been seen to have existed".³⁹ However, he conceded that not all judges viewed it this way. Many felt that *Anns*' "much sought-after universal basis for duty is unattainable and even undesirable, and that an incremental approach based on previous decisions on a case by case basis was less subjective and therefore preferable".⁴⁰

20 His Honour felt that this might have arisen because many judges came to the conclusion that *Anns* had turned its back on one of the most basic characteristics of the common law, which he expressed as follows:⁴¹

The common law is built on interconnected layers of principles, universal and particular, each dependent on and interacting with the other, held together by the overarching goal of fairness and justice. To understand this is to comprehend the common law's eternal search for rational and universal principles in the law. Thus, in the area of negligence, the principles relating to the imposition of a duty of care must be rational and coherent and be reliably and consistently determined. With the universal in the form of general principles, the law will be a coherent body of rules, and not consist of singular instances of judicial decisions unrelated to each other. However, to have the universal without the particular is to lose sight of the need for practical solutions for the myriad of disputes that come before the courts. These general principles provide the focus to which the

37 [1988] AC 473.

38 *Rowling v Takaro Properties Ltd* [1988] AC 473 at 501D–F.

39 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [34].

40 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [34].

41 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [28].

particular (*viz*, the facts of decided cases *and* the present case) must then be analysed so that the courts may, within this aggregation of the universal and the particular, reach a result that is fair and just.⁴²

21 The Court of Appeal opined that *Anns* invited so much criticism because many took the view that in *Anns* the particular had been severed from the universal, even though there was no compelling evidence of that since Lord Wilberforce surely must have (more than anyone else) appreciated that the very essence of the common law is its incrementalism. Moreover, a fair reading of Lord Wilberforce's dictum in *Anns* might actually show that his Lordship did not intend for his test to apply in a vacuum, distanced from all considerations of prior decisions.⁴³ However, perception is everything and the test was perceived as antagonistic to the incremental nature of the common law and so feared for its potential to unleash "uncontrolled expansion of liability".⁴⁴

22 Be that as it may, *Anns* was first doubted⁴⁵ and then, finally, overruled in England by the House of Lords in *Murphy*.⁴⁶

C. *The position after Caparo*

23 The demise of *Anns* led to the development of another test to determine duty of care. In *Caparo Industries plc v Dickman*,⁴⁷ Lord Bridge of Harwich⁴⁸ propounded the three-stage test, which essentially consisted of asking: (a) whether the loss was foreseeable? (b) whether there was

42 In *K v The Secretary of State for the Home Department* [2002] EWCA Civ 775 at [11], Laws LJ put it another way. His Lordship observed that the "conditions upon which the common law will impose a duty of care so as to give rise to a cause of action in negligence are by no means precisely fixed. This typifies the common law's virtue, that claims are decided case by case so as to do justice in a myriad of different circumstances. This however has to be tempered by the influence of another virtue, which is the common law's capacity to develop firm principle. That is virtuous because it affords a strong measure of legal certainty. The tension between these two virtues is a major characteristic of the common law's method. It is important that we should not make too great a sacrifice of the principle of legal certainty on the altar of the common law's flexibility, or *vice versa*."

43 For another such reassessment of what Lord Wilberforce really meant, see Sykes Ag J in *S&T Distributors Limited v CIBC Jamaica Limited* (24 September, 12 and 19 November 2004) <http://www.sc.gov.jm/Judgments/sc/CLS222_1999.pdf> (accessed 20 August 2007) at paras 41–42.

44 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [35].

45 See, eg, *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Sutherland Shire Council v Heyman* (1985) 60 ALR 1; *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 and *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175.

46 *Murphy v Brentwood District Council* [1991] 1 AC 398.

47 [1990] 2 AC 605 ("Caparo").

48 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617–618.

sufficient proximity between defendant and claimant for a duty to arise? and (c) whether it is fair, just and reasonable to impose a duty? However, the test was no panacea to the problem and certainly was not epitomised by its clarity. The House of Lords in *Caparo* itself acknowledged this by recognising, firstly, that the ingredients of the three-stage test were merely convenient labels and, secondly, that their usefulness was limited.⁴⁹

24 In the High Court of Australia, Kirby J in *Perre v Apand Pty Ltd* observed:⁵⁰

As against the approach which I favour, it has been said that the three identified elements are mere 'labels'. So indeed they are ... Labels are commonly used by lawyers. They help steer the mind through the task in hand.

