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LORD ATKIN AND THE PHILOSOPHER'S STONE: THE SEARCH FOR A UNIVERSAL TEST FOR DUTY

Spandeck Engineering (S) Pte. Ltd. v. Defence Science & Technology Agency

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I. INTRODUCTION

Lord Atkin's attempt in *Donoghue v. Stevenson*[1] to articulate a general principle of negligence has set many judges, philosophers and scholars of tort law in search of the perfect test for duty of care—a magic wand that would solve all the problems of duty at one stroke. Others have been less sanguine about such endeavours, preferring to accept that a comprehensive, universal test for duty is inconceivable. May L.J., after reviewing the authorities and the tests in the economic loss case of *Merrett v. Babb*,[2] stated:

> But I also think that it is reaching for the moon—and not required by authority—to expect to accommodate every circumstance which may arise within a single short abstract formulation. The question in each case is whether the law recognises that there is a duty of care.[3]

In the recent decision of *Spandeck Engineering (S) Pte. Ltd. v. Defence Science & Technology Agency,*[4] the Singapore Court of Appeal boldly reached for the moon in clarifying the law in Singapore and stating a comprehensive, universal duty test for all categories of negligence. Chan C.J., delivering the judgement of the court, undertook an extensive review of the various common law approaches and academic opinion before adopting Phang J.'s approach in *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric*.[5] *Spandeck* offers judges, practitioners and scholars of tort law an excellent analysis of the duty of care jurisprudence in the common law and

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1 [1932] A.C. 562 [*Donoghue*].
2 [2001] Q.B. 1174 [*Merrett*].
3 *Ibid.* at 1193.
4 [2007] SGCA 37 [*Spandeck*].
5 [2007] 1 S.L.R. 853 [*Sunny Metal*].

has reconciled the conflicting positions in Singapore with an authoritative statement of the duty of care test.

While *Spandeck's* clarification of the law is timely and welcome, the court's approach raises some interesting questions. The key features of the new approach are (i) a reaffirmation of the incremental approach to the development of negligence; (ii) the adoption of the *Anns* two-stage test of proximity and policy; (iii) the grounding of proximity in the twin concepts of assumption of responsibility and reliance; and (iv) the rejection of reasonable foreseeability as an element of the duty test, although it remains relevant as a preliminary factual inquiry.

II. Singapore's Approach to the Duty of Care

The facts in *Spandeck* were that the appellant had entered into a contract with the Singapore Government (the employer) to redevelop a medical facility for the Ministry of Defence. The contract incorporated the terms of the Public Sector Standard Conditions of Contract, which required a supervising officer (S.O.) to be appointed. The S.O. would be responsible for the administration and supervision of the project, as well as the certification of interim payments in respect of the contractor's work. The respondent, a division of the Ministry of Defence, was appointed as the S.O. The appellant had submitted two tenders—a base tender and an alternative tender with a cheaper design. There was some dispute as to the actual terms and conditions that were incorporated in the contract. Further negotiations were held and the employer agreed to some adjustments to the terms, subject to additional conditions, which included a payment by the appellant of another performance bond.

The appellant eventually decided that the conditions were too onerous and novated the contract. The appellant's contract with the employer had a clause stating that the respondent's responsibilities were solely to the employer and not to the appellant (clause 2.8), and that any dispute between the appellant and the respondent was to be settled by arbitration (clause 34.2). The contract also provided that the employer would under no circumstances be liable to the appellant for any failure or delay by the respondent in certifying payment to the appellant (clause 32.8), thus shielding the employer from liability to the appellant in the event of any negligence of the respondent. As a result of the novation, the appellant lost its contractual right to arbitration to resolve any dispute as to payment for work done.

The appellant therefore sued the respondent in tort to recover its economic losses caused by the respondent's alleged negligence: the losses claimed included those due to under-certification of works, under-payment for variation works, loss of profits and loss of some management fees. The trial judge held that there was no duty of care owed by the respondent to the appellant. The Court of Appeal upheld the trial judge's decision and went on to state the law on duty of care in Singapore, the essence of which was summed up in the conclusion:

> To recapitulate: A *single* test to determine the existence of a duty of care should be applied regardless of the nature of the damage caused (*i.e.*, 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.[6]

