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PROXIMITY AS REASONABLE EXPECTATIONS

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Proximity is a necessary condition to found a duty of care in negligence, In this article, I make three arguments. First, I argue that the cases show that proximity as currently defined (physical, causal and circumstantial closeness between the plaintiff and defendant) is an unsatisfactory duty-determining device. Proximity so defined does not explain most of the Singapore duty cases and is unsatisfactory in dealing with psychiatric harm cases. Next, I explore why this is so. It turns out that the current definition is unsatisfactory because it is non-binary, non-basic and fails to accommodate both the personal characteristics of the parties and residual legal principles. Lastly, I propose a new proximity rule and guidelines in implementing this rule. The new proximity rule is: proximity is present if and only if it is reasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered.

I. INTRODUCTION

Proximity is a necessary condition to found a duty of care in negligence. However, its current definition is unsatisfactory, and this leaves courts with the unenviable task of couching the real factors going towards proximity in terms of the current proximity definition. While much has been written on the duty of care,[1] a systematic study of proximity—showing that it does not work, why it does not work, and what can be done to make it work—has yet to be done. This article aims to plug that gap.

Part II makes two arguments. First, the cases do not use the definition of proximity in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[2] to determine duty. Second, this is because the definition is non-binary and non-basic and fails to accommodate as relevant duty-determining factors the personal characteristics of the plaintiff and defendant as well as residual legal principles.

In Part III, a new proximity rule that addresses the weaknesses of *Spandeck*'s proximity definition is proposed: proximity is present if and only if it is reasonable to expect the defendant to take into account the plaintiff's interest in not suffering the

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1 See Andrew Phang, Cheng Lim Saw & Gary Chan, "Of Precedent, Theory and Practice—The Case for a Return to *Anns*" [2006] Sing JLS 1; Kumaralingam Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing JLS 350; Kumaralingam Amirthalingam,"Refining the Duty of Care in Singapore" (2008) 124 Law Q Rev 42; David Tan & Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half a Decade on" (2013) 25 Sing Ac LJ 510.

2 [2007] 4 SLR (R) 100 (CA) [*Spandeck*].

damage that he suffered. Three guidelines in applying this new proximity rule are also proposed. First, an assumption of responsibility is an independent way of satisfying proximity. Second, the relevant proximity factors are control, knowledge, closeness in time and space between the defendant's conduct and the plaintiff's damage, the defendant's conduct being a direct cause of the plaintiff's damage, vulnerability in the narrow sense and residual legal principles. Third, unless there was an assumption of responsibility, control and knowledge are necessary requirements for establishing proximity.

II. The Three Proximities are an Unsatisfactory Duty-Determining Device

Lord Denning MR famously said that the function of the duty of care is to limit liability for negligence.[3] In *Spandeck*, the Court of Appeal laid down Singapore's test for the existence of a duty of care in negligence claims. Under the *Spandeck* test, a duty of care exists if three requirements are satisfied: (i) the harm suffered by the plaintiff is foreseeable in a purely factual sense; (ii) there is proximity between the plaintiff and the defendant; and (iii) policy considerations do not militate against finding a duty.[4]

The difference between proximity and policy is that the former is only concerned with the interaction between the plaintiff and the defendant and doing interpersonal justice as between them and nobody else, while the latter refers to considerations of community welfare like public morality, social philosophy and economics (*ie*, reasons that lie outside the parties).[5] The *Spandeck* test applies to all types of damage suffered by the plaintiff. So, it applies whether the plaintiff suffered personal injury, psychiatric harm, property damage or pure economic loss.[6]

This Part demonstrates why proximity, as defined in *Spandeck* to mean the three proximities, is an unsatisfactory duty-determining device. In the first section, the three proximities are introduced. The second section shows how the cases do not use the three proximities to determine duty. The third and last section explains why this is so.

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3 *Dorset Yacht Co Ltd v Home Office* [1969] 2 QB 412 at 424 (CA). See also *Spandeck, supra* note 2 at paras 29, 30; John Fleming, "Remoteness and Duty: Control Devices in Liability for Negligence" (1953) 31:5 Can Bar Rev 471 at 473-474; Leon Green, "Foreseeability in Negligence Law" (1961) 61:8 Colum L Rev 1401 at 1408.

4 *Spandeck, supra* note 2 at paras 73-85. Technically, factual foreseeability is not part of the *Spandeck* test; as it was viewed as almost always fulfilled, it was described as merely a "preliminary requirement" or "threshold issue": *ibid* at paras 73, 115. However, the factual foreseeability requirement was not satisfied in *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR (R) 674 (CA) [*Ngiam*], *Man Mohan Singh s/o Jothirambal Singh v Zurich Singapore Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd)* [2008] 3 SLR (R) 735 (CA), and *AYW v AYX* [2016] 1 SLR 1183 (HC) [*AYW*]. This suggests that the requirement is no less deserving of proper consideration than the *Spandeck* test's other two requirements.

5 *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at para 49 (CA); *Deloitte & Touche v Livent Inc (Receiver and Manager of)* [2017] 2 SCR 855 at paras 37-40 (SCC). See David Tan & Goh Yihan, *supra* note 1 at 535-536. When the defendant is a public authority, Canadian courts have acknowledged that there is no meaningful distinction between proximity and policy: *Cooper v Hobart* [2001] SCC 79 at para 27; *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 at para 31 (SCC).

6 *Spandeck, supra* note 2 at para 115.

A. *Defining the Three Proximities*

Proximity is meant to tell us that closeness between the defendant's conduct and the plaintiff's damage is required to found a duty, and not just foreseeability of harm.[7] Thus, the Privy Council in *Yuen Kun Yeu v Attorney-General of Hong Kong* held that foreseeability of harm is necessary but insufficient to found a duty (otherwise "there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning"); what is also required is proximity, which imports "the whole concept of necessary relationship between plaintiff and defendant".[8]

Spandeck tells us that proximity focuses on the closeness of the relationship between the plaintiff and the defendant;[9] a closer relationship means proximity is more likely to be found. The words "closeness of the relationship between the plaintiff and the defendant" require clarification. They do not refer only to the closeness in a relationship that arises when parties are known to each other and have interactions, *ie*, a factual relationship, prior to the plaintiff suffering damage caused by the defendant's conduct. Instead, these words are understood to mean "the closeness of the connection between several things".[10] Proximity, then, is the degree of closeness of the connection between two things.

What are these two things? *Spandeck* tells us that there are three types of proximity: physical, causal and circumstantial.[11] Physical proximity is closeness, in the sense of space and time, between (i) the plaintiff's person or property; and (ii) the defendant's person or property.[12] Causal proximity is closeness in the causal connection between the defendant's conduct and the plaintiff's damage suffered.[13] Circumstantial proximity is the closeness in the factual relationship between the plaintiff and the defendant; thus, for example, circumstantial proximity exists in an employer-employee and a professional-client relationship.[14]

In short, *Spandeck* introduced the three proximities into Singapore law. The three proximities are closeness in (i) time and space between the plaintiff's person or property and the defendant's person or property; (ii) the causal connection between the defendant's conduct and the plaintiff's damage suffered; and (iii) the parties'

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7 J F Keeler, "The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care" (1989) 12:2 Adel L Rev 93 at 97; Richard Kidner, "Resiling from the Anns Principle: The Variable Nature of Proximity in Negligence" (1987) 7:3 LS 319 at 319; Christian Witting, "The Three Stage Test Abandoned in Australia—Or Not?" (2002) 118 Law Q Rev 214 at 218 [Christian Witting, "The Three Stage Test"].

8 [1987] 3 WLR 776 at 783 (PC). These statements were cited with approval in *Spandeck*: see *Spandeck, supra* note 2 at para 76.

9 *Spandeck, supra* note 2 at para 77. This exact statement was repeated in *Animal Concerns Research and Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at para 36 (CA) [*Animal Concerns*].

10 Thus, it has been noted in Christian Witting, "Duty of Care: An Analytical Approach" (2005) 25:1 Oxford J Leg Stud 33 at 37 [Christian Witting, "Duty of Care"] that:

> The legal relationship must be distinguished from any factual relationship that existed between the parties at the time of the injurious interaction. It is not a prerequisite that there existed any factual antecedent relationship in order for a duty of care to be recognized…

11 *Spandeck, supra* note 2 at paras 78, 81.

12 *Ibid* at para 78.

13 *Ibid.*

14 *Ibid.*

factual relationship. This definition was derived from the following statements of Deane J in *Sutherland Shire Council v Heyman*:

> 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… circumstantial proximity… and… causal proximity…[15]

Not all three proximities have to be sufficiently present to establish the presence of proximity. As negligence is an immensely wide field,[16] how "much" of each of the three proximities needs to be present depends on the category of case[17] and is entirely context-dependent.[18] By way of example, driver-nearby-road-user is an uncontroversial duty category. Admittedly, a driver does not have a factual relationship with nearby road users (since they are strangers to each other) and so circumstantial proximity is absent. However, there is physical proximity between the driver and nearby road users, because the driver is close in time and space to nearby road users. (In this regard, the recent decision in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*[19] erred in implicitly defining physical proximity as the closeness between the usual theatre of operations of the defendant's vehicle and the plaintiff's café.)[20] Causal proximity is present because if the driver's carelessness leads to an accident, the plaintiff will suffer damage directly (meaning immediately, without any intervening cause). Therefore, in road accident cases, the presence of physical and causal proximity alone justifies a finding of proximity.

B. *The Cases do not Use the Three Proximities to Determine Duty*

The cases do not use the three proximities when determining duty. First, the three proximities do not explain most of Singapore's duty cases. Second, when the plaintiff suffers psychiatric harm, the three proximities sometimes fail to distinguish between deserving and undeserving plaintiffs. Further, in the specific situation where the psychiatric harm is caused by witnessing an accident victim's horrific injuries and such accident was caused by the defendant's carelessness, the three proximities have to be substantially changed. Third, in Australia the three proximities were hardly used previously and have in fact been abandoned some time ago.

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15 (1985) 60 ALR 1 at 55 (HCA) [*Sutherland*] (italics omitted).

16 It has been said that "nothing in the definition of negligence indicates the scope of protection of that tort", thus setting negligence apart from the nominate torts like assault and false imprisonment, which protect a well-defined interest: M H McHugh, "Neighbourhood, Proximity and Reliance" in P D Finn, ed, *Essays on Torts* (Sydney, Australia: The Law Book Company Limited, 1989) 5 at 7.

17 *Spandeck, supra* note 2 at para 78.

18 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 (CA) [*Anwar*] at para 149; Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109:3 Law Q Rev 461 at 461; J F Keeler, *supra* note 7 at 101-102; Richard Kidner, *supra* note 7 at 332.

19 [2018] 2 SLR 588 (CA).

