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THE DUTY OF CARE OF A CLERK OF WORKS—*SPANDECK* AND ITS AFTERMATH

Animal Concerns Research & Education Society v. Tan Boon Kwee[1]

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I. INTRODUCTION

The test for establishing a duty of care in negligence in Singapore was famously and definitively reformulated by the Court of Appeal in 2007. In the landmark case of *Spandeck Engineering (S) Pte. Ltd. v. Defence Science & Technology Agency*,[2] the Court, after a very thorough exposition of the existing tests for duty in Singapore and elsewhere, adopted a test based on that which had been proposed in the High Court by Andrew Phang Boon Leong J. (as he then was)[3] in *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric*.[4] The *Spandeck* test, comprising a threshold requirement of factual foreseeability followed by proximity and policy factors applied on an incremental, case-by-case basis,[5] was formulated in the context of a claim for economic loss, but was designed as a single test to be applied across the board in negligence actions—as evidenced by its subsequent application in the psychiatric harm cases of *Ngiam Kong Seng & another v. Lim Chiew Hock*[6]

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1 [2011] SGCA 2 [*Animal Concerns*].

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

3 Phang J. was appointed to the Court of Appeal in 2006. He was one of the three judges who decided *Spandeck.* The judgment was delivered by V.K. Rajah J.A.

4 [2007] 1 S.L.R.(R.) 853 [*Sunny Metal*]. Although *Sunny Metal* was subsequently appealed to the Court of Appeal ([2007] 3 S.L.R.(R.) 782), that court left open the question of the appropriate tests for establishing a duty of care.

5 *Spandeck*, *supra* note 2 at para. 115. "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 [2008] 3 S.L.R.(R.) 674 (C.A.) [*Ngiam*].

and *Man Mohan Singh s/o Jothirambal Singh & Another v. Zurich Insurance (Singapore) Pte. Ltd. (now known as QBE Insurance (Singapore) Pte. Ltd.) & another and another appeal*.[7]

Now, in the case of *Animal Concerns*, the Court of Appeal has been called on to apply the *Spandeck* test to another economic loss situation, and in so doing has taken the opportunity to discuss various aspects of the test and its application. The judgment, delivered by Phang J.A., spans a number of issues, including the role of tort law in situations involving a contractual matrix and the role of policy in determining the existence of a duty. This note will examine the decision, focusing on Phang J.A.'s observations with respect to these and other important matters.

II. The Facts and the Judgement of the High Court

The claimant, Animal Concerns Research and Education Society, planned to establish an animal shelter on land which it leased from the Singapore Land Authority ("SLA"). It appointed as contractor for the project A.n.A Contractor Pte. Ltd. ("A.n.A"), a company of which the defendant, Tan Boon Kwee, was a director. A.n.A then appointed the defendant, whose fees it paid,[8] as the project's clerk of works/site supervisor.[9] In addition, A.n.A appointed "qualified persons"—an architect and an engineer—to supervise the architectural and structural work. The project faced a number of problems, including a foul smell and a discharge of effluence caused by the use of wood chips as landfill during the course of levelling the site. The SLA and the National Environment Agency determined that this constituted pollution of the surrounding environment, and the claimant was therefore obliged to excavate the rear portion of the site before carrying out any further work. The claimant brought actions for breach of contract and negligence against A.n.A, and also sued the defendant in his capacity as clerk of works, claiming that he had been negligent in supervising the levelling of the site and in allowing unsuitable material to be used as landfill.

At first instance,[10] the judge, Kan Ting Chiu J., found that A.n.A. had been under a contractual duty to level and refill the land properly, which it had breached by causing the wood chips to be used.[11] However, Kan J. dismissed the claimant's action in negligence against the defendant, holding that, under section 10(5)(b) of the *Building Control Act*,[12] the only duty of a site supervisor in small-scale building works such as these was immediate supervision of the critical structural elements of the works, which encompassed only "parts or elements of a building" and did not

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7 [2008] 3 S.L.R.(R.) 735 (C.A.) [*Man Mohan Singh*].