It should be noted that earlier jurisprudence on duty of care had already established a similar two-stage approach with respect to pure economic loss. Judith Prakash J. had set out the approach in the High Court decision of *P.T. Bumi Tankers v. Man B. & W. Diesel S.E. Asia Pte. Ltd.,*[7] relying on the authority of *Management Corp. Strata Title No. 1272 v. Ocean Front.*[8] Although the Court of Appeal overruled Judith Prakash J. on the facts,[9] it did not disapprove of the test itself. Soon after the *P.T. Bumi* decision, the Court of Appeal delivered its judgment in *The Owners of the Sunrise Crane v. Cipta Sarana Marine Pte. Ltd. (The Sunrise Crane)*,[10] in which a majority held that the two-stage approach to duty of care was confined to pure economic loss cases, whereas for other negligence cases involving physical damage, the *Caparo* three-stage approach remained.[11]

Too much ink has been spilled over the difference between the *Anns*[12] two-stage and *Caparo*[13] three-stage tests. It is suggested that the difference is more apparent than real, as both approaches apply similar criteria when applied to the facts.[14] In both cases, courts invariably undertake a contextual analysis of reasonable foreseeability and proximity, as well as a broad consideration of policy or other factors that shed light on whether recognition of a duty of care would be fair, just and reasonable. The real difference is in the underlying methodology. *Anns* grounded its test in a general principles approach, whereby courts did not have to look at previous categories of duty when extending the law. All that courts had to do was to apply the general principles encapsulated in the two-stage test. This had an expansionary effect on the tort of negligence, which eventually resulted in the House of Lords returning to a more cautious incremental approach in *Caparo*. The incremental approach requires courts to examine existing categories of duties to find analogous situations to the new category that is being considered. If none exists, then a novel category of duty should be considered only in exceptional circumstances.[15]

The Court of Appeal in *Spandeck* was motivated by two concerns in its extensive review of the law on the duty of care in general, and liability for pure economic loss in particular. The first concern was the lack of clarity and inconsistencies in the duty

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6 *Supra* note 4 at para. 115.

7 [2003] 3 S.L.R. 239 [*P.T. Bumi*].

8 [1996] 1 S.L.R. 113 [*Ocean Front*].

9 *Man B. & W. Diesel S.E. Asia Pte. Ltd. v. P.T. Bumi Tankers* [2004] 2 S.L.R. 300.

10 [2004] 4 S.L.R. 715 [*The Sunrise Crane*].

11 See for example, *T.V. Media Ptd. Ltd. v. De Cruz Andrea Heidi* [2004] 3 S.L.R. 543; *The Sunrise Crane, supra* note 10.

12 *Anns v. Merton London Borough Council* [1978] A.C. 728 [*Anns*].

13 *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 [*Caparo*].

14 This observation has already been made following earlier jurisprudence: See, K. Amirthalingam, The Sunrise Crane—Shedding New Light or Casting Old Shadows on Duty of Care?" [2004] S.J.L.S. 551 at 554.

15 *P.T. Bumi, supra* note 7.

of care jurisprudence in Singapore. The second was the potential danger that the tort of negligence posed to the "redistribution of wealth in the economy."[16] There is ongoing debate on whether tort law should be based on corrective or distributive justice theories. *Spandeck* suggests that Singapore has adopted a distributive justice model, with the national economy and welfare as paramount considerations.[17] While this may be a matter for further debate, the court's impressive analysis of the duty of care jurisprudence and its enunciation of a general principle for Singapore is to be lauded.

This new test for duty of care, which is a two-stage process in the *Anns* tradition, was developed in the context of pure economic loss and anchored in its application to the key elements of assumption of responsibility and reasonable reliance. *Spandeck* confirms Singapore's duty of care jurisprudence in the incremental tradition, which is not problematic. In terms of the test itself, *Spandeck* has rejected reasonable foreseeability as an element of the legal test for duty, and confined itself to two inquiries—proximity and policy. At one level it may be argued that little has changed in that the orthodox approach treats reasonable foreseeability very much as a preliminary threshold inquiry and focuses on the latter two questions. Thus, *Spandeck* nicely formalises existing practice. This paper considers whether there may be some situations where a legal test of reasonable foreseeability may nevertheless be useful, and it also explores the anatomy of the dual test of proximity and policy.

It is in some ways unfortunate that reasonable foreseeability, which is the cornerstone of duty of care,[18] is now relegated to a preliminary inquiry that is not part of the legal test for duty. Reasonable foreseeability serves an important normative function. Reducing it to a purely factual inquiry strips away this critical normative function. A factual inquiry does not answer the question whether the defendant *ought to* have foreseen.[19] Critically, the new approach to factual foreseeability does not specify whether the test is objective or subjective. Removing the reasonableness requirement by implication removes the objective element.

