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Spandeck: A Relational View of the Duty of Care

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Abstract

The use of a general framework in the determination of a duty of care has seemingly fallen out of favour following the UK Supreme Court's decision in *Robinson*. Relying on the example of the *Spandeck* framework in Singaporean jurisprudence, this piece presents the argument that such frameworks, being consistent with a relational conception of tort law, can provide a useful means of determining whether a duty of care exists. In so doing, this piece addresses some criticisms of the relational view and re-emphasises the important role the duty of care plays in the tort of negligence.

Keywords: tort, negligence, corrective justice, duty of care, Spandeck

I. Introduction

Almost 90 years have passed since the seminal judgment in *Donoghue v Stevenson*.[1] Yet the duty of care concept remains fraught and contested.[2] The lack of a clear approach is problematic.[3] Tort law, being a "social and evolutionary phenomenon

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1 [1932] AC 562.

2 See *Robinson v Chief Constable of West Yorkshire Police* [2018] 2 All ER 1041 [21], [30], [83], [100].

3 Andrew Clarke and John Devereux, 'Hard Cases Making Bad Law: The Elusive Search for a Test for Duty of Care' (2019) 26 Tort L Rev 177, 183.

[…] where the law and social life affect each other in complex ways"[4] must therefore continually adjust to rapidly changing social circumstances. Courts may soon be invited to decide whether duties of care exist in novel cases.[5] While existing legal principles may be extended to cover unique factual matrices that may arise,[6] these legal principles must be coherent if they are to be meaningfully applied.

This article therefore argues that the general framework set out by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* represents a clear and principled approach to analysing a duty of care.[7] Writers have expounded on the merits of the *Spandeck* framework[8] or have attempted to flesh out the concept of proximity,[9] but I aim to add to this literature by showing how *Spandeck* is consistent with a relational theory of tort law.[10]

Following the introduction in Part I, this article proceeds in four parts. Part II lays out the features of the *Spandeck* framework. Part III sketches out how a relational theory of tort is reflected in the *Spandeck* framework. Criticisms of the relational view and of proximity will be addressed, along with some implications arising from the relational view of tort. Part IV explains, with reference to cases, how *Spandeck* reflects this relational view sketched out in Part III. Slight changes are proposed to the *Spandeck* formulation to better align it with the relational view. Part V concludes.

II. Features Of *Spandeck*

Spandeck is a two-stage test prefaced by the threshold requirement of factual foreseeability. The threshold requirement of factual foreseeability is a low one that will invariably be satisfied in most cases.[11] Here, the courts examine the facts to

4 Peter Cane, *Key Ideas in Tort Law* (Bloomsbury, 2017) 81–82; Goh Yihan, 'Tort Law in the Face of Land Scarcity in Singapore' (2009) 26(2) Arizona J of Intl & Comparative L 335.

5 *Oscar Willhelm Nilsson v General Motors LLC* (ND Cal) (Trial Pleading) WL 514625 (2018). The Plaintiff in this case was involved in an accident with a self-driving vehicle. He sued General Motors ("GM") in the tort of negligence, alleging that GM owed him a duty to have its self-driving vehicle operate in a manner which obeyed traffic laws and regulations.

6 *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004, 1026–27.

7 [2007] 4 SLR(R) 100 [72]. See also David Tan and Goh Yihan, 'The Promise of Universality' (2013) 25 SAcLJ 510 [4]–[8]; *Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others (CA)* [2013] 3 SLR 284 [54].

8 David Tan, 'The End of the Search for a Universal Touchstone for Duty of Care?' (2019) 135 LQR 200.

9 David Tan, 'The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care' (2010) SJLS 459, 469 – 481.

10 See generally Ernest Weinrib, 'The Disintegration of Duty' (2006) 31(2) Advocates Quarterly 212, 233–45.

11 *Spandeck* (n 7) [75]–[76].

determine if it would have been foreseeable to the defendant that a failure to take reasonable care would result in the plaintiff suffering loss.[12]

At the first stage, the court considers whether there is legal proximity between the parties.[13] Proximity includes "physical, circumstantial and causal proximity" and the "twin criteria of voluntary assumption of responsibility and reliance" ('VAR-R'),[14] and has been expanded to include other factors, such as knowledge.[15] If the proximity requirement is met, a *prima facie* duty of care arises.[16] At the second stage, policy factors militating against the imposition of this duty are considered. This involves a "weighing and balancing of competing moral claims and broader social welfare goals".[17] Examples of policy factors include the existence of a contractual framework,[18] indeterminate liability,[19] and the value of human life.[20] Policy reasons that favour imposing a duty of care can be considered to dismiss the defendant's "spurious negative policy considerations".[21]