20 *Ibid* at para 47.

1. *The Three Proximities do not Explain most of Singapore's Duty Cases*

In most of Singapore's duty cases post-*Spandeck*, the presence or absence of proximity has not turned on the presence or absence of any one or combination of the three proximities.[21] Instead, proximity's presence or absence has turned on other factors, specifically (i) assumption of responsibility; (ii) control; and (iii) knowledge and vulnerability.

(a) *Assumption of responsibility*: The definition of "assumption of responsibility" has been notoriously unstable.[22] Arguably, the Court of Appeal in 2011 provided this definition: the defendant assumes responsibility to the plaintiff when he performs an activity and (i) it is reasonable for the plaintiff to rely on him taking care in performing such activity; and (ii) he knows or ought to know that the plaintiff will place reliance on him taking care.[23] Recent cases confirm that the same definition applies in the United Kingdom[24] and Canada.[25] Under this definition, the twin of assumption of responsibility, reliance, is exactly the same as element (i).[26] This two-pronged definition of assumption of responsibility given in *Go Dante Yap* will be used in Part III of this article. However, it should be noted that not all the cases discussed in this Part II embrace this definition (indeed, some of them refer to an assumption of responsibility without defining the same).

It was probably a harbinger of things to come that the decision in *Spandeck* itself turned, not on the three proximities, but on the absence of an assumption of responsibility. In *Spandeck*, the plaintiff contractor sued the defendant for undervaluation and under-certification of work performed by the plaintiff for a third party. There was no contract between the plaintiff and the defendant. The contract between the plaintiff and the third party stated that (i) the defendant's duty was owed only to the third party and not the plaintiff; and (ii) disputes between the plaintiff and third party were to be resolved by arbitration, and this included disputes as to the valuation or certification done by the defendant.

The Court of Appeal held that there was no proximity and so the defendant did not owe the plaintiff a duty of care. This conclusion, however, was not derived from an application of the three proximities. Instead, there was no proximity as the defendant

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21 An exception is *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 (HC), where it was held that an ex-employer owed a duty to his ex-employee to prepare a reference with care, because there was causal and circumstantial proximity, and an attenuated form of reliance.

22 Kit Barker, *supra* note 18; Andrew Robertson & Julia Wang, "The Assumption of Responsibility" in Kit Barker, Ross Grantham & Warren Swain, eds, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Portland, Oregon: Hart Publishing, 2015) at 49.

23 *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at para 35 (CA) [*Go Dante Yap*].

24 *Steel v NRAM Limited (formerly NRAM Plc)* [2018] UKSC 13 at para 19 [*Steel*]. It was also noted that while element (i) will often be fulfilled if element (ii) is fulfilled, both inquiries are distinct: *ibid.*

25 *R v Imperial Tobacco Canada Ltd* [2011] SCC 42 at para 42.

26 James Plunkett, *The Duty of Care in Negligence* (Oxford: Hart Publishing, 2018) at 139. Reliance as defined here is a proximity factor. Technically, actual reliance is not a proximity factor, although courts often confuse reliance with actual reliance, perhaps because they are usually both present or both absent on the facts. The plaintiff's actual reliance should only be relevant at the causation stage of the negligence action, since the defendant's carelessness would not have caused the plaintiff's damage if the plaintiff did not actually rely on the defendant, even if such reliance was expected. It is proper to look at reliance at the duty stage, since we are concerned with the situation of both parties before the plaintiff actually relied on the defendant's conduct and suffered damage. See *ibid* at 138-139.

did not assume a responsibility to take care in discharging his work.[27] There was no assumption of responsibility because the presence of the arbitration clause in the contractual framework was inconsistent with the defendant expressly or impliedly assuming such responsibility. It is thus somewhat ironic that although *Spandeck* laid down the three proximities as integral to Singapore's test for the existence of a duty of care, the three proximities were not applied to decide the case; instead, it was the absence of an assumption of responsibility that led the court to deny a duty.

The same thing happened in *Animal Concerns.* The plaintiff appointed a company to construct an animal shelter. The company in turn appointed the defendant as the clerk of works, whose job was to ensure that the company's work was carried out to the plaintiff's specifications. The defendant was the main director of the company and had procured his own appointment as the clerk of works. The company breached its contract by using certain inferior materials for backfilling, and this resulted in the plaintiff having to incur environmental cleaning-up costs. The plaintiff sued the defendant for negligent supervision.

The Court of Appeal held that there was sufficient proximity between the plaintiff and defendant to found a duty of care. The finding of proximity turned on the defendant's assumption of responsibility, not the three proximities. The court held that the defendant in *Animal Concerns* had assumed responsibility for the various responsibilities that attended the clerk of works role, because he had procured that very appointment and by so doing had also held himself out as possessing the necessary expertise for that role.[28] The court also held that the plaintiff's reliance on the defendant was reasonable, since (i) it must have been obvious to the defendant that the plaintiff was relying on him; and (ii) the defendant had procured his own appointment.[29] By way of distinguishing from the facts of *Spandeck*, in *Animal Concerns* there was nothing in the contractual framework that was inconsistent with the defendant assuming responsibility.[30]

Assumption of responsibility is also the decisive factor in considering whether a duty of care is owed by banks to customers in respect of different services. Two cases serve to illustrate this.

In *Go Dante Yap*, the Court of Appeal held that the defendant bank owed a duty of care to the plaintiff customer in respect of rendering services and executing the plaintiff's instructions. The court held that the defendant owed the plaintiff an implied contractual duty of care under certain account-opening documents, and this implied contractual duty was sufficient to create the necessary proximity to give rise to a duty in negligence.[31] But the court also held that, even if the account-opening documents were disregarded, there was sufficient proximity because there was an assumption of responsibility by the defendant towards the plaintiff.[32]

In *Deutsche Bank AG v Chang Tse Wen*,[33] the Court of Appeal considered a more specific duty question: whether the defendant bank owed the plaintiff investor a duty to render investment advice with care. The court held that this duty did not arise

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27 *Spandeck, supra* note 2 at paras 81, 102, 108.
28 *Animal Concerns, supra* note 9 at para 63.
29 *Ibid* at para 64.
30 *Ibid* at paras 71-73.
31 *Go Dante Yap, supra* note 23 at para 34.
32 *Ibid* at para 35.
33 [2013] 4 SLR 886 (CA) [*Deutsche Bank*].

because there was no proximity. Again, the three proximities were not deployed; instead, it was held that there was insufficient proximity because on the facts the bank had not assumed a responsibility to perform investment advisory services.[34]

(b) *Control*: The factor of control refers to the defendant's control over the risk of harm.[35] Where the plaintiff sues for damage caused by an activity conducted on certain premises, the defendant's control over that activity is an absolute requirement for establishing proximity, and the three proximities are relatively insignificant. Two cases illustrate this.

This first case is *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*.[36] In *STSK*, the plaintiff got injured while he was in a berthing area looking for a towboat he was assigned to service. The first defendant was the lessor of the berthing area and the second defendant was the sub-lessor of a portion of that berthing area. The third defendant was mooring a crane barge in the berthing area (without the involvement of the first and second defendants) when the mooring wire got fouled. It was this fouled wire that injured the plaintiff when it suddenly sprung up.

The Court of Appeal held that there was sufficient proximity only in relation to the third defendant, and so only the third defendant owed the plaintiff a duty of care. Admittedly, there was sufficient proximity between the plaintiff on one hand, and the first and second defendants as occupiers on the other, since the plaintiff was physically on the first and second defendants' property when the accident happened. But the sufficiency of physical proximity did not justify a finding of proximity, since the first and second defendants were not in charge of the mooring operation, which was the harm-causing activity. Instead, it was the third defendant, as the party controlling the mooring operation, which owed the plaintiff a duty of care.[37]

Thus, *STSK* shows that the defendant's control over the harm-causing activity can be an absolute requirement for establishing proximity.[38] In contrast, sufficient physical proximity alone, as established in *STSK* between the first two defendant occupiers and the plaintiff, was not enough to establish proximity. In fact, Menon CJ even implied that proximity would not be established between the first two defendant occupiers and a hypothetical worker who got injured while taking part in the mooring operation in *STSK*, notwithstanding that there would be sufficient physical and circumstantial proximity in such a case.[39] This shows starkly the importance of control as a proximity factor.

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[34] *Ibid* at paras 48-56. See also *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 at paras 119-124, where the defendant bank's relationship manager was held to owe the plaintiff investor a duty to render investment advice with care because he would recommend the plaintiff specific investment products. Arguably, an assumption of responsibility was present on the facts, although those words were not used in the judgment. The judgment did not discuss the three proximities at all.

[35] *NTUC, supra* note 19 at para 40.

[36] [2013] 3 SLR 284 (CA) [*STSK*].

[37] *Ibid* at paras 103-108, 138, 141.

[38] See also *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360 at para 41 (CA), where it was noted that contractors and sub-contractors would generally owe workers on the worksite a duty of care, due to the control they had over the worksite and the on-going activities on it.

[39] *Ibid* at paras 79, 80, 130. The legally significant difference between the plaintiff in *STSK* and a worker involved in the mooring operation in *STSK* is that the latter was clearly a lawful entrant to the site of the mooring operation while the former was not: see *STSK, supra* note 36 at paras 101-103, 130.

The second case is *Singapore Rifle Association v Singapore Shooting Association*.[40] In this case, the defendant lessee allowed the plaintiff to occupy and manage the premises under a gratuitous license. The plaintiff suffered property damage due to flooding caused by certain negligently constructed drainage works. Those works were carried out as part of a major renovation undertaken by the lessor (through the lessor's contractor). The court held that the defendant did not owe the plaintiff a duty in relation to the drainage works: proximity was absent because during the renovation period, the defendant had no control over the premises or the works carried out on it. Again, it can be seen that the plaintiff's claim for damage caused by an activity conducted on certain premises cannot succeed if the defendant, though an occupier of the premises, had no control over that activity.