When the modern tort of negligence began to take shape in *Donoghue*, liability for psychiatric injury and pure economic loss were not significant issues. As courts gradually recognised liability in these areas, the potential for widespread or indeterminate liability became a concern. Special rules were created to control the extent of liability in these particular situations, giving rise to pockets of jurisprudence with their own unique rules within the genus of the general principles of negligence. Reasonable foreseeability had a critical function, as it was refined into a narrower test, akin to the reasonable foreseeability test in remoteness: the inquiry was whether a reasonable person in the defendant's position ought to have foreseen that the *particular claimant,*

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16 *Spandeck, supra* note 4 at para. 27.

17 See observations *ibid.* at paras. 27, 29, 49, 64 and 85.

18 *Palsgraf v. Long Island Railroad Co.* (1928) 284 N.Y. 339 (U.S.); *Bourhill v. Young* [1943] A.C. 42 (U.K.).

19 See *McLoughlin v. O'Brian* [1983] 1 A.C. 410 at 420 per Lord Wilberforce: "Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such."

not as a member of an unascertained class,[20] could have suffered the *particular type of loss*, be it economic loss or psychiatric injury.[21]

Spandeck rejected this conception of reasonable foreseeability, holding that the factual foreseeability test for duty was distinct from the reasonable foreseeability test for remoteness.[22] If it is no longer necessary to foresee that the potential claimant in an economic loss or psychiatric injury case may suffer that type of damage (economic loss or psychiatric injury), then this poses new challenges, particularly in the secondary victim nervous shock cases, such as *Frost v. Chief Constable of South Yorkshire*[23] and *Alcock v. Chief Constable of South Yorkshire Police*.[24] In the very recent decision of *Johnston v. N.E.I. International Combustion Ltd.*,[25] the House of Lords reiterated the importance of reasonable foreseeability (as a normative, rather than merely factual question) in psychiatric injury cases.[26] The High Court of Australia has also in recent years emphasised the role of reasonable foreseeability in psychiatric injury cases.[27]

While the Court of Appeal in *Spandeck* is entirely correct that in most cases factual foreseeability will be sufficient as a pre-requisite to the duty of care inquiry, it is suggested that nothing is lost in retaining reasonable foreseeability in the duty test. Even with a relatively undemanding threshold, whereby anything that is not far-fetched or fanciful may be treated as foreseeable,[28] it nevertheless gives courts a crucial lever to make a judgment as to whether or not, as a matter of law, a duty should exist. Kirby J. made an incisive observation in the recent decision of *New South Wales v. Fahy*,[29] where this undemanding test for reasonable foreseeability

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20 *Caltex Oil (Australia) Pty. Ltd. v. The Dredge Willemstad* (1977) 136 C.L.R. 529 at 555 per Gibbs C.J., at 593 per Mason J.

21 See *McLoughlin, supra* note 19 at 423, quoting with approval the following passage from A.L. Goodhart, "The Shock Cases and Area of Risk" (1953) 16 M.L.R. 14 at 22: "As her cause of action is based on shock it is only foresight of shock which is relevant." See also, *Caltex Oil, ibid.* at 572 per Stephen J.: "…for instance in nervous shock the recognized test, that of reasonable foreseeability of injury by nervous shock, introduces a further control in that the precise kind of damage suffered must have been foreseeable."

22 "We rejected the respondent's submission that this factual requirement was not satisfied because the respondent could not have foreseen (essentially) the *kind of losses* suffered by the appellant. This is because the test envisaged by the respondent (ie, foreseeability of the *kind* of losses) is properly the test for the remoteness of damages in tort, and is not the test for factual foreseeability in relation to the duty of care." *Spandeck, supra* note 4 at para. 89 (emphasis in original).

23 [1999] 2 A.C. 455 [*Frost*].

24 [1992] 1 A.C. 310 [*Alcock*].

25 [2007] UKHL 39 [*Johnston*].

26 *Ibid.* at para. 28 per Lord Hoffmann: "Of course the test of whether it is foreseeable that the employee of reasonable fortitude would suffer psychiatric injury does not depend entirely upon the statistical evidence. In *McLoughlin, supra* note 19 at 432 Lord Bridge of Harwich pointed out that foreseeability did not depend on "the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect" but on whether the judge "as fairly representative of…the educated layman…[formed the]… view from the primary facts [that]…the proven chain of cause and effect was reasonably foreseeable."