III. Clearing the Conceptual Ground

Proximity is central to the *Spandeck* framework.[22] Other jurisdictions, however, have utilised concepts such as "reasonable foreseeability"[23] or policy reasons in the duty of care analysis.[24] Here I address some criticisms of proximity in the duty of care analysis, arguing that this analysis is best approached through the concept of proximity because it reflects the essence of tort law which is, on the relational view, primarily concerned with corrective justice.[25]

A. Addressing criticisms of proximity

There are two main criticisms against using proximity to determine the existence of a duty of care: first, proximity merely expresses "the result of

12 ibid [89]; *Animal Concerns Research & Education Society v Tan Boon Kiwee* [2011] 2 SLR 146 [35].
13 *Spandeck* (n 7) [77]–[82].
14 ibid [81].
15 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 588 [50].
16 *Spandeck* (n 7) [83].
17 ibid [85].
18 ibid [114].
19 *NTUC Foodfare* (n 15) [54].
20 *Man Mohan Singh s/o Jothirambal Singh and another v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 [51]; *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 [210].
21 *Animal Concerns* (n 13) [77].
22 *Spandeck* (n 7) [79]–[81].
23 See Stephen Todd (ed), *The Law of Torts in New Zealand* (6th edn, Thomson Reuters 2013) [5.2.03].
24 See *Robinson* (n 2) [29], [30], [42]; *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649.
25 See John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30(1) Law and Philosophy 1, 6.

a process of reasoning rather than the process itself";[26] and, second, proximity has been described as a mere label in contrast with a proper concept insofar as a duty of care is concerned.[27] Plunkett, for example, cites Mason CJ and Wilson J's dissent in *Hawkins v Clayton*,[28] arguing that proximity is a mere label and pointless as a concept.[29] Both judges opined that the relevant inquiry was whether "the professional relationship of solicitor and client gave rise to a *relationship of sufficient proximity* founded upon an assumption of responsibility […] and reliance".[30] Plunkett argues that the reference to "more specific concepts"[31] in determining the existence of a duty supports the aforementioned criticisms of proximity. A closer examination of the judgement, however, suggests that both judges used proximity *qua* descriptor and not *qua* concept. Both judges concluded that "intermeddling in the estate has no bearing on the existence or otherwise of the *requisite relationship of proximity* […] sufficient to found the alleged duty".[32] Clearly, both judges expressed the result of their analysis by saying that there was no "relationship of proximity".[33]

Criticisms of proximity therefore stem from the lack of a clear understanding of the context in which 'proximity' is used.[34] Where there is a duty of care, the parties are in sufficient *proximity* to each other. We express the results of our analysis accordingly: "a duty arises because the parties are sufficiently proximate" or there was a "relationship of proximity". In these statements, proximity expresses the result of finding that there is a duty of care in a particular situation. But that is different from the idea of proximity *qua* concept.

Moreover, 'proximity' in common parlance gives the impression of the parties being close in space and time.[35] One might interpret the statement "a duty arises because the parties are sufficiently proximate" to mean that a duty arises because both parties are sufficiently close to each other in *time* and *space* such that

[26] *Hill v Van Erp* (1997) 71 ALJR 487, 558. See also James Plunkett, *The Duty of Care in Negligence* (Hart Publishing 2018) 188.

[27] *Caparo v Dickman* [1990] 2 AC 605, 628. Cf Andrew Phang, Cheng Lim Saw, and Gary Chan, 'Of Precedent, Theory and Practice - The Case for a Return to Anns' (2006) SJLS 1, 41–42.

[28] (1988) 78 ALR 69.

[29] Plunkett (n 26) 188.

[30] *Hawkins v Clayton* (1988) 78 ALR 69, 72 (emphasis added).

[31] Plunkett (n 26) 188.

[32] ibid 73 (emphasis added).

[33] ibid.

[34] See David Adger, 'This Simple Structure Unites All Human Languages' (2019) 76 Nautilus <http://nautil.us/issue/76/language/this-simple-structure-unites-all-human-languages> accessed 27 September 2019.

[35] See Low Kee Yang, 'Occupiers' Liability After See Toh: Change, Uncertainty and Complexity' (2013) SJLS 457, 468.

one party ought to take reasonable care, by bearing in mind the other party, when acting.[36]

However, the definition of "proximity" extends *beyond* temporal and spatial relationships. For instance, in *Spandeck* the court relied heavily on the *Sutherland* factors[37] which not only include physical and causal, but also circumstantial, proximity which Deane J in *Sutherland* described as "an overriding relationship of employer and employee".[38] Subsequent cases, applying the concepts of VAR-R or knowledge to establish the presence of a *prima facie* duty of care, have expanded the scope of proximity beyond the temporal and spatial aspects. In cases relying on VAR-R, it would be a stretch to use proximity in terms of being close in time and space. Proximity in these cases demonstrates a different meaning: that both parties are close in terms of *moral* relationships.[39]

Courts are aware of the propensity of language to confuse. In *NTUC Foodfare Co-operative Ltd v SIA Engineering Company Limited* ('*NTUC Foodfare*'),[40] the case involved a claim for pure economic loss arising from the defendant's negligent operation of an airtug which crashed into a pillar. This caused structural damage, affecting the plaintiff's food kiosk which was situated nearby. Consequently, the plaintiff was forced to shut its food kiosk. The court held that there was sufficient legal proximity between the plaintiff and the defendant to found a duty of care.[41] This was due to "physical proximity between the parties" as the defendant was "operat[ing] airtugs in close *propinquity* to the [plaintiff's] [k]iosk".[42] Using *propinquity* instead of *proximity* signifies that the court did not want to confuse proximity *qua* legal concept and proximity *qua* descriptor in describing the facts.

