The Single Test for Professional Negligence in Singapore

Dr Philip Chan  
National University of Singapore  
bdgccf@nus.edu.sg

Whilst the mother of all common law must be English law, the common law position of professional negligence in Singapore has evolved into a single test for professional negligence regardless of the nature of the loss suffered. The Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37; [2007] 4 SLR 100, has departed from the English law position of having a separate treatment in establishing professional negligence in respect of pure economic loss. This paper examines the rationale for adopting the single test and concludes that it would bring about greater legal certainty without opening the flood gate for unlimited claims.

Duty of Care, Foreseeability, Proximity, Public Policy, Incremental application of test

1. Introduction

Every professional knows that his practice gives him a chance to use the knowledge and the skills that he possesses to earn a livelihood. In return, society, in particular the common law, demands that he exercises care when discharging his professional obligations. It is easier to understand the duty of care owed to a client when there is a contractual relationship. In a case where there is no contractual relationship, the common law would insist that before a professional is found liable for a person’s losses, there must exists a legal relationship termed a legal proximity.

The part of the common law that prescribes rules on professional negligence is called the law of torts. In English law, the origin of negligence could be said to be traced to the case of *Donoghue v Stevenson*¹ wherein the test of proximity appeared to have been fixed to reasonable foresight. In that case, the plaintiff’s claim was in respect of a physical injury after consuming ginger beer that had a decomposed snail soaked in it. The next case on negligence that extended the coverage of the plaintiff’s claim was *Hedley Byrne & Co Ltd v Heller & Partners Ltd*² whereby the court held that in certain circumstances, the defendant would owe a duty of care to the defendant in respect of pure economic loss. This case is also interesting as it held that a defendant could be liable for not just negligent acts but negligent words as well. However, in the case itself the defendants were not liable as there was an exemption clause.

---

¹ [1932] AC 562.  
In Singapore, the courts faithfully followed the English cases and both cases became part of Singapore law. The subsequent development in English courts did not command an obedient acceptance of English case authorities, which strictly speaking, were authorities from a foreign jurisdiction but within the common law family of jurisdictions and could have the status of persuasive precedents only.

Through a series of cases, it was becoming clear that two lines of cases in the law of negligence were forming. There was a test for physical damage and injury and death cases using the test established in *Donoghue v Stevenson* and what has become known as the exclusionary rule of cases using the test established in *Hedley Byrne*. In the meanwhile, the case that caused much concern in the English courts was the case of *Anns v Merton London Borough Council*. It was running against the comfortable pace of measured growth in the law of negligence. It was the concern of many judges that by formulating a universal test where “it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist”, there could be uncontrollable growth of the law of negligence. Indeed, the words of Cardozo CJ in *Ultramares Corp v Touche, Niven & Co*, *ie*, the imposition of “liability in an indeterminate amount for an indeterminate time to an indeterminate class” have haunted many a judge in the English courts. Against this background, the incremental approach in the growth of the scope of negligence became popular both in the English and Australian jurisdictions.

The trend in Singapore did not fit into the development of the English cases as would a hand in glove but generally developed also two similar lines of cases until the recent case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*. The Singapore Court of Appeal in this case laid down a single test to be used to establish professional negligence regardless of the type of loss suffered whether it be pure economic loss or otherwise. This case is taken straight out from a building and construction project involving a certifier engaged by the employer who is being sued by a builder for negligent under-certification resulting in financial loss.

This paper examines the case to see whether the Singapore Court of Appeal is restating existing principles or has something new to offer. Indeed as a critique done on the case, did the Singapore court miss a chance to evaluate all available ideas pertaining to the law of

---

3 [1978] AC 728  
4 255 NY 170 (1931) at 179.  
negligence? It is the intention of this paper to show that whilst the Singapore Court of Appeal has done a good job of reconciling the existing principles put before the court and even refreshing to dissect the concept of foreseeability, there is a missing link.