25 In respect of the gathering debate about what the ideal approach to determining whether in any given case the defendant owed the claimant a duty of care should be (that is, the incremental approach or the general principle approach), the Court of Appeal declared as follows:⁵¹

In our view, incrementalism is not a distinct and alternative method which results in a plethora of discrete sets of rules (as opposed to a set of general (and universal) principles). Instead, it is an analogical process to apply specific facts to the general principle. According to this approach, a court should, when applying the specific step of the general principle, utilise the incremental methodology to decide first whether that specific step (or criterion) can be satisfied with reference to decided cases. This will provide an essential check to any unwarranted expansion of liability for negligent acts. However, as we will further observe ... *where there are no decided cases, recourse to general principles is not only valid but also desirable*. Such an approach, an interaction of the universal with the particular⁵² ... would, in our view, aid in the development of a rational and purposive concept of negligence which can achieve fairness and justice in each case. [emphasis added]

26 As to the current position in England in respect of acts or omissions causing pure economic loss, the Chief Justice observed that:⁵³

English law currently prevents recovery for such claims. In *Murphy* ... the House of Lords adopted what is known as the 'exclusionary rule' in relation to cases involving pure economic loss flowing from careless acts or omissions ... if the infliction of loss by the defendant on the claimant

49 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618B–D *per* Lord Bridge and at 628C–E *per* Lord Roskill.

50 (1999) 198 CLR 180 at 284.

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

52 *Rowling v Takaro Properties Ltd* [1988] AC 473.

53 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [47].

was to be categorised as wrongful, it was necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. What was necessary was evidently a relationship of proximity so close that it was 'akin to contract' ... to introduce the element of reliance such that the scope of the duty of care owed by the defendant to the claimant was wide enough to embrace pure economic loss ... English law will deny the existence of a duty of care to any individual suffering pure economic loss caused by careless acts or omissions where there is neither personal injury nor property damage.

D. Current position in England

27 Chan CJ found that the current position in England in respect of the attempt to find a single formula which will serve as a general test of liability has proven illusory (and clearly foreseeability is not the sole springboard to determining the existence of the duty of care) and that, in reality, three plausible tests are currently floating in England. They are: (a) the three-stage test of foreseeability, proximity and fairness in *Caparo*; (b) the assumption of responsibility doctrine in cases where the negligent performance of services⁵⁴ or making of statements⁵⁵ causes economic loss; and (c) the incremental test.⁵⁶

28 The Court of Appeal concluded thus:⁵⁷

[T]he establishment of no less than three separate tests for duty, in our view, puts paid to the search for a general principle applicable to all situations where tortious liability may arise. Damage arising from different situations (*viz*, pure economic loss or physical damage) is seen to require the application of different tests, and even within the rubric of physical damage, there is some confusion as regards which of the three tests is applicable to determine a duty of care.

IV. The position in Singapore

29 The Court of Appeal in *Spandek Engineering* surveyed the position in Singapore in respect of tests that were applied to ascertain duty of care, firstly, in cases of pure economic loss and, secondly, in cases of physical damage.

30 In respect of the former cases, the Court of Appeal, found that the position was as stated in *RSP Architects Planners & Engineers v Ocean*

54 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 ("Henderson").

55 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

56 As emphasised by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617–618.

57 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [48].

*Front Pte Ltd*⁵⁸ and *RSP Architects Planners & Engineers v MCST Plan No 1075*⁵⁹.

31 In *Ocean Front*, the Court of Appeal applied the two-stage test in *Anns* and said that the first question which needed to be asked was whether “there exists that degree of proximity between the plaintiff and the defendant as would give rise to a duty of care by the latter to the former with respect to the damage sustained by the former”.⁶⁰ If it exists, the next question which needed to be asked is whether there was any policy consideration in negating such a duty of care. If the answer is in the negative, then a duty of care arises. The Chief Justice in *Spandeck Engineering*⁶¹ took the view that in *Ocean Front* (and in most cases) the very reasons for concluding that there was proximity would mean that the policy considerations would be in favour of imposing liability on the defendant.

