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# THE SALIENT FEATURES OF PROXIMITY: EXAMINING THE *SPANDECK* FORMULATION FOR ESTABLISHING A DUTY OF CARE

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The articulation of a single two-stage test by the Singapore Court of Appeal to determine the imposition of a duty of care in negligence for all types of damage claimed and for all factual scenarios is an admirable effort to bring doctrinal clarity to the neighbourhood principle. However, the notion of proximity which forms the cornerstone of the *Spandeck* test can benefit from a more methodical examination of a set of factual factors relevant to the relationship between the parties to the dispute. This article argues that the salient features approach of the High Court of Australia may be modified and adapted to assist Singapore courts in their analysis of "proximity" under the *Spandeck* formulation, and would be of significant practical benefit to judges and lawyers in their appraisement of the factual matrix.

## I. INTRODUCTION

The simple question of "Who, then, in law, is my neighbour?"[1] has confounded courts, academics and lawyers for years. A plethora of tests, touchstones, formulations and concepts are strewn in the path of the quest for the holy grail. In the Commonwealth common law jurisdictions, the highest appellate courts have struggled with defining a clear test that will determine when one is a neighbour who owes a duty of care to another. In 2007, the Singapore Court of Appeal in *Spandeck Engineering (S) Pte. Ltd. v. Defence Science & Technology Agency*[2] boldly declared "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."[3] Much has been written in this area, and the highest appellate court in Singapore referred extensively

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[1] *Donoghue v. Stevenson* [1932] A.C. 562 at 580 (H.L.) [*Donoghue*].

[2] [2007] 4 S.L.R.(R.) 100 (C.A.) [*Spandeck*].

[3] *Ibid.* at 130 (emphasis in original).

to the English authorities[4] and a number of commentators[5] before arriving at its formulation. However, what was starkly missing was any meaningful examination of the merits of the salient features approach used in the determination of a duty of care which arguably is the prevailing orthodoxy in the High Court of Australia.[6] If, as the Court of Appeal has asserted, that proximity is a "composite idea" that "import[s] the whole concept of the necessary relationship between the claimant and the defendant described by Lord Atkin in *Donoghue v. Stevenson*",[7] then this paper argues that the principled consideration of a modified set of salient features can provide valuable guidance to Singapore courts, as well as other courts, when evaluating the factual matrix of each case to determine whether the requisite proximity was present.

The importance of proximity as a "touchstone and control of the categories of case[s] in which a duty of care is adjudged to arise"[8] has been said to be a "conceptual determinant" and "unifying theme" for establishing the existence of a duty of care.[9] While proximity may be sound as a *concept*, what is unclear is the *mechanics* of its application to a panoply of novel factual situations. The Court of Appeal in *Spandeck* rejected criticisms that proximity was an "artificial exercise in judicial creativity"[10] and heralded a renaissance for the principle of proximity:

> Its very presence suggests that it has some substantive content that is capable of being expressed in terms of legal principles. Rather than denouncing it as a mere 'label', the courts should strive to infuse some meaning into it, if only so that lawyers who advise litigants and even law teachers can make some sense of the judicial formulations.[11]

One must therefore reject the contention of Lord Bridge that "the concepts of proximity and fairness … are not susceptible of any such precise definition as would be necessary to give them utility as practical tests".[12] As academic commentator John Hartshorne points out, "the daily business of advising clients, drafting pleadings, framing submissions for court, and even drafting of judgments creates an irrepressible

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4 See *e.g.*, *Anns v. Merton London Borough Council* [1978] A.C. 728 (H.L.) [*Anns*]; *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 (H.L.); *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605 (H.L.) [*Caparo*]; *Murphy v. Brentwood District Council* [1991] 1 A.C. 398 (H.L.); *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 (H.L.) [*Alcock*]; *Customs and Excise Commissioners v. Barclays Bank plc* [2007] 1 A.C. 181 (H.L.).

5 See *e.g.*, Tan Keng Feng, "The Three-Part Test: Yet another Test of Duty in Negligence" (1989) 31 Mal. L. Rev. 223; J. A. Smillie, "The Foundation of the Duty of Care in Negligence" (1989) 15 Monash U.L. Rev. 302; Kumaralingam Amirthalingam, "*The Sunrise Crane*—Shedding New Light or Casting Old Shadows on Duty of Care?" [2004] Sing. J.L.S. 551; Andrew Phang, Saw Cheng Lim and Gary Chan, "Of Precedent, Theory and Practice—The Case for a Return to *Anns*" [2006] Sing. J.L.S. 1; Robby Bernstein, *Economic Loss* (London: Sweet & Maxwell, 1998) at 21.

6 See *e.g.*, *Graham Barclay Oysters Pty. Ltd. v. Ryan* (2002) 211 C.L.R. 540 (H.C.A.) [*Graham Barclay Oysters*]; *Crimmins v. Stevedoring Industry Finance Committee* (1999) 200 C.L.R. 1 (H.C.A.) [*Crimmins*]; *Woolcock Street Investments Pty. Ltd. v. CDG Pty. Ltd.* (2004) 216 C.L.R. 515 (H.C.A.) [*Woolcock*].

7 *Spandeck*, *supra* note 2 at 133.

8 *Ibid.* at 133 (citing *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1 at 55 (H.C.A.), *per* Deane J.).

9 See *e.g.*, Phang, Saw and Chan, *supra* note 5 at 11-2; *Bryan v. Maloney* (1995) 182 C.L.R. 609 at 619 (H.C.A.).

10 *Spandeck*, *supra* note 2 at 133.

11 *Ibid.*

12 *Caparo*, *supra* note 4 at 618.

incentive for lawyers to distil principles, guidelines and indeed tests from appellate judgments."[13] But there is still much to be clarified with regard to this principled approach to proximity championed by the Singapore Court of Appeal. Although the advent of the salient features approach in Australia was largely a result of judicial exasperation with the failure to locate a distinct test to determine duty,[14] this paper contends that if these factors were clearly articulated and properly examined in an intelligently bounded manner within the confines of proximity as understood in the *Spandeck* formulation, it would not only infuse the two-stage test with much robustness but also be of great practical assistance to judges and lawyers in their appraisement of the factual matrix.

Part II examines the concept of proximity as used in the *Spandeck* formulation, the distinction between factual and normative analysis in the two stages and the possibility of Singapore courts considering different factors relevant to a particular factual matrix in meeting the test of proximity. Part III explores the meaning of "salient features" as a methodology employed by the High Court of Australia in determining a duty of care, and postulates how an evaluation of salient *factual* features may be useful in informing the content of proximity in the *Spandeck* formulation. Part IV suggests that a set of proximity factors—gleaned from the salient factual features of a number of cases covering different kinds of damage and different types of claimants or defendants—may provide courts with better guidance in their consideration of the first stage of the *Spandeck* test. Part V concludes that a principled application of salient factual features as proximity factors—by analogy with past decided cases and in an incremental fashion—can provide greater clarity and certainty to the resolution of the duty of care issue.

## II. Proximity in the *Spandeck* Formulation

Essentially, *Spandeck* signalled a return to *Anns v. Merton*.[15] In the unanimous judgment delivered by Chan Sek Keong C.J. in *Spandeck*, the Court explained that

> a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if 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.[16]

In an attempt to elucidate the elusive notion of proximity, the Court of Appeal approved the observations of Deane J. of the High Court of Australia in *Sutherland*

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[13] John Hartshorne, "Confusion, Contradiction and Chaos within the House of Lords post *Caparo v. Dickman*" (2008) 16 Tort Law Review 8 at 9.

[14] See *e.g.*, *Perre v. Apand Pty. Ltd.* (1999) 198 C.L.R. 180 (H.C.A.) [*Perre*]. The differing approaches to the duty of care issue in *Perre* have been described as an instance of "doctrinal chaos". See Christian Witting, "The Three-stage Test Abandoned in Australia—or Not?" (2002) 118 L.Q.R. 214; *Graham Barclay Oysters*, *supra* note 6 at 617, *per* Kirby J.

[15] See *Spandeck*, *supra* note 2 at 130, *per* Chan C.J.: "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".

[16] *Ibid.* at 130 (emphasis in original).

*Shire Council v. Heyman*,[17] quoting a lengthy passage which included the following lines:

> The requirement of proximity is directed to *the relationship between the parties* in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves *the notion of nearness or closeness and embraces physical* proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial* proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (*perhaps loosely*) be referred to as *causal* proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained.[18]

In holding that pure economic loss was recoverable in a negligence action in Singapore, the *Spandeck* court held that:

> 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.[19]

From the factual matrix of *Spandeck*, where the actionable damage was *pure economic loss*, it was clear that the test of whether there was sufficient legal proximity may be adequately analysed with reference *only* to the factors of assumption of responsibility and reliance.[20] However, when the relevant damage is recognisable psychiatric illness, the twin criteria may be inapplicable, as the Court of Appeal later demonstrated in its adoption of the three factors from *McLoughlin v. O'Brian*[21] in the case of *Ngiam Kong Seng v. Lim Chiew Hock*.[22] In particular, the Court observed that the three factors articulated by Lord Wilberforce in *McLoughlin*—(a) the class of persons whose claims should be recognised; (b) the proximity of the claimants to the accident; and (c) the means by which the shock was caused—are consistent with the broad categories set out by Deane J. of the High Court of Australia.[23] In dicta, however, the Court commented that the twin criteria "could also possibly apply in a situation of psychiatric harm, depending on the precise facts of the case at hand".[24]

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17 *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1 at 55 (H.C.A.) [*Sutherland*], *per* Deane J.

