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THE *SUNRISE CRANE*—SHEDDING NEW LIGHT OR CASTING OLD SHADOWS ON DUTY OF CARE?

The Owners of the Sunrise Crane v. Cipta Sarana Marine Pte. Ltd.

KUMARALINGAM **AMIRTHALINGAM***

I. INTRODUCTION

The Sunrise Crane, a ship designed to carry hazardous chemicals, arrived in Singapore carrying a cargo of highly corrosive nitric acid. It was discovered that one tank of acid had been contaminated by hydraulic oil and had to be disposed of urgently. The appellant, who owned the Sunrise Crane, entered into a contract with a business called Pink Energy Enterprises (Pink Energy) for the disposal of the acid. The appellant informed Pink Energy of the hazardous nature of the cargo and Pink Energy assured the appellant that it could safely dispose of the acid. Pink Energy then informed the appellant that it had arranged for the acid to be transferred to the Pristine, a ship owned by the respondent. Pink Energy negligently failed to inform the respondent of the nature of the cargo which, due to its corrosive nature, required stainless steel tanks for safe transport. The Pristine was made of mild steel and was not suitable for carrying the nitric acid. Shortly after the transfer of acid from the Sunrise Crane to the Pristine, the latter sank. The acid had reacted with the mild steel and damaged the hull of the Pristine, causing it to take in water.

The respondent brought an action against the appellant, alleging negligent failure to warn it of the nature of the cargo. The trial judge, Belinda Ang J., found in favour of the respondent, and in the Court of Appeal the appeal was dismissed by majority of 2-1.[1] The majority held that, in addition to informing the independent contractor of the nature of the cargo, the appellant had a separate duty of care to warn the respondent directly. The dissenting judge, Judith Prakash J., while sympathetic to the plight of the respondent, took the view that the recent Court of Appeal decision

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* LL.B. (Hons.), Ph.D. (Australian National University); Associate Professor, Faculty of Law, National University of Singapore. This paper is written in honour of Tan Keng Feng, a close colleague and friend, with whom I have enjoyed teaching tort law for several years and with whom I have had the pleasure of many long discussions on duty of care over lunch in the smoky pub of the Guild House! Keng Feng's views on duty of care have proved prescient in Singapore and his resignation from NUS after 30 years of service will be a sad loss both to his colleagues and to generations of law students.

1 [2004] S.G.C.A. 42 [the *Sunrise Crane*]. The majority consisted of Yong Pung How C.J and Chao Hick Tin J.A.

in *Man B&W Diesel S.E. Asia Pte. and Another v. P.T. Bumi International Tankers and Another Appeal*[2] and the earlier case of *Mohd. bin Sapri v. Soil-Build (Pte.) Ltd*.[3] precluded a finding of a duty of care. It is suggested that, instead of analysing the action in the *Sunrise Crane* from the perspective of a direct duty, the case could equally have been analysed as an instance of a personal non-delegable duty.[4]

II. Duty of Care—Tests and Approaches

Three distinct approaches to duty of care in negligence are applied in the leading common law jurisdictions: the two stage approach of *Anns v. Merton London Borough Council*,[5] the three stage approach of *Caparo Industries Plc. v. Dickman*[6] and the salient features approach of *Perre & Ors. v. Apand Pty. Ltd*.[7] Lord Atkin's original dictum in *Donoghue v. Stevenson* cast the duty test in terms of "reasonable contemplation" of the class of claimants where the claimants are "so closely and directly affected" that they are neighbours in the legal sense.[8] While this neighbour principle was intended to be of general application, Lord Atkin warned against over-extension of the concept, and clearly envisaged a cautious, incremental development of the tort of negligence.[9] This caution was ignored by Lord Wilberforce in *Anns*, when he declared:

> Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 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 …[10]

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2 [2004] 2 S.L.R. 300 [*P.T. Bumi*].

3 [1996] 2 S.L.R. 505.