2. Facts of the Case

The plaintiff was the contractor and the defendant was the Superintending Officer appointed pursuant to the provisions of a building contract. The defendant was not a party to the contract. The contract incorporated the terms of the Public Sector Standard Conditions of Contract (“PSSCOC”), by which an appointed superintending officer was responsible for the administration and supervision of the Project, including certifying interim payments in respect of the appellant’s work for the Project. Another relevant provision is clause 34 which provided for the settlement of disputes including a reference to arbitration. The plaintiff’s case was dismissed and the plaintiff in its capacity as an appellant is appealing against the decision of the learned judge.

It was noted by the Court of Appeal that “the Contract was eventually novated to Neo Corporation Pte Ltd (“NeoCorp”). The novation agreement between the appellant, the Employer and NeoCorp was signed on 16 July 2001”. 6 “At the time of the novation, the appellant had only completed about half of the Contract work. In the ordinary course of events, the appellant would have been paid the full lump sum at the end of the Project and would also have been entitled to submit to the Consultants for certification any claim for works not certified. If disputes arose, the appellant was entitled to submit these disputes for resolution in accordance with the arbitration clause (ie, cl 34 of the Contract). However, the appellant lost this right when it novated the Contract to NeoCorp in July 2001. This was the reason why the appellant had decided to pursue a claim against the respondent in tort to recover its alleged losses.”7

3. Main Issues in the Case

The plaintiff did not have a contract with the defendant. Accordingly, the only cause of action open to the plaintiff was to sue the defendant in tort. It was a case of professional negligence. It was alleged that the defendant negligently under-valued and consequently, negligently under-certified the amount that ought to be due to the plaintiff. As a result, the plaintiff suffered financial loss. This is set out in paragraph 19 below.

---

6 See paragraph 17.
7 See paragraph 18.
The appellant claimed against the respondent for negligence on the basis that the respondent owed it a duty of care to apply professional skill and judgment in certifying, in a fair and unbiased manner, payment for work carried out by the appellant to avoid causing it any loss due to undervaluation and under-certification of works. The appellant claimed that the respondent breached this duty by negligently undervaluing and under-certifying the appellant’s works, leading to the following losses:

(a) $2,234,704.24, being the difference between the amount claimed by the appellant for works done on site, and the certified amount in progress payment No 23;
(b) $290,102.25, being underpayment of variation orders;
(c) $629,994.59, being loss of profit from the balance of works;
(d) $124,827.02, being loss of management fees from mechanical and electrical variation orders; and
(e) $530,324.08, being loss of interest.8

As in all cases of alleged negligence, it is incumbent on the plaintiff to establish that the defendant owes the plaintiff a duty of care.9 There were no further issues discussed by the Court of Appeal as it was able to dispose of the case on the ground that there was a failure to establish such a duty.

4. Establishing a single test for negligence

When faced with the question on the approach to be adopted in establishing a duty of care, the Court of Appeal was disappointed with the current state of affairs10 but was nevertheless guided by the objective of the common law to “reach a result that is fair and just”.11 In order to do that, the court had to balance the interest of the parties. In respect of the defendants, especially those facing pure economic loss claims, the courts ought to exercise caution and judiciousness in not extending the limits of liability for negligent acts to avoid any unforeseen economic cost to the public in the court’s desire to do justice to the claimant in the particular case.12

---

8 See paragraph 9.
9 See paragraphs 21 and 22.
10 See paragraph 27 where the courted noted that, “The current state of the law in Singapore on liability in negligence for pure economic loss, and indeed for physical damage, is not entirely satisfactory.”
11 See paragraph 28.
12 See paragraph 27.
In respect of the claimants, the court was questioning whether it should be guided by a test “which is fair and just between the parties without imposing an unacceptable economic cost to the public” instead of having “different tests to determine the existence of a duty of care for cases of pure economic loss and cases of physical damage”. Consequently, the Court of Appeal had resolved itself to introduce a single universal test rather than status quo rule the day.