32 In *Eastern Lagoon*, the Court of Appeal propounded a two-stage test very similar to *Anns* but expressly rejected the test in *Anns*, arguing that Lord Wilberforce’s “sweeping proposition of a single general rule or principle which can be applied in every situation to determine whether a duty of care arises and secondly the fact that the test propounded by his Lordship in the first stage was based on foreseeability of damage alone”⁶² made it an objectionable test. L P Thean JA in *Eastern Lagoon* observed that just because a two-stage test was applied in *Ocean Front*, it did not follow that the court applied the *Anns*’ twofold test because, for one, the court’s finding that there was sufficient degree of proximity was not premised on foreseeability of damage alone, but on the consideration of other relevant facts.⁶³

33 Later cases⁶⁴ confirmed that the two-stage test was meant for use only in cases involving pure economic loss and, in Singapore, was not applicable to cases of physical damage.

58 [1996] 1 SLR 113 (“*Ocean Front*”).

59 [1999] 2 SLR 449 (“*Eastern Lagoon*”).

60 *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 at 139, [69] per L P Thean JA.

61 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [54].

62 *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 at [18].

63 *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 at [29]–[30].

64 See *The Sunrise Crane* [2004] 4 SLR 715; *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR 300 and *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR 214.

34 The Court of Appeal in *Spandeck Engineering*⁶⁵ argued that the two-stage test – whether as enunciated in *Anns* or as propounded by L P Thean JA in *Eastern Lagoon* – is susceptible to different interpretations depending on how it is construed. If too literal a construct is put on it, it would imply that there is no longer a need to draw analogies with decided cases, then it would, indeed, be a “hybrid or composite” test and not wholly “universal” in nature. However, if a more liberal or expansive interpretation is put on it, then the two-stage test (including the *Anns*’ two-stage test) can be seen as existing within the broad scheme of the incremental nature of the common law “drawing its conclusions from *precedents*, and this necessarily presupposes that *even within the confines of a general principle*, there remains the scope for the application of an analogising or incremental approach, and the two must not be viewed as being mutually exclusive”.⁶⁶

35 Significantly, Chan CJ concluded that the two-stage test in *Anns* and *Ocean Front* were in “substance and effect”⁶⁷ the same.

36 In respect of the test to determine duty of care in cases of physical damage, Chan CJ observed that in these cases, not involving pure economic loss, the position in Singapore is that the three-part test in *Caparo*, which clearly involves the incremental approach, applied.⁶⁸

V. The need for a new approach

37 Given that the object of the court, whether it deals with physical damage cases or pure economic loss cases, is to achieve a result which is fair and just between the parties without imposing an unacceptable economic cost to the public, Chan CJ threw the gauntlet in *Spandeck Engineering* and asked why there should be two different tests to ascertain duty of care in physical damage cases and pure economic loss cases.⁶⁹

65 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [60]–[61].

66 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [61].

67 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [61].

68 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [62]–[63]. See also *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 3 SLR 24; *Standard Chartered Bank v Coopers & Lybrand* [1993] 3 SLR 712; *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317; *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR 505; *D v Kong Sim Guan* [2003] 3 SLR 146; *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR 543 and *The Sunrise Crane* [2004] 4 SLR 715.

69 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [64].

38 His Honour found, firstly, that there is a need for a different approach to determine duty of care in cases of pure economic loss because, even though in Singapore⁷⁰ recovery is possible for pure economic loss, a different and restrictive test is applied as compared to cases involving physical damage simply because the losses carry different consequences. But His Honour pointed out that the differing treatment was not because of anything inherent in the type of loss but rather it is the circumstances in which the economic loss has arisen.⁷¹ It is clear that the cases show that the failure to recover was not because the loss was “economic” but because of other reasons, high among which was the “floodgates” argument.⁷² Chan CJ concluded, therefore, that in Singapore, not only is it the case that there is no justification for a general exclusionary rule against recovery of all economic losses, but there is no reason not to extend liability for pure economic loss to novel situations provided that the issues of indeterminate liability and policy can be adequately dealt with and this can be done through the incremental approach which provides a necessary safeguard.⁷³

39 Furthermore, His Honour concluded that, for a number of reasons⁷⁴ there was no need to apply different tests for cases of pure economic loss and cases of physical damage. So a single test is preferable to determine duty of care irrespective of the type of damages claimed, and this should include claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions.⁷⁵

VI. What is the applicable single test?

40 As to what the single test should be, the Court of Appeal pronounced as follows:⁷⁶

In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if

70 As opposed to England where after *Murphy* an “exclusionary rule” applies: *Rowling v Takaro Properties Ltd* [1988] AC 473.