8 This was somewhat unusual, since clerks of works' fees are more commonly paid for by the person commissioning the work. See *Animal Concerns*, *supra* note 1 at para. 53, quoting I.N. Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th ed., vol. 1 (London, U.K.: Sweet & Maxwell, 1995) at para. 2-024.

9 Although the technical term for a clerk of works under the *Building Control (Amendment No. 2) Regulations* 2007 (S. 495/2007 Sing.), is now a "resident technical officer", Phang J.A. preferred to use the traditional term.

10 *Animal Concerns Research & Education Society v. A.n.A Contractor Pte. Ltd. & another* [2010] SGHC 85.

11 *Ibid*. at para. 34. This made it unnecessary to deal with the negligence action.

12 Cap. 29, 1999 Rev. Ed. Sing. [*Building Control Act*].

include backfill.[13] In addition, even if backfill *could* be considered a "critical structural element," the defendant had fulfilled his minimal supervisory obligations under the relevant legislation.[14] The claimant appealed against this part of the judgment, arguing that the defendant had owed it duties under both the *Building Control Act* and at common law, that he had breached these duties, and that recoverable damage had resulted.

III. The Judgment of the Court of Appeal

With respect to the argument that the defendant owed a duty under the *Building Control Act*, Phang J.A. pointed out that, even if the claimant's interpretation of the statutory wording had been correct, the mere existence of a statutory duty would not in itself have been sufficient to give rise to an action, there being no common law tort of "careless performance of a statutory duty".[15] While an alternative action might, in theory, have been available under the tort of breach of statutory duty, no such action had been brought, and such an action would, anyway, have been available only if the court had considered that the legislature intended a civil law remedy to be provided.[16] On the facts, however, none of this mattered, since the wording of section 10(5)(b) of the *Building Control Act* did not cover a situation of this kind in the first place. Kan J. had been correct in concluding that the backfilling did not form part of the "structural elements" of the building works and that the defendant had been under no statutory duty to supervise it.[17]

Turning to the argument that the defendant had owed the claimant a common law duty of care, Phang J.A. traced the origins of the *Spandeck* test to Lord Wilberforce's two stage test of proximity and policy in *Anns v. Merton London Borough Council*,[18] and examined both the formulation of the *Spandeck* test and its subsequent application in *Ngiam.*[19] He observed that, whereas the English and Australian approaches to duty of care were currently in a state of flux,[20] the Singapore test was similar to that applied in Canada—notwithstanding the fact that while Singapore had moved to a threshold requirement of factual foreseeability, Canada had retained reasonable foreseeability as an element of the test itself.[21]

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[13] *Supra* note 10 at para. 37.

[14] *Ibid*. at para. 38.

[15] *Animal Concerns*, *supra* note 1 at para. 21. In this respect, Phang J.A. referred to the decision of the House of Lords in *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633 at 732-735.

[16] *Ibid*. at para. 24. Phang J.A. cited the decision of the House of Lords in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398 at 407 and 412.

[17] *Ibid.* at paras. 21 to 28.

[18] [1978] A.C. 728 (H.L. (Eng.)) [*Anns*].

[19] *Ngiam*, *supra* note 6.

[20] See *Animal Concerns*, *supra* note 1 at paras. 30-31. On the English and Australian positions, Phang J.A. referred, *inter alia*, to *Customs & Excise Commissioners v. Barclays Bank plc.* [2007] 1 A.C. 181 (H.L. (Eng.)), W.V. Horton Rogers, *Winfield & Jolowicz on Tort*, 18th ed. (London, U.K.: Sweet & Maxwell, 2010), chapter 5 and Francis Trindade, Peter Cane & Mark Lunney, *The Law of Torts in Australia*, 4th ed. (South Melbourne, Australia: Oxford University Press, 2007), chapter 9.