27 *Tame v. New South Wales* (2002) 211 C.L.R. 317; *Gifford v. Strang Patrick Stevedoring* (2003) 214 C.L.R. 269. See also, *Rosenberg v. Percival* (2001) 205 C.L.R. 434; *Woods v. Multi-Sport Holdings Pty. Ltd.* (2002) 208 C.L.R. 460.

28 *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40.

29 [2007] HCA 20 [*Fahy*].

was challenged:

> It follows that it is quite wrong for critics to portray *Shirt* [which endorsed a wide interpretation of reasonable foreseeability] as providing an "open sesame" to liability by removing the requirement of reasonableness inherent in Lord Atkin's approach in *Donoghue v Stevenson.* The law has not lost the moorings of that fundamental requirement. On the contrary, the *Shirt* formulation, in a highly practical way, directs specific attention to a series of considerations that are typically such as to moderate the imposition of legal liability where that would not be reasonable.[30]

The factual matrix of *Spandex* with its tri-partite contractual structure provides a classic illustration of the value of reasonable foreseeability as a control mechanism. Let us take a typical tri-partite contractual relationship: A has a contract with B and a separate contract with C. C acts negligently to the detriment of B with which it has no contract. B sues C in negligence. C may well argue that while it was factually foreseeable that its negligence could cause B harm, the contractual structure and terms were such that it was not reasonable in law to expect it to foresee harm to B.

Two cases illustrate this argument: *Pacific Associates Inc. v. Baxter*[31] and *The Sunrise Crane*.[32] In the former, the claimant was a contractor engaged to do work under the supervision of the defendant who was retained by the employer. The claimant had a contract with the employer which contained clauses providing that the defendant would not be personally liable to the claimant and that any dispute would be resolved by arbitration. The claimant's appeal was unanimously dismissed by the Court of Appeal: two of the judges held that in light of the contractual structure, it was not reasonable to expect the defendant to foresee that the claimant would rely on the defendant to make good his economic loss.

In *The Sunrise Crane*, the defendant had entered into a contract with a third party for the disposal of hazardous acid from its ship. The third party engaged the claimant under a separate contract to dispose of the acid. The claimant was not informed of the corrosive nature of the acid and used an unsuitable vessel, which sank as a result of acid corrosion. A majority in the Court of Appeal held that the defendant was under a duty to directly inform the claimant of the nature of the acid, but the dissenting judge held that while there was a proximate relationship between the two parties, it was not reasonable to expect the defendant to foresee that the claimant would send an unsuitable vessel, as the obligation to warn the claimant rested with the third party that had engaged the claimant's services.[33] Thus, while in both these cases factual foreseeability would have been satisfied, reasonable foreseeability offered a normative device for the judges to determine whether or not the defendant ought to have foreseen the risk of harm to the claimant and thus attract a common law duty of care.

In terms of proximity, the court in *Spandeck* was of the view that despite the many criticisms aimed at the concept, it remained a valuable one that constituted the core of the duty test. In giving content to proximity, the court referred with approval to

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30 *Ibid.* at para. 121.
31 [1990] 1 Q.B. 993 [*Pacific Associates Inc.*].
32 *Supra* note 10.
33 *Ibid.* at paras. 73-75.

Deane J.'s explanation of proximity in *Sutherland Shire Council v. Heyman*[34] and held that the crux of proximity lay in the twin elements of voluntary assumption of responsibility and reliance:

> In our view, 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. Where A voluntarily assumes responsibility for his acts or omissions towards B, and B relies on it, it is only fair and just that the law should hold A liable for negligence in causing economic loss or physical damage to B.[35]

In the earlier High Court decision of *Sunny Metal*,[36] Phang J., referring to his extra-judicial writing, expressly made these two concepts the foundational bases of proximity.