18 *Spandeck*, *supra* note 2 at 132 (emphasis in original).

19 *Ibid.* at 134 (emphasis added). See the application of the twin criteria in a negligent misstatement context in *Yap Boon Keng Sonny v. Pacific Prince International Pte. Ltd.* [2009] 1 S.L.R.(R.) 395 at paras. 158-9 (H.C.).

20 *Ibid*. at 136-42.

21 [1983] 1 A.C. 410 (H.L.) [*McLoughlin*].

22 [2008] 3 S.L.R.(R.) 674 (C.A.) [*Ngiam*].

23 *Sutherland*, *supra* note 17 at 55-6. See also *Jaensch v. Coffey* (1984) 155 C.L.R. 549 at 584-5 (H.C.A.).

24 *Ngiam*, *supra* note 22 at 716. Despite the Court of Appeal's rejection of the primary victim/secondary victim dichotomy as established in *Page v. Smith* [1996] 1 A.C. 155 (H.L.), one suspects that the twin criteria of assumption of responsibility and reliance may be applicable to a situation where it is arguable that a defendant owes a "primary" victim a duty of care to avoid causing a recognisable psychiatric illness consequential upon physical injury.

In *Ngiam*, the Court steadfastly reiterated "the ideal envisioned in *Spandeck* of having 'a single test'"[25] but conceded that "in determining whether the requisite proximity is present in a particular case, much will turn on the precise factual matrix concerned."[26] Furthermore, Andrew Phang J.A., writing the unanimous judgment for the Court, emphasised that

> there must, in principle as well as in logic, justice and fairness, be a *holistic and integrated* analysis of the relevant factual matrix *both* from the perspective of *proximity* (as between *the parties*) *and* from the perspective of *public* policy (on a *broader societal* level).[27]

Although the principle is clear, whether there is a set of proximity factors that may be universally applied to the analysis of different factual matrices is less certain.

*Spandeck* presented the Court with a factual scenario where the requisite connection between the plaintiff and the defendant may be found by examining whether the twin factors of assumption of responsibility and reliance were present. It is this author's contention that where the damage suffered is pure economic loss, these two factors in themselves *may* be sufficient for the examination of proximity: the two parties are more closely and directly connected if both factors were present compared to the situation where only one factor was present.[28] However, in other situations involving physical injury,[29] or where a statutory authority is the defendant,[30] the twin factors may be insufficient for an evaluation of whether proximity was satisfied. In these situations, a court applying the *Spandeck* formulation may have to examine *other* factors which are relevant to the precise factual matrix; this was alluded to by the Court of Appeal in *Ngiam*, but without further discussion.[31] It is also evident in *Ngiam*—where the psychiatric harm suffered was of a *different kind* of damage compared to pure economic loss in *Spandeck*—that by departing from the twin criteria of assumption of responsibility and reliance and embracing the *McLoughlin* factors, the Court of Appeal is open to considering other factors for the determination of proximity as between the parties depending on the relevant factual matrix and the kind of harm.[32] Thus it is arguable that there may be a list of proximity factors relevant to ascertaining the requisite connection between the plaintiff and the defendant for all kinds of damage or loss, with the exception of psychiatric harm, where the *McLoughlin* proximity factors will apply.

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[25] *Ngiam*, *ibid.* at 726 (internal citations omitted).

[26] *Ibid.* at 727.

[27] *Ibid.* at 697.

[28] There are other situations involving pure economic loss where the defendant's *knowledge* that the claimant's "economic well-being is dependent upon [the defendant's] careful conduct of [the claimant's] affairs", even in the absence of actual reliance by the claimant, may impel the court to find a duty of care. See *White v. Jones* [1995] 2 A.C. 207 at 272 (H.L.). See also Part IV(C) below.

[29] See *e.g.*, *Graham Barclay Oysters*, *supra* note 6 (where the plaintiff, who contracted hepatitis A through the consumption of contaminated oysters, sued the company which produced the oysters, the city council and the state).

[30] See *e.g.*, *Crimmins*, *supra* note 6 (where a waterside worker, who was diagnosed as suffering from mesothelioma caused by the inhalation of asbestos fibres, sued the statutory authority responsible for supervising stevedoring operations at Australian ports).

[31] *Ngiam*, *supra* note 22 at 727.

[32] *Ibid*. at 684.

Perhaps one should approach proximity in the first part of the *Spandeck* formulation from the perspective of *fact*-based reasoning based on the relationship between the parties prior to the alleged damage suffered, and the second part of the *Spandeck* test as *policy*-based considerations grounded in generalised broader societal concerns (such as interference with personal autonomy, emphasising personal responsibility, placing an arbitrary value on human life, compatibility with statutory functions or coherence with other areas of law). Notwithstanding doubts—even from the House of Lords—over the ability of any single general principle to provide a practical test which could be applied to every situation giving rise to a duty of care,[33] this paper does not take issue with the *Spandeck* formulation.[34] The author accepts the theoretical framework for the two-stage analysis enunciated in *Spandeck*.[35] While one may argue that the threshold requirement of factual foreseeability and the two-stage test of proximity and public policy may in practice mirror the three-step test laid down by the House of Lords in *Caparo Industries plc v. Dickman*,[36] what this paper is mainly concerned about is the content of proximity and it endeavours to provide a useful set of principled guidelines that will benefit "the daily business of advising clients, drafting pleadings, framing submissions for court, and even drafting of judgments."[37]

During the 1990s and early 2000s, proximity was a neglected concept in the jurisprudence of the House of Lords, perhaps attributable to a judicial backlash against the association of proximity with the *Anns* era. Although the *Caparo* test for duty of care contained a distinct element of proximity to be satisfied, the House mysteriously sidestepped the discussion of proximity in a number of decisions up to 2005, preferring to invoke either the concept of assumption of responsibility or matters of fairness, justice and reasonableness.[38] The *Caparo* test has also garnered

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33 See *e.g.*, *Caparo*, *supra* note 4 at 617, *per* Lord Bridge. See also Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane and Jane Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (New York: Oxford University Press, 1998) 59 at 60.

34 *Cf.* Kumaralingam Amirthalingam, "Refining the Duty of Care in Singapore" (2008) 124 L.Q.R. 42; Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing. J.L.S. 350. See also *Ngiam*, *supra* note 22 at 717: "viewing the whole matter from a holistic as well as practical perspective, it is clear that there is no difference, *in substance*, between the approach in *Spandeck* and that proposed by Prof Kumaralingam".

35 See also Lum Kit-Wye, "*Spandeck* and the Tortious Duty of Care in Singapore" [2010] 3 J. Bus. L. 179 at 187: "The Court of Appeal's decisive move in advocating the use of one single test for the determination of a duty of care in negligence is to be welcomed as it gives much needed certainty and simplicity to an area of law which had become increasingly uncertain and confusing".

36 *Supra* note 4 at 618. The three-part test comprises the elements of foreseeability, proximity and the requirement that any imposition of duty be "fair, just and reasonable". It has been noted that post-*Caparo*, "decisions of the House of Lords upon duty of care have of late reduced to the brink of incomprehensibility issues such as which, if any, legal principles should be applied in determining whether a duty of care was owed, and what those principles actually mean". See Hartshorne, *supra* note 13 at 8. See also observations that the *Spandeck* formulation is essentially a three-stage test: Lum, *ibid.* at 193; K. L. Ter, "The Search for a Single Formulation for the Duty of Care: Back to *Anns*" (2007) 23 Tottel's Journal of Professional Negligence 218 at 222.

37 Hartshorne, *supra* note 13 at 9.

38 For example, during the 1990s and the early 2000s, some members in the House of Lords referred extensively to the concept of assumption of responsibility in resolving the issue of duty of care in negligence cases. See *e.g.*, *Spring v. Guardian Assurance plc* [1995] 2 A.C. 296 at 318 (H.L.); *Williams v. Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830 at 834 (H.L.). The House has also embraced more overt considerations of public policy. See *e.g.*, *X* (*Minors*) *v. Bedfordshire County Council* [1995]

its fair share of criticism.[39] John Hartshorne laments that "even if methodologies and underlying policies can be identified, this does not necessarily make it any easier for lawyers to understand judgments, advise clients or predict the outcome of cases."[40] In more recent cases like *D v. East Berkshire Community Health NHS Trust*[41] and *Sutradhar v. Natural Environment Research Council*,[42] the House appeared to return to a more considered application of proximity, albeit lacking any penetrating analysis.

The consideration of when a duty of care should be imposed in the law of negligence—and the subsequent inquiry of proximity—cannot be divorced from the broader conception of the purpose of the law of negligence, and normative frameworks of corrective and compensatory justice. While such discussion is beyond the scope of this article, it is important to note that under the author's framework, salient features should be seen as "factual features linking the parties [which are] indicative of substantial pathways to harm between the plaintiff and defendant"[43] (informing the content of proximity in the first stage of the *Spandeck* formulation), while matters of policy should refer to normative reasoning "about what the rights and obligations of individuals *ought to be*"[44] (the second stage of the *Spandeck* formulation).