71 See Robby Bernstein, *Economic Loss* (Sweet & Maxwell, 2nd Ed, 1998) at p 21.

72 See, eg, *Murphy v Brentwood District Council* [1991] 1 AC 398 at 485 per Lord Oliver; *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 at 375 per Oliver LJ and *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 32 per Mason J.

73 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [69].

74 *Inter alia*, “doctrinal untidiness” and the fact that two different tests do not address the concerns which prompted the more restrictive approach for some cases of pure economic loss in the first place: *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [70].

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

76 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [73].

its application is preceded by a preliminary requirement of factual foreseeability. We would add that this test is to be applied incrementally, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. We would admit at this juncture that this is basically a restatement of the two-stage test in *Anns*, tempered by the preliminary requirement of factual foreseeability.

41 Therefore, the starting point, even before the stage one test is embarked upon, is the need to ascertain a preliminary issue and this is whether there is factual foreseeability. This does not amount to a separate test⁷⁷ because this requirement will almost always be satisfied simply because of its very nature and the very wide nature of the “net” it necessarily casts. However, it is not discarded as an element, it is a necessary element but it will almost always be present.⁷⁸ So, factual foreseeability is a “necessary element in any claim in negligence ... is a threshold question which the court must be satisfied is fulfilled, failing which the claim does not even take off”.⁷⁹

42 As to the elements of the single two-prong test, Chan CJ stated that in stage one there is a need (when ascertaining whether there exists a duty of care) to establish that there is sufficient legal “proximity” between the parties.⁸⁰ However, the Court of Appeal went further and declared that proximity is not a mere label or artificial concept not susceptible to definition but has substance which is capable of being defined and of being expressed in terms of legal principles and so the courts should endeavour to introduce some meaning into the concept.⁸¹

43 Once factual foreseeability, as a preliminary issue, is found and legal proximity as the first stage of the two-prong test is established, a *prima facie* duty of care arises. It will then be incumbent on the court to

77 Even though previously it was incorporated as the stage one test in the *Caparo* three-stage test.

78 See *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853.

79 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [76].

80 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [77].

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

ascertain whether policy “considerations should then be applied to the factual matrix to determine whether or not to negate this duty”.⁸² The Chief Justice – fully cognisant of the criticisms levelled at the utilisation of policy considerations, specifically the potential to result in arbitrary decisions – observed that the “danger is not with judges deciding cases based on policy considerations but rather with judges deciding cases based solely on them”.⁸³ He also cautioned against allowing policy considerations to be subsumed by the earlier concept of proximity, this judges can avoid by articulating the true reasons – whether they involve counterbalancing moral, societal or economic consideration – which make recovery undeserved and ensure that litigants do not come off with the feeling that there are ulterior, but unarticulated, reasons for the result.⁸⁴

VII. Two criticisms

44 Two criticisms can be made about the applicable test as propounded by the Court of Appeal. First, the so-called two-stage test now authoritatively stated to be the single test to determine whether a defendant owes a claimant a duty of care, whether the loss suffered is purely economic or physical in Singapore,⁸⁵ appears, in point of fact, to be a “2½-limb” test. The two substantial ones, of course, are “proximity” and “policy considerations” with “factual foreseeability” being the less substantial (but not legal) preliminary hurdle, which in fact is the emasculated first-stage test under *Caparo*. So, whether one labels factual foreseeability a test or not, it is a hurdle which has to be surmounted, even if it will almost always be present.⁸⁶

45 Second, the Court of Appeal spoke strongly of the need for the courts to go beyond simply declaring that because proximity is a mere label and artificial concept not susceptible to definition (because it is

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

83 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [84].

84 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [85]. This echoes N J Mullany, “Proximity, Policy, and Procrastination” (1992) 9 Aust Bar Rev 80 at 83, who said that the “proximity concept must not continue to be used to shroud what is in fact pure public policy. Judges should openly express the true premises of their decisions and, if recovery is considered to be undeserved, in the light of greater moral, social, economic, administrative or philosophical perceptions, then those reasons, and not others inherently uncertain in nature, should be expressed as the true foundation for denial of recovery”.

85 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [75]–[76].