(c) *Knowledge and vulnerability*: Knowledge means the defendant's actual or constructive knowledge that his conduct could lead to the plaintiff suffering harm, or that the plaintiff was dependent on him for protection from harm.[41] Vulnerability refers to the plaintiff's dependence on the plaintiff to protect the defendant from harm.[42]

It should be noted that the Australian courts have a narrower definition of vulnerability, which we will call "vulnerability in the narrow sense". Vulnerability in the narrow sense is the plaintiff's inability to protect himself from the consequences of the defendant's carelessness either entirely or at least in a way that would cast the consequences of loss on the defendant.[43] The lack of vulnerability in the narrow sense has been described as "merely one—although often a decisive—reason for rejecting the existence of a duty of care in tort in cases of pure economic loss".[44] Where a plaintiff in Australia sues a builder for pure economic loss due to latent property defects, the plaintiff's vulnerability may be decisive in determining duty.[45]

Back to Singapore. Our courts have used the presence of knowledge and vulnerability to justify why and when a solicitor owes a duty to a third party whose interests are aligned with his client's. This can be seen in *Anwar* and *AEL v Cheo Yeoh & Associates LLC*.[46]

In *Anwar*, the defendant solicitor was engaged to help a father restructure certain debts owed to a bank. The father told the defendant that he did not want the plaintiffs (being his sons) to be personally liable for those debts. The father and the plaintiffs signed several agreements with the bank to restructure the debts. The defendant failed to point out that the agreements contained a clause under which the plaintiffs agreed to personally guarantee the father's debts. Subsequently, the father defaulted, the bank claimed against the plaintiffs under the personal guarantee clause, and the plaintiffs sued the defendant for failing to bring this clause to their attention.

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40 [2018] 2 SLR 616 (CA) [*SRA*].

41 *NTUC, supra* note 19 at para 40.

42 *Anwar, supra* note 18 at para 154. Since dependence is synonymous with reliance, we could say that vulnerability is actual reliance, which should not be a proximity factor as it goes towards causation: see *supra* note 26.

43 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530 (HCA). There appears to be only one Singapore case that has adopted vulnerability in the narrow sense as a proximity factor: see the High Court case of *Chu Said Thong v Vision Law LLC* [2014] 4 SLR 375 at paras 180, 210.

44 *Ibid* at 552.

45 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 at para 182 (HCA) [*Brookfield*].

46 [2014] 3 SLR 1231 (HC) [*AEL*].

The court held that the defendant owed the plaintiffs a duty of care.[47] Proximity was present because there was sufficient physical, causal and circumstantial proximity. In addition, there were three other factors supporting the finding of proximity. The first factor, control, was present because the defendant, by having overall charge of the father's affairs with the bank, was substantially in control over the actions of the plaintiffs and the father.[48] The second factor, vulnerability, was present since the plaintiffs depended on the defendant to bring the personal guarantee clause to their attention, and it was the defendant's failure to do so that led the plaintiffs to sign the agreements and ultimately to incur the liabilities to the bank.[49]

The third factor, knowledge, was present as the defendant knew that (i) the father had engaged him at least partly to ensure that the plaintiffs were not personally liable for the father's debts; and (ii) his action or inaction would directly affect the plaintiffs' interests.[50] Knowledge was also present in the sense that the plaintiffs and the defendant knew each other.[51]

What must be noted is that a significant justification for the findings of circumstantial and causal proximity was the knowledge in (i) and (ii) respectively, and each of these two proximities was described as independently capable of justifying a finding of proximity.[52] Sufficient physical proximity, too, was founded partly on the basis of knowledge, specifically the fact that the parties knew each other.[53] Thus, even while there was sufficient physical, circumstantial and causal proximity, the three proximities were not the best reasons why proximity was established. Instead, two of the three proximities were significantly founded on knowledge, and the third partly so. Therefore, it is more accurate to say that proximity was present because of the presence of knowledge, vulnerability and control, and not because of the sufficiency of the three proximities.

In *AEL*, the plaintiffs were disappointed beneficiaries who stood to benefit under a will but did not, as the will was invalid due to the negligence of the defendant solicitor who had prepared the will for the testator client. The High Court held that the defendant owed the plaintiffs a duty of care in preparing the will. Proximity was established as there was circumstantial proximity and causal proximity (but not physical proximity). Circumstantial and causal proximity were founded solely on the basis of the defendant's knowledge;[54] specifically, the defendant knew that (i) the testator wanted to make the plaintiffs beneficiaries; and (ii) if the will was prepared carelessly such that it was invalid, the plaintiffs would inevitably suffer economic loss upon the testator's death. Also, as in *Anwar*, the court discussed vulnerability and control and held that their presence on the facts strengthened the finding of proximity. This was because the defendant was in complete control over whether the

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47 The court also held that the defendant was liable under an implied retainer.

48 *Anwar, supra* note 18 at para 154.

49 *Ibid.*

50 *Ibid* at paras 147-151.

51 *Ibid*.

52 *Ibid* at paras 147-150. Another reason for the finding of circumstantial proximity was that the father's wish to benefit the plaintiffs could only be effected through the defendant's careful performance of legal services to the father: *ibid* at para 147.

53 *Ibid* at paras 150, 151.The other basis for the finding of physical proximity was the defendant instructing the plaintiffs how to sign the agreements containing the personal guarantee clause.

54 *AEL, supra* note 46 at paras 84, 85.

plaintiffs would be validly appointed as beneficiaries, and the plaintiffs were thus wholly dependent on the defendant and therefore vulnerable.[55]

2. *The Three Proximities are Unsatisfactory in Dealing with Psychiatric Harm Cases*

The three proximities are unsatisfactory in dealing with psychiatric harm cases for two reasons. First, they sometimes fail to distinguish between deserving and undeserving plaintiffs who suffered shock and psychiatric harm from being in the danger zone of separate accidents caused by different defendants' carelessness. Second, in the specific situation where the psychiatric harm is caused by witnessing an accident victim's horrific injuries and such accident was caused by the defendant's carelessness, the three proximities have to be substantially changed.

The three proximities sometimes fail to distinguish between deserving and undeserving plaintiffs who suffered shock and psychiatric harm from being in the danger zone of separate accidents caused by different defendants' carelessness. Take first the case of plaintiff X, the sole survivor of a flat that collapsed from negligent construction. Miraculously, X suffered no physical injuries from the ordeal, but later on he suffered psychiatric harm from the trauma. Then take another plaintiff Y, who while driving was involved in a minor car accident due to another person's careless driving. Y was completely unhurt from the accident. However, due to his extraordinarily fragile mental constitution, Y suffered psychiatric harm from that accident. X sues the careless builder and Y sues the careless driver.

Now, one would imagine that X is a deserving plaintiff but Y is not, because it is reasonably foreseeable that X but not Y would suffer psychiatric harm from their respective experiences. The problem is that the three proximities do not take into account the reasonable foreseeability of psychiatric harm, which is an important and sometimes even decisive proximity factor. The importance of this factor is seen in the English case of *Attia v British Gas plc*.[56] There, it was held that the plaintiff could recover damages for psychiatric harm caused by witnessing her home and possessions damaged by a fire that was caused by the defendant's negligence, if her psychiatric harm was reasonably foreseeable. The three proximities played no part in this conclusion.

But it gets worse. The problem is not only that, by failing to take into account the reasonable foreseeability of psychiatric harm, the three proximities treat our two hypothetical plaintiffs, X and Y, alike. The further problem is that the three proximities, when applied to the claims of X and Y, lead to a counter-intuitive outcome: Y has a stronger claim than X!

How can this be? At the outset, circumstantial proximity is absent in both cases: X is just as much a stranger to the careless builder as Y is to the careless driver. But when it comes to physical and causal proximity, it is relatively easier for Y to establish both proximities than it is for X. Take physical proximity first. The careless driver in Y's case was close in time and space to Y; indeed, that must be the case in every motor accident. But in X's case, the careless builder's person or property was nowhere near X in time or space when the building collapsed (unless one deemed

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[55] *Ibid* at paras 86-90.

[56] [1988] QB 304 (CA).

the collapsed building the builder's property). It is the same with causal proximity. Y's shock and psychiatric harm was the direct result of the careless driver. But the careless builder did not directly lead to X's shock and psychiatric harm; certain events had to happen first, including the building authority's certification that the flat was fit for occupation, and several rounds of inspection and maintenance that (perhaps carelessly) failed to detect the defects.

It therefore appears that the three proximities fail to distinguish between the deserving X and underserving Y, and it does so not by treating the two plaintiffs unlike, but by treating Y's claim as stronger than X's!

The three proximities are more useful in one type of psychiatric harm case: where the plaintiff suffered psychiatric harm from witnessing the injuries of a victim of an accident caused by the defendant's carelessness. In such cases, the Court of Appeal applies the three proximities, but even then it has to substantially change one of them.

When faced with a plaintiff who suffered psychiatric harm from witnessing the injuries of a victim of an accident caused by the defendant's carelessness, the court's main concern is to prevent the defendant from being liable to an indeterminate class of plaintiffs. To deal with this concern, Lord Wilberforce in *McLoughlin v O'Brian*[57] proposed three limitations to such claims: for the defendant to owe the plaintiff a duty of care, the plaintiff must (i) be a spouse or parent of the victim (or have some other close tie with the victim); (ii) be close in terms of time and space to the accident or its immediate aftermath; and (iii) have suffered the psychiatric harm through direct sight or hearing of the accident or its immediate aftermath. These three limitations became known as the *McLoughlin* factors.

In *Ngiam*, the Court of Appeal rationalised the *McLoughlin* factors in terms of the three proximities.[58] The first factor, relating to the closeness of the plaintiff's tie with the victim, was equated with circumstantial proximity. The second *McLoughlin* factor, relating to the closeness in terms of time and space to the accident or its immediate aftermath, is obviously the same as physical proximity. And the third *McLoughlin* factor of requiring the psychiatric harm to be caused through direct sight or hearing of the accident or its immediate aftermath, was equated with causal proximity.

The problem lies in equating the first factor with circumstantial proximity. As discussed, circumstantial proximity means the closeness in the factual relationship between the plaintiff and the defendant. However, in this situation, circumstantial proximity refers to the factual relationship between the plaintiff and the victim who suffered physical injury from an accident that was caused by the defendant's carelessness. Thus, we see that the three proximities, even when applied to the specific situation where the psychiatric harm is caused by witnessing the horrific injuries of an accident victim, have to be substantially changed.

3. *The Three Proximities were Hardly Used by the Australian Courts, and Australia has Abandoned the Three Proximities*

As discussed, when *Spandeck* defined proximity as encompassing the three proximities, it was adopting Deane J's proximity definition 22 years ago in *Sutherland*.

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57 [1983] 1 AC 410 (HL).

58 *Ngiam, supra* note 4 at paras 101-103.

However, Deane J hardly used the three proximities in analysing whether proximity was actually present on the facts of *Sutherland*. In *Sutherland*, the plaintiff sued the council for failing, by reason of careless inspection or inadequate system, to secure that his house was not erected with unsafe foundations, thus leading the plaintiff to incur cost in performing remedial works.