## III. Making Sense of "Salient Features"

Since the retirement of Deane J. from the High Court of Australia, the concept of proximity as the touchstone for imposing a duty of care has lost its ardent advocate.[45] As a result, as the composition of the court changed over the years, a new methodology known as "salient features" emerged.[46] The contemporary Australian approach (although there are a number of different views expressed by members of the High Court) is to engage in an analysis in which a range of different aspects of the relationship are assessed. This approach originated as early as 1976 where in *Caltex Oil* (*Australia*) *Pty. Ltd. v. The Dredge 'Willemstad'*, Stephen J. found that the presence of a number of "factors" all "combine to constitute a relationship of sufficient proximity

2 A.C. 633 (H.L.); *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59 (H.L.); *Arthur JS Hall & Co. v. Simons* [2002] 1 A.C. 615 (H.L.); *Rees v. Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309 (H.L.). See also *Customs and Excise Commissioners v. Barclays Bank plc*, *supra* note 4 at paras. 15, 36, 49-53, 68-77.

39 See *e.g.*, Hartshorne, *supra* note 13; Keith Stanton, "Decision-making in the Tort of Negligence in the House of Lords" (2007) 15 Tort Law Review 93; Jenny Steele, "Scepticism and the Law of Negligence" (1993) 52 Cambridge L.J. 437.

40 Hartshorne, *ibid.* at 8-9.

41 [2005] 2 A.C. 373 at para. 20 (H.L.).

42 [2006] 4 All E.R. 490 at paras. 38, 48 (H.L.) [*Sutradhar*].

43 Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31 Melbourne U.L. Rev. 569 at 570.

44 *Ibid.* at 573, citing Peter Cane, "Another Failed Sterilisation" (2004) 120 L.Q.R. 189 at 191-2 (emphasis in original). See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 263: "[a] 'policy argument' for a given decision is an argument which shows that to decide a case in this way will tend to secure a desirable state of affairs".

45 See *e.g.*, *Sutherland*, *supra* note 17 at 55; *Jaensch v. Coffey*, *supra* note 23 at 584-5.

46 The retreat of the Australian High Court from proximity has been well-chronicled. See *e.g.*, Phang, Saw and Chan, *supra* note 5 at 13-8. This judicial checklist of factors was also discussed in Jane Stapleton, *supra* note 33 at 59.

to give rise to a duty of care."[47] Hence this multi-factorial approach was initially conceived *not* as a replacement for proximity, but to infuse meaning and provide a set of practical analytical factors into the concept of proximity. However, it was unfortunate that later members of the High Court abandoned this link to proximity and instead chose to focus only on an evaluation of salient features to determine a duty of care. In *Perre*, Gummow J. explicitly approved of this salient features methodology[48] and astutely indicated that there was "no simple formula which can mask the necessity for examination of the particular facts."[49] Applied most adroitly in 1999 by McHugh J. (Gleeson C.J. concurring) in *Crimmins v. Stevedoring Industry Finance Committee*, this approach jettisons the search for a unifying principle, and instead examines all the salient features of the factual matrix.[50] Gaudron and Callinan J.J. also adopted the salient features approach, albeit with emphasis on different factors,[51] while Kirby J. opted for the *Caparo* test.[52]

In *Crimmins*, the late plaintiff was a waterside worker who was diagnosed as suffering from mesothelioma caused by the inhalation of asbestos fibres when he was unloading asbestos cargoes. He sued the Australian Stevedoring Industry Authority, a statutory authority supervising stevedoring operations at Australian ports, for negligently exposing a waterside worker to asbestos dust. In finding that the Authority owed a duty of care to the plaintiff, Gaudron J., who was in the majority, found that the plaintiff

> was not only *vulnerable* to injury by reason of the hazardous nature of his employment but he was less able than employees in most other industries to protect his own interests … [T]he Authority ought to have *known* from its inspectors of the frequency with which and the degree to which waterside workers at the Port of Melbourne were exposed to asbestos … [T]he Authority was in a position to take various steps … to *control* or minimise those risks.[53]

Similarly, McHugh J. held that the statutory authority owed a duty of care to the worker because "it directed him to places of work where there were risks of injury of which … the [A]uthority knew or ought or have known that the worker was specially vulnerable".[54]

In explaining the salient features approach, McHugh J. took pains to emphasise that the starting point is to ascertain "whether the case comes within a factual

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47 (1976) 136 C.L.R. 529 at 577 (H.C.A.). See also *Perre*, *supra* note 14 at 254, *per* Gummow J. Barwick C.J. also commented that the elements of a relationship out of which a duty of care is imposed by law "will be elucidated in the course of time as particular facts are submitted for consideration in cases coming forward for decision" in *Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt* (1968) 122 C.L.R. 556 at 569 (H.C.A.).

48 *Supra* note 14 at 254. Gummow J. also referred to his use of the salient features approach in at least two previous cases: *Hill v. Van Erp* (1997) 188 C.L.R. 159 at 233-4 (H.C.A.); *Pyrenees Shire Council v. Day* (1998) 192 C.L.R. 330 at 389 (H.C.A.) [*Pyrenees*].

49 *Perre*, *supra* note 14 at 253.

50 *Crimmins*, *supra* note 6 at 39-51 (where McHugh J. sets out clear sections in his judgment analysing each salient feature of the factual matrix and comparing them to past cases).

51 *Ibid*. at 24-5, 115-7.

52 *Ibid*. at 80-6.

53 *Ibid.* at 24-25 (emphasis added).

54 *Ibid.* at 26.

category where duties of care have or have not been held to arise."[55] His Honour was of the view that when the court develops novel cases incrementally by reference to analogous cases, "the reasons in each new case help to develop a body of coherent principles which can … provide a measure of certainty and predictability as to the existence of duties of care [in future cases]."[56] However, the salient features approach is not just a judicial checklist of factors that may indicate or negative the existence of a duty of care without "a chain of reasoning linking these factors with the ultimate conclusion."[57] Using analogical reasoning, the background of legal decision-making can remain "relatively fixed" and the "range of evidentiary materials is narrower."[58] This judicial philosophy behind the use of salient features is compatible with the *Spandeck* court's methodology of employing the two-stage test in the context of analogising the facts of the case at hand with those of past decided cases.[59] Furthermore, as McHugh J. remarks, the cost of litigation may be reduced and

> adherence to the incremental approach imposes a necessary discipline upon the examination of policy factors with the result that the decisions in new cases can be more confidently predicted, by reference to a limited number of principles capable of application throughout the category.[60]

In 2002, this approach found more support on the High Court, with Gummow and Hayne JJ. declaring in *Graham Barclay Oysters v. Ryan* that

> [a]n evaluation of whether a relationship between a [defendant] and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered… In particular categories of cases, some features will be of increased significance.[61]

In the context of a duty owed by a statutory authority to a class of persons, it "ordinarily will be necessary to consider the degree and nature of *control* exercised … over the harm that eventuated" and "the degree of *vulnerability* of those who depend on the proper exercise by the authority of its powers."[62] In the same year, a majority of the High Court also applied the salient features analysis in *Tame v. New South Wales*; *Annetts v. Australian Stations Pty. Ltd.*[63] In particular, in the *Annetts*

55 *Ibid.* at 29.
56 *Ibid.* at 32-3.
57 *Ibid.* at 33. *Contra* Stapleton, *supra* note 33 at 59.
58 *Ibid.* at 33.
59 *Spandeck*, *supra* note 2 at 134.
60 *Crimmins*, *supra* note 6 at 34.
61 *Graham Barclay Oysters*, *supra* note 6 at 597-8.
62 *Ibid.* at 597 (emphasis added).
63 (2002) 211 C.L.R. 317 (H.C.A.) [*Tame*]. Two cases were decided simultaneously as they shared common issues regarding the existence of a duty of care. In *Tame*, the appellant was involved in a motor vehicle accident, and her blood alcohol content was wrongly recorded by a police officer on a traffic collision report. Although the error was eventually corrected, the appellant became aware of it and was afraid that her reputation would be tarnished by people believing that she was drinking heavily before the accident. The appellant developed a psychotic depressive illness. The High Court held that she was owed no duty of care by the police. In *Annetts v. Australian Stations* [*Annetts*], the 16-year-old son of the appellants left the family home to work for the respondents as a jackaroo at a cattle station in Western Australia. Before the son left home, his mother phoned the respondent and was assured that he would work under constant supervision and would be well looked after. Notwithstanding these assurances, the

decision, Callinan J. relied on the relationship of proximity as the foundation of duty of care identified by the presence of a number of factors which included assumption of responsibility by the defendants in relation to the safety of the deceased, reliance of the parents of the deceased upon the defendant to supervise the child, and knowledge of the defendant of such reliance.[64]

By 2009, the lower courts, in particular the New South Wales Court of Appeal, had refined the salient features approach into a rigorous inquiry that contains as many as seventeen possible factors.[65] The notion of proximity as nearness in a physical, temporal or relational sense of the plaintiff to the defendant,[66] relevant to evaluating the existence of a duty of care in psychiatric harm cases,[67] has been captured as one of the salient features in this analysis. Similarly, "the degree of reliance by the plaintiff upon the defendant" and "any assumption of responsibility by the defendant" are amongst the factors to be considered.[68] It should be noted that "one salient feature may be of such overwhelming importance that others are unable to dislodge its impact",[69] but the court is nonetheless obliged to analyse this feature in context with all others to determine its relative importance in the circumstances of the case in question.[70]