4 The limitation of liability under the Merchant Shipping Act also arose as an issue and a very brief comment will be made on this point towards the end of this piece.

5 [1978] A.C. 728 [*Anns*].

6 [1990] 2 A.C. 605 [*Caparo*].

7 (1999) 198 C.L.R. 180 [*Perre*].

8 [1932] A.C. 562 at 580.

9 *Ibid.* at 580: "To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v. Pender* in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide."

10 *Anns*, *supra* note 5 at 751-752.

The significance of the *Anns* two stage approach lay in its preference for a "general principles" approach over an "incremental approach". The former simply applies the existing legal principles to novel situations to determine whether or not a duty should be recognised, whereas the latter gives weight to existing categories of negligence, preferring to develop the law by a combination of analogous and principled reasoning.[11] The *Anns* general principles approach was seen as laying down a very liberal test for duty (unconstrained as it was by existing categories) and soon fell into disfavour.[12] It was subsequently rejected by the House of Lords in *Caparo*, where a three stage approach, which reintroduced incrementalism and imported an additional requirement of proximity, was embraced:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.[13]

The difficulties with the requirement of proximity have been well documented and need not be repeated here.[14] What should be noted is that the Australian High Court, from which the House of Lords drew inspiration for the proximity test, has itself questioned proximity as a useful concept,[15] and has firmly rejected the *Caparo* three stage test.[16] The Australian High Court has now adopted an incremental approach to duty of care, which requires evaluation of all the salient features that are relevant to the question of whether or not a duty ought to be owed.[17] The impetus for such an approach was the general dissatisfaction with the concept of proximity and a desire for greater transparency in judicial reasoning. Previously, there was a sense that concepts such as reasonable foreseeability and proximity were being used to disguise certain policy choices made by judges.[18] The new approach requires judges to identify the salient features and articulate the policy factors that guide their reasoning.[19]

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11 The modern source for this incremental approach is found in the judgment of Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424.

12 Early judicial criticism by the House of Lords was apparent in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210.

13 *Caparo*, *supra* note 6 at 617-618.

14 See for example, Tan Keng Feng, "The Three-Part Test: Yet Another Test of Duty in Negligence" (1989) 31 Mal. L. Rev. 223; Des Butler, "Proximity as a Determinant of Duty: The Nervous Shock Litmus Test" (1995) 21 Mon. L. Rev. 159; John F. Keeler, "The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care" (1989) 12 Adel. L. Rev. 95.

15 The Australian High Court began to distance itself from the concept in a series of cases starting in 1996, including *Hill v. Van Erp* (1997) 188 C.L.R. 159; *Pyrenees Shire Council v. Day* (1998) 192 C.L.R. 330; *Perre & Ors. v. Apand Pty. Ltd.* (1999) 198 C.L.R. 180.

16 *Sullivan v. Moody* (2001) 207 C.L.R. 562; *Graham Barclay Oysters Pty. Ltd. v. Ryan* (2002) 211 C.L.R. 540.

17 *Crimmins v. Stevedoring Industry Finance Committee* (1999) 200 C.L.R. 1; *Brodie v. Singleton Shire Council* (2001) 206 C.L.R. 512.

18 See Michael Jones, *Textbook on Torts*, 8th ed., (Oxford: Oxford University Press, 2002) at 37-39, and the cases cited therein.

19 See Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane & Jane Stapleton (eds.) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998).

It is suggested that if transparency is the goal, this objective can be achieved under the *Anns* two stage or *Caparo* three stage tests. The problem lies not with the nature of the tests; the tests merely provide an analytical framework within which the courts can, and should, articulate the critical factors and values that are relevant to their analysis of duty.[20] The problem actually lies with the judicial philosophies underpinning the tort of negligence and the tension between the liberal, "general principles approach" and the conservative, "incremental approach". If proximity was a cloak for policy considerations, the search for a comprehensive test for duty may well be a cloak for the battle between liberal and conservative approaches to negligence.