Deane J held that the council did not owe a duty of care to the plaintiff. He held that proximity was not present because (i) the plaintiff was claiming for the council's failure to prevent him from suffering economic loss, but there was generally no duty to either prevent reasonably foreseeable injury being sustained by another or avoid causing mere economic loss; and (ii) the plaintiff had not relied on the council with respect to the erection or condition of the house (in fact, the plaintiff had when purchasing the house ignored the council in relation to certain statutory procedures).[59] Admittedly, Deane J also mentioned that causal proximity was absent, in that the direct cause of the plaintiff's damage was the builder's carelessness in constructing the house, rather than the council's carelessness.[60] However, by emphasising that his conclusion on proximity would not apply if the damage suffered were physical or property damage, or if the council had encouraged the plaintiff to rely on its conduct,[61] Deane J gave more weight to reasons (i) and (ii).

Sutherland was not an exception in seeing little use of the three proximities as a duty determining device. In *Bryan v Maloney*,[62] the High Court of Australia held that a professional builder owed a subsequent purchaser[63] a duty to take reasonable care in the construction of a dwelling house and was liable to her in damages for an amount equal to the decrease in its value arising from the inadequacy of its footings. Deane J, together with Mason CJ and Gaudron J, held that proximity was present because the builder was in a relationship of proximity with the first owner, and that relationship was very similar to that between the builder and the subsequent owner, since in both cases (i) the builder had assumed a responsibility in relation to the adequacy of the house's footings; and (ii) causal proximity was present.[64]

Similarly, in *Crimmins v Stevedoring Industry Finance Committee*,[65] the plaintiff wharf worker claimed that he suffered an illness from exposure to asbestos dust while employed by different stevedores as a casual worker. The defendant port authority had the authority to direct workers like the plaintiff as to when, where and for which particular stevedore they had to work, and its function included the promotion of safety practices by employer stevedores. The defendant was held to owe the plaintiff a duty to take care to protect him from the foreseeable risk of injury from asbestos exposure.

The three proximities played no part in this conclusion. Gaudron J found a duty based on (i) the plaintiff's vulnerability, which arose from the hazardous nature of his job, his casual employment with different stevedores and his need to comply with the authority's direction; (ii) the authority's knowledge of the health risks from asbestos exposure and constructive knowledge that wharf workers were exposed to asbestos;

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59 *Sutherland, supra* note 15 at 65.
60 *Ibid* at 66.
61 *Ibid*.
62 (1995) 182 CLR 609 (HCA) [*Bryan*].
63 A purchaser other than the first owner of the house.
64 *Bryan, supra* note 62 at 627, 628.
65 (1999) 200 CLR 1 (HCA) [*Crimmins*].

and (iii) the authority's ability to control the risks from asbestos exposure.[66] McHugh J (with whom Gleeson CJ agreed)[67] likewise found a duty based on (i) the plaintiff's vulnerability and specifically his need to comply with the authority's direction; (ii) the authority's knowledge or constructive knowledge of the risk of harm to the class of persons that included the plaintiff if it did not exercise its powers; and (iii) the authority's ability to control the risk of harm.[68] Only Kirby J used the word "proximity" in his judgment, and even then he did not refer to the three proximities; instead, he found that proximity was present because the authority had a direct, regular and multi-layered relationship with workers like the plaintiff.[69]

In *Agar v Hyde*,[70] it was held that the defendant members of the board of a voluntary sporting association which had the capacity to make and alter the rules of rugby contests owed no duty to players in relation to the risk of physical injury. None of the judges analysed the duty question in terms of proximity. According to Gleeson CJ, no duty arose because it could hardly be said that the defendants, by reason of their collective capacity to alter international rugby rules, had control over rugby games in a Sydney suburb or country town.[71] Similarly, Gaudron, McHugh, Gummow and Hayne JJ held that no duty was owed because (i) there was generally no duty to act to prevent damage;[72] (ii) the defendants had no control over rugby matches in any practical sense and could at most be said to have some influence over how rugby would be played in Australia;[73] and (iii) imposing a duty would compromise individual autonomy as sporting associations would substantially cease regulating their sport for fear of liability, resulting in diminished choices available for all.[74]

Spandeck adopted the three proximities in 2007. Yet, Australia had, at least six years before that, abandoned the three proximities (and indeed proximity in general) in favour of the salient features approach to determining duty. In *Sullivan v Moody*,[75] five High Court judges in a single judgment abandoned proximity as a duty-determining device. They reasoned that (i) courts were trying to determine whether two parties were in a sufficiently proximate relationship to give rise to a duty of care; and (ii) to answer that there was a sufficiently proximate relationship when proximity is present is obviously of no assistance.[76] In particular, the judges in *Sullivan* were unpersuaded that the three proximities, as used by Deane J in prior cases, could give practical guidance in determining whether a duty existed in novel cases.[77]

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66 *Ibid* at 24-25 paras 44-46.
67 *Ibid* at 13 para 3.
68 *Ibid* at 39 para 93, 42 para 104, 44 para 108.
69 *Ibid* at 83 para 229.
70 [2000] HCA 41 [*Agar*].
71 *Ibid* at para 16.
72 *Ibid* at paras 68, 69.
73 *Ibid* at paras 81-83. Compare *Agar* with the English case of *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 (CA). There, the defendant boxing board was held to owe a duty to professional boxers in setting rules for boxing matches, so that immediate and effective medical attention would be provided where required, because the board regulated and controlled such fights.
74 *Ibid* at para 90.
75 [2001] HCA 59 [*Sullivan*].
76 *Ibid* at para 48.
77 *Ibid.*

Sullivan was in fact a novel case where proximity was arguably self-evident,[78] but the court held that no duty was owed by the defendant doctors and social workers to the plaintiff father when investigating allegations that the father sexually abused his children. Imposing a duty would put the defendants in a bind. The defendants' statutory function was to investigate and report upon allegations of harm inflicted on children. It would therefore be inconsistent with discharging this function if they were also to owe a duty to take care to protect persons suspected of being the sources of that harm.[79]

Having abandoned proximity, Australian courts now determine whether a duty exists according to a multifactorial approach, searching for salient features which point to a duty.[80] The New South Wales Court of Appeal in *Caltex Refineries (Qld) Pte Ltd v Stavar* listed 17 salient features that may be considered in determining whether to impose a duty of care.[81] The salient features are non-exhaustive and include the three proximities, assumption of responsibility, control, vulnerability in the narrow sense, actual or constructive knowledge and the undesirability of imposing a duty of care that conflicts with an existing duty of the defendant.[82]

C. *Why the Three Proximities are an Unsatisfactory Duty-Determining Device*

We have seen that the three proximities do not explain most of the Singapore cases, which have turned on factors like the assumption of responsibility, control, vulnerability and knowledge. In psychiatric harm cases, the three proximities fail to distinguish between deserving and undeserving plaintiffs and, where the plaintiff suffered psychiatric harm from witnessing the injuries of a victim of an accident caused by the defendant's carelessness, the Singapore courts have had to change the definition of circumstantial proximity to mean the closeness of the factual relationship between the plaintiff and the victim of the accident, instead of that between the plaintiff and the defendant. Finally, we have seen that the Australian courts, which first introduced the three proximities (through Deane J), have hardly used them, and have in fact abandoned the concept of proximity in favour of the salient features approach. All this begs the question: why?

Two reasons are proposed. The first reason is that the three proximities are non-binary and non-basic factors for determining whether a duty of care exists. The second reason is that the three proximities are under-inclusive in failing to accommodate certain factors that are relevant to determining the existence of a duty: namely (i) the personal characteristics of the plaintiff and the defendant; and (ii) residual legal principles.

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78 Christian Witting, "The Three Stage Test", *supra* note 7 at 216-217.

79 *Sullivan, supra* note 75 at para 61. The case of *Hunter v McKenna* (2014) 253 CLR 270 (HCA) was decided on the same ground; it was held that a hospital did not owe a duty of care to the relatives of a man killed while travelling with his mentally ill friend whom the hospital had assessed as being mentally ill, because the hospital was required by statute to release from detention the mentally ill friend unless no other care of a less restrictive kind was appropriate and reasonably available.

80 See generally, David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459.

81 (2009) 75 NSWLR 649 at para 103 (CA). Some of these 17 factors will fall to be considered under the first and third requirements of the *Spandeck* test.

82 *Ibid* at paras 103, 104.

1. *The Three Proximities are Non-Binary and Non-Basic*

(a) *Non-binary*: In crafting a duty-determining device, it is more desirable to rely on binary instead of non-binary factors. Being non-binary in nature, the three proximities are less attractive than binary factors as a duty-determining device.

A factor supporting the existence of a duty is binary if and only if it is possible for a court to make a finding that it is either present or absent on the facts of a particular case. For example, factors like control, knowledge, vulnerability and vulnerability in the narrow sense are binary factors. The defendant occupier of premises either did or did not control the plaintiff-damaging activity that was conducted on his premises. The defendant authority either knew or should have known of the risk of harm to the plaintiff wharf worker from exposure to asbestos, or it did not know and should not have been expected to know. A non-client plaintiff was either vulnerable or not vulnerable vis-à-vis the defendant solicitor.

A factor is non-binary if it is not binary. The three proximities are non-binary because a court cannot technically make a finding that any one or more of the three proximities is/are present or absent, although in practice they sometimes use such language. The three proximities tell us to look into the degree of closeness of the connection between two things: the plaintiff's person or property and the defendant's person or property (physical proximity), the causal connection between the defendant's conduct and the plaintiff's damage suffered (causal proximity), and the factual relationship between the plaintiff and the defendant (circumstantial proximity). And when confronted with a set of facts, one cannot technically say whether closeness between any of those two things is present or absent.

There is a range of closeness: two things can be very close, somewhat close, somewhat distant, very distant, and anything in between. If we gave numbers to describe these states, so that the state of these two things being as close as possible from each other is state 1 and the state of them being as distant from each other as possible is state 10, we can immediately appreciate that one cannot pick a state other than 1 or 10, say state 3, and conclude that closeness is present. The reason is that we do not know whether state 3 indicates sufficient closeness; we could only know that if there were a rule saying something like 'closeness is present if and only if there is present the state x, where x is smaller than 4.' Thus, one could not say that persons q and r have a factually close relationship, unless there existed a rule saying, for example, that a close factual relationship exists only if q and r have known each other for more than three years and have had more than s number of meaningful interactions in the last year. Similarly, one could not say that t was close to u in a causal sense, unless there existed a rule saying, for example, that closeness in a causal sense exists only if t was the direct cause of u. Such a rule, which we will call a rule of sufficient closeness, can convert a non-binary factor into a binary one. The problem is that, when it comes to the three proximities, there is no rule of sufficient closeness.

In short, the three proximities are non-binary as there is no rule to tell us how close the two things that each of physical, causal and circumstantial proximity tells us to examine must be, in order for any of the three proximities to be present.

Why are non-binary factors inferior to binary factors for determining the existence of a duty of care? Since binary factors are either present or absent, a court that uses

binary factors to decide whether a duty of care exists in a particular case could reason as such: (i) the facts of this case are most similar to those in case *z*; (ii) in case *z* a duty of care was found because of the presence of binary factors *q*, *r* and *s*; (iii) in this particular case, binary factors *q*, *r* and *s* are present; and (iv) thus, a duty of care exists in this case.