86 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853.

difficult to define it) and “strive to infuse some meaning into it”⁸⁷ so that it can be better explained by lawyers to their clients and understood by students.⁸⁸ Indeed, the Chief Justice argued that proximity has substance that is capable of being defined and capable of being expressed in terms of legal principles.⁸⁹ In coming to this conclusion the Court of Appeal was greatly (perhaps, over-greatly) influenced by the judgment of Deane J in *Sutherland Shire Council v Heyman*⁹⁰ and by the views of the learned authors of “Of Precedent, Theory and Practice – The Case for a Return to *Anns*”⁹¹.

46 In *Sutherland Shire Council v Heyman*,⁹² Deane J observed that proximity was involved with notions of closeness, which incorporate: (a) physical proximity between the parties (whether with regards their persons or property); (b) circumstantial proximity (eg, the relationship between professional advisers and clients); and (c) causal proximity (the close linkage between the careless conduct and the damage suffered) which, in turn, may reflect the twin criteria of (d) voluntary assumption of responsibility and reliance. These factors, however, feature differently in terms of their application and importance in different cases. Be that as it may, these factors cannot be dismissed merely as involving some peculiar ideas of ethics and justice or as mere matters of fact. Proximity is a question of law that needs to be determined by reference to legal reasoning. However, proximity (and the factors which go into its determination) must be read in the light of and together with conceptions of fairness, reasonableness and public policy.

87 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 at [80].

88 Against this is, of course, the argument that clients deserve to know in advance exactly what their duties to others are (Desmond Manderson, “Proximity and the Ethics of Law” (2005) 28(3) UNSW Law Journal 697 at 713) and not to turn to lengthy and time consuming arguments in the court (see *Perre v Apand* (1999) 198 CLR 180 at 216 *per* McHugh J). In *Brian v Maloney* (1995) 182 CLR 609 at 653, Brennan J said that “the law of negligence should be capable of application in solicitors’ offices. It should not have to await definition in litigation”. The criterion of liability must present an ascertaining meaning if it is to have utility (*Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 at 397 *per* Robert Goff LJ and *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 *per* Lord Bridge). The law is a system of rules and proximity, in that context, can be nothing more than “a surplus or a waste – so much unnecessary verbiage”: see (2005) 28(3) UNSW Law Journal 697 at 713.

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

90 (1985) 60 ALR 1 at 55–56.

91 Andrew Phang, Saw Cheng Lim & Gary Chan, “Of Precedent, Theory and Practice – The Case for a Return to *Anns*” [2006] Sing JLS 1.

92 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.

47 Chan CJ said:⁹³

Deane J's analysis in *Sutherland*, that proximity includes physical, circumstantial as well as causal proximity, does provide substance to the concept since it includes the *twin criteria of voluntary assumption of responsibility and reliance*, where the facts support them, as essential factors in meeting the test of proximity.

48 The judgment of Deane J, it is submitted, is too wedded to the concepts of assumption of responsibility⁹⁴ and reliance, and while helpful in many circumstances they simply do not have universal application such that they can be elevated to the position as being the essential nexus to the establishment of proximity. They may be adequate in most circumstances, but by no means all. In other words, there could be proximity in a given case – even where there is no assumption of responsibility and reliance – where, *eg*, there was a relationship between the parties akin to contract.⁹⁵ In truth, proximity is not a concept within which operate integral and necessary sub-concepts such as assumption of responsibility and reasonable reliance, proximity is simply another concept co-equal in operation to assumption of responsibility and

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

94 Note the following comments about the notion of *assumption of responsibility*: (a) Lord Griffiths observed in *Smith v Bush* [1990] 1 AC 831 at 862 that “the phrase ‘assumption of responsibility’ can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice”; (b) Lord Oliver in *Caparo* ([1990] 2 AC 605 at 637) opined that voluntary assumption of responsibility was “a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises”; (c) Lord Slynn in *Phelps v Hillingdon* [2001] 2 AC 619 at 654 observed that “it is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility”; and (d) more recently, in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28 at [5], Lord Bingham concluded that the problem here is that “the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the three-fold test”.