III. Duty of Care in Singapore

Despite academic criticism,[21] and rejection by the House of Lords, the *Anns* test remains influential in local jurisprudence and finds its staunchest supporter in one of Singapore's leading torts scholar, Tan Keng Feng, who once proclaimed that "[t]he [*Anns*] two-stage test will not be easily bettered."[22] Recent Court of Appeal decisions appear to vindicate his view. In *Management Corp. Strata Title No. 1272 v. Ocean Front Pte. Ltd.,*[23] the court applied the *Anns* two stage approach and relied on *Junior Books Ltd. v. Veitchi Co. Ltd.*,[24] a highly discredited English decision, where a subcontractor was held liable in negligence for economic loss caused to the claimant with whom the subcontractor had no contractual relationship.

In *R.S.P. Architects Planners & Engineers v. M.C.S.T. Plan No. 1075*[25] the court was asked to reconsider *Ocean Front* on the ground that Singapore had already adopted the *Caparo* three stage test and therefore *Ocean Front* was wrong in relying on *Anns*.[26] In *Eastern Lagoon*, *the* court held that the reasoning in *Ocean Front* was perfectly justifiable; that the *Anns* two stage test as applied in *Junior Books* and followed in *Ocean Front* did include a separate inquiry into foreseeability and proximity at the first stage and therefore was not incompatible with *Caparo*.[27] More recently, the Court of Appeal in *P.T. Bumi* endorsed the *Anns/Ocean Front* two stage test.[28] The first stage involves an inquiry into proximity and reasonable foreseeability, taking into account all salient features of the case; and the second stage involves

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20 Kumaralingam Amirthalingam, "The Shifting Sands of Negligence: Reasonable Reliance to Legitimate Expectation?" (2003) 3 O.U.C.L.J. 81 at 103-104.

21 See for example, John C. Smith and Peter Burns, "*Donoghue v. Stevenson*—The Not so Golden Anniversary" (1983) 46 M.L.R. 147.

22 Tan Keng Feng, *supra*, note 14 at 235.

23 [1996] 1 S.L.R. 113 [*Ocean Front*].

24 [1983] 1 A.C. 520 [*Junior Books*].

25 [1999] 2 S.L.R. 449 [*Eastern Lagoon*].

26 *Caparo* was applied in the economic loss cases of *Ikumene Singapore Pte. Ltd. and Another v. Leong Chee Leng (Foo Huat Kim and Another, Third Parties)* [1992] 2 S.L.R. 890 and *Standard Chartered Bank and Another v. Coopers & Lybrand (sued as a firm)* [1993] 3 S.L.R. 712.

27 For discussion of these developments, see Debbie Ong, "Defects in Property Causing Pure Economic Loss: *Management Corp. Strata Title No 1272 v. Ocean Front Pte. Ltd.*" [1995] S.J.L.S. 256; Debbie Ong, "Defects in Property Causing Pure Economic Loss: The Resurrection of *Junior Books* and *Anns*" [1996] S.J.L.S. 257; Debbie Ong, "The Test of Duty for Defective Property Causing Pure Economic Loss" [1999] S.J.L.S. 667.

28 *P.T. Bumi*, *supra* note 2 at paras. 29 to-34.

consideration of any material policy matters that may preclude the existence of such a duty.

Notwithstanding these developments endorsing a two stage test, the majority in the *Sunrise Crane* applied the *Caparo* three stage test and listed the salient features of the case that supported the finding of a duty of care.[29] The majority referred to *P.T. Bumi* and *Ocean Front* and held that the test and approach in those cases were limited to pure economic loss situations and were not applicable to the *Sunrise Crane*, which concerned physical damage.[30] This suggests that in Singapore, the *Anns/Ocean Front* two stage test is to be applied to economic loss cases, while the *Caparo* three stage test is to be applied to all other situations.[31] The dissenting judge took the view that a uniform approach should be applied to all cases of negligence,[32] with the salient features of each case being determinative of the existence and scope of duty. There is, in fact, very little difference between the *Caparo* three stage approach and the *Anns/Ocean Front* two stage approach once it is appreciated that the latter has been applied in a manner that includes consideration of the three stages identified in *Caparo*.[33]