The salient features approach is not as unbounded or as unpredictable as its critics had made it out to be. While a number of members of the Australian High Court may have made a miasmal mess of the multi-factorial approach by "conflat[ing] considerations of public policy with factors which are more relevant in assessing the degree of proximity in the relationship between the parties",[71] it is nonetheless possible in practice to make a distinction between factual features and normative features—both to be examined separately under each limb of the *Spandeck* formulation.[72] The "salient features" methodology proposed by the author here is different from the Australian approach in that it encompasses only the *factual* features or "proximity factors" pertinent for establishing proximity in the first stage of the *Spandeck* formulation; the *normative* factors presently also considered under the Australian salient features approach will only be scrutinised in the second stage of the *Spandeck* test. Employed in a principled and systematic manner, this revised salient features approach can yield a more robust analysis of the factual matrix than the vagaries of proximity. As commentator Christian Witting points out, by undertaking a fact-based evaluation of the positioning of the parties with respect to each other at a point

respondent assigned the son to work alone as caretaker at a remote station. The son was found dead as a result of exhaustion, dehydration and hypothermia. Despite no direct perception of the son's death or immediate aftermath, the mother nonetheless suffered an entrenched psychiatric condition. The High Court held that the respondent owed a duty of care to the parents because factors like control, assumption of responsibility, reliance and knowledge were present to establish a relationship between the parties.

[64] *Ibid.* at 436.

[65] See *e.g.*, *Caltex Refineries (Queensland) Pty. Ltd. v. Stavar* [2009] N.S.W.C.A. 258 at para. 103 [*Stavar*]; *Makawe Pty. Ltd. v. Randwick City Council* [2009] N.S.W.C.A. 412 at paras. 17, 93 [*Makawe*].

[66] See also *Spandeck*, *supra* note 2 at 132.

[67] See *e.g.*, *McLoughlin*, *supra* note 21 at 421-2; *Ngiam*, *supra* note 22 at 730-2.

[68] *Stavar*, *supra* note 65 at para. 103.

[69] *Makawe, supra* note 65 at para. 139.

[70] *Ibid*. at paras. 137-9.

[71] Phang, Saw and Chan, *supra* note 5 at 17.

[72] Lum, *supra* note 35 at 189: "The Court of Appeal in *Spandeck* was firmly of the view that the different stages of the test should be looked at as separate requirements and not subsumed within each other".

in time prior to their injurious interaction, the salient features approach determines whether there existed substantial causal pathways with a potential for harm: "The more substantial the pathways, the greater the potential for harm, and the greater the likelihood that a duty of care will be recognised."[73] Where such factual features are present, then the parties are brought *closer* to each other or are more *proximate*, in the sense that failure by one party to take care will increase the likelihood of harm to the other. The assumption therefore is that a duty of care arises (*Spandeck* first stage). The onus should then lie on either the court or the defendant to establish reasons for not imposing the duty, for example, taking into account the possible future impact of a particular duty upon those likely to occupy positions similar to the present disputing parties or achieving socially desirable results (*Spandeck* second stage).

## IV. Proximity and its Salient Features

A unanimous High Court in *Sullivan v. Moody* has rejected the application of proximity, observing that:

> The formula is not 'proximity' . . . It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited.[74]

However, there may be little *practical* difference between salient features approach and the notion of proximity. What the High Court had done in *Sullivan* was simply to fuse the descriptive (factual) with the prescriptive (normative), in essence collapsing the *Anns* test into one unitary multi-factorial inquiry. Indeed the question of who is my neighbour—that it is one who is "so closely and directly affected by my act that I ought reasonably to have them in contemplation when as being so affected when I am directing my mind to the acts and omissions which are called in question"[75]—may be answered, in part, by considering the relevant factors in each factual matrix. A methodical examination of salient *factual* features of the relationship between the disputing parties can bring significant utility to proximity. Interestingly, McHugh J.'s analysis in *Crimmins*—by first considering reasonable foreseeability of injury to the plaintiff, then a list of salient features, followed by "other supervening reasons in policy to deny the existence of a duty of care"[76]—parallels the *Spandeck* inquiry of factual foreseeability, proximity and public policy.

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[73] Witting, *supra* note 43 at 575.

[74] (2001) 207 C.L.R. 562 at 578-9 (H.C.A) [*Sullivan*]. It should however be noted that the term "salient features" did not actually appear in *Sullivan*, but the Court's reasoning, albeit infused with overwhelming policy considerations, was substantially similar to this approach. See, *e.g.*, Ian Malkin and Tania Voon, "Social Hosts' Responsibility for Their Intoxicated Guests: Where Courts Fear to Tread" (2007) 15 Tort Law Journal 62 at 79-81.

[75] *Donoghue*, *supra* note 1 at 580. The recent unanimous decision of the High Court of Australia in *Sydney Water Corporation v. Turano* (2009) 239 C.L.R. 51 at 73 (H.C.A.) used similar language evocative of the neighbour principle when it found that a duty of care could not be imposed because the requisite degree of control—a salient feature—did not exist.

[76] *Crimmins*, *supra* note 6 at 39.

Kirby J.'s concern that the salient features approach both lacks a methodology and fails to recognise the important role of public policy considerations[77] can be allayed because a multi-factorial examination of the factual matrix under the rubric of legal proximity provides the methodology for evaluating a unifying concept and the second stage of the *Spandeck* formulation affords ample opportunities for the court to engage with issues of public policy. While it is "conceptually neater" to "disentangle the proximity requirement from the policy considerations as far as possible",[78] it does not mean that the mechanics of proximity in practice is clearly discernible. A sound concept must be complemented by its coherent application assisted by the articulation of a set of factual criteria that should be considered in each case.

As highlighted in Part II, the factual matrix of *Spandeck* involved *economic loss*, and the twin criteria of assumption of responsibility and reliance were apposite to the analysis of proximity. However, when determining whether a duty of care was owed by the defendant to take reasonable precautions to avoid *physical harm* to a class of persons, the twin criteria may be inadequate to the task. Take for example the factual matrix of *Crimmins*. It would be difficult to argue that the Australian Stevedoring Industry Authority voluntarily assumed responsibility for the safety of the waterside worker, and it was not clear that the plaintiff relied on the statutory authority—rather than on his employers—to take precautions against his exposure to asbestos dust in the course of stevedoring operations. *Spandeck*'s twin criteria will not be sufficient for a comprehensive interrogation of the factual matrix for the determination of proximity. However, if one considers other features of the factual matrix, like the vulnerability of the waterside worker to injury and the control that the statutory authority had over both the risk of harm and the plaintiff, then it is likely that the requisite proximity between the plaintiff and the defendant would be satisfied. Even in a situation of economic loss like the Orchard Road flooding in Singapore,[79] an analysis of whether there was sufficient proximity between the relevant statutory authorities and the shop tenants would require an examination of factors beyond the twin criteria. Such an exercise would be carried out with reference to past decided cases under the salient features approach, and this form of analogical incrementalism would find favour with the *Spandeck* methodology.[80]

A compelling argument may be made to inform the content of proximity in *Spandeck* with the salient features approach—focusing only on *factual* features as proximity factors. In many novel situations, the content of proximity can be elucidated by a set of non-exhaustive enumerated factors or salient features which can have *universal* application to different factual scenarios. The factors can overlap

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77 *Graham Barclay Oysters*, *supra* note 6 at 625-7. In any event, Kirby J.'s proposal to ask the "ultimate question" whether "in all the circumstances" it would be "reasonable to impose upon the one a duty of care to the other" introduces even greater judicial discretion to the determination of duty (at 627-8).

78 Phang, Saw & Chan, *supra* note 5 at 28.

79 "Flash floods wreak havoc" *The Straits Times* (9 August 2010) <http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory_541057.html>; "Why Orchard Road flooded" *The Straits Times* (9 August 2010) <http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory_555341.html>; "Not responsible for floods" *The Straits Times* (9 August 2010) <http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory_555796.html>.

80 *Spandeck*, *supra* note 2 at 130.

depending on the factual matrix.[81] With reference to past decided cases, the key factual elements that inform proximity can include[82]:

(i) control by the defendant of the risk of harm;
(ii) vulnerability of a class of persons to which the plaintiff belongs—in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm;
(iii) assumption of responsibility by the defendant to avoid harm to the plaintiff;
(iv) reliance by the plaintiff on the defendant to take care;
(v) actual or constructive knowledge of the defendant of that reliance or the risk of harm.