95 Although the High Court of Australia has said that the twin criteria of assumption of responsibility and reliance is important, it has held that it is not a necessary factor. See *Bryan v Maloney* (1995) 182 CLR 609; *Esanda Finance Corporation Limited v Peat Marwick Hungerford* (1997) 71 ALJR 448; *Hawkins v Clayton* (1988) 164 CLR 539; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Sparnon v Apand Pty Ltd* Federal Court of Australia, South Australian District Registry, General Division, No SG 28 of 1994 (20 December 1996).

reasonable reliance. The over emphasis of proximity may, unfortunately, well have acted as a blinker.⁹⁶

49 Also, with great respect, there is danger in travelling down this path because concepts such as proximity are in a sense transient in nature. Remember that prior to *Anns* the only utilised and acceptable concept was “reasonable foreseeability”⁹⁷ but today it is stuck behind on the legal shelf as inadequate (and possibly not fit for purpose), overtaken as it is by proximity, which in the end may have always meant the same thing. After all, reasonable foreseeability was never a subjective test operating in *vacuo*. It was as “holistic”⁹⁸ as proximity is claimed to be today. Its underpinning was always “ought-istic” (to coin a phrase), in that the question always was whether – given that the defendant and the claimant were so closely and directly connected with each other – the defendant “ought” to have reasonably foreseen that his acts or omissions would cause loss to the defendant. Does that not, in “substance and effect”, amount to what encompasses “proximity” today? The answer, it is submitted,⁹⁹ must be emphatically in the affirmative, because even the most casual reader of Lord Atkin’s “neighbour” principle in *Donoghue v Stevenson*, must appreciate that when his Lordship observed that “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”¹⁰⁰ are my “neighbours”, that statement had a two-fold meaning. That is: (a) a defendant ought to have within his contemplation (reasonable foresight); (b) those persons who are so “closely and directly” affected by his act (proximity) and if one of those persons happens to be the

96 See the view of the learned authors of *Clerk & Lindsell on Torts* (Sweet & Maxwell, 18th Ed, 2001) at paras 7-95, where it is noted that different “views have been expressed as to the relationship of the threefold test [in *Caparo*] and assumption of responsibility”. Lord Goff in *Henderson* ([1995] 2 AC 145 at 181) regarded “assumption of responsibility” as rendering any inquiry into the threefold criterion of fairness as being superfluous. An alternative view regards “assumption of responsibility” as a sub-set of proximity.

97 Chan CJ cited with approval the following view of the learned authors of “Of Precedent, Theory and Practice – The Case for a Return to *Anns*” ([2006] Sing JLS 1 at 42) “that if indeed the ‘proximity’ concept is merely a label or an artificial exercise in judicial creativity, then one must ask why the concept is still resorted to or utilised in the various tests. Its very presence suggests that it has some substantive content that is capable of being expressed in terms of legal principles”: *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [80]. With great respect, the same could have been said about the concept of “reasonable foreseeability” before it was left by the wayside by proximity.

98 Andrew Phang, Saw Cheng Lim & Gary Chan, “Of Precedent, Theory and Practice – The Case for a Return to *Anns*” [2006] Sing JLS 1 at 47.

99 This despite the fact that some post-*Anns* courts (see *Hill v Van Erp* (1997) 71 ALJR 487) have tried to represent proximity as being something involving reasonable foreseeability plus something else.

100 *Donoghue v Stevenson* [1932] AC 562 at 580.

claimant, the former owes the latter a duty of care. In other words, the defendant – in these circumstances (where there is reasonable foresight and proximity) – owes the claimant a duty of care. These twin components (reasonable foresight and proximity) are collectively referred to today as “proximity”.¹⁰¹ However, there is no reason why they cannot be referred to, as they once were, as “reasonable foreseeability”, when in truth they have, it is submitted, always meant the same thing.

50 Accordingly, it is the view of the present writer that to be obsessed with proximity and to invest unwisely in promoting it beyond its capacity and scope is likely to hinder understanding rather than advance it. In *Caparo*, Lord Roskill gave a signal reminder of the role and position of phrases like “proximity” *et al* and the danger of inflating them into things they are not. His Lordship said:¹⁰²

Phrases such as ‘foreseeability’, ‘proximity’, ‘neighbourhood’, ‘just and reasonable’, ‘fairness’, ‘voluntary acceptance of risk’, or ‘voluntary assumption of responsibility’ will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

51 In *KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd*,¹⁰³ Gopal Sri Ram JCA in the Malaysian Court of Appeal, with reference to the usefulness of various tests, *indicia* or guidelines to ascertain whether a duty of care exists in given circumstances, concluded wisely that “the ultimate question whether a duty of care should be in a particular case is essentially fact sensitive”.¹⁰⁴ Furthermore, let us not forget that it was not without reason that Dawson J in *Hill v Van Erp*,¹⁰⁵ in the High Court of Australia, concluded that proximity “expresses the result of a process of reasoning rather than the process itself”.¹⁰⁶

101 See *Barrett v Enfield LBC* [2001] AC 550 at 560, *ie*, reasonable foreseeability and something more.

102 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 628.