The shortcoming of the salient features approach is that it often includes consideration of matters that are pertinent to whether or not the defendant has taken reasonable care in the circumstances, thus conflating the duty and breach issues.[34] Instead of confining the analysis to whether or not a *duty should be recognised* in a particular situation, judges often make a judgment as whether *liability should be imposed*.[35] By absorbing the breach issue into the scope of duty, there is much greater room for disagreement on the facts, leading to conflicting statements by judges. This results in considerable uncertainty in the scope and extent of duty.

What is perhaps of concern is the manner in which the judges in the *Sunrise Crane* applied the concepts of reasonable foreseeability and proximity. The majority took the view that, because the two ships were physically next to each other and actual transfer of chemicals from one to the other occurred, the parties were "as proximate as could conceivably be."[36] However, proximity is not necessarily established by mere physical closeness; it is meant to be a conceptual determinant of categories whereby parties can be deemed to be neighbours in a *legal*, not just *physical*, sense. The case of *Gala v. Preston*[37] illustrates this. There, passengers in a car driven negligently by the defendant—one would have thought this would also be "as proximate as could conceivably be"—were deemed not to be sufficiently proximate because of additional factors surrounding the nature of their activity and conduct.[38]

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29 See Table *infra* at Appendix A.

30 *P.T. Bumi*, *supra* note 2 at para.44.

31 For recent applications of the *Caparo* test, see *D v. Kong Sim Guan* [2003] 3 S.L.R. 146; *T.V. Media Pte. Ltd. de Cruz Andrea Heidi and Another Appeal* [2004] 3 S.L.R. 543.

32 It was implicit in her view that the *Anns/Ocean Front* two stage test and the *Caparo* three stage test were effectively indistinguishable: *P.T. Bumi*, *supra* note 2 at para. 81.

33 A lucid reconciliation of these approaches can be found in the trial judgment in *P.T. Bumi.* [2003] 3 S.L.R. 239 at paras. 22 to 31 per Judith Prakash J.

34 See, *e.g.*, *Woods v. Multi-Sports Holdings Pty. Ltd.* (2002) 208 C.L.R. 460.

35 See Kumaralingam Amirthalingam, *supra* note 20 at 91-97.

36 S*upra* note 1 at para. 50.

37 (1991) 172 C.L.R. 243.

38 The facts were that a group of youngsters had consumed alcohol and stolen a car for a joyride and possibly with intent to commit further crimes. The driver was driving at high speed and negligently lost

The dissenting judge reasoned that, once the appellant had awarded the contract to a competent independent contractor, it was no longer foreseeable to the appellant that the respondent would send an unsuitable ship. This presupposes that the appellant was entitled to assume that the independent contractor had informed the respondent of the nature of the cargo. With respect, this conception of reasonable foreseeability may be unduly restrictive and contrary to the conventional broader notion of the concept."[39] The judge then said:

> Considering that there was proximity in the sense used in *Caparo* but, in my view, no reasonable foreseeability, it is now necessary to consider whether it would be just, fair and reasonable in all the circumstances to impose on the appellant a duty …

This statement is remarkable, as it suggests that a duty of care could conceivably be imposed in the absence of reasonable foreseeability, a concept that has been central to all tests and approaches to duty since *Donoghue*. As one English commentator put it, "The concept of foreseeability … is ubiquitous in the tort of negligence. *It is the foundation of the neighbour principle*."[40] The reasoning of the dissenting judge vindicates some of the criticisms made in 1989 by Tan Keng Feng of the *Caparo* proximity approach.[41] Perhaps, the precise approach matters less nowadays, as what is gaining favour in many jurisdictions is the articulation and consideration of all salient features of the case that point to the existence and scope of a duty of care. It does not really matter whether these salient features are relevant to reasonable foreseeability, proximity or policy/what is fair, just and reasonable (whether applying *Anns* or *Caparo*). The difficulty lies in the selection and evaluation of these salient features where there is a danger that the process becomes too subjective.[42]