[21] *Ibid*. On the Canadian position, Phang J.A. referred, *inter alia*, to *Cooper v. Hobart* (2001) 206 D.L.R. (4th) 193 (S.C.C.) at paras. 30-31 [*Cooper v. Hobart*], *Odhavji Estate v. Woodhouse* (2003) 233 D.L.R. (4th) 193 (S.C.C.) at paras. 46-50, *Syl Apps Secure Treatment Centre v B.D.* (2007) 284

In this case, the threshold requirement of factual foreseeability was easily fulfilled since it was "reasonably foreseeable"[22] that failure to supervise the backfill would cause damage to the claimant. In terms of the two elements of the test—proximity and policy—Phang J.A. held that legal proximity, which embraced "physical, circumstantial and causal proximity, including (where the facts support it) any voluntary assumption of responsibility by the defendant and reasonable reliance thereon by the [claimant]",[23] was also satisfied. Although not every case would give rise to a proximate relationship—the qualifications of clerks of works could "vary enormously",[24] thus excluding from the scope of duty particular acts or omissions, and in cases not involving a contractual nexus, there might be no assumption of responsibility at all[25]—the facts here favoured a finding of proximity. The defendant, as the main director of A.n.A, had procured his own appointment as clerk of works, creating a situation "equivalent to contract" of the kind referred to by Lord Devlin in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[26] He had voluntarily assumed a duty to the claimant, which had relied on him to oversee the project, having been misled into believing him to be independent of A.n.A.[27] Phang J.A. rejected the defendant's argument that, had the claimant really wished him to be accountable, it could have sought a personal guarantee or have introduced him as a further party to the contract. In this respect, he observed:

> The mere fact that there is a pre-existing contractual relationship... between the parties should not, in itself, be sufficient to exclude a duty of care on one of them to avoid causing pure economic loss to the other (the situation is *a fortiori* where, as here, there is in fact no contractual relationship between the parties, but merely a contractual backdrop, in the sense that each party was in a separate contractual relationship with a third party, *viz*, A.n.A). The true principle, in determining whether or not any contractual arrangement has this effect, should be whether or not the parties structured their contracts intending thereby to exclude the imposition of a tortious duty of care.[28]

Whereas in both *Spandeck* and the English Court of Appeal decision in *Pacific Associates Inc. v. Baxter*[29] the presence of an arbitration clause had pointed unequivocally to an intention to exclude any action in tort,[30] there was, in this case, no

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D.L.R. (4th) 682 (S.C.C.) at paras. 23-30 and *Fullowka et al. v. Pinkerton's of Canada Limited et al*. (2010) 315 D.L.R. (4th) 577 (S.C.C.).

[22] *Animal Concerns*, *supra* note 1 at para. 35.

[23] *Ibid*. at para. 36.

[24] *Ibid*. at para. 53.

[25] *Ibid*. at paras. 48-55. Phang J.A. observed that it was more common for actions to be brought against architects, rather than clerks of works, with the latter's negligence being relevant only in terms of contributory negligence when they were employed by clients. See, in this respect, *Kensington and Chelsea and Westminster Area Health Authority v. Wettern Composites and others* (1984) 1 Con. L.R. 114 (H.C.). For a local authority on clerks of works. see, too, *Chuang Uming (Pte.) Ltd, v. Setron Ltd*. [1999] 3 S.L.R.(R) 771 (C.A.).

[26] [1964] 1 A.C. 465 (H.L. (Eng.)).

[27] *Animal Concerns*, *supra* note 1 at paras. 63-64.

[28] *Ibid*. at para. 71. In this respect, Phang J.A. referred to the decision of the House of Lords in *Henderson and others v. Merrett Syndicates Ltd. and others* [1995] 2 A.C. 145 at 193-194.

[29] [1990] 1 Q.B. 993.