Under this revised salient features approach, the indeterminacy of the class of persons—presently viewed to be a salient feature by the High Court of Australia[83]—would be excluded from consideration under proximity in the *Spandeck* first stage, but would be examined as a policy consideration under the second stage. Depending on the factual matrix, a particular factor or set of factual factors may be determinative of the issue of proximity. However, each factor is not a necessary requirement for the existence of a *prima facie* duty of care. The New South Wales Court of Appeal was of the view that:

> [C]ontrol, vulnerability and reliance … are three particularly important salient points to be considered in deciding whether there is a duty of care, but they are not all-or-nothing necessary elements to be satisfied if a duty of care is to be established.[84]

In *Spandeck*, it was clear that assumption of responsibility and reliance were the key factors.[85] Although Andrew Phang, Saw Cheng Lim and Gary Chan asserted that "reasonable reliance as well as the voluntary assumption of responsibility appear … to constitute the best—and most practical—criteria for establishing whether or not there is proximity between the claimant and the defendant from a legal standpoint",[86] a survey of a number of key Australian cases suggests that more factors should be included in this analysis, and that the presence/absence of these other factors may prove dispositive of the proximity issue in certain scenarios. In *Pyrenees Shire Council v. Day*, the authority defendant's knowledge was considered an essential factor in the finding of duty.[87] In *Perre*, *Crimmins* and *Woolcock*, the vulnerability of

[81] For example, in the context of common law liability in negligence for statutory authorities, reliance can be "a combination of the requirements of the existence of powers in the statutory authority to ameliorate harm [or control over the risk of harm] and the vulnerability of the plaintiff to that harm." See *Crimmins*, *supra* note 6 at 41. See also *Pyrenees*, *supra* note 48 at 347, 362, 370-2, 389, 420-1; *Perre*, *supra* note 14 at 194-5, 202, 230-6; *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 C.L.R. 520 at 551 (H.C.A).

[82] See also *Crimmins*, *supra* note 6 at 39, *per* McHugh J. A more comprehensive list may be found in the decisions of the New South Wales Court of Appeal, *e.g.*, *Stavar*, *supra* note 65 at para. 103; *Makawe*, *supra* note 65 at paras. 17, 93. However, it should be noted that this list combines both factual factors and policy-based reasoning indiscriminately.

[83] See *e.g.*, *Woolcock*, *supra* note 6 at 553, 574-5.

[84] *Makawe*, *supra* note 65 at para. 21.

[85] *Spandeck*, *supra* note 2 at 134.

[86] Phang, Saw and Chan, *supra* note 5 at 47.

[87] *Pyrenees*, *supra* note 48 at 371, 389, 420.

the plaintiff was a key consideration[88]; whilst in *Graham Barclay Oysters*, the lack of control by the council over the risk of harm that eventuated was a critical factor in not finding a duty of care.[89]

### A. *Control*

In scenarios involving a statutory authority as a defendant, the element of control can be dispositive of the proximity issue; it is often tenuous to argue that a statutory authority, with its core functions and responsibilities defined by legislation, has voluntarily assumed responsibility to avoid harm to a particular plaintiff or a class of persons. In *Graham Barclay Oysters*, Gleeson C.J. proclaimed that control "is a well established basis for the existence of a duty of care in a public authority or a private citizen."[90] In that case, a representative action was brought by a group of consumers who had contracted the hepatitis A virus after eating oysters harvested from a lake in New South Wales. The waters had been polluted by human faeces which had contaminated the oysters. The court held that neither the State nor the local government authority owed a duty of care to the consumers of the contaminated oysters. In particular, McHugh J. found that that although the Executive government of that State was exercising various powers given to it by the legislature, they "do not constitute 'control' of the industry in any relevant sense."[91] It is also arguable that "control was the basis of liability" in *Dorset Yacht Co. Ltd. v. Home Office*.[92] The *capacity* of the defendant to control the situation that might give rise to the risk of harm is a critical consideration. In *Modbury Triangle Shopping Centre Pty Ltd v. Anzil*, a clear absence of the ability of the defendant to control the risk of harm to the plaintiff has led the court to find that there was no duty of care owed.[93] Hayne J. emphasised that "a duty to take steps to control [a particular hazard] should not be found if the person said to owe the duty has not the capacity to fulfil it."[94] Most recently, in *Sydney Water Corporation v. Turano*,[95] a unanimous High Court held that:

> [I]n the absence of *control* over any risk posed by the tree in the years after the installation of the water main there was not a *sufficiently close and direct*

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88 *Perre*, *supra* note 14 at 228-30; *Crimmins*, *supra* note 6 at 24, 42-4, 85; *Woolcock*, *supra* note 6 at 530-3. See also *Esanda Finance Corporation Ltd. v. Peat Marwick Hungerfords* (1997) 188 C.L.R. 241 at 284-5 (H.C.A.) (where the plaintiff was capable of protecting itself).

89 *Graham Barclay Oysters*, *supra* note 6 at 558-62, 579-82, 598-600. See also *Brodie v. Singleton Shire Council* (2001) 206 C.L.R. 512 at 559 (H.C.A.); *Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil* (2000) 205 C.L.R. 254 at 263-4, 270, 291-3 (H.C.A.) [*Modbury Triangle*].

90 *Graham Barclay Oysters*, *ibid.* at 558; see also 598 *per* Gummow and Hayne JJ.

91 *Ibid*. at 581.

92 *Modbury Triangle*, *supra* note 89 at 264, *per* Gleeson C.J. (citing *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 at 1038-9 (H.L.), *per* Lord Morris).

93 *Modbury Triangle*, *ibid.* at 263, 292-3. The plaintiff, who was employed by a tenant of the defendant shopping centre, was attacked by three assailants in a poorly lit outdoor car park of shopping centre at night and suffered serious injuries.

94 *Ibid.* at 293.

95 *Supra* note 75.

> *connection* between Sydney Water and Mrs. Turano … for her to be a 'neighbour' within Lord Atkin's statement of the principle.[96]

In the established categories of duty of care, such as in doctor-patient,[97] school-pupil[98] and employer-employee[99] relationships, the salient feature of control by the defendant over the risk of harm or injury is clearly present.[100] For instance, the employer has the capacity to control the situation by controlling the employee and the system of work that is followed; hence the duty owed by the employer to the employee is "a duty to provide a safe system of work and ensure that reasonable care is taken."[101] Similarly, a parent may be liable to another for the misconduct of the child because the parent is expected to be able to control the child.[102] It is also apparent that the occupier of land has the power to control the state or condition of the land, and it is this power of control "which of itself suffices to give rise to a duty . . . to take reasonable care to avoid a foreseeable risk of injury" to the entrant.[103] Generally, public authorities and lawful entrants on land under the care, control and management of those authorities form another category.[104] In particular, the salient feature of control has been demonstrated to be most relevant in cases where a statutory authority's duty of care to a class of persons is disputed.[105] The basis upon which a duty of care owed to members of the public who use public facilities is imposed upon

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96 *Ibid.* at 73 (emphasis added). *Cf. Adeels Palace Pty. Ltd. v. Moubarak* (2009) 239 C.L.R. 420 at 436-7 (H.C.A.) (where a duty to control the conduct of others was found).

97 See *e.g.*, *Sidaway v. Governors of Bethlem Royal Hospital* [1985] A.C. 871 (H.L.) [*Sidaway*]; *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582 (Q.B.); *Rogers v. Whitaker* (1992) 175 C.L.R. 479 (H.C.A.).

98 See *e.g.*, *Geyer v. Downs* (1977) 138 C.L.R. 91 at 93-4, 101-2 (H.C.A.); *Commonwealth v. Introvigne* (1982) 150 C.L.R. 258 at 271 (H.C.A.) [*Introvigne*]; *Trustees of the Roman Catholic Church for the Diocese of Canberra v. Hadba* (2005) 221 C.L.R. 161 at 175 (H.C.A.) [*Hadba*] (the plaintiff there however failed to prove breach of duty of care in providing adequate supervision during recess).

99 See *e.g.*, *Hamilton v. Nuroof (WA) Pty. Ltd.* (1956) 96 C.L.R. 18 (H.C.A.); *Bankstown Foundry Pty. Ltd. v. Braistina* (1986) 160 C.L.R. 301 (H.C.A.); *Stevens v. Brodribb Sawmilling Company Pty. Ltd.* (1986) 160 C.L.R. 16 (H.C.A.).

100 For cases discussing the importance of the presence of the feature of control over the risk of harm in the imposition of a duty of care, and in certain circumstances a heightened non-delegable duty, see *e.g.*, *Kondis v. State Transport Authority* (1984) 154 C.L.R. 672 at 687-8 (H.C.A.) [*Kondis*]; *Burnie Port Authority v. General Jones Pty. Ltd.*, *supra* note 81 at 550-1; *Northern Sandblasting Pty. Ltd. v. Harris* (1997) 188 C.L.R. 313 at 401 (H.C.A.).

101 *Modbury Triangle*, *supra* note 89 at 292.

102 *Smith v. Leurs* (1945) 70 C.L.R. 256 at 259, 261-2 (H.C.A.). See also *Modbury Triangle*, *ibid.* at 292, 299.

103 *Australian Safeway Stores Pty. Ltd. v. Zaluzna* (1987) 162 C.L.R. 479 at 488 (H.C.A.) *per* Mason, Wilson, Deane and Dawson JJ.

104 See *e.g.*, *Nagle v. Rottnest Island Authority* (1993) 177 C.L.R. 423 (H.C.A.); *Swain v. Waverley Municipal Council* (2005) 220 C.L.R. 517 (H.C.A.).