…Ultimately, the resolution of a claim in negligence should be based on general principles that have universal application to every factual situation which gives rise to a legal dispute either on liability or damages.

Being aware that it would have to deal with the close historical connection between the Singapore legal system and that with the English common law, the Singapore Court of Appeal reviewed the law as is developing in England that had influenced the decisions in the Singapore courts. As the case law developed in Singapore two English cases appear to dominate.

The first English case of influence is *Anns* which modified universal test the Singapore Court of Appeal used to lay the foundation for a line of cases in Singapore to be created that allowed a successful claim for pure economic loss by a management corporation in a condominium development. The two oft-cited cases are *Ocean Front* and *Eastern Lagoon*. The Singapore Court of Appeal noted the modified “two-stage process” and captured the principle at paragraph 56 as articulated by Thean JA in *Eastern Lagoon*.

As to what this “two-stage process” entailed, Thean JA continued at [31]:

Stripped of the verbiage, the crux of such approach [ie, the “two-stage process”] is no more than this: the court first examines and considers the facts and factors to determine whether there is sufficient degree of proximity in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former. …

Next, having found such degree of proximity, the court next considers

---

13 See paragraph 64.
14 See paragraph 28.
15 See RSP Architects Planners & Engineers v Ocean Front Pte Ltd [1996] 1 SLR 113.
16 See RSP Architects Planners & Engineers v MCST Plan No 1075 [1999] 2 SLR 449.
whether there is any material factor or policy which precludes such duty from arising.17

It was also noted that in modifying the Anns test, the Court of Appeal in Eastern Lagoon reaffirmed that, “The court’s finding … was not premised on foreseeability of damage lone, but on the consideration of other relevant facts.”18

The second English case of influence is Caparo19 which three-part test has been used to establish whether there is a duty of care of owed by a defendant to a plaintiff in which the loss suffered is physical damage. The Singapore Court of Appeal acknowledged that several cases have adopted the three-part test, namely, endorsed Ikumene Singapore Pte Ltd v Leong Chee Leng20; Standard Chartered Bank v Coopers & Lybrand21; Pang Koi Fa v Lim Dfloor Phing22; Mohd bin Sapri v Soil-Build (Pte) Ltd23; D v Kong Sim Guan24; TV Media Pte Ltd v De Cruz Andrea Heidi25; and The Sunrise Crane.26 Lord Bridge of Harwich in Caparo held at 617–618:

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

Then there are several loose canon balls that would randomly shoot across the reasoning of some of the judgments. A hot favourite would be the use of an incremental approach in establishing the duty of care to avoid opening the flood gates to especially pure economic loss claims. The Singapore Court of Appeal noted that the English House of Lords in Caparo27 endorsed the incremental approach advocated by the High Court of Australia in Sutherland.28

---

17 See paragraph 56.
18 See paragraph 45.
19 Caparo Industries Plc v Dickman [1990] 2 AC 605.
23 [1996] 2 SLR 505.
24 [2003] 3 SLR 146.
25 [2004] 3 SLR 543
27 Caparo Industries Plc v Dickman [1990] 2 AC 605.
28 Sutherland Shire Council v Heyman (1985) 60 ALR 1.
In response, the Singapore Court of Appeal had expressed its reservations of the use of the approach but advanced its own understanding of it in paragraph 43. The court advocated an approach that would allow “interaction of the universal with the particular”. It had noted earlier in its judgment at paragraph 28 that, “These general principles provide the focus to which the particular (viz, the facts of decided cases and the present case) must then be analysed so that the courts may, within this aggregation of the universal and the particular, reach a result that is fair and just.”