A comparison of the salient features identified by the majority and the minority in the *Sunrise Crane* is illustrative. See Table *infra* at Appendix A. While both identified the dangerousness of the activity, the majority highlighted the appellant's failure to communicate this risk to the respondent and the fact that the respondent was in a vulnerable position vis-à-vis the appellant. The minority focused on the fact that the appellant had informed the independent contractor and had relied on the independent contractor taking reasonable care.

A significant issue in the *Sunrise Crane* concerned the extent to which liability in negligence could be imposed within a particular contractual matrix. The question that often arises is whether a party who has a contractual remedy against another should be allowed to rely on a tortious remedy for the same loss against a third party, with whom no contract exists but who is involved in the entire transaction. This was an issue that

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control of the car, crashing it into a tree. The majority held: "In this situation the parties were not in a relationship of proximity to each other such that the first appellant, as the driver of the vehicle, had a relevant duty of care to the respondent, as a passenger in the vehicle. *Ibid*. at 254.

39 *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. (Wagonmound No. 2)* [1967] 1 A.C. 617; *Jolley v. Sutton London Brough Council* [2000] 1 W.L.R. 1082. Note also the comment by Lord Reid in *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1970] S.L.T. 68 at 70: "It only leads to trouble if one tries to graft on to the concept of foreseeability some rule of law to the effect that a wrongdoer is not bound to foresee something which in fact he could readily foresee as quite likely to happen."

40 Michael Jones, *Textbook on Torts*, 8th ed., (Oxford: Oxford University Press, 2002) at 37 (emphasis added).

41 Tan Keng Feng, *supra* note 14.

42 See the concerns expressed in H Luntz, "Torts Turnaround Downunder" (2001) 1 O.U.C.L.J. 95.

was extensively considered by the Court of Appeal in *P.T. Bumi*. P.T. Bumi had entered into a contract with Malaysian Shipyard and Engineering Sdn. Bhd. (MSE) for the supply of a ship to be built to certain specifications. MSE subcontracted the supply of the engine to Man B&W Diesel S.E. Asia Pte. Ltd. (MBS), whose parent company, Mirrlees Blackstone Ltd. (MBUK) built the engine. The engine was defective and P.T. Bumi suffered pure economic loss as a result. The trial judge held that the subcontractors, MBS and MBUK, did owe a duty of care to P.T. Bumi. The Court of Appeal reversed this, partly on the ground that liability for pure economic loss should not be recognised in such cases and partly on the ground that the contractual arrangements precluded liability in tort.[43]

The contract between P.T. Bumi and MSE had certain limitation clauses with respect to liability and imposed responsibility on MSE for any wrongs committed by the subcontractors. Significantly, clause 22 provided that, "Nothing contained in this CONTRACT or any sub-contract awarded by BUILDER shall create any contractual relationship between any such sub-contractor and OWNER …"[44] The trial judge and the Court of Appeal took diametrically opposite positions on this, as is evident from this statement:

> [The trial judge] seems to assume that under the present law, Bumi had the right to claim against MBS and MBUK when she said "cl 22 … did not attempt to deprive Bumi of any claim in tort against the sub-contractors which the general law *granted* to them". But this is the very question which is confronting the court: should Bumi be granted such a right? To answer this question, the correct approach is not to ask whether there is any justification for depriving Bumi of the remedy or whether the clauses in the main contracts had provided that Bumi had lost all rights to sue the sub-contractors, but whether there are any compelling reasons to extend the law and to afford such a separate remedy to Bumi.[45]

In the *Sunrise Crane*, the majority makes the following statement, which, prima facie, appears to contradict the statement in *P.T. Bumi*:

> [W]hile it is true that the law of tort offers an avenue of redress for losses suffered by a person where such losses would otherwise be without remedy, it does not conversely mean that remedies in tort become automatically unavailable simply because the plaintiff has a remedy in contract against another party. To conflate the two would be to ignore the fundamental difference between contract and tort. Tortious duties are primarily fixed by law while contractual duties are based on the consent of the parties.[46]

It is difficult to reconcile these two passages, except to say that there are, as the majority in the *Sunrise Crane* held, distinct rules governing liability for pure economic loss.[47] As a statement of general principle, it seems that the view expressed in the *Sunrise Crane* is preferable. Tortious liability is imposed by the general law;

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43 The discussion here will be limited to the interplay between torts and contracts, leaving the discussion on economic loss for analysis elsewhere.

44 *P.T. Bumi*, *supra* note 2 at para. 36.

45 *Ibid*. at para. 53.

46 The *Sunrise Crane*, *supra* note 1 at para. 34.

47 *Ibid*. at paras. 35-36.

it exists despite the acts or intention of the parties. Contractual liability exists only when the parties have entered into a contract; it is a creation of the parties. Therefore, the relevant question in cases where a particular contractual structure exists is not whether the contractual structure *creates* rights in torts; rather it should be whether the contractual structure *eliminates* any rights in torts that may independently exist.

In any case, it is respectfully suggested that the detailed examination of duty of care in the *Sunrise Crane* was unnecessary. The appeal could have been disposed of by considering whether or not it was an appropriate case to hold a party liable for the tort of its independent contractor. In other words, instead of complicating the duty of care test, the focus could have been on the extent of personal non-delegable duties, for which there is established case law both overseas and locally.

IV. Personal non-Delegable Duty

There are three ways in which a party may be held liable for the torts of another.[48] One is by holding the party to be under a direct duty to the claimant, illustrated by cases such as *Home Office v. Dorset Yacht Co. Ltd*.[49] This category of cases, where the tortfeasor who is under the control and supervision of the defendant escapes and causes harm to the claimant, is distinguishable from the *Sunrise Crane*, where the defendant entrusts the carrying out of certain activities to a competent independent contractor who causes harm to the claimant. The second method is through the doctrine of vicarious liability, which on the facts was not applicable to the case at hand.[50] The third is through the concept of a personal non-delegable duty, which is particularly apposite to cases like the *Sunrise Crane*. It is regrettable that the court, which in recent negligence cases has actively considered Australian jurisprudence, did not consider the Australian High Court decision in *Burnie Port Authority v. General Jones Pty. Ltd*.[51]

The claimant in *Burnie Port Authority* had stored vegetables in the appellant's buildings. The appellant was carrying out extension works to the building which involved welding work and the use of highly flammable insulating material. It was well known that if ignited, this material burned at a "geometrically progressive" rate and was extremely hazardous. The work was carried out by independent contractors who negligently ignited the material, which caused a fire that destroyed the building, including the claimant's vegetables. The majority in the High Court of Australia, relying on early English authorities,[52] held that there were some categories of cases where a defendant could not discharge a duty of care merely by engaging a competent independent contractor. The defendant was required to ensure that care was taken. Thus, while the task may be delegated, the duty remains personal to the defendant and the negligence of the independent contractor will result in liability to the defendant.

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48 This pertains to torts requiring fault. Where the tort itself is strict liability, then as long as there is a causal connection to the defendant, liability will follow.

49 [1970] A.C. 1004.

50 It is well established that there is no vicarious liability for the torts of an independent contractor. See, Horton W.V. Rogers, *Winfield & Jolowicz on Tort* 16th ed. (London: Sweet & Maxwell, 2002) 702; Rosalie P. Balkin & James L.R. Davis, *Law of Torts*, 3rd ed, (Sydney: LexisNexis, 2004) 793.

51 (1994) 179 C.L.R. 520 [*Burnie Port Authority*].