105 See *e.g.*, *Stovin v. Wise* [1996] A.C. 923 (H.L.) [*Stovin*]; *Romeo v. Conservation Commission of the Northern Territory* (1998) 192 C.L.R. 431 (H.C.A.) [*Romeo*]; *Graham Barclay Oysters*, *supra* note 6; *Crimmins*, *supra* note 6; *Mulligan v. Coffs Harbour City Council* (2005) 223 C.L.R. 486 (H.C.A.) [*Mulligan*]; *Vairy v. Wyong Shire Council* (2005) 223 C.L.R. 422 (H.C.A.) [*Vairy*]. The courts may prefer to hold that a broad duty exists when a statutory authority has care, control and management of the land or facilities, but will not find breach because of public policy considerations of personal responsibility and obviousness of risk when engaging in dangerous recreational activities. See *e.g.*, Mark Lunney, "Personal Responsibility and the 'New' Volenti" (2005) 13 Tort Law Review 76; *Mulligan*; *Vairy*; Pam Stewart and Geoff Monahan, "*Roads & Traffic Authority of New South Wales v. Dederer*: Negligence and the Exuberance of Youth" (2008) 32 Melbourne U.L. Rev. 739.

statutory authorities responsible for the control of those premises was explained by Hayne J. in *Romeo v. Conservation Commission of the Northern Territory*:

> It has now long been held by this Court that the position of an authority … which has power to manage, and does manage, land which the public use as of right is broadly analogous to that of an occupier of private land. It is the management of the land by the authority which provides the *necessary relationship of proximity* between the authority and members of the public.[106]

Even the House of Lords, perhaps grudgingly, in a recent decision commented that in cases of conduct causing physical injury, there "must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation",[107] a feature which was lacking in that case. Thus when confronted with a novel situation, courts may, by analogous reasoning and in an incremental fashion, compare the degree of control that the defendant has in those factual circumstances with the kind of control present in these established categories.

### B. *Vulnerability*

The salient feature of vulnerability on the part of the plaintiff has been explored in a number of recent cases. In *Woolcock Street Investments v. CDG*, a case involving economic loss as a consequence of structural distress to a building, the joint judgment of Gleeson C.J., Gummow, Hayne and Heydon JJ. held that vulnerability is "to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant".[108] The plaintiff, a subsequent purchaser of a commercial building with latent structural defects, did not engage an expert to inspect the building and did not inquire whether the premises was free of defects. The building consisted of warehouses and offices, and had no dwellings. The majority found that, on the facts, the plaintiff failed to show that it was vulnerable to the economic consequences of any negligence of the defendants in their design of the foundations of the building, and could not have protected itself against the economic losses it alleged.[109] In the same case, McHugh J. was open to adopting a broader interpretation of vulnerability to include situations where "by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury."[110] Kirby J. was of the view that vulnerability should

> not [be] confined to cases of poverty, disability, social disadvantage or relative economic power … [but] extend[ed] to those who, like the plaintiffs in *Perre*, might be carrying on a profitable economic enterprise but who are exposed to an

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[106] *Romeo*, *ibid.* at 487-8 (emphasis added). In *Romeo*, the drunken plaintiff fell from the top of a cliff on to a beach in a nature reserve managed by the defendant. The court found that the defendant who had the power of management and control of the land owed a duty of care to the plaintiff, but the defendant had not breached its duty. See also *Vairy*, *ibid.* at 449, *per* Gummow J.

[107] *Sutradhar*, *supra* note 42 at para. 38.

[108] *Woolcock*, *supra* note 6 at 530.

[109] *Ibid*. at 533.

[110] *Ibid*. at 549.

> insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves.[111]

*Perre v. Apand* is a paradigm case where the plaintiffs were in a "very exceptional and vulnerable position in which they had no opportunity of protecting themselves".[112] In *Perre*, the plaintiffs could do nothing to protect themselves from the dire economic consequences to them of the defendant's negligence in supplying seed potatoes infected with bacterial wilt which caused the quarantine of the plaintiff's land. This salient feature, even *in the absence of* any assumption of responsibility by the defendant or reliance by the plaintiff, led the court to impose a duty of care to protect the plaintiff from the risk of pure economic loss.[113] Similarly, in *Hill v. Van Erp*, the intended beneficiary plaintiff depended entirely on the solicitor defendant performing the client's retainer properly and the beneficiary could do nothing to ensure that this was competently performed.[114] However, in *Esanda Finance Corporation Ltd. v. Peat Marwick Hungerfords*, there was no vulnerability as the financier itself could have made inquiries regarding the financial health of the company to which it was to lend money, rather than depend on the auditor's certification or accounts of the company.[115]

In an established category of duty of care, the vulnerability to the risk of harm under the defendant's control is often present. In a school, young students are usually vulnerable to the risk of physical injury and the school authorities have clearly been held to owe a duty of care for the safety of students.[116] This has sometimes been referred to as non-delegable duty of care which arises where there is "vulnerability on one side *and* power or control on the other."[117] McHugh J. observes that vulnerability of the plaintiff manifests itself differently in a number of established categories:

> The boredom and familiarity of repetitive work and the fatigue induced by long hours may cause the employee to lose concentration and increase the risk of injury. The restrictions on freedom imposed on the prisoner take away his or her autonomy and lessen the prisoner's capacity to guard against danger. The immaturity of a child—especially a young child—makes the child insensitive to danger to him or herself and other children.[118]

The courts have also considered the inability of children to protect themselves from sexual abuse by teachers or staff members of schools, and have imposed a duty of

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111 *Ibid*. at 575-6.

112 *Ibid*. at 592, *per* Callinan J.

113 *Perre*, *supra* note 14 at 225, 326-9.

114 *Supra* note 48.

115 *Supra* note 88.

116 See *supra* note 98.

117 Prue Vines, "*New South Wales v. Lepore*; *Samin v. Queensland*; *Rich v. Queensland*: Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability" (2003) 27 Melbourne U.L. Rev. 612 at 623 (emphasis added). See also *Burnie Port Authority v. General Jones Pty. Ltd.*, *supra* note 81 at 544-57; *Kondis, supra* note 100 at 687; *Introvigne*, *supra* note 98 at 270-1; *Ramsay v. Larsen* (1964) 111 C.L.R. 16 at 28 (H.C.A.). However, the diversity of judicial views—as well as academic opinions—on the precise nature of a non-delegable duty is beyond the scope of this article. See *e.g.*, *Leichhardt Municipal Council v. Montgomery* (2007) 230 C.L.R. 22 (H.C.A.); *New South Wales v. Lepore* (2003) 212 C.L.R. 511 (H.C.A.) [*Lepore*]; Christian Witting, "*Leichhardt Municipal Council v. Montgomery*: Non-Delegable Duties and Roads Authorities" (2008) 32 Melbourne U.L. Rev. 332.

118 *Hadba*, *supra* note 98 at 175.

care on the school—and have even held the school vicariously liable for the acts of its staff.[119] In employer-employee relationships, courts have frequently found employees to be vulnerable to physical injury,[120] and coupled with the salient feature of the employer's ability to exercise significant control over the risk of harm,[121] a duty of care is unequivocally imposed. Similarly, the vulnerability of a patient to harm resulting from medical diagnosis and subsequent treatment presents a compelling factor for the recognition of a duty of care in doctor-patient relationships.[122]

It is important to note that vulnerability is often considered with the element of control. In their joint judgment in *CAL No. 14 Pty. Ltd. v. Motor Accidents Insurance Board*, Gummow, Heydon and Crennan JJ. explained that a duty of care is often imposed where

> some control must be exercised by the defendant over another person who either was vulnerable before the control was first exercised, or has become vulnerable by reason of the control having begun to be exercised.[123]

Examples given include pupils in relation to their teachers, wards in relation to their guardians, patients in relation to hospitals, prisoners in relation to gaolers and employees in relation to their employers.[124] A similar point was made by McHugh J. in *Crimmins* regarding how vulnerability is often considered with control (as well as reliance),[125] and the vulnerability of the plaintiffs to harm was an important element for all the justices in *Pyrenees*.[126]

### C. *Assumption of Responsibility/Reliance*

As the *Spandeck* court pointed out, these twin factors are often essential factors in meeting the test of proximity.[127] In a number of established categories that a common law duty of care is owed, the twin criteria of assumption of responsibility

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[119] *Lepore*, *supra* note 117 at 511.

[120] See *e.g.*, *Crimmins*, *supra* note 6 at 42-4. See also *Oberoi Imperial Hotel v. Tan Kiah Eng* [1992] 1 S.L.R.(R.) 1 at 7 (C.A.).

[121] See *e.g.*, *Crimmins*, *ibid.* at 42-3. See also *O'Rourke v. Schacht* [1976] 1 S.C.R. 53 (police officer directing traffic exercises requisite control over risk of harm); *Howard v. Jarvis* (1958) 98 C.L.R. 177 (H.C.A.) (gaoler who had custody of prisoner).

[122] See *e.g.*, *Sidaway*, *supra* note 97 at 884: "the relationship of doctor and patient is a very special one, the patient putting his health and his life in the doctor's hands".

[123] (2009) 239 C.L.R. 390 at 406 (H.C.A.) [*CAL*]. In *CAL*, a man who had been drinking in the public bar of a hotel was killed when riding back home on a motorcycle. The hotel licensee had noticed that the man was drunk and asked him for his wife's telephone number so that she could be contacted to come and get him. The deceased refused and demanded that he be given his motorcycle to ride home. In the action brought by the deceased's widow and the Motor Accidents Insurance Board against the proprietor of the hotel and the licensee, the court held that the proprietor and licensee of licensed premises owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of alcohol they choose to consume.

[124] *Ibid.*

[125] *Crimmins*, *supra* note 6 at 41.