[30] In *Spandeck*, *supra* note 2, the defendant, a division of the Ministry of Defence ("MOD"), was the supervising officer appointed by the Singapore Government ("the Government") under its contract with

inconsistency between, on the one hand, the contract between the claimant and A.n.A and, on the other, the possibility of the defendant being held liable in negligence to the claimant.[31] And while there was a widely recognised overlap between the scope of a defendant's duty of care and breach of that duty, *Spandeck* suggested that in cases involving a contractual matrix, issues relating to that matrix should be handled at the duty stage, where they could be relevant in terms of both proximity and policy.[32]

Turning to the second, policy, limb of the *Spandeck* test, Phang J.A. identified three policy considerations which could influence the finding of a duty. With respect to the first—whether it would be wrong to superimpose a wider common law duty of care onto the duties laid out in the legislation—Phang J.A. was of the view that it would *not* be wrong. Unlike *Murphy v. Brentwood District Council*,[33] where the relevant U.K. legislation[34] had afforded a private law cause of action, the wording of section 10 of the *Building Control Act*[35] offered no action in private law. There was thus a lacuna which the courts could remedy by holding a clerk of works subject to minimum standards of care via the tort of negligence.[36] The second—whether the imposition of a duty of care would constitute an unwarranted lifting of the corporate veil—merited even less discussion, since the question would have arisen only if the defendant were being sued for the acts and omissions of A.n.A, and not his own tort.[37] The third policy consideration—whether the lack of any checks and balances arising out of the defendant's conflicts of interest actually favoured the imposition of a duty of care—was potentially more complicated, since it involved the invocation of policy to help create, rather than defeat, a duty. In this respect, Phang J.A. observed that willingness to consider policy as a factor *supporting* a duty should not be seen as a retreat from *Spandeck* and a return to the three-part test of *Caparo Industries plc v. Dickman.*[38] Although, under the second limb of the *Spandeck* test, policy considerations were most commonly used to negate a duty of care, whereas, under the third limb of the *Caparo* test, the role of policy was a positive one which required it to be "fair just and reasonable" for the court to recognise a duty of care, there was no reason why the courts in Singapore should not use policy to justify the existence of a duty, since "[w]hile the *Spandeck* test does not require this, it does not prohibit it either... for courts may sometimes need to deploy such countervailing positive policy considerations in order to dismiss spurious negative policy considerations raised by the defendant."[39]

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the claimant, which was redeveloping a medical facility for the MOD. The claimant sued the defendant for its alleged negligence in, *inter alia*, under-certifying the work which it had done. The claimant's contract with the Government included a clause stating that the defendant's duties were owed solely to the Government and not to the claimant, and that any dispute between the claimant and the defendant was to be settled by arbitration.

[31] *Animal Concerns*, *supra* note 1 at paras. 72-73.

[32] *Ibid*. at paras. 61 and 66.

[33] [1991] 1 A.C. 398 (H.L. (Eng.)).

[34] *Defective Premises Act 1972* (U.K.), 1972, c. 35.

[35] *Supra* note 12.

[36] *Animal Concerns*, *supra* note 1 at paras. 80-82.

[37] *Ibid*. at paras. 83-85.

[38] [1990] 2 A.C. 605 (H.L. (Eng.)) [*Caparo*], cited *ibid*. at para. 77. The test comprises reasonable foreseeability, proximity and "fair, just and reasonableness".

[39] *Animal Concerns*, *supra* note 1 at para. 77. In this respect, Phang J.A. referred to the High Court decision in *Amutha Valli d/o Krishnan v. Titular Superior of the Redemptionist Fathers in Singapore and others* [2009] 2 S.L.R.(R.) 1091 [*Amutha Valli*], where such an exercise was undertaken by Lee Seiu Kin J.

Moreover, as the Court of Appeal had observed in *Spandeck*, it was in all cases important to avoid giving the impression that there might be "unexpressed motives" behind a finding for or against a duty.[40] In the circumstances, Phang J.A. concluded that, since the defendant's dual position as director of A.n.A and clerk of works had inevitably compromised his ability to scrutinise A.n.A's work, he should be held accountable to the claimant.[41]

A duty of care having been established, the issues of breach, causation and remoteness of damage were easily resolved. It was clear that the defendant, whose standard of care was to be assessed objectively on the basis of knowledge reasonably available to him,[42] had failed in his duties to the claimant, and that this failure had caused the relevant damage, since, had he monitored the work properly and/or informed the qualified persons, the backfilling would have been stopped.[43] Moreover, the case satisfied the *Wagon Mound* test for remoteness,[44] since it was "perfectly foreseeable" that failure to supervise the backfilling could result in economic loss to the claimant.[45] No defences having been pleaded,[46] Phang J.A. held that the defendant was therefore liable to the claimant, with damages to be assessed.