52 *Hughes v. Percival* (1883) 8 App. Cas. 443; *Black v. Christchurch Finance Co.* [1894] A.C. 48.

In effect, this doctrine imposes strict liability on defendants and is justified on the ground that the nature of the risk is such that it is unfair for the defendant to avoid personally taking care to prevent harm to others. Cases justifying a personal non-delegable duty are generally characterised by the existence of a special relationship between the claimant and defendant whereby the latter is in possession of special knowledge or control and the former is particularly vulnerable and necessarily reliant on the defendant.[53] In addition, most such categories involve activity that is especially dangerous or hazardous. The principle, in such cases, was articulated by Lord Blackburn over a hundred years ago:

> [The] duty went as far as to require (the defendant) to see that reasonable skill and care were exercised … If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself … but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.[54]

The difficulty, as Tan Keng Feng has noted, is that "the boundaries between the various categories are not easily identifiable."[55] The *Sunrise Crane*, however, was arguably the very kind of situation which called for a personal non-delegable duty. As both majority and minority recognised, the activity was one that was exceptionally hazardous and fraught with catastrophic risk. In such cases, parties that introduce the risk should not be allowed to absolve themselves of liability simply by contracting out the task. There is a strong policy argument in favour of a personal non-delegable duty because, absent such a duty, there is no incentive on parties undertaking extra hazardous activity to take extra measures to contain the risk.[56]

Recent cases in Singapore on personal non-delegable duty appear not to have been brought to the court's attention in the *Sunrise Crane*.[57] Had the court analysed the case from the personal non-delegable duty perspective, many of the difficulties surrounding the duty test could have been avoided. The appellant, in transferring a highly corrosive acid to the respondent's ship, clearly owed a duty to warn. The question then should have been whether or not the appellant could discharge that duty by engaging an independent contractor. According to established authority, the answer should have been in the negative and the appellant should consequently have been held liable in negligence.

V. The Merchant Shipping Act

Brief mention should be made of the statements in the *Sunrise Crane* on a ship owner's ability to limit liability under the Merchant Shipping Act. The majority

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53 *Burnie Port Authority*, *supra* note 51 at 550-551.

54 *Hughes v. Percival, supra* note 52 at 446.

55 Tan Keng Feng, "Landlord's Liability" (1998) 114 L.Q.R. 193 at 196.

56 See, *e.g.*, the reasoning in the Indian Supreme Court decision of *M.C. Mehta v. Union of India* (1987) 1 S.C.C. 395 following the Bhopal gas disaster.

57 See, *e.g.*, *Afro-Asia Shipping Company (Pte.) Ltd. v. Da Zhong Investment Pte. Ltd. & Ors.* [2004] 2 S.L.R. 117; *Y v. National Parks Board & Ors.* [2003] S.G.M.C. 36; *The "Lotus M (No. 2)"* [1998] 2 S.L.R. 145.

agreed with the views of the dissenting judge on this point. Section 136 of the Merchant Shipping Act provides that, where a ship has, in the discharge of cargo, caused damage to any property, the owner of the ship may limit its liability for loss or damage according to the Act as long the loss or damage was caused "without his actual fault or privity". This requirement derives from the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957 and its equivalent has been interpreted narrowly by English courts.[58] Effectively, ship owners have to demonstrate that they had adopted and implemented an efficient system of management of the vessel to minimise any risks during loading and discharging cargo.[59] Rather than just proving absence of fault or privity, it imposes a positive standard to put in place certain safety measures. This, the appellant in the *Sunrise Crane* could not prove.