If incrementalism is intended to return the development of liability in negligence to the basis that discrete sets of rules should govern different factual scenarios, the central problem, as Prof Stanton noted at p 48, is that it requires a return to an approach which has been systematically destroyed since Donoghue v Stevenson, as generations of lawyers have since been trained to believe that the tort of negligence is based on a common general principle. In this respect, we agree with Lord Bingham of Cornhill in Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181 (“Customs and Excise Commissioners”), where he observed (at [7]) that the “incremental test is of little value as a test in itself, and is only helpful when used in combination with a principle which identifies the legally significant features of a situation”. In our view, incrementalism is not a distinct and alternative method which results in a plethora of discrete sets of rules (as opposed to a set of general (and universal) principles). Instead, it is an analogical process to apply specific facts to the general principle. According to this approach, a court should, when applying the specific step of the general principle, utilize the incremental methodology to decide first whether that specific step (or criterion) can be satisfied with reference to decided cases. This will provide an essential check to any unwarranted expansion of liability for negligent acts. However, as we will further observe (at [72] below), where there are no decided cases, recourse to general principles is not only valid but also desirable. Such an approach, an interaction of the universal with the particular (see [28] above), would, in our view, aid in the development of a rational and purposive concept of negligence which can achieve fairness and justice in each case.  

29 See paragraph 43.
Related to the incremental approach would be the exclusionary rule that appeared to be adopted by the House of Lords in Murphy\textsuperscript{30} which is seen as an approach that seeks to balance and perhaps control cases that would otherwise fall into the legal abyss pursuant to the threat of a state of indeterminacy as alerted by Cardozo CJ in the application of a universal rule allowing a successful claim of pure economic loss. The Singapore Court of Appeal accepted at paragraph 45 that, “it has long been recognised that the effect of Murphy is simply that English law will deny the existence of a duty of care to any individual suffering pure economic loss caused by careless acts or omissions where there is neither personal injury nor property damage: see Charlesworth & Percy on Negligence (Sweet & Maxwell, 11th Ed, 2006) at para 2-134.”

The last category of cases given recognition by the Singapore Court of Appeal has its origin in Hedley Byrne\textsuperscript{31}. Essentially, the court noted at paragraph 44 that the cases concern “liability for psychiatric harm and negligent misstatements causing pure economic loss” were grounded “on an assumption of responsibility towards the recipient of the statement in question and reliance by him on its accuracy”.

6. The Single Test Explained

The Singapore Single Test for negligence has three parts as set out below.

1. test for factual foreseeability
2. tested for proximity with an incremental approach
3. test for policy with an incremental approach

It is explained in paragraph 73 of the Singapore Court of Appeal judgment in Spandeck. The court acknowledged that it is, “basically a restatement of the two-stage test in Anns, tempered by the preliminary requirement of factual foreseeability” and has been applied previously in other jurisdictions.\textsuperscript{32}

In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if its application is

\textsuperscript{30} Murphy v Brentwood District Council [1991] 1 AC 398.
\textsuperscript{31} Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.
\textsuperscript{32} See paragraph 73 where it was, inter alia, stated, “We would admit at this juncture that this is basically a restatement of the two-stage test in Anns, tempered by the preliminary requirement of factual foreseeability. Indeed, we should point out that this is the test applied in substance by many jurisdictions in the Commonwealth: see, for example, the Canadian case of Cooper v Hobart (2001) 206 DLR (4th) 193; the New Zealand case of Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324; and the general summary provided in Phang, Saw & Chan ([26] supra) at 9–28.”
preceded by a preliminary requirement of factual foreseeability. We would add that this test is to be applied incrementally, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. …

Whilst acknowledging that, “factual foreseeability is too wide a criterion to be effective as a legal control mechanism if all that it means is that the defendant ought to have known that the claimant would suffer damage from his (the defendant’s) carelessness”, the court went on to state that it, “is not to say that it is not a necessary element in any claim in negligence, just that it is a threshold question which the court must be satisfied is fulfilled, failing which the claim does not even take off”. If the threshold question is answered in the positive, the proximity test is applied.