IV. Discussion

The decision of the Court of Appeal in *Animal Concerns* is a welcome addition to the *Spandeck* jurisprudence. Since—like *Spandeck*—it involved an action for pure economic loss brought against a defendant who had been employed to supervise contractual obligations,[47] Phang J.A.'s conclusion that the presence of a contractual matrix did *not* (as it had in *Spandeck*) preclude a duty of care in negligence is obviously significant. On the other hand, given the established history of concurrent duties in contract and tort, and the absence in this case of any *Spandeck*-type clauses in the contract between the claimant and A.n.A confining the defendant's duties to those owed to A.n.A or requiring any dispute between the claimant and the defendant to be settled by arbitration,[48] this conclusion was neither particularly surprising nor especially ground-breaking.

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[40] *Ibid*., citing *Spandeck*, *supra* note 2 at para. 85.

[41] *Ibid*. at paras. 86-87.

[42] *Ibid*. at para. 91. This was the test endorsed in *JSI Shipping (S) Pte. Ltd. v. Teofoongwonglcloong (a firm)* [2007] 4 S.L.R.(R) 460 (C.A.) at para. 69.

[43] *Ibid*. at para. 98.

[44] *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, as applied by the Court of Appeal of Singapore in *Ho Soo Fong v. Standard Chartered Bank* [2007] 2 S.L.R.(R) 181 and *Sunny Metal*, *supra* note 4.

[45] *Animal Concerns*, *supra* note 1, at para. 99.

[46] In this respect, Phang J.A. observed (*ibid*. at para. 102) that, had the defendant attempted to claim contributory negligence on the part of the qualified persons, this would not have succeeded, since they had been entitled to expect the defendant to carry out his duties properly. The relevance of the defence would, anyway, have depended on the qualified persons being in the employ of the claimant.

[47] For the facts of *Spandeck*, see *supra* note 30. The main difference between the two cases (apart from the presence or absence of clauses confining the defendant's duty to his contractual partner and requiring any dispute between the claimant and the defendant to go to arbitration) is that in *Spandeck*, the claimant was the contractor whose work the defendant under-certified, whereas in *Animal Concerns* the claimant was the party who engaged the contractor whose work the defendant failed properly to supervise.

[48] *Ibid*.

The judgment raises a number of other interesting points, one of which concerns the intersection of statutory and common law duties. In *Animal Concerns*, Phang J.A. observed that there was no common law action for careless performance of a statutory duty, and that, even if the terms of the *Building Control Act* had been breached, an action for breach of statutory duty would have been available only if the legislature had intended there to be a civil remedy.[49] On the other hand, he considered that there were no policy reasons against superimposing a wider common law duty onto the duties under the *Act*.[50] Given the fact that, as he remarked, the Singapore test for the duty of care now most closely resembles that of Canada,[51] it is worth noting that Canadian law with respect to common law actions associated with breaches of statutory duty has undergone significant changes in recent decades. In 1983, in *The Queen v. Saskatchewan Wheat Pool*,[52] the Supreme Court of Canada (while recognising the special place of industrial safety statutes in giving rise to private law remedies)[53] held that breach of a statutory obligation did not inherently create a private cause of action, and that breach of statutory duty did not exist as a nominate tort in that jurisdiction. However, in the ensuing years, the waters have been muddied by a number of decisions—including *Cooper v. Hobart*,[54] *Edwards v. Law Society of Upper Canada*[55] and *Y.O. v. Belleville (City) Chief of Police*[56]—in which a common law duty of care in negligence has been imposed for breach of statutory obligations. Although actions for breach of statutory duty in jurisdictions where the tort still exists tend to be confined to industrial safety statutes,[57] in Canada actions in negligence based on breaches of statutory provisions have not been similarly constrained. Commentators have argued that the precipitate removal of breach of statutory duty[58] in *Saskatchewan Wheat Pool* left a gap in Canadian law which the courts have since filled by illegitimately extending the tort of negligence[59]—and with the *Cooper v. Hobart* jurisprudence possibly on the wane,[60] the future role of negligence in cases where statutes have been breached is uncertain. While the decision in *Animal Concerns* is based on a separate, additional, duty of care in