[126] *Pyrenees*, *supra* note 48 at 347 *per* Brennan C.J., 361 *per* Toohey J., 370 *per* McHugh J., 389-90 *per* Gummow J., 421 *per* Kirby J.

[127] *Spandeck*, *supra* note 2 at 134.

and reliance are present.[128] For example, "a solicitor owes a duty of care in tort because, like any professional person, he or she voluntarily assumes responsibility towards an individual client".[129] Other obvious examples include adults looking after children, and schools entrusted with the care of pupils. What is at issue in such situations is often the standard of care and not whether a duty was owed in the first place.

The notion of assumption of responsibility was discussed in much detail in the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*,[130] which held that there could be liability in negligence in respect of carelessly produced statements resulting in pure economic loss. Although consideration of assumption of responsibility on the part of the defendant was prominent in cases like *Spring v. Guardian Assurance*[131] and *Henderson v. Merrett Syndicates Ltd.*[132] which extended its application beyond negligent misstatements, what was exactly entailed in this concept, along with the accompanying requirements of reasonable reliance and a special relationship, has never been entirely clear.[133] In *Bishara v. Sheffield Teaching Hospitals NHS Trust*, Sedley L.J. commented that "assumption of responsibility is simply one of the ways in which the necessary degree of proximity may arise".[134] In *Mitchell v. Glasgow City Council*, Lord Hope thought that

> [t]he situation would have been different if there had been a basis for saying that the defenders had *assumed a responsibility* to advise the deceased of the steps that they were taking, or in some other way had induced the deceased to *rely* on them to do so. It would then have been possible to say not only that there was a relationship of proximity but that a duty to warn was within the scope of that relationship.[135]

Moreover, recent decisions of the House of Lords like *Customs and Excise Commissioners v. Barclays Bank*[136]

> represent ... a dramatic shift from the earlier impression that the assumption of responsibility doctrine was becoming the touchstone of liability in economic loss cases, and cloud ... the extent to which matters of fairness, justice and reasonableness and/or policy may still need to be considered even in the context of whether there has been an assumption of responsibility.[137]

In *Modbury Triangle*, Gleeson C.J. distinguishes between the capacity and obligation of the defendant, explaining that the relevant question is whether the defendant

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[128] See *e.g.*, William Norris, "The Duty of Care to Prevent Personal Injury" [2009] 2 Journal of Personal Injury Law 114 at 115.

[129] *Rowley v. Secretary of State for Work and Pensions* [2007] 1 W.L.R. 2861 at para. 57 (C.A.).

[130] [1964] A.C. 465 (H.L.).

[131] [1995] 2 A.C. 296 (H.L.).

[132] [1995] 2 A.C. 145 (H.L.).

[133] See *e.g.*, Hartshorne, *supra* note 13 at 10. See also Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461.

[134] [2007] EWCA Civ 353 at para. 11 (C.A.).

[135] [2009] 1 A.C. 874 at 890 (H.L.) [*Mitchell*] (emphasis added).

[136] *Supra* note 4 at paras. 36, 49-53, 68-77.

[137] Hartshorne, *supra* note 13 at 12. See also Kevin Stanton, "Professional Negligence: Duty of Care Methodology in the Twenty First Century" (2006) 22 Professional Negligence 134.

assumed an obligation to care for the safety of persons in the position of the plaintiff.[138] It was held that the fact that the occupier of the car park in that case had the capacity to decide when the car park would be illuminated at night "does not mean that the [defendant] assumed a particular responsibility to protect anyone who might lawfully be in the car park against attack by criminals."[139] Furthermore, in respect of established categories, as Mason J. explains in *Kondis v. State Transport Authority*:

> The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care … In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property *as to assume a particular responsibility for his or its safety*, in circumstances where the person affected might reasonably expect that due care be exercised.[140]

The two factors of assumption of responsibility and reliance are interrelated. It was identified in *Watson v. British Boxing Board of Control Ltd* that the special features giving rise to a duty of care in that case are "those of assumption of responsibility and reliance".[141] It was clear in *Spandeck* that there was neither voluntary assumption of responsibility nor reliance, and therefore the respondent could not be held to have a duty of care to the appellant to certify the payments for work done correctly.[142] In cases involving statutory authorities, the Australian courts appear to place less weight on the presence of reliance. In *Pyrenees*, a majority of the High Court rejected reliance as a determinative factor in giving rise to a duty of care,[143] with Gummow J.[144] and Kirby J.[145] convinced that general reliance was a legal fiction. Toohey J., on the other hand, suggested that while reliance may not of itself be a basis for finding a duty of care, it could be relevant to the question of whether a duty exists.[146] Lord Nicholls in *Stovin v. Wise* has made similar observations that reliance is

> a useful aid . . . because it leads easily to the conclusion that the authority can fairly be taken to have assumed responsibility to act in a particular way. Reliance may be actual, in the case of a particular plaintiff, or more general, in the sense

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138 *Modbury Triangle*, *supra* note 89 at 264.

139 *Ibid*. at 265.

140 *Supra* note 100 at 687 (emphasis added).

141 [2001] 2 W.L.R. 1256 at para. 43 (C.A.). See also *Kirkham v. Chief Constable of Greater Manchester Police* [1990] 2 Q.B. 283 at 289 (C.A.); *Capital & Counties plc v. Hampshire County Council* [1997] Q.B. 1004 at 1034-8 (C.A.).

142 *Spandeck*, *supra* note 2 at 139-42.

143 *Supra* note 48 at 344, *per* Brennan C.J.. In *Pyrenees*, the fire escaped from a fireplace lit by a tenant to warm the premises at night. The cause was a latent defect in the chimney of which he was unaware. The fire destroyed a shop and neighbouring tenants' property. The plaintiffs succeeded in their action against the council who had previously inspected the premises but did not take further action in relation to the defective fireplace and did not exercise its powers under the *Local Government Act*.

144 *Ibid*. at 387-8.

145 *Ibid*. at 411.

146 *Ibid*. at 359-61.

> that persons in the position of the plaintiff may be expected to act in reliance on the authority exercising its powers.[147]

Furthermore, the notion of reliance may be intertwined with the salient feature of *knowledge* of that reliance by the defendant.[148]

In *Stovin v. Wise*, the Norfolk County Council as a highway authority had responsibilities for maintaining and improving highways, including powers to remove potential sources of danger.[149] The Council knew of the dangerous traffic junction but did not create the source of danger. In that case, the Council did not have control over the source of danger but had control of the means to avert a dreadful accident. The House of Lords was split, with a bare majority finding on public policy grounds that the Council did not owe a duty of care to drivers of vehicles in those circumstances. However, in a vigorous dissent, Lord Nicholls (Lord Slynn agreeing), found that the requisite proximity existed:

> [There] are several features which, in combination, seem to me to point to the conclusion that the existence of such a duty and such a liability would indeed be fair and reasonable. …The existence of a source of danger exposes road users to a risk of serious, even fatal, injury. Road users, especially those unfamiliar with the stretch of road, are *vulnerable*. They are *dependent on* highway authorities fulfilling their statutory responsibilities.[150]

Similarly, in *Perrett v. Collins*, Swinton Thomas L.J. found that "[t]he first and second defendants have undertaken to discharge the statutory duty and in my judgment no injustice is done by imposing such a duty on them in respect of a negligent act."[151] In addition,

> the second defendant … certified that the aircraft was safe to fly … [T]hey voluntarily assumed … the responsibility of issuing the certificate … and, accordingly, in effect, certif[ied] that the aircraft was safe … [T]he Judge was right to hold that there was sufficient proximity and that it was fair, just and reasonable to impose a duty.[152]

Reliance was also held to be a key element since

> any reasonably well informed member of the public … would expect there to be such a regulatory system in force to ensure his safety … [A] member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so.[153]

Whether or not the term "proximity" was used by the courts, what is evident in an overwhelming number of English and Australian authorities is the judicial examination for the presence of the elements of assumption of responsibility and

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[147] *Supra* note 105 at 937.
[148] See *e.g.*, *Makawe*, *supra* note 65 at para. 26.
[149] *Supra* note 105.
[150] *Ibid*. at 939-940 (emphasis added).
[151] [1998] 2 Lloyd's Rep. 255 at 270 (C.A.) [*Perrett*].
[152] *Ibid*. at 272.
[153] *Ibid*.

reliance from the factual matrix. However it is important to note that when the salient features of control and vulnerability are present, a duty of care is likely to be imposed even where assumption of responsibility by the defendant or reliance on the part of the plaintiff may be "completely absent".[154] Under the *Spandeck* formulation, this finding of a *prima facie* duty under the first stage based on the presence of a number of proximity factors may nonetheless be negated by policy considerations in the second stage.