> We would further submit that *both* bases are not only to be ascertained on an objective basis but are also *complementary and integrated.* …The rationale of reasonable *reliance* centres on the *claimant's* perspective, whilst the rationale of *voluntary assumption* of responsibility centres on the *defendant's* perspective (the defendant having *made* the alleged misstatement in the first instance). In summary, *both* perspectives are, at bottom, *two different (yet inextricably connected) sides of the same coin and ought therefore to be viewed in an integrated and holistic fashion.* It therefore should not be surprising in the least that courts and judges frequently refer to *both* bases in the same case or judgment, respectively. …It might, however, be argued that—situations of negligent misrepresentation apart—in many situations, there might not be *actual or factual* reliance and/or assumption of responsibility as such. It is submitted that this is too narrow an approach to take, especially having regard to the fact that the concept of proximity itself is (as we have argued) not merely factual but is, rather, *legal* in nature. In other words, there will be situations where, notwithstanding the absence of actual reliance and/or assumption of responsibility, the court concerned will nevertheless hold that there ought, *in law*, to be found reliance as well as assumption of responsibility on the basis of what, respectively, a reasonable claimant and a reasonable defendant ought to contemplate.[37]

This approach to proximity is not problematic in so far as it applies to economic loss cases; but it raises some questions when applied universally. First, while assumption of responsibility and reasonable reliance may be two sides of the same coin in negligent misrepresentation cases such as *Hedley Byrne v. Heller*,[38] the two concepts are not necessarily complementary.[39] Proximity in the *Hedley Byrne* type cases is

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34 (1985) 157 C.L.R. 424 [*Sutherland Shire Council*].

35 *Spandeck, supra* note 4 at para. 81.

36 *Supra* note 5.

37 *Ibid.* at para. 63.

38 [1964] A.C. 465 [*Hedley Byrne*].

39 *White v. Jones* [1995] 2 A.C. 207 and *Spring v. Guardian Assurance Plc.* [1995] 2 A.C. 296 are useful illustrations of cases where there was voluntary assumption of responsibility by the defendant but no reliance by the claimant. See also, W.V.H. Rogers, *Winfield & Jolowicz Tort* (London: Sweet & Maxwell, 17th ed., 2006) 186-190 for a discussion of this point.

aimed at finding a relationship that is comparable to contract. Thus, the attitudes and expectations of the parties, by way of assumption of responsibility on the one hand and reasonable reliance on the other, are critical. Outside this specific area, these twin elements are not critical. In the tort of negligence, it is the defendant's, and not the claimant's, conduct that is the focus of inquiry: assumption of responsibility may therefore be relevant. Nevertheless, courts have tended to look for a corresponding "reliance" element, which, strictly speaking, is unnecessary; and they often do so on the basis of general reliance[40] (*i.e.*, imputed reliance, as alluded to in the extract above), which has been criticised as resting liability on fiction.[41]

Secondly, while assumption of responsibility is significant in the economic loss arena, due to the quasi-contractual nature of many of these cases and the need to confine the scope of liability, surely the general law of negligence is intended to operate where there was in fact no assumption of responsibility. The law simply imposes a duty on individuals to take reasonable care to avoid reasonably foreseeable harm to persons who are neighbours in the Atkinian sense, regardless of any assumption of responsibility. For example, if a person walks into a classroom and is blinded by a dart thrown by an errant schoolboy, it would be unrealistic to speak of the boy assuming responsibility for the unknown entrant or the entrant relying on the boy not to throw the dart negligently.

Proximity may be illuminated by any number of factors or combinations thereof, be it a physical, circumstantial or causal nexus; special knowledge, voluntary assumption of responsibility or foreseeability of particular damage; or the special nature of the defendant, claimant or circumstances. Different categories of negligence will call for different ways of constructing proximity to determine whether the claimant, in Lord Atkin's parlance, is "so closely and directly affected" that he or she ought to be treated as a neighbour in the legal sense. Voluntary assumption of responsibility and reliance, in the *Spandeck* dichotomy of universal and particular principles,[42] properly belong to the latter rather than the former. These two concepts are apposite to the exceptional areas of negligence where liability is not ordinarily justified, unless the defendant placed him or herself in such a position vis-à-vis the claimant so as to attract a duty of care. Thus, voluntary assumption of responsibility and reliance often feature in cases involving pure economic loss, omissions and public authorities.

A final observation relates to the interaction between proximity and policy. One reason proximity fell out of favour was because it was so value-laden that it appeared to function as a proxy for policy-making by judges. Deane J. was explicit in stating that considerations of proximity cannot be divorced from notions of what is fair and reasonable or matters of policy. This assessment of what is fair and reasonable should be made within the confines of the facts of the case and the circumstances of the parties. The question is whether it is fair and reasonable to find that the defendant and claimant were neighbours in the legal sense—this may be referred to as the "proximity policy" consideration. It is not about whether in general terms it

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40 See *e.g., Sutherland Shire Council*, *supra* note 34; *Stovin v. Wise* (1996) A.C. 923.