The court also suggested that section 136 of the Merchant Shipping Act may have outlived its usefulness and that Parliament should consider enacting new legislation giving effect to a later convention, the Convention on Limitation of Liability for Maritime Claims 1976, which has a higher monetary limit but a more protective provision where the limitation rights are lost only if it is proved that the loss "resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."[60]

VI. Conclusion

In the final analysis, the *Sunrise Crane* is a case which both illuminates and confuses the law on duty of care in Singapore. It contains statements on the interaction of torts and contracts which conflict with those in *P.T. Bumi;* and internally, there is disagreement amongst the judges on the correct approach to duty of care. The case also raises the possibility of different "tests" for different categories of duty; it appears that the approach to pure economic loss cases is to be isolated from the approach to physical injury cases, with the former calling on the *Anns/Ocean Front* two-stage approach and the latter the *Caparo* three stage approach. This fracturing of the law of negligence has already occurred in the recent medical negligence case of *Dr Khoo James & Anor v. Gunapathy d/o Muniandy*,[61] where the Court of Appeal held that medical practitioners constituted a special category, quite separate from other professionals, and should be subject to a distinct approach.

The *Sunrise Crane* does make it clear that judges have to identify and apply all the salient features of a case in establishing the requirements of reasonable foreseeability and proximity, as well as in determining whether it is fair, just and reasonable to impose a duty. In undertaking this analysis, judges will take on board any policy considerations that may have a bearing on the existence and scope of the duty in question. Once this is recognised, it is suggested that it makes little difference whether one applies the *Anns/Ocean Front* approach or the *Caparo* approach to

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58 *The Norman* [1960] 1 Lloyd's Rep. 1; *The England* [1973] 1 Lloyd's Rep. 373; *Grand Champion Tankers Ltd. v. Norpipe A/S (The Marion)* [1984] 1 A.C. 563.

59 The *Sunrise Crane*, *supra* note 1 at para. 98.

60 Ibid. at para. 101.

61 [2002] 2 S.L.R. 414 at 435.

framing the duty. Either framework is adequate, and continuing to distinguish them obscures rather than clarifies the law. The ultimate question in any duty inquiry is whether or not, given the facts of the case, a duty of care *ought* to be imposed. By over-analysing the doctrinal approach to duty, there is a real risk of missing the woods for the trees.

APPENDIX A

Majority	Minority
The cargo to be transferred was highly dangerous and toxic	Nitric acid is an extremely dangerous substance capable of causing physical damage to person and property
The appellant knew that Pink Energy would not be the party removing the cargo	The appellant was aware of the danger that nitric acid could cause
There was no written communication between the appellant and Pink Energy as to the nature of the cargo and there was a failure to respond to Pink Energy's request for that information	The appellant appointed a reputable agent to obtain for it a licensed contractor to take the nitric acid off its ship
The appellant's and respondent's vessels were in close proximity to each other when the transfer was carried out	The agent had approached a reputable licensed contractor (Pink Energy) to dispose of the material
The appellant, being in the business of transporting dangerous chemicals, would have appreciated the dire consequences if nitric acid were to be transferred to a vessel not built for receiving such a substance	Pink Energy was informed of the nature of the cargo
The practice of the Sunrise Crane of asking for a MSS[62] in relation to the first-time shipment of a particular chemical illustrated the need for special care in regard to the shipment of such chemicals	The appellant only gave the contract to Pink Energy after receiving an assurance that Pink Energy was capable of carrying out the disposal of such cargo and Pink Energy was acting as an independent contractor, not as employee or agent of the appellant

[62] Material Safety Data Sheet. It was a common practice in the transportation of chemicals for an information sheet detailing the nature of the cargo to be provided in order to give notice to the recipient as to any dangers inherent in the cargo.

APPENDIX A (*Continued*)

Majority	Minority
The crew of the Pristine had asked for a sample of the material but this was not provided to them by the crew of the Sunrise Crane	Pink Energy sub-contracted the job to Pristine Maritime without informing the latter of the true nature of the cargo
There was evidence to suggest that during the transfer of the contaminated cargo, the crew of the Pristine were without protective gear	When the Pristine arrived and moored alongside the Sunrise Crane, no one on board the Sunrise Crane informed those on board the Pristine of the nature of the cargo to be transferred