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[49] *Animal Concerns*, *supra* note 1 at paras. 21-24, referred to *supra* notes 15 and 16 and accompanying text.

[50] *Ibid*. at paras. 80-82, referred to *supra* note 36 and accompanying text.

[51] *Ibid*. at paras. 30-31, referred to *supra* note 21 and accompanying text.

[52] [1983] 1 S.C.R. 205 [*Saskatchewan Wheat Pool*].

[53] *Ibid*. at 223.

[54] *Supra* note 21.

[55] [2001] 3 S.C.R. 562 (S.C.C.).

[56] (1991) 3 O.R. (3d) 261 (Gen. Div).

[57] See, *e.g*., *I.C.I. Ltd. v. Shatwell* [1965] A.C. 656 (H.L. (Eng.)).

[58] Note that the U.K. Law Commission discussion paper, U.K., Law Commission, *Administrative Redress: Public Bodies and the Citizen*, (No. 187) (June 2008) also canvassed the possibility of total or partial abolition of the tort, due to a "perception of uncertainty and unpredictability" in the action. However, the final report (No. 322) (April 2010) did not recommend abolition. For further discussion, see Neil J. Foster, "The Civil Action for Breach of Statutory Duty in the Common Law World", online at Selected Works <http://works.bepress.com/neil_foster/36> (last accessed: 27 April 2011).

[59] See Foster, *ibid.*, at p. 17. See also, Lewis Klar, "Breach of Statute and Tort Law" in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law*, (Oxford and Portland, Oregon: Hart Publishing, 2007) 61, who concludes that "Courts ought not to be interpreting statutory provisions to determine whether they give rise to private law duties. They ought instead to be examining the interaction between the parties to the dispute and applying common law principles to the parties' relationship."

[60] See Klar, *ibid*.

negligence, rather than one derived from a statutory breach, it would nevertheless be fascinating to know what the Singapore courts make of the developments in Canada in the post-*Saskatchewan Wheat Pool* line of cases.

The decision in *Animal Concerns* also highlights a number of unresolved issues with respect to the *Spandeck* test. The first relates to the nagging problem of foreseeabilty. The Court of Appeal in *Spandeck* removed the element of reasonable foreseeability from the duty of care test and reduced foreseeability to a threshold factual requirement.[61] While in most cases this will make little, if any, difference, it can give rise to difficulties in situations where reasonable foreseeability fulfils a normative function—leading the court to ask not simply whether the defendant *could* have foreseen that his act would harm the claimant, but whether he *should* have foreseen it. Foreseeability most commonly serves such a function in cases involving psychiatric harm, as the decision in *Ngiam*[62] illustrates. In that case, the Court of Appeal openly recognised the significance of reasonable foreseeability, observing that "the concept of proximity itself represents a legal (or normative) concept of reasonable foreseeability".[63] Treating reasonable foreseeability as an aspect of proximity is, of course, a perfectly legitimate approach. However, it is not necessarily the ideal one, since reasonable foreseeability and proximity really address different issues—the former focusing on the circumstances in which a duty of care should be owed and the latter focusing on the person to whom it should be owed. Moreover, it seems that the threshold requirement of factual foreseeability is something with which the judiciary is not yet entirely comfortable—as can be seen from Phang J.A.'s statement in *Animal Concerns* that it was "reasonably foreseeable"[64] that if the defendant did not take care the claimant would suffer economic loss. While, on the facts, the enquiry clearly *was* a purely factual one carried out at the threshold stage, the use of traditional "reasonable foreseeability" terminology highlights the somewhat unsettled role of foreseeability under the *Spandeck* test.