103 [2006] 5 MLJ 513 at [10].

104 See also *Arab-Malaysian Finance Bhd v Steven Phoa* [2003] 1 MLJ 567. It is important at this juncture to take note of a salutary piece of general advice given by Lord Browne-Wilkinson in *Barrett v Enfield LBC* [2001] AC 550 at 560 that in an area of the law which was uncertain and developing, *ie*, the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power, “it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true” (albeit, in this case, for the purpose of striking out).

105 (1997) 71 ALJR 487.

106 *Hill v Van Erp* (1997) 71 ALJR 487 at 558. Moreover, three Justices, including Dawson J, in *Hill v Van Erp* (*per* Toohey and Gummow JJ at [57]) concluded that it
(*cont'd on the next page*)

52 However, even as acknowledged by the Chief Justice,¹⁰⁷ very senior judges in developed common law jurisdictions have declared that the concept is incapable of precise definition¹⁰⁸ and that it cannot be explained in “any logical process of analogical deduction”,¹⁰⁹ and for that reason have been content to merely describe it.¹¹⁰ They have also felt it unnecessary to rush into definition because at the end of the day, in a typical case, when the question is whether there is sufficient proximity between the negligent act and the loss, the court would look at the nature of the relationship between the parties, the substance of the transaction and a combination of such factors and conclude that there was or was not (as the case may be) sufficient proximity to recover any proven loss.¹¹¹

53 Indeed, in *Ocean Front*, on the facts of the case (a condominium case), the Court of Appeal found that there was a duty of care from the combination of several factors evidencing proximity: (a) the defendant’s undertaking to construct the development in a good and workmanlike manner; (b) after completion, the defendant remained the legal owner of the common property and was responsible for its maintenance and upkeep; (c) the defendant incorporated a management committee (“MC”), the claimant, to hold and to maintain the common property; and (d) the defendant was obviously aware that if the common property was defective as a result of defective workmanship, any damage to it

is appropriate to simply view the concept of proximity as “expressing the proposition that in the law of negligence reasonable foreseeability of harm may not be enough to establish a duty of care. Something more is required and it is described as proximity”. So too Lord Roskill in *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520 at 546 treated Lord Wilberforce’s first limb test of “proximity” as encompassing factors in addition to foreseeability. Moreover, in *Yuen Kun Yeu v A-G of Hong Kong* [1988] AC 53 at 63 (*per* Lord Keith) it was argued that “foreseeability of harm is a necessary ingredient of a relationship (of proximity), but it is not the only one. 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 forebears to shout a warning”.

107 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [79].

108 See Bingham LJ in *Caparo Industries plc v Dickman* [1989] QB 653 at 679. In *Davis v Radcliffe* [1990] 2 All ER 536 at 540, Lord Goff said that “it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist”. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, it is considered preferable that “the law should develop categories of negligence incrementally and by analogy with established categories”.

109 See Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 411 which is totally contrary to Deane J’s view that “proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction”: *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55–56.

110 See *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 194 *per* Lord Keith of Kinkel.

111 See *D’Amato v Badger* [1996] 2 SCR 1071 at [7].

would have to be made good by the MC.¹¹² Indeed, L P Thean JA in *Ocean Front*, having taken into account the above factors, concluded that the “relationship between the [defendant] and the [claimant MC] was as close as could be short of actual privity of contract”.¹¹³

54 It is clear that in most cases the courts do not need to express in legal terms the concept of proximity because whether there is proximity or not is par excellence fact-sensitive and based on common sense. Whether there is a duty of care is of course a question of law, but whether there is proximity on the facts of a case, it is submitted, is not so. After all, simply put (as argued above),¹¹⁴ proximity is the term used to describe the “close and direct” relationship that Lord Atkin described as necessary to establish “neighbourhood” and a duty of care in *Donoghue v Stevenson*.¹¹⁵ What is clear is that the combination factors which may point to there being proximity are varied and depend very much on the facts of each case. That being so, is there any point in striving to “infuse some meaning” into the label proximity, when it is clear that one “searches in vain for a single unifying characteristic”?¹¹⁶

55 In any event, “proximity” as a concept is more apt in the domain of the ethics of law rather than practical law.¹¹⁷ As Lord Roskill said in *Caparo*:¹¹⁸

If this conclusion (*ie*, that concepts such as ‘proximity’ *et al* are mere labels) involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care ... I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.