In the test of proximity, the Singapore Court of Appeal adopted Deane J’s analysis in Sutherland, “that proximity includes physical, circumstantial as well as causal proximity”. This, the court felt, “does provide substance to the concept since it includes the twin criteria of voluntary assumption of responsibility and reliance, where the facts support them, as essential factors in meeting the test of proximity.” As regards using the incremental approach in establishing proximity, the court held at paragraph 82 that, “the court should apply these concepts first by analogising the facts of the case for decision with those of decided cases, if such exist, but should not be constrained from limiting liability in a deserving case only because it involves a novel fact situation”. Once a prima facie duty of care arises, policy considerations would be examined.

As guardians of justice, courts are tasked with duty to ensure that policy considerations do not result in “arbitrary decisions”. Accordingly, the courts take heed of “the obvious

33 See paragraph 75.
34 See paragraph 76.
35 See paragraph 81.
36 See paragraph 83.
objections to utilising policy as the overarching determinant of liability”. However, the courts are accept that, “it is inescapable that some measure of public policy must be considered but it must not be the sole determinant”. Amongst the policy considerations, the court included (a) the contractual matrix which defines the rights and liabilities of the parties and the relative bargaining positions of the parties; (b) value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals; and (c) greater moral, social, economic, administrative or philosophical public perceptions. In any event, the Singapore Court of Appeal cautioned that, “…the courts must be careful to differentiate such considerations from the requirement of proximity…”

7. Applying the single test to the facts

7.1 Factual foreseeability

In the application of the single test to the case, the court held at paragraph 89 that the factual requirement of foreseeability was satisfied as “it must have been foreseeable to the respondent that any negligence in its certification would directly deprive the contractor of moneys he would otherwise have been entitled to, and that if it had been paid the correct amounts, it might not have got into financial difficulties”.

7.2 Incremental approach applied to proximity issue

The actual mechanics of the application of the single test appear to show the “hunt” for a precedent with salient facts that are materially the same as the present case. Once the case is found, it is dissected for an examination of the precedent’s application of the test of proximity to see whether it satisfies Singapore’s single test. A further test would be to identify its “track record” as a precedent whose decision has been followed by courts of other jurisdictions as well or not.

The case identified is Pacific Associates Inc v Baxter and the principles looked at are whether there was a reliance on the part of the contractor and whether there was an assumption of responsibility on the part of the certifier. Essentially, the English Court of Appeal held that the existing contractual arrangement clearly showed that there was no contract between the two although if the two wanted to, they could easily have been arranged

---

37 See paragraph 83.
38 See paragraph 84.
39 See paragraph 83.
40 See paragraph 85.
41 See paragraph 85.
42 See paragraph 84.
43 [1990] 1 QB 993.
for a contractual relationship between the two. This meant that each was expected to play
their respective role in the contractual matrix that did not bring about any reliance on the
certifier’s services on the part of the contractor or any assumption of responsibility on the
part of the certifier towards the contractor.44

7.3 Incremental approach applied to policy issue

Using the same case, the Singapore Court of Appeal adopted Russell LJ’s decision on policy
consideration where he held that, “it was not just and reasonable that there should be imposed
on the engineer a duty which the contractor chose not to make a contractual one because,
inter alia, the arbitration clause provided an adequate remedy in the event of under-
certification”.

7.4 Incremental Approach through precedent analysis

It was found by the Singapore Court of Appeal that the courts of two other jurisdictions,
namely, Australia45 and Hong Kong,46 have adopted the decision of Pacific Associate.

Having reviewed cases from the other jurisdictions that followed the Pacific Associate, the
Singapore Court of Appeal held that there was no good reason to depart from the decision of
the case as in the cases reviewed they have adopted the case as an authority and accordingly
found that there was no legal proximity created by the set of circumstances. The court went
one step further and held that even if duty of care is established, the court would have
adopted the policy consideration not to impose a duty of care on the defendant.