### D. *Knowledge*

The salient feature of knowledge is a more open-ended factual inquiry. Courts have examined the defendant's knowledge of the risk of harm (which include knowledge of the physical state or condition of premises or land under the defendant's care, control and management),[155] the defendant's knowledge of the reliance of a class of persons on the defendant to take reasonable care for their safety,[156] and the defendant's knowledge of the plaintiff's vulnerability.[157] In *Perre*, McHugh J. observed that "[t]he cases have recognised that knowledge, actual or constructive, of the defendant that its act will harm the plaintiff is virtually a prerequisite of a duty of care in cases of pure economic loss."[158] Similar considerations apply in physical injury cases. In *Modbury Triangle*, Gleeson C.J. (with whom Gaudron and Hayne JJ. agreed), in refusing to impose a duty on a suburban shopping centre for the physical safety of shop employees in the car park at night, held that the "control and *knowledge* which form the basis of an occupier's liability in relation to the physical state or condition of the land are absent when one considers the possibility of criminal behaviour on the land by a stranger".[159] The statutory authority defendant's knowledge of the substantial risk of fire from using a defective chimney was considered an important, even essential, factor weighing in favour of a duty in *Pyrenees*.[160] Although in *Cole v. South Tweed Heads Rugby League Football Club Ltd.* the duty issue was largely decided on public policy grounds that individuals should not be able to avoid personal responsibility for the risks that that accompany their autonomous choice to consume alcohol,[161] nevertheless Gummow and Hayne JJ. found it significant that the club serving alcohol had little control over what patrons did with the bottles of alcohol

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154 *Makawe*, *supra* note 65 at para. 21 (referring to *Perre*, *supra* note 14). See also *Stovin*, *supra* note 105 at 938, *per* Lord Nicholls: "reliance [is not] a necessary ingredient in all cases".

155 See *e.g.*, *Romeo*, *supra* note 105 at 461; *Commissioner for Railways v. McDermott* [1967] 1 A.C. 169 at 186 (P.C.).

156 See *e.g.*, *Modbury Triangle*, *supra* note 89 at 264.

157 See *e.g.*, *Crimmins*, *supra* note 6 at 41.

158 *Perre*, *supra* note 14 at 230. See also *Perre* at 282, *per* Kirby J.; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'*, *supra* note 47 at 555, *per* Gibbs C.J.

159 *Supra* note 89 at 266 (emphasis added).

160 *Supra* note 48 at 420.

161 (2004) 217 C.L.R. 469 at 476-8, 491-2, 507 (H.C.A.) [*Cole*]. In *Cole*, the plaintiff had been drinking for a number of hours at the defendant club, and was consequently refused service because of her intoxication. The manager of the club offered her transport home in the guise of a courtesy bus or, when this was vehemently rejected, offered to ring a taxi for her. Both were refused. The plaintiff was run down by a motor vehicle shortly after leaving the club with her companions and suffered serious injuries. The court, by a 4-2 majority, held that the club did not owe the plaintiff a duty of care.

and could not have any actual or constructive knowledge of what amount of alcohol every patron on its premises consumed.[162]

In *Stovin*, Lord Nicholls considered a number of factual "features" which his Lordship held that "in combination" pointed to the existence of a duty of care, and that "such a liability would indeed be fair and reasonable".[163] One of the key features was knowledge: "When an authority is aware of a danger it has knowledge road users may not have. It is aware of a risk of which road users may be ignorant."[164] In certain situations, questions concerning the defendant's knowledge, whether actual or constructive, can also be matters going to breach, not duty.[165] It is important to note that there is inevitably overlap between issues of duty and breach, particularly where the degree and specificity of the defendant's knowledge of the risk and magnitude of that risk of harm (or the vulnerability of a class of persons) may determine the scope of the duty and entail certain appropriate precautions to be taken in the circumstances.[166] Nonetheless, the case for imposing a duty of care "is always strengthened if the defendant actually knew of the risk" and "is strengthened further if the defendant knew the magnitude of the risk".[167]

## V. Conclusions

A consideration of salient factual features as proximity factors could be seen as a judicial methodology driven by the proximity principle. As Kirby J. intimated, one should seek to "draw out of existing categories the unifying threads which will permit a consistent methodology or approach."[168] One would agree that "in determining whether the requisite proximity is present in a particular case, much will turn on the precise factual matrix concerned."[169] Gummow J. echoes this sentiment, pointing out the fact that there is no simple formula "is not a problem to be solved [but] rather . . . it is a situation to be recognised".[170] By articulating a set of factors that courts may consider in the examination of the factual matrix, the Singapore Court of Appeal can provide greater clarity and predictability in scenarios where a duty of care is an issue. Part IV has provided a set of possible proximity factors more commonly found across a range of factual matrices that encompass different kinds of damage; this list is by no means exhaustive. Much like the disposition of the issue of breach, where the court weighs a number of factors—which include the probability of the risk of harm, the gravity of the harm and burden of taking precautions—in order to determine what a reasonable person would have done in the circumstances,[171] a multi-factorial

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162 *Ibid*. at 489-90.
163 *Supra* note 105 at 939.
164 *Ibid*. at 940.
165 *Crimmins*, *supra* note 6 at 44-5.
166 See *e.g.*, *Barber v. Somerset County Council* [2004] 1 W.L.R. 1089 at 1109 (H.L.); *Stokes v. Guest, Keen and Nettlefold (Bolts and Nuts) Ltd.* [1968] 1 W.L.R. 1776 at 1783 (Birmingham Assizes).
167 *Woolcock*, *supra* note 6 at 550.
168 Michael Kirby, "Foreword" in Norman A. Katter, *Duty of Care in Australia* (Pyrmont, N.S.W.: LBC Information Services, 1999).
169 *Ngiam*, *supra* note 22 at 727.
170 *Perre*, *supra* note 14 at 253 (internal quotations omitted).
171 See *e.g.*, *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40 at 47-48 (H.C.A.); *Tesa Tape Asia Pacific Pte Ltd v. Wing Seng Logistic Pte Ltd* [2006] 3 S.L.R.(R.) 116 at 126 (H.C.).

approach to proximity would be an appropriate methodology to investigate when a duty of care is owed to one who is "so closely and directly affected by my act".[172] McHugh J. summarises it succinctly in *Tame v. New South Wales*: "neighbour = person closely and directly affected = proximity".[173]

One can view proximity/salient features as the positive factual features of a case (first stage of *Spandeck* test) and policy considerations as the normative features (second stage of *Spandeck* test). An investigation of the salient factual features in the first stage helps the court to ascertain if the relationship between the parties is "sufficiently *proximate* as to give rise to a *prima facie* duty of care" and the second stage allows the court to "candidly" evaluate the "*policy* factors which ought nevertheless to limit the scope of liability established by the test in the first stage."[174] This revised salient features approach prevents conflation of factual and normative analysis, the "mischief" of which has been highlighted.[175] On its own, the legal concept of proximity, whether in the *Anns* approach, the *Caparo* test or the *Spandeck* formulation, does not provide claimants with sufficient clarity in respect of the objective factors—or a particular combination thereof—that are likely to lead to a finding of a *prima facie* duty of care as between the plaintiff and the defendant. It is unsurprising that virtually all House of Lords decisions which purport to apply the *Caparo* test skip the proximity evaluation and focus almost exclusively on the "fair, just and reasonable" requirement. Admittedly, it is inescapable that the ultimate proximity question requires a "subjective value judgment".[176] But this is not to deny the usefulness of considering the salient factual features of the relationship. In cases involving economic loss, the proximity factors of assumption of responsibility and reliance (as seen in *Spandeck*), as well as additional consideration of other factors like vulnerability of the plaintiff (as examined in *Woolcock*) or the defendant's knowledge of the risk of harm (as evaluated in *Perre*), are especially relevant to determining the closeness and directness of the relationship between the parties. In cases involving psychiatric harm, the *McLoughlin* factors (as considered in *Ngiam*) appear to be more appropriate for elucidating the content of proximity. In other scenarios involving physical injury, particularly where a statutory authority is the defendant *and* where the plaintiff is not personally known to the defendant, it may be difficult to apply the twin criteria in *Spandeck*; the element of control and knowledge of the risk of harm by a defendant and the vulnerability in the plaintiff may provide more "substantive content"[177] in an overall evaluation of the facts to ascertain proximity between the parties.[178]

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[172] *Donoghue*, *supra* note 1 at 580.

[173] *Tame*, *supra* note 63 at 356.

[174] Phang, Saw and Chan, *supra* note 5 at 5. See also *Spandeck*, *supra* note 2 at 134; *Ngiam*, *supra* note 22 at 693: "Assuming a positive answer to the preliminary question of factual foreseeability and the first stage of the legal proximity test, a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty".

[175] See *e.g.*, Witting, *supra* note 43 at 573. Witting also argued that this lack of differentiation has an "obfuscatory effect and gives credence to suggestions that the courts have attempted to 'hide' the use of policy in duty of care decision-making" (at 582).

[176] Norman Katter, "'Who then in law is my neighbour?' Reverting to first principles in the High Court of Australia" (2004) 12 Tort Law Review 85 at 97.

[177] *Spandeck*, *supra* note 2 at 133.

[178] See also *Makawe*, *supra* note 65 at para. 21; *Graham Barclay Oysters*, *supra* note 6 at 597-9.

As Simpson J. in *Makawe* noted, "the path to defining the circumstances in which a duty of care is owed by one party to another has been a long and tortured one, and has, as yet, no end."[179] However, the revised salient features approach to proximity, when applied in a principled and incremental manner,[180] will no doubt bring one more closely and directly toward the end of the journey.

[179] *Makawe*, *ibid.* at para. 91.

[180] See *Spandeck*, *supra* note 2 at 134: "in determining proximity as expounded by Deane J. in *Sutherland*, the court should apply these concepts first by analogising the facts of the case for decision with those of decided cases, if such exist, but should not be constrained from limiting liability in a deserving case only because it involves a novel fact situation".