41 See generally, *Pyrenees Shire Council v. Day* (1998) 192 C.L.R. 330; *Graham Barclay Oysters v. Pty. Ltd. v. Ryan* (2002) 211 C.L.R. 540 at para. 234.

42 See *Spandeck, supra* note 4 at para. 28: "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."

is fair and reasonable to recognise a duty of care—that question is a "public policy" one that operates at a level above and beyond proximity.[43]

This distinction seems to have been elided in the reasoning in *Spandeck*. The court held that even if a relationship of proximity could have been established on the facts, public policy dictated that a tortious duty of care should not be superimposed on a contractual framework. As a matter of public policy, there is no objection to superimposing a tortious duty on a contractual framework. There is a clear line of authority in England to this effect,[44] and the Singapore Court of Appeal has also accepted this view.[45] Perhaps it should have been held that on the facts of *Spandeck* it would not have been fair, just and reasonable to recognise a relationship of proximity between the parties giving rise to a tortious duty, as it would have been in conflict with the existing contractual structure governing the relations between the parties.

III. Other Approaches to Duty of Care

When Lord Atkin crafted his neighbour principle in *Donoghue*, he warned against the dangers of reading too much into his dictum and grounded his reasoning on existing jurisprudence. In particular, he relied on *George v. Skivington*,[46] where the respondent manufacturer of shampoo was held liable to the appellant, who was the wife of the purchaser of the shampoo, on the ground that the respondent knew that the shampoo was bought for the use of the appellant. Lord Atkin then extrapolated from that case the idea that a manufacturer who puts into commercial circulation defective food products, which are purchased and consumed without any opportunity for intermediate inspection which would have revealed the defect, owes a duty of care to the ultimate consumer for whom the product was intended. This is a classic example of incremental reasoning.

In the course of his judgment, Lord Atkin lamented the lack of a general principle that underpinned the categories in which duties of care had been recognised in the absence of contract or other pre-existing relationships. Building on the dicta in *Heaven v. Pender*[47] and *Le Lievre v. Gould*,[48] as well as the existing authorities recognising a duty of care, he articulated the now famous neighbour principle.[49] While the *Donoghue* test was later seen as resting on reasonable foreseeability,[50] Lord Atkin in fact made proximity a central aspect of the neighbour principle. Not

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43 See further, K. Amirthalingam, "The Shifting Sands of Negligence: Reasonable Reliance to Legitimate Expectation?" (2003) 3 O.U.C.L.J. 81 at 103.

44 See especially, *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145.

45 *The Sunrise Crane, supra* note 10 at para. 34.

46 (1869) L.R. 5 Ex. 1.

47 (1883) 11 Q.B.D. 503.

48 [1893] 1 Q.B. 491 [*Le Lievre*].

49 *Donoghue*, *supra* note 1 at 580-581: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — 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." (Footnotes omitted).

50 See especially, *Bourhill, supra* note 18.

only did he make it a core element of duty, he also implicitly recognised that the determination of new categories of proximate relationships that qualify for a duty of care would involve difficult policy choices for judges. Referring to *Le Lievre*, Lord Atkin stated:

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act …There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises.[51]

The rapid expansion of negligence around the common law world led to divergent judicial development of the neighbour principle's progeny. In summary, the English courts have, in general, preferred a three-stage analysis (the *Caparo* approach): first, was the claimant reasonably foreseeable; second, was there a sufficient relationship of proximity between the parties; and third, would it be fair, just and reasonable to recognise a duty of care. The courts have eschewed any notion that the *Caparo* approach is the only one to be used, an implicit acknowledgement that a one-size-fits-all approach is not feasible in the tort of negligence, which today covers so many diverse activities, interests and potential defendants.