In contrast, a court that uses the three proximities to decide whether a duty of care exists in a particular case cannot reason in the same way. The problem lies in steps (ii) and (iii). Suppose that at step (ii), the court observes that in case *z* a duty of care was found because there was a sufficient degree of closeness in the causal and circumstantial sense. At step (iii), the court decides that in the case at hand there is a lesser degree of closeness in the causal and circumstantial sense. The crucial question is thus whether that lesser degree of closeness is nonetheless sufficient to found a duty. There is no answer to this question: the court cannot answer it because there is no rule of sufficient closeness.

Now suppose that the facts of the case at hand are most similar to cases *y* and *z*. At step (ii), the court observes that (1) a duty of care was found in case *z* because there was a sufficient degree of closeness in the causal and circumstantial sense; and (2) in case *y*, no duty of care was found because there was an insufficient degree of closeness in the causal and circumstantial sense. At step (iii), the court decides that in the case at hand the degree of closeness in both a causal and circumstantial sense is greater than that in case *y*, but lesser than that in case *z*. Again, the question is whether this particular degree of closeness is sufficient to found a duty. And again, there is no answer to this question because there is no rule of sufficient closeness. If the case law tells us that state 2 was close enough and state 5 was not close enough, where does that leave state 4?

A critique: perhaps we have too readily accepted that control, knowledge, vulnerability and vulnerability in the narrow sense are binary? Could they in fact be, like the three proximities, non-binary? After all, one could very sensibly speak of different degrees to which the defendant had control over the risk of harm: the defendant could have had a little, some or significant control over the risk of harm. Similarly, plaintiffs may be of varying degrees of vulnerability in the narrow sense; there is surely a range in measuring one's ability to protect oneself.

The response to this critique is that courts are *more likely* to treat control, knowledge, vulnerability and vulnerability in the narrow sense as binary, as compared to the three proximities. Many of the Singapore cases discussed above, like *Animal Concerns, Go Dante Yap, Deutsche Bank, STSK* and *SRA*, treated the three proximities as non-binary proximity factors. They spoke of the sufficiency (or lack thereof) of proximity, thus inviting the just-mentioned problems that accompany pitching proximity factors along a scale. In contrast, the Singapore courts have treated control, knowledge, vulnerability and vulnerability in the narrow sense as binary factors; as either present or absent on the facts.

In short, in crafting a duty-determining device, it is desirable for courts to use factors that are either present or absent on the facts; *ie*, binary instead of non-binary proximity factors. The Singapore cases show that courts are more likely to treat factors other than the three proximities as binary. On this count then, the three proximities are inferior to these other factors.

(b) *Non-basic*: In crafting a duty-determining device, it is more desirable to rely on basic instead of non-basic proximity factors. Being non-basic in nature, the three proximities are less attractive than basic proximity factors in determining duty.

A factor supporting the existence of a duty is basic if and only if its presence or absence must be determined by reference to the facts of the case at hand and nothing else. For example, the cases show that control, knowledge and vulnerability are basic proximity factors. If we wanted to determine whether the defendant occupier controlled the plaintiff-damaging activity that was conducted on his premises, we have to look at whether the occupier controlled that activity, and nothing else. If we wanted to determine whether the defendant authority knew or should have known about the health risks to the plaintiff wharf worker from asbestos exposure, we have to look at what the authority knew and what a reasonable authority would have known, and nothing else. If we wanted to determine if a non-client plaintiff was vulnerable vis-à-vis the defendant solicitor, we have to look at whether the client was dependent on the solicitor's carefulness in performing the activity. In other words, we have to look at the facts of the case at hand, and nothing else.

A factor is non-basic if it is not basic. The three proximities are non-basic because a court cannot determine whether any of physical, circumstantial and causal proximity is present or absent by looking only at the facts of the case at hand. Instead, a court often has to rely on basic factors, which are present or absent solely by reference to the facts, in determining whether any of the three proximities is fulfilled.

For example, as discussed, it was held in *Anwar* that (i) a significant reason for circumstantial proximity being present was that the defendant knew that the father had engaged him at least partly to ensure that the plaintiffs were not personally liable for the father's debts; (ii) causal proximity was present because the defendant knew that his action or inaction would directly affect the plaintiffs' interests; and (iii) physical proximity was present at least partly because the parties were known to each other. Thus, a basic factor, the defendant's knowledge, significantly determined the existence of two of the three proximities and partly determined the existence of the third. As discussed, a similar thing happened in *AEL*, where circumstantial and causal proximity were founded solely on the basis of the defendant's knowledge.[83]

Sutherland provides another example. As discussed, in *Sutherland* Deane J held that causal proximity was absent between the defendant council and the subsequent home purchaser plaintiff, as there was no directness between the defendant's conduct and the plaintiff's injury.[84] Thus, we should not say that causal proximity is a proximity factor. Instead, we should say that the defendant's carelessness being a direct cause of the plaintiff's damage is a proximity factor. Similarly, we should say that if the plaintiff's person or property and the defendant's person or property were close in time and space, that fact, instead of physical proximity, is supportive of a duty finding.

It could be said that causal and physical proximity are, unlike circumstantial proximity, *not* non-basic factors. After all, one could, relying only on the facts of the case at hand, determine if the defendant's carelessness was a direct cause of the

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[83] See the text accompanying *supra* notes 54-55.

[84] See the text accompanying *supra* note 59. It has thus been argued that Deane J's finding that there was no proximity in *Sutherland* stated a conclusion rather than expressed an argument: J F Keeler, *supra* note 7 at 101.

plaintiff's damage, or if the plaintiff's person or property and the defendant's person or property were close in time and space. But the argument here is precisely that: causal and physical proximity are non-basic factors because they are *expressed* in a non-basic way. It is not obvious what the terms causal and physical proximity mean; their meanings have to be unpacked. How much simpler if we instead referred to them as "whether defendant's conduct was a direct cause of the plaintiff's injury" and "closeness in time and space between the defendant's conduct and the plaintiff's damage" respectively?

In short, if the factors supporting the existence (or otherwise) of a duty of care are non-basic in nature, they merely conceal factors that are basic in nature. They must first be unpacked so that those basic factors underneath can be revealed. Since the law strives for clarity and simplicity, there is no reason to use the three proximities to determine duty because of their non-basic nature; instead, we should use only basic factors, those being the most direct and obvious reasons for why a duty exists in certain cases and not in others.[85]

In fact, there is another reason why we should prefer basic as opposed to non-basic factors for determining the existence of a duty of care: to lessen confusion. Causal proximity, we recall, is the closeness in the causal connection between the defendant's conduct and the plaintiff's damage suffered. One would have thought that unpacking this non-basic factor could sensibly reveal the following basic factor: if the plaintiff's damage was directly caused by the defendant's conduct, this supports the existence of a duty of care. Instead, we see the presence of causal proximity in *Anwar* and *AEL* justified on the basis that the defendant's *knowledge* that his conduct if careless would directly cause the plaintiff harm. Such reasoning, it is proposed, is symptomatic of the confusion bred by the non-basic nature of the three proximities.

2. *The Three Proximities Fail to Accommodate Other Duty-Relevant Factors*

(a) *Failure to accommodate personal characteristics of plaintiff and defendant (control, knowledge and vulnerability in the narrow sense)*: Another weakness of the three proximities as a duty-determining device is that they fail to accommodate the personal characteristics of the plaintiff and the defendant, even while courts have consistently held that such personal characteristics are relevant in determining whether a duty exists.

As discussed, courts have held that proximity factors like the defendant's control over the harm-causing activity and his actual or constructive knowledge that his misconduct could lead to the plaintiff suffering damage (or of the plaintiff's dependence on him for protection), and the plaintiff's vulnerability in the narrow sense, are personal characteristics of the parties that are relevant in determining whether a duty of care exists. These personal characteristics cannot be comfortably fit into the three proximities since the latter look exclusively at the closeness between the parties in the physical, causal and circumstantial sense.

(b) *Failure to accommodate residual legal principles*: By legal principles are meant rules that (i) refer only to the interaction between the plaintiff and the defendant

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[85] David Tan makes a similar point: see David Tan, "Debunking a Myth: A Rejection of the 'Assumption of Responsibility' Test for Duty of Care" (2014) 22 Torts Law Journal 183 at 193-196.

in a particular case; and (ii) seek to achieve interpersonal justice as between them and nobody else. Thus, the three proximities, which tell us that a duty of care should be found when there are present three types of closeness in the relationship between the plaintiff and defendant (physical, causal and circumstantial closeness), are legal principles. The personal characteristics of the parties, like the defendant's knowledge and control and the plaintiff's vulnerability in the narrow sense, are also legal principles. The cases, however, reveal that, besides the three proximities and the personal characteristics of the parties, there exists other legal principles that are relevant in determining duty. These legal principles, which are not in the form (i) 'because the plaintiff/defendant had a certain characteristic'; or (ii) 'because there was physical, causal or circumstantial closeness in the relationship between the plaintiff and the defendant', and which we will call *residual legal principles*, obviously cannot be accommodated by the three proximities. A non-exhaustive list of residual legal principles is discussed below.

Two residual legal principles have already been mentioned: in deciding whether a duty should be imposed, it is relevant to consider whether such imposition would (i) conflict with pre-existing duties owed by the defendant;[86] or (ii) be inconsistent with the responsibilities assumed by the defendant in accordance with the contractual matrix.[87]

Another residual legal principle is that, generally speaking, there is no duty for pure omissions, as opposed to positive acts.[88] Arthur Ripstein explains this as follows:

(i) people are not in charge of each other and so each person is free to use his means and pursue his own purposes subject to the like entitlement of other people to do the same;[89]
(ii) thus, the law of negligence has the limited aim of protecting the plaintiff's means against the side effects of the defendant's use of his means;[90]
(iii) since misfeasance consists of the defendant depriving the plaintiff of means to which the latter had a prior right,[91] there is generally a duty owed in respect of misfeasance; while

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86 See also *James-Bowen v Commissioner of Police for Metropolis* [2018] UKSC 40 at paras 30-33 [*James-Bowen*] (Commissioner of Police did not owe a duty to her officers, in the conduct of proceedings against her based on those officers' alleged misconduct, to take reasonable care to protect them from reputational harm, because the Commissioner's public duties were inconsistent with protecting the reputational interests of her officers); *SXH v Crown Prosecution Service* [2017] UKSC 30 at para 38 (Crown Prosecution Service owed no duty to asylum seeker complaining of excessive detention because such a duty would conflict with its public duty).