8. Observations

It would appear that the Singapore Court of Appeal was properly guided by current
precedents as the number of decisions referred to from five other jurisdictions totalled 28
decisions with the English decisions leading at twenty-two decisions, then a drastic levelling
to two decisions each from Australia and New Zealand and one decision each from Canada
and the United States of America. In paragraph 73 of its judgment, the Singapore Court of
Appeal acknowledged that the single test is a restatement of the two-stage test in Anns with
modifications and justified the use of it by apparently stating that “many jurisdictions in the
Commonwealth” have already applied the single test.

44 See paragraphs 99 and 100.
46 Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd (1989) 47 BLR 139.
It would appear that the court was satisfied that the single test was not a completely new test but one that presumably took account of the leading cases from the whole of the Commonwealth. However, it would also appear that a rather important Australian High Court case did not make its appearance in the judgment, namely, *Perre and others v Apand Pty Ltd*. Otherwise, the Singapore Court of Appeal would have had the opportunity to consider incorporating what is termed the “vulnerability” factor. In *Perre*, McHugh J said at paragraph 118 that,

“The vulnerability of a plaintiff to a harm from the defendant’s conduct is therefore ordinarily a pre-requisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant’s conduct and was not induced by the defendant’s conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.”

This principle was applied by the High Court of Australia in *Woolcock* which did not follow *Bryan v Maloney*. It has since remained in favour. In a very recent case in January 2008, the Supreme Court of Northern Territory in the case of *NTA v Johnson Holland Pty Ltd & Ors* in an application to strike out the Statement of Claim by one of the defendants for not disclosing a cause of action against it granted the application on the grounds that,

“…the Statement of Claim should be struck out against the sixth defendant as not disclosing a cause of action. The pleading must disclose the facts upon which it is alleged the duty of care would arise. Here a necessary ingredient was the vulnerability of the plaintiff in the relevant sense. The facts alleged in the Statement of Claim do not allege that the plaintiff was, in any relevant sense, vulnerable to the economic consequence of any negligence of the sixth defendant.”

9. Conclusion

The concept of the common law that it exists and is awaiting discovery has its charm but in practice, the development of the common law depends on three main things. First, it depends on the thoroughness of counsel’s getting up work and the robustness of their submissions.

---

47 (1999) 164 ALR 606
48 *Woolcock Street Investments Pty Ltd v CDG Pr7y Ltd* [2004] HCA; 216 CLR 515; 205 ALR 522; 78 ALJR 628.
51 See paragraph 33.
Second, with the deepest respect, it depends on the soundness of the bench. Third, it depends on the financial stamina of the appellant and its willingness to wash dirty linen in public.

For many years, Singapore had used a legacy left by the British in its legal framework, that is, to receive English law into the Singapore legal system and to treat it as part of its law. Whilst the British might have presumably wanted a law that they are familiar while occupying Singapore, Singapore, when it became an independent country, realised that the running of a common law legal system requires its citizens to contribute to its development by financing disputes in court, yes, if possible, at the highest appellate court. Thus, the continued reception of English law until 1993 was, not altogether, a disservice to the development of Singapore common law given that Singapore had a small population and its population is unlikely to resolve their disputes in court as it is accustomed to mediation by village heads and clan leaders.

However, Singapore is no longer bound by what the English courts decide but being a member of the family of common law, the courts now has the advantage of tapping on the rich pool of case law generated by the larger and more litigious countries in the Commonwealth. Therefore, it is not a happy occasion when an important case appears in the highest court in the land and a case available to shed light on an important point of law for consideration is left out of the judges’ deliberation, especially when they are laying down an important test to determine whether a defendant owes a duty of care to a plaintiff while the defendant is carrying out some commercial activity.

Nevertheless, Singapore courts are now guided by a single, uniform professional negligence test applicable to both pure economic loss cases as well as other non-pure economic loss cases.