From the 1980s to the 1990s, the Australian courts adopted an approach to duty of care that used the concept of proximity as the "touchstone and control" of all categories of negligence.[52] Proximity was conceived by Deane J. as a normative tool to determine whether or not the parties *ought* to be treated as being sufficiently closely and directly affected to justify recognising a duty of care. From the mid-1990s,[53] following Deane J.'s departure from the High Court, the court began to de-emphasise proximity. The search for an alternative to proximity led the High Court of Australia to focus on "vulnerability,"[54] before resigning itself to the reality that duty of care in complex, novel cases would have to be decided on a case-by-case basis, taking into account all the factual circumstances, policy considerations and potential implications of the decision.[55]

The Supreme Court of Canada has generally applied the two-stage *Anns* test,[56] and in a series of decisions since 2001,[57] it has refined that test into a three-stage approach. In a unanimous decision earlier this year, the court reiterated the three-stage analysis:

> Accordingly, in order to establish … a duty of care, (1) the harm complained of must have been reasonably foreseeable, (2) there must have been sufficient

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51 *Donoghue, supra* note 1 at 581–582.

52 *Jaensch v. Coffey* (1984) 155 C.L.R. 549; *Sutherland Shire Council, supra* note 34; *Burnie Port Authority v. General Jones* (1994) 179 C.L.R. 520; *Bryan v. Maloney* (1995) 182 C.L.R. 609.

53 The first signs were evident in *Hill v. Van Erp* (1997) 188 C.L.R. 159.

54 *Perre v. Apand Pty. Ltd.* (1999) 198 C.L.R. 180 [*Perre*]; *Crimmins v. Stevedoring Industry Finance Committee* (1999) 200 C.L.R. 1.

55 *Perre, supra* note 54; *Graham Barclay Oysters v. Pty. Ltd. v. Ryan* (2002) 211 C.L.R. 540.

56 *Kamloops (City of) v. Nielsen* [1984] 2 S.C.R. 2.

57 *Hill v. Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41; *Syl. Apps. Secure Treatment Centre v. B.D.* [2007] SCC 38 [*Syl. Apps. Secure Treatment Centre*]; *Childs v. Desormeaux* [2006] SCC 18; *Odhavji Estate v. Woodhouse* [2003] SCC 69; *Edwards v. Law Society of Upper Canada* [2001] SCC 80; *Cooper v. Hobart* [2001] SCC 79.

> proximity between [the parties] such that it would be fair and just to impose a duty of care, and (3) there must be no residual policy reasons for declining to impose such a duty.[58]

The Canadian approach incorporates the *Caparo* "fair, just and reasonable" element into the proximity inquiry, leaving a separate *Anns* "public policy" inquiry. It should be noted also that the claimant bears the burden of proof with respect to the first two stages, but having discharged that burden, the defendant then carries the burden of persuading the court that there are countervailing policy arguments that operate to negate or restrict the duty.

IV. Conclusion

One of the problems with duty of care is the assumption that reasonable foreseeability and proximity should be stripped of any policy consideration; otherwise they become mere labels within which judges make hidden value choices. There is a sense that judges must extricate all their "policy considerations" or "normative choices" and bundle them into a third limb with the explicit label of "policy" or "fair, just and reasonable." It is suggested that the three limbs are inherently normative and informed by policy choices, and that these policy choices need to be kept separate for analytical purposes as each limb performs a different function.

The policy question at the reasonable foreseeability stage reinforces the fact that negligence is premised on community ethics and standards of reasonableness in society; the scope of one's duty does not extend to all foreseeable consequences, but only to those which the judge (or jury) believes it is reasonable to expect one to contemplate. The policy question at the proximity stage is limited to "factors arising from the particular relationship"[59] which fairly make the parties neighbours in the legal sense between whom there may, as a matter of law but subject to the factual circumstances, exist a duty of care. The third stage concerns broader policy questions dealing with "the effect of recognising a duty of care on other legal obligations, the legal system and society more generally."[60] It operates as a judicial sieve to filter out claims, which for broad public policy reasons should not be permitted.

Spandeck has certainly contributed immensely to Singapore's jurisprudence on duty of care. The decision itself clarifies the law in Singapore and offers a pragmatic approach to resolving duty of care problems. It goes without saying that duty of care is a normative construct, and ultimately, how we slice it up may well be a matter of taste. Indeed, how one slices up the tort of negligence to resolve the overlap and contradictions between the various elements of the tort is equally a matter of taste.[61] Only time will tell whether *Spandeck* passes a universal taste test.

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58 *Syl. Apps. Secure Treatment Centre, supra* note 57 at para. 34.

59 *Ibid.* at para. 32.

60 *Ibid.*

61 *Roe v. Minister of Health and Another* [1954] 2 Q.B. 66 at 85 per Lord Denning; *Jolley v. Sutton London Borough Council* [2000] 1 W.L.R. 1082 at 1091 per Lord Hoffmann.