87 See also *Brookfield, supra* note 45 at paras 33, 34, 58, 132, 144, 156 (builder did not owe owners' corporation a duty in respect of defects in common property of a service apartment because owners' corporation was controlled by the company that operated the service apartment and could have protected itself by contract).

88 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at paras 34, 69 [*Robinson*]; *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 [*Michael*]; *Stovin v Wise* [1996] AC 923 (HL); *Childs v Desormeaux* [2006] 1 SCR 643 (SCC) [*Childs*]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47 [*CAL*]. For exceptions to this general rule (and such exceptions are residual legal principles too), see Stelios Tofaris & Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 Cambridge LJ 128.

89 Arthur Ripstein, *Private Wrongs* (Cambridge, Massachusetts: Harvard University Press, 2016) at 8.

90 *Ibid* at 87.

91 *Ibid* at 50.

(iv) in contrast, nonfeasance consists of the defendant failing to use his means in a way that suits the plaintiff, which is not a wrong, because the defendant is not in charge of the plaintiff.[92]

Ripstein's account[93] explains and enriches the positive-act-or-pure-omission distinction found in the cases. The residual legal principle that emerges from Ripstein's account, which we will call the misfeasance-nonfeasance distinction, is: if the defendant deprived the plaintiff of his means to which the plaintiff had a prior right, this supports finding the existence of a duty; conversely, if the defendant merely failed to use his means in way that suited the plaintiff's preferred use of those means, this supports a no-duty finding.[94]

Yet another residual legal principle: if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority.[95] Thus, in *Robinson*, it was held that a policeman owed a duty to take care not to hurt innocent bystanders while arresting a suspect, because like any private person, the policeman owed a duty not to cause reasonably foreseeable physical loss from his positive acts.[96]

III. The Solution: Proximity as Reasonable Expectations

A. *A New Proximity Rule*

Recall that proximity must be present for a duty of care to exist. Proximity encompasses the three proximities and, depending on the category of case, there must be a sufficiency of any one or combination of the three proximities before proximity can be established. Recall also that the three proximities are an unsatisfactory duty-determining device because the cases do not use them. Finally, it has been explained why the three proximities are unsatisfactory: they are non-binary and non-basic, and fail to accommodate (i) the personal characteristics of the plaintiff and the defendant; and (ii) residual legal principles.

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92 *Ibid* at 56.

93 Ripstein's account is by no means new, as Ripstein himself acknowledges: see Peter Benson, "Misfeasance as an Organising Normative Idea in Private Law" (2010) 60 UTLJ 731. Although there are critiques of Ripstein's theory, those critiques focus on other aspects of his theory and do not deny Ripstein's explanation for the misfeasance-nonfeasance distinction: see Scott Hershovitz, "The Search for a Grand Unified Theory of Tort Law" (2017) 130:3 Harv L Rev 942; Emmanuel Voyiakis, "Means, Rights, and Opportunities: on Arthur Ripstein's *Private Wrongs*", *Taylor & Francis* (13 April 2018) online: Taylor & Francis Online <http://doi.org/10.1080/20403313.2018.1451464>. It should be noted that the cases often explain the misfeasance-nonfeasance distinction not in Ripstein's terms, but as a natural expression of the law's regard for the plaintiff's autonomy: see *Cole v South Tweed Head Rugby League Football Club* [2004] HCA 29, at paras 14, 15, 38; *CAL, supra* note 88 at para 38.

94 Admittedly, it could also be argued that causal proximity sufficiently accounts for the misfeasance-nonfeasance distinction, so there is sufficient causal proximity in cases of misfeasance but not in cases of nonfeasance. If this is the case, then the misfeasance-nonfeasance distinction will not be a residual legal principle. Nevertheless, we will assume that it is a residual legal principle for convenience, as Ripstein's elegant explanation of that distinction would otherwise be superfluous.

95 *Robinson, supra* note 88 at para 33.

96 Lord Mance and Lord Hughes emphasised that previous cases concerning police liability also rested on policy concerns regarding defensive policing: *ibid* at paras 85-91, 114-118.

In this Part III, a new proximity rule and several guidelines are proposed. The new rule addresses the weaknesses of the three proximities and has other advantages that the three proximities do not and is therefore a better duty-determining device. This new rule, which we will call the Reasonable Expectations Rule, states:

> Proximity is present if and only if it is reasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered.

Whether it is reasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered is determined from the perspective of the community. In other words, proximity is present if and only if the community expects the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered; if we say that it is reasonable that the defendant takes account of the plaintiff's interest, this is so only because community expectations so dictate. For this reason, the Reasonable Expectations Rule might also be called the Community Expectations Rule.

Two points must be made about community expectations. First, community expectations refers to whether the community expects the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered, *but only from the perspective of doing interpersonal justice between both parties;* ie*, only from the perspective of proximity, not policy*.[97] We are here concerned with whether the community thinks it fair and just *as between the parties only*, given all the circumstances, to say that the defendant must take into account the plaintiff's interests.

Second, community expectations take into account, and are therefore not identical to, the expectations of the plaintiff and the defendant prior to their injurious interaction. Obviously, the particular expectations of the plaintiff and the defendant exert significant influence on what the community expects of that particular defendant's conduct.[98] But they are not the same thing. Community expectations are the means

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97 Community expectations are also considered at the policy stage of the *Spandeck* test, especially in determining what types of damage are actionable in negligence: *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 at para 50 (CA). For psychiatric harm, see Prue Vines, "Proximity as Principle or Category: Nervous Shock in Australia and England" (1993) 16:2 UNSWLJ 458 at 461 (increasing appreciation of psychiatric illness as a medical condition led courts to be more willing to recognise a duty of care in relation to psychiatric harm). For wrongful conception, see Christian Witting, "Physical Damage in Negligence" (2002) 61:1 Cambridge LJ 189 at 194, 203, 206 (courts took heed of social views in deciding to classify the pain, suffering and inconvenience of pregnancy and birth as a kind of physical damage, despite the mother's physiological integrity being intact and any risk of physical harm having fallen away after a successful birth). For land contamination, see *ibid* at 199, 203, 206 (courts classified nuclear waste being dumped on land as physical damage to reflect the social stigma attached to such land, despite the land having suffered no physical change or diminution of its functional characteristics). For authority that a proximity factor can also be a policy factor, see *Animal Concerns, supra* note 9 at paras 66-69 (consistency with contractual matrix goes towards both proximity and policy). For a list of policy factors, see Jane Stapleton, "Duty of Care Factors: A Selection from the Judicial Menus" in Peter Cane & Jane Stapleton eds. *The Law of Obligations: Essays in Celebration of John Fleming* (New York: Oxford University Press, 1998) 59 at 93-95.

98 Thus, in *Fullowaka v Royal Oaks Ventures* (2010) 315 DLR (4th) 577 (SCC), the Canadian Supreme Court held that a security firm employed to protect life and property around a mine during a bitter strike owed a duty of care to prevent the murder of replacement miners. This was because the reasonable expectations of both the replacement miners and the security firm were that the firm would take reasonable steps to guard them against risks. The expectations were reasonable because the firm had given assurance to those miners who had then reasonably relied on them, and the firm had undertaken to exert some control over the risk to the miners.

by which courts take into account other factors that are not readily amenable for consideration as going towards the parties' mutual expectations, like vulnerability in the narrow sense. More importantly, community expectations are what ultimately guide the court in novel cases and are thus the real driving force behind developments in the common law on duty. All this will be discussed below.

How should we apply the Reasonable Expectations Rule? Three guidelines help guide the Rule's application. The guidelines are:

(i) *Guideline I*: If there was an assumption of responsibility, the Reasonable Expectations Rule is fulfilled.

(i) *Guideline II*: The relevant proximity factors are:

a. control (*ie*, the defendant's control over the risk of harm);
b. knowledge (*ie*, the defendant's actual or constructive knowledge that his conduct could lead to the plaintiff suffering harm);
c. closeness in time and space between the defendant's conduct and the plaintiff's damage;
d. the defendant's conduct being a direct cause of the plaintiff's damage;
e. vulnerability in the narrow sense; and
f. residual legal principles.

(iii) *Guideline III*: Unless there was an assumption of responsibility, proximity is absent if the defendant had no control over the risk of harm, or if the defendant had no actual or constructive knowledge that his conduct could lead to the plaintiff suffering harm.

It follows from Guidelines I and III that, if control, knowledge and assumption of responsibility are *all* absent, proximity is absent. That said, this does not mean that factors (c)–(f) in Guideline II are superfluous. Another way of stating Guideline III is that absent an assumption of responsibility, control and knowledge are necessary factors for a duty to arise. But they may not be sufficient, and the factors in (c)–(f) in Guideline II must still be considered to determine if proximity is present.

B. *Explaining the New Proximity Rule*

1. *The Reasonable Expectations Rule*

The Reasonable Expectations Rule states: Proximity is present if and only if it is reasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered. The reasons for adopting the Reasonable Expectations Rule are as follows.

(a) *Failure of precise proximity rules*: That we should test proximity by means of the broad and flexible Reasonable Expectations Rule is the natural and logical conclusion of decades of frustrated attempts to fashion a more precise duty-determining device.

We saw in Part II the failure of the three proximities as a duty-determining device. That failure is actually part of a larger failure to fashion proximity into a more precise duty-determining device. M H McHugh said in 1989 that formulating a duty rule was impossible because such a rule had to embrace the countless factual permutations

and cover all existing duty categories at the same time.[99] Indeed, the English courts' skepticism of proximity is well-known. In *Caparo Industries Plc v Dickman*,[100] it was variously called "not a definable concept"[101] and a "convenient label" that was so imprecise as to be useless as a practical test.[102] These statements were recently re-affirmed by the United Kingdom Supreme Court in *Steel*,[103] to put to bed any notion that proximity could ever be a precise rule.

It is little wonder that Christian Witting's definition of proximity is also broad and flexible: proximity, he said, seeks to determine whether as between the plaintiff and the defendant there existed prior to their injurious interaction "significant causal pathways", by which the defendant's carelessness might have resulted in harm to the plaintiff or persons similarly situated.[104]

(b) *Uses a reasonableness standard—comparison with assumption of responsibility*: So other proximity rules have failed, but why the Reasonable Expectations Rule? One reason is that only a reasonableness standard can take account of all facts that are relevant to achieving interpersonal justice between the parties,[105] which is the aim of proximity.

It is revealing that an assumption of responsibility is sufficient in itself to establish a duty, and it too uses a reasonableness test. James Plunkett argues that the cases show that the defendant's assumption of responsibility to the plaintiff is an entirely independent way of establishing a duty, and this is justified because the defendant had objectively consented through his conduct to a legal obligation to take care.[106] Recall that the definition of assumption of responsibility uses a reasonableness test: the defendant assumed responsibility if it was reasonable for the plaintiff to rely on him to take care in performing an activity, and the plaintiff knew or ought to have known of such reliance. In short, if assumption of responsibility, which can independently found a duty, has to use a reasonableness test, it should be unsurprising that proximity, another duty-determining device, has to use a reasonableness test as well.