In *Animal Concerns*, Phang J.A. also concluded that, because the qualifications of clerks of works vary, the scope of the duty imposed on a clerk of works may also vary from case to case.[65] There certainly *are* authorities establishing that what is expected of a defendant may be influenced by the skill-sets associated with his profession,[66] or

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[61] *Spandeck*, *supra* notes 2 and 5.

[62] *Ngiam*, *supra* note 6.

[63] *Ibid*. at para. 104. Note, too, *Man Mohan Singh*, *supra* note 7, which involved actions both for psychiatric harm and for the fertility treatment which the claimants underwent after the defendant negligently killed both their sons in a road accident. With respect to the fertility treatment, the Court held, at para. 48, that: "it was not justifiable to fix [the defendant] with such a degree of foresight... in these circumstances". For further discussion of the role of reasonable foreseeability in determining a duty of care, see Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" (2007) Sing. J.L.S. 350 and Goh Yihan, "Duty of Care in Psychiatric Harm Cases in Singapore" (2008) 124 Law Q. Rev. 539. See also, David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" (2010) Sing. J.L.S. 459.

[64] *Animal Concerns*, *supra* note 1 at para. 35, referred to *supra* note 22 and accompanying text.

[65] *Ibid*. at para. 53, referred to *supra* note 24 and accompanying text.

[66] See, *e.g*., *Phillips v. William Whiteley Ltd.* [1938] 1 All E.R. 566 (K.B.D.), in which it was held that a jeweller owed a duty to pierce ears with the care and skill of a reasonably competent jeweller, and not that of a reasonably competent surgeon.

by his position within a professional hierarchy.[67] These cases are, however, usually framed in terms of the standard required of a defendant in discharging his duty of care, rather than the scope of his duty—since the scope of a defendant's duty is generally determined by the circumstances in which the duty of care arises, and not by his credentials. And although, as Phang J.A. recognised, the areas of duty and standard/breach often overlap,[68] the level of care and skill required of a defendant is adjudged not by reference to his personal qualifications, but by reference to his place within a given profession. While the position of a clerk of works—who may come from a wide range of professional backgrounds, and whose role, whether central or peripheral, is likely to be circumscribed by contract—is somewhat unusual, the care and skill demanded of him will nevertheless always be gauged objectively.

In addition, Phang J.A. placed considerable emphasis on the defendant's assumption of responsibility as a key factor in establishing legal proximity, and thus a duty of care.[69] However, while it is quite clear that A.n.A, as the contractor, assumed a responsibility to the claimant, and that the claimant reasonably relied on A.n.A to appoint an independent and conscientious clerk of works, it is not as clear that such a relationship of responsibility and active (rather than passive) reliance existed between the defendant and the claimant, whose relationship was buffered by A.n.A. As Phang J.A. recognised, assumption of responsibility and reliance will not be appropriate touchstones in every case.[70] There is, perhaps, a danger that, by according them so much weight, courts may come to apply them almost automatically, even in cases where the facts do not immediately lend themselves to such an analysis.

A final point relates to policy, the thorough discussion of which in *Animal Concerns*[71] reminds us of how far the courts have come in their willingness openly to articulate matters which for so long remained covert. The logic behind Phang J.A.'s conclusion that the second—policy—limb of the *Spandeck* test should be capable of supporting, as well as negativing, a duty of care was impeccable. The only question relates to his analysis of the third—"fair, just and reasonable"—limb of the *Caparo* test. This he equated with the policy limb of *Spandeck*, although he opined that while the policy limb of *Spandeck* was "essentially negative"[72] in nature, the "fair, just and reasonable" limb of *Caparo* was fundamentally positive. However, while there is no doubt that the second limb of *Spandeck* does, indeed, normally serve as a consideration to negative duty, it is less obvious that the third limb of *Caparo* serves a contrastingly positive function. *Caparo* is a test fundamentally predisposed against a duty of care, and one in which there must be positive considerations to justify the creation of a duty in a novel situation. But these positive considerations tend to be