56 In “Proximity and the Ethics of Law”,¹¹⁹ Desmond Manderson outlined the journey that the High Court of Australia took from 1984 to 1998 in grappling with the proximity concept, with its high-water mark being reached in the judgment of Deane J in *Stevens v Brodribb Sawmilling Company*,¹²⁰ in which His Honour “sought to give content to

112 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [53].

113 *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [53].

114 *Donoghue v Stevenson* [1932] AC 562 at 580.

115 *Donoghue v Stevenson* [1932] AC 562 at 580.

116 See *Cooper v Hobart* [2001] 3 SCR 537 at [35] *per* McLachlin CJ and Major J.

117 (2005) 28(3) UNSW Law Journal 697 at 713.

118 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 628.

119 (2005) 28(3) UNSW Law Journal 697.

120 (1986) 160 CLR 16.

the duty (of care) by reference to the concept of proximity¹²¹. He argued that proximity:¹²²

[R]emains the general conceptual determinant and unifying theme of the categories of case in which the common law of negligence recognises the existence of duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another.

However, in the end, Deane J's proximity "project" was comprehensively "railroaded" as exemplified by the following statement of Kirby J in *Pyrenees Shire Council v Eskimo Amber Pty Ltd*:¹²³

[I]t is tolerably clear that proximity's reign in (the High Court of Australia), at least as a universal identifier of the existence of a duty of care at common law, has come to an end.

57 The great difficulty in attempting to resurrect William Deane's endeavour to give content to the duty of care by reference to the concept of proximity – as surely the Chief Justice seeks to do in *Spandeck Engineering* – is that judges have very simplistic notions of ethics (in as much as ethical philosophers have simplistic notions of the law). As Manderson¹²⁴ argues, Deane J's (possibly the greatest advocate of making proximity a legal doctrine) "understanding of ethics was too simplistic to properly articulate the unsettling role that proximity fills". Accordingly, would it not be to flog a dead horse?

VIII. Conclusion

58 The Chief Justice concluded that henceforth:¹²⁵

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

121 (2005) 28(3) UNSW Law Journal 697 at 699.

122 (2005) 28(3) UNSW Law Journal 697 at 699.

123 (1998) 192 CLR 330 at 414.

124 (2005) 28(3) UNSW Law Journal 697 at 713.

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

59 That conclusion states, in as clear and self-explanatory a way as possible, the law of negligence as it relates to the determination of duty of care in the tort of negligence as it applies to Singapore today.

60 Even so, three parting observations can be made on the judgment of Chan CJ in the Court of Appeal in *Spandek Engineering*:

(a) It firmly acknowledges that the common law is incremental in nature but it concedes (it is submitted, correctly) that it could grant recovery even in novel situations¹²⁶ and is not hamstrung by there being no precedent.

(b) It denotes, without a doubt, an unqualified return to *Anns*, even though there is some misgiving in it representing the single, two-stage test as truly “two-stage”, when in fact it is arguable that it is in reality a kind of “2½-limb” test, the half-limb being an initial factual as opposed to legal foreseeability test, which nevertheless may prove a real first-stage hurdle.

(c) Regrettably, however, it clings too heavily to the discredited and discarded¹²⁷ notion of proximity as a legal doctrine and an essential underpinning, which leading members of the House of Lords and the High Court of Australia over the last two decades have relegated to the position of a mere label and artificial tag of convenience, inhabiting more appropriately the realm of questions of fact.

126 This really is more orthodox than it sounds, for the Chief Justice has obviously not forgotten the instructive words of Lord Macmillan in *Donoghue v Stevenson* ([1932] AC 562 at 619) that “the categories of negligence are never closed”.

127 At least, most certainly in Australia, to which jurisdiction the concept of proximity owes its origins in the first place, as opposed to England.