In fact, because proximity has to cover more ground than the assumption of responsibility concept, *a fortiori* it has to rely on a reasonableness test. The assumption of responsibility concept is relevant only in situations where the plaintiff and the defendant are at the very least known to each other. Thus, the Court of Appeal in *Anwar* emphasised that a solicitor engaged to draft a will could not be said to have assumed a responsibility to a disappointed beneficiary who was unaware of the solicitor and the will (and conversely, the beneficiary did not rely on the solicitor).[107] Proximity, on the other hand, is broader: it has to accommodate all situations where

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99 M H McHugh, *supra* note 16 at 20.

100 [1990] 2 AC 605 (HL) [*Caparo*].

101 *Ibid* at 633 (Lord Oliver of Aylmerton).

102 *Ibid* at 618 (Lord Bridge).

103 *Supra* note 24 at para 22. See also *Robinson, supra* note 88 at para 21, rejecting the notion that there exists a single test for determining the existence of duty.

104 Christian Witting, "Duty of Care", *supra* note 10 at 37. See also Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31:2 Melbourne UL Rev 569 at 570.

105 See generally, John Gardner, "The Many Faces of the Reasonable Person" (2015) 131:4 Law Q Rev 563.

106 Plunkett, *supra* note 26 at 131-138.

107 *Anwar, supra* note 18 at paras 89, 159-161.

the defendant is reasonably expected to take into account the interests of the plaintiff, and this includes but is not limited to the situation where the plaintiff and the defendant are known to each other. Thus, the act of driving generates expectations between strangers: one has to take into account the safety of nearby road users and the mental well-being of their loved ones. In short, the parties being known to each other can in some cases generate an expectation that one takes into account the interest of the other, but it is not the only way of generating such expectations.

Therefore, since proximity has to cater to more fact situations than the assumption of responsibility concept, and the latter concept already relies on a reasonableness standard, it is inevitable that any rule of proximity has to rely on a reasonableness standard.

The foregoing also explains *Guideline I*. It is always reasonable to expect the defendant to take care of the plaintiff's interest in not suffering the damage that he suffered if it is reasonable for the plaintiff to rely on the defendant to take care and the defendant knows or ought to know of such reliance. Therefore, the presence of an assumption of responsibility will always satisfy the Reasonable Expectations Rule.

(c) *Accommodates all relevant proximity factors—explaining the relevant factors and how the Reasonable Expectations Rule accommodates them*: Since only a reasonableness standard can take account of all facts relevant to achieving interpersonal justice between the parties, the Reasonable Expectations Rule can accommodate all relevant proximity factors. These factors are found in *Guideline II*:

a. control (*ie*, the defendant's control over the risk of harm);
b. knowledge (*ie*, the defendant's actual or constructive knowledge that his conduct could lead to the plaintiff suffering harm);[108]
c. closeness in time and space between the defendant's conduct and the plaintiff's damage;
d. the defendant's conduct being a direct cause of the plaintiff's damage;
e. vulnerability in the narrow sense; and
f. the residual legal principles.

It will be noted that *Guideline II* excludes or re-expresses several proximity factors that were discussed in Part II. Circumstantial proximity is excluded as it is non-binary and non-basic; as shown above, it often conceals binary and basic factors like control and knowledge. Causal proximity, or the closeness between the defendant's conduct and the plaintiff's damage, is re-expressed as a binary and basic factor: the defendant's conduct being a direct cause of the plaintiff's damage. Admittedly, this bears some overlap with legal causation, but this poses no problem, since both duty and legal causation must be made out for the plaintiff's claim to succeed. Further, and in any event, duty and legal causation are conceptually distinct: the former goes towards defining the circumstances under which a person must look out for the victim's interest in not suffering the damage suffered *before* such suffering, while the latter defines the extent the victim's damage is attributable to a person who should have but did not take care, *after* the full extent of damage is suffered.

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[108] This includes but is not limited to the defendant's actual or constructive knowledge of the plaintiff's dependence on him for protection.

Physical proximity is re-expressed as a basic factor and its scope expanded (although it remains a non-binary factor): closeness in time and space between the defendant's conduct and the plaintiff's damage, so as to control negligence liability in cases where third parties under the control of the defendant escape and cause damage to life and property in the vicinity.[109]

Assumption of responsibility is also excluded as a relevant proximity factor. As defined earlier, an assumption of responsibility is present when it is reasonable for the plaintiff to rely on the defendant and the defendant knows or ought to know that fact. This is obviously a non-basic factor that conceals basic factors like control and knowledge, and so it is excluded. Since reliance is defined as the reasonableness of the plaintiff's reliance on the defendant to take care (*ie*, the first element of the definition of assumption of responsibility), it is also a non-basic factor that conceals basic factors and is therefore excluded as a proximity factor.

As discussed, actual reliance is not a relevant proximity factor since it goes towards causation. Vulnerability is also excluded as it is defined as dependence, which is synonymous with actual reliance.

How does the Reasonable Expectations Rule accommodate the relevant proximity factors? Control and knowledge are accommodated as it is unreasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered if the defendant had no control over the risk of harm or had no actual or constructive knowledge that his conduct could cause the plaintiff harm. Closeness in terms of time and space can be explained as a proximity factor since the separation by time and space between the defendant's conduct and the plaintiff's damage is relevant to the reasonableness of expecting the defendant to look out for the plaintiff.[110]

The defendant's conduct being a direct cause of the plaintiff's damage is surely a relevant factor towards the reasonableness of expecting the defendant to take account of the plaintiff's interest in not suffering the damage he suffered. After all, it is more reasonable to expect people to be responsible for the direct instead of indirect consequences of their conduct on others.

Why is vulnerability in the narrow sense a relevant proximity factor? After all, why must the defendant concern himself with the plaintiff's inability to protect himself? Desmond Manderson argues persuasively that the defendant must do so because that responsibility is thrust upon him: "in the ineffable otherness and vulnerability of a face, there resides already a demand for care;"[111] and "there is inherent in the first encounter between persons a relationship with the vulnerable that calls us, that cannot be circumscribed in advance, and that therefore places demands upon us that we may not wholly welcome and do not wholly expect".[112] The Reasonable Expectations Rule is flexible enough to incorporate Manderson's argument: since a reflection on human relationships reveals that there is an innate call within us to

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[109] See *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) [*Dorset (HL)*] and the discussion of *Dorset (HL)* in *Lamb v Camden London Borough Council* [1981] 2 WLR 1038 at 1051-1052 (CA).

[110] *Ibid*.

[111] Desmond Manderson, "Current Legal Maxims in which the Word Neighbour Occurs: Levinas and the Law of Torts" in Desmond Manderson, ed, *Essays on Levinas and Law: A Mosaic* (London: Palgrave Macmillan, 2009) 111 at 113. See also Jane Stapleton, "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24:2 Austl Bar Rev 135.

[112] Desmond Manderson, *ibid* at 114.

take care of those who cannot protect themselves (*ie*, those who are vulnerable in the narrow sense), it is reasonable to expect the defendant to take such a plaintiff's interest into account.

The Reasonable Expectations Rule is also flexible enough to incorporate the residual legal principles discussed above. It is unreasonable to expect a defendant to owe a duty that would conflict with his pre-existing duties or the contractual matrix of which he is a part. Nor is it reasonable to compel the defendant to use his means according to the plaintiff's preference (*eg*, to rescue the plaintiff from drowning): this explains the misfeasance-nonfeasance distinction. On the other hand, it is reasonable to expect a defendant public authority to owe a duty if a private person similarly situated would owe that same duty.

Given how the Reasonable Expectations Rule easily accommodates all the proximity factors identified in the cases, it is unsurprising that Gaduron J explicitly identified proximity as reasonable expectations.[113]

(d) *Community expectations are what ultimately guide courts in novel cases*: We have seen how the Reasonable Expectations Rule might equally be called the Community Expectations Rule. One strength of the Rule's explicit consideration of community expectations is that community expectations are what ultimately guide courts in novel cases. For this reason, they are what drive the development of the common law on duty, and so the Reasonable Expectations Rule, by explicitly requiring the court to consider community expectations, implicitly acknowledges this key role.

Proximity has been described as a conduit for the application of the community's expectations about responsibility.[114] In *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*, the court noted that reasonableness is judged in light of current community standards.[115] In *Bryan*, Mason CJ, Deane J and Gaudron J said:

> Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the courts' assessment of community standards and demands.[116]

And again in *Agar*, Gleeson CJ said:

> I am unable to accept that the circumstances of life in this community are such that the conception of legal responsibility should be applied to the relation which existed between the appellants and all people who played the game of rugby football and were, on that account, affected by their action or inaction in relation to the rules of the game.[117]

The fundamental point is that, when deciding whether to impose a duty in a novel situation, there is often no one clearly correct answer, so the court is ultimately guided

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113 *Hawkins v Clayton* (1988) 164 CLR 539 at 593 (HCA).

114 See generally Adam Kramer, "Proximity as Principles: Directness, Community Norms and the Tort of Negligence" (2003) 11 Tort Law Review 70. Cristina Tilley also observed in 2017 that tort is a vehicle through which a community perpetually considers, reconsiders and communicates its values: Cristina Carmody Tilley, "Tort Law Inside Out" (2017) 126:5 Yale LJ 1320. Admittedly, Tilley does not contend that tort law is only about the perpetuation of social morality; she believes that where the dispute is national in scope, efficiency considerations rather than local community values are at the fore.

115 [2002] HCA 35 at para 14.

116 *Bryan, supra* note 62 at 618.

117 *Agar, supra* note 70 at para 23.

by its sense of community expectations. There is no one clearly correct answer because even if the court applied basic and binary factors only (like control, knowledge, vulnerability in the narrow sense and the residual legal principles), whether the presence of any combination of these factors leads to the finding of a duty is up to the court. As Christian Witting noted (albeit with respect to the salient features approach), the search for duty-determining factors does not "add up" to anything.[118] Further, Witting was concerned mainly with basic and binary factors, so the problem is exacerbated if the court applied the three proximities instead, since these are non-binary and non-basic factors. The recent case of *NTUC* illustrates this.

In *NTUC*, the defendant driver carelessly drove his heavy vehicle into the pillar of a third party's building. The pillar supported the floor of the plaintiff's café. The café did not sustain any property damage but for safety reasons the public authority ordered a temporary closure of the café. The Court of Appeal held that the driver owed a duty to the café in respect of lost profits during its closure.