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[67] See, *e.g.*, *Wilsher v. Essex Area Health Authority* [1987] 1 Q.B. 730 (EWCA) (The Court of Appeal judgment was reversed on other grounds by the House of Lords [1988] 1 A.C. 1074), in which it was held that a junior doctor owed a duty to treat a patient with the care and skill of a reasonably competent junior doctor, and—by implication—not that of a reasonably competent consultant.

[68] *Animal Concerns*, *supra* note 1 at para. 61, referred to *supra* note 32 and accompanying text.

[69] *Ibid.* at paras. 63-64, referred to *supra* note 27 and accompanying text.

[70] *Ibid*. at para. 36, referred to *supra* note 23 and accompanying text, where Phang J.A. referred to them being relevant "where the facts support it".

[71] Under the *Spandeck* test, it is clear that 'policy' means 'public policy'. See, *e.g.*, *Spandeck*, *supra* note 2 at para. 84, where Chan Sek Keong C.J. referred to it being generally recognised that "public policy is an unruly horse".

[72] *Supra* note 1 at para. 77.

relevant—albeit in a somewhat unarticulated form—at the proximity stage of the test, rather than the "fair, just and reasonable" stage. As applied by the courts, the "fair, just and reasonable" requirement forces a claimant who has managed to overcome the hurdles of reasonable foreseeability and proximity to jump a final hurdle, effectively satisfying the court that, in the particular circumstances of the case, it would *not* be *un*fair, *un*just or *un*reasonable for the defendant to owe him a duty of care.[73] While Phang J.A.'s interpretation of this aspect of *Caparo*[74] certainly had no effect on his judgment—which was based on the inherent flexibility of the second stage of *Spandeck* and its prior application to support a duty in *Amutha Valli*[75]—it reflects the difficulties of definition and interpretation to which the various tests for establishing a duty of care continue to give rise.

V. Conclusion

Given the relative newness of the *Spandeck* test, each case in which it is interpreted and applied offers valuable insight into the courts' approach to its elements. *Animal Concerns*, as a Court of Appeal decision delivered by the judge on whose formulation the test is based, is of particular significance in this respect. While the most noteworthy aspect of the decision may be its confirmation that the presence of a contract need not prevent a duty of care in tort, Phang J.A.'s judgment touches on a number of other important areas, which he addresses with his habitual attention to detail. Some aspects of the *Spandeck* test may still require refinement, and others clarification, but these are early days, and we are fortunate to have an approach to establishing duty of care which promises to be both durable and practical.

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[73] See, *e.g.*, *Marc Rich & Co AG v. Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] A.C. 211, where the House of Lords held that it would not be fair, just and reasonable for a certification society which had negligently certified a ship as fit to sail to owe a duty of care to cargo owners for the loss of their cargo when the ship sank. One of the primary reasons for this decision was the fact that, in the particular situation, the certification society's enormous liability would have been out of all proportion to its fault in stating that the ship was fit to sail.

[74] In support of his conclusion on this point, Phang J.A. cited Mark Lunney & Ken Oliphant, *Tort Law: Text and Materials*, 3d ed. (Oxford: Oxford University Press, 2008), and referred to the authors' observation, at p. 141, that, as between the *Anns* and *Caparo* tests: "The difference may aptly be characterized as one between an approach that starts from a presumption of duty, and requires the invocation of policy factors if the duty is to be negated, and one that starts from a presumption of no duty, and requires the invocation of policy factors if a new duty is to be established (see *Stovin v. Wise* [1996] A.C. 923 at 949, per Lord Hoffmann)." However, the "invocation of policy factors" to which the authors refer relates to considerations which justify a new duty in a novel situation at the proximity stage, rather than to considerations of whether, in the circumstances, it is "fair, just and reasonable" to recognise a duty.

[75] *Supra* note 39.