NTUC was the first time the Singapore courts were confronted with a claim for pure economic loss flowing from damage to the property of a third party. The court examined the proximity factors and found that there was sufficient physical and causal proximity, and that the defendant had actual or constructive knowledge that if he drove the heavy vehicle carelessly, it could collide into structures (like the pillar) supporting the floor of the café. While this reasoning can be criticised,[119] that is not the fundamental point. The fundamental point is that these three duty-supporting factors do not "add up" to anything. The court could have said that the three present factors were sufficient to found proximity and thus a duty. Equally, the court could have said that the three present factors were insufficient to found proximity and thus no duty was owed.[120] There is no rule to tell the court if it should take the duty or no-duty road. It is left with one, albeit unarticulated, guide: proximity is concerned with interpersonal justice, so whether the three present factors are sufficient to establish proximity ultimately depends on whether the community expects the defendant to take account of the plaintiff in not suffering the damage that he suffered.

The Reasonable Expectations Rule is not a radical refashioning of proximity. The United Kingdom does not have a proximity rule. When confronted with a novel duty case, its courts face the same problem—how to choose between the duty and no-duty roads? Recently, the United Kingdom Supreme Court held that a bank that had issued a credit reference, upon request and unaware of the request's purpose, did not owe a duty to the defendant, which was the undisclosed principal of the requestor.[121] The existing case law established that a duty would be owed if the defendant was the recipient and the bank knew the purpose of the request. So, the court had to decide whether to relax those two conditions; if yes, there would be a duty. The court said

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[118] Christian Witting, "The Three Stage Test", *supra* note 7 at 218.

[119] We have already seen how the court used a different definition of physical proximity: see the text accompanying *supra* note 19. The finding of sufficient causal proximity may also be questioned: the building authority's closure order and not the accident was arguably the direct cause of the plaintiff's lost profits; the court dismissed this argument on the basis that it was eminently foreseeable and a natural consequence that the accident would lead to the closure order: *NTUC, supra* note 19 at para 49.

[120] See *Spandeck*, *supra* note 2 at para 73; *Dorset (HL), supra* note 109 at 1058-1059.

[121] *Playboy Club London Limited v Banca Nazionale del Lavoro SPA* [2018] UKSC 43.

no, but a yes answer was equally available,[122] since at this point the decision is made by asking whether the claimed duty would be fair, just and reasonable.[123] This is not very different from falling back on community expectations for guidance.[124]

That the courts in determining duty ultimately consider community expectations of the defendant's conduct vis-à-vis the plaintiff can be seen from Arthur Ripstein himself. It is telling that Ripstein, who tries to explain negligence cases with his grand unified theory that no person is in charge of another,[125] concedes that there are at least some cases that can only be explained with reference to what the community expects of the defendant. In *Childs*, the Canadian Supreme Court held that a social host owed no duty to protect third parties from the carelessness of a guest who had consumed excessive alcohol at a 'Bring Your Own Bottle' party. Ripstein concedes that his misfeasance-nonfeasance distinction cannot be easily applied to the facts of *Childs*: there is no obvious answer to the question of whether the defendant's act should be characterised as (i) endangering the plaintiff; or (ii) failing to protect the plaintiff against another's acts, and so this crucial question is left to "an exercise of judgment, based on a view of social life in Canada in the twenty-first century".[126]

(e) *Achieves interpersonal justice*: Another advantage of the Reasonable Expectations Rule is that it reflects the aim of proximity: interpersonal justice between the parties. Interpersonal justice, which the court in *STSK* accepted as necessary to maintain civil peace through providing recourse for interpersonal wrongs,[127] entails considering the matter from the perspectives of both the plaintiff and the defendant.[128] The Reasonable Expectations Rule does exactly that. It is broad enough to accommodate a global assessment of all relevant proximity factors (as discussed above), and thus accommodates both parties' perspectives.

(f) *Avoids rendering the breach inquiry near-otiose*: The Reasonable Expectations Rule expresses a community expectation "that the defendant take account of the plaintiff's interest in not suffering the damage that he suffered". The expectation is phrased in this manner, instead of an expectation to "take care", so as to avoid falling into the trap of phrasing the duty formula so narrowly as to render the breach inquiry near-otiose.

To elaborate, if the court finds that there is a duty to take care to do *m* or not to do *n* (or a duty to do *m* carefully), the breach inquiry simply becomes whether the defendant did or did not do *m* or *n* (as the case may be), which is easily resolved

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122 See also the explanation of *Caparo, supra* note 100, in *Steel, supra* note 24 at para 22: "… it was by declining to accept that the law should develop incrementally to the point for which the claimants contended that the House in the *Caparo Industries* case determined to allow the auditors' appeal."

123 *James-Bowen, supra* note 86 at para 23; *Robinson, supra* note 88 at para 29.

124 It should be emphasised that, as mentioned at *supra* note 97, to be faithful to the *Spandeck* test, the community expectations considered here are those that go towards proximity only.

125 Scott Hershovitz, *supra* note 93.

126 Arthur Ripstein, *supra* note 89 at 98.

127 *STSK, supra* note 36 at para 87.

128 Ernest Weinrib has argued that in negligence, the injustice done and the injustice suffered are the same: see Ernest Weinrib, "The Disintegration of Duty" (2006) 31:2 Adv Q 212 at 216. This implicitly supports testing the reasonableness of expecting the defendant to take account of the plaintiff from both parties' perspectives.

on the facts.[129] In short, by phrasing the expectation as one "that the defendant take account of the plaintiff's interest in not suffering the damage that he suffered", the Reasonable Expectations Rule focusses the analysis on whether liability should exist assuming the conduct was careless, and away from whether the conduct was careless, which is the proper province of the breach inquiry.[130]

2. *Guideline III: Unless there was an Assumption of Responsibility, Control and Knowledge are Necessary to Establish Proximity*

We have seen how the defendant's control over the risk of harm, and his actual or constructive knowledge that his conduct could result in the plaintiff's harm, are both duty-supporting proximity factors.

Can we go further than that? It turns out we can. We can say that, absent an assumption of responsibility, a defendant must have control over the risk of harm that the plaintiff suffered, before the defendant can owe a duty of care. As Christian Witting noted, the defendant must have some minimal capacity to avoid the damage; if he had no control over the risk of harm, then he had no capacity to avoid the damage at all.[131] This, indeed, is the same reason why negligence insists that a defendant cannot owe a duty to an unforeseeable plaintiff: as Ripstein noted in relation to the no-duty finding in *Palsgraf v Long Island Railroad Co*,[132] you cannot owe a duty to someone who is unforeseeable because you cannot take account of someone of whom no account can be taken.[133] In short, before a duty can be imposed, the defendant must have had control over the risk of harm, for the same reason that the harm suffered must have been foreseeable: otherwise, the law would be imposing a duty on the defendant to do the impossible,[134] which is anathema since negligence is fault-based.

We can say the same thing about knowledge: absent an assumption of responsibility, it is a necessary requirement for finding a duty that the defendant had actual or constructive knowledge that his conduct could lead to the plaintiff's harm,[135] since the defendant must have had some minimal capacity to avoid the damage. As McHugh J said in 1999:

> [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. Negligence at common law is still a fault based

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[129] Plunkett, *supra* note 26 at 123-129; James Goudkamp, "Breach of Duty: A Disappearing Element of the Action in Negligence?" (2017) 76:3 Cambridge LJ 480 at 481-483; *Go Dante Yap, supra* note 23 at paras 18, 19; *AYW, supra* note 4 at paras 42-48, 52-57.

[130] Plunkett, *supra* note 26 at 127-128.

[131] Christian Witting, "Duty of Care", *supra* note 10 at 36.

[132] 248 NY 339, 162 NE 99 (1928) (New York Court of Appeals).

[133] Arthur Ripstein, *supra* note 89 at 90. For the argument that foreseeability is the moral glue of negligence, see David Owen, "Figuring Foreseeability" (2009) 44:5 Wake Forest L Rev 1277.

[134] Christian Witting, "Duty of Care", *supra* note 10 at 61.

[135] This was explicitly stated by McHugh J in *Crimmins, supra* note 65 at para 102. See also *Barclay v Penberthy* [2012] HCA 40 at paras 43, 44, 86, 173, 174, 176, 177 (commercial pilot owed a duty to a company that had chartered the ill-fated flight for its employees to test marine technology equipment, in relation to pure economic loss flowing from the loss of services of the employees who were killed or injured, because the pilot had knowledge of the company and the purpose of the flight).

> system… It would offend current community standards to impose liability on a defendant for acts or omissions which he or she could not apprehend would damage the interests of another.[136]

Why is an assumption of responsibility an exception to control and knowledge being absolute requirements for establishing a duty of care? Recall the definition of an assumption of responsibility: the defendant assumed responsibility if it was reasonable for the plaintiff to rely on him to take care in performing an activity, and the plaintiff knew or ought to have known of such reliance. We then observe that the bedrock of an assumption of responsibility is not the defendant's control over the risk of harm or actual or constructive knowledge of such harm; rather, it is the reasonableness of the plaintiff's reliance on the defendant to take care in performing an activity. Suppose the defendant expressly undertook to safeguard the plaintiff from harm that a third party might inflict on the plaintiff. Then, notwithstanding that the defendant later realised that he had insufficient control over and/or knowledge of that particular potential harm, it would still be reasonable for the plaintiff to rely on the defendant's (unwithdrawn) undertaking and the defendant to expect the same, and these justify the existence of duty.[137] Thus, we can see why an assumption of responsibility, which by itself can fulfill the Reasonable Expectations Rule, is an exception to control and knowledge being necessary to establishing proximity.

IV. Conclusion

This article has shown that and explained why the three proximities are an unsatisfactory duty-determining device. A new proximity rule is proposed to replace the three proximities: proximity is present if and only if it is reasonable to expect the defendant to take account of the plaintiff's interest in not suffering the damage that he suffered. Guidelines, including a list of proximity factors, have also been suggested.

Our Court of Appeal noted in *Spandeck* that resolving a negligence claim "should be based on general principles that have universal application to every factual situation".[138] Unfortunately, courts have long struggled with formulating general principles of universal application when it comes to determining whether a duty should be imposed. Partly, this is because defining proximity as the three proximities is unduly restrictive. This in turn has compelled courts to couch the real factors going towards proximity in terms of the three proximities.

It is therefore hoped that (a) the new proximity rule proposed in this article will liberalise the concept of proximity by enabling courts to take account of the myriad factors that may be relevant in a duty case; and (b) the guidelines accompanying the new proximity rule will at the same time provide some degree of certainty to the proximity analysis.

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136 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 230 (HCA).
137 See *Michael, supra* note 88.
138 *Spandeck, supra* note 2 at para 28.