Clearly, the context in which "proximity" is used distorts its meaning *qua* concept and meaning *qua* descriptor. This confusion, however, can be resolved by understanding that proximity refers to a set of intrinsic characteristics and its centrality in the duty of care analysis which the court in *Spandeck* alluded to in that "proximity has some substantive content that can be expressed in terms of legal principles".[43] The linguistic meaning of proximity in this context is that of

[36] See also Justin Tan, 'Proximity as Reasonable Expectations' (2019) SJLS 147, 167.
[37] Spandeck (n 7) [81] citing *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.
[38] *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 55–56.
[39] See Section C "Proximity Defined qua Concept" below.
[40] [2018] 2 SLR 588.
[41] ibid [46].
[42] ibid [47] (emphasis added).
[43] Spandeck (n 7) [80]. See also *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 [183]–[185] where the Singapore Court of Appeal distinguished between descriptive and normative restitution. The former does not shed "any light on why the gains were disgorged as well as the conceptual basis of the relevant head of damages".

a *concept* bearing certain *essential* characteristics,[44] not of a *descriptor*. Having made this crucial distinction, the following sections flesh out what proximity *qua* concept means and how it instantiates a relational view of tort law.

B. Defining concepts

There are three possible ways of defining proximity *qua* concept. First, through essentialism, concepts are defined by drawing from the essence of the concept itself.[45] It arises from the idea that everything has a basic set of characteristics. The process of defining involves "isolating this common nature or intrinsic property".[46] Second, concepts may also be defined through linguistic use: the definition of the concept arises from the manner of its linguistic usage.[47] The traditional interpretation of Wittgenstein's 'family resemblance' passages is a straightforward denial of essentialism: there is no essentialist definition that captures the common features of a concept-word.[48] Concept-words therefore only derive their identity from "a shareable practice of expression, reaction and use of language".[49] Bangu's alternative interpretation of Wittgenstein posits that "speakers do not need to know an essentialist definition of games in order to apply [the word] game[s] correctly".[50] One does not "feel the pressure of the requirement to be able to identify a common feature while we use the terms correctly".[51] For instance, one does not need to identify common features of games to use the word 'game' correctly.

Where essentialism is concerned, concepts clearly do not exist independently of language. On the other hand, Bangu might have a point that everyday users of language need not know the common features encapsulated by a word to use that word correctly. However, where the law is concerned, and concept-words are used to denote or refer to certain ideas, one must know what these ideas are to correctly use the concept-word. For example, to use 'consideration' in contract law correctly,

[44] See Desmond Manderson, 'Emmanuel Levinas and the Philosophy of Negligence' (2006) 14 Tort L Rev 33, 46.

[45] Michael Freeman (ed), *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) [1-009].

[46] ibid.

[47] ibid [1-008].

[48] Sorin Bangu, 'Later Wittgenstein on Essentialism, Family Resemblance and Philosophical Method' (2005) 6(2) Metaphysica 53, 56.

[49] Stewart Candlish and George Wrisley, 'Private Language' (Stanford Encyclopaedia of Philosophy, 30 July 2019) <https://plato.stanford.edu/entries/private-language/#SigIss> accessed 27 September 2019.

[50] Sorin Bangu, 'Later Wittgenstein on Essentialism, Family Resemblance and Philosophical Method' (n 48) 62.

[51] ibid.

one must know the bundle of ideas (i.e., an element in the formation of a valid contract) to which it refers.

The third way of defining concepts, termed by Zipursky, is "pragmatic conceptualism".[52] In accordance with this view, concepts are understood by grasping from "within the practices of the law, the pattern of verbal and practical inferences that constitute the relevant area of the law".[53] While the starting point of any concept focusses on linguistic expression,[54] and concepts can be "partially shaped by linguistic practices, this does not necessarily entail that concepts are meanings".[55] For instance, considering the various *concepts* of law, *viz.*, law as a series of general orders backed up by threats (Austin) or law as a union of primary and secondary rules (Hart), this differs from how lawyers or laypeople use the word 'law'. Per Canale, "conceptual content does not identify with linguistic content, although the former is strictly related to the latter".[56]

Pragmatic conceptualism holds that the rules and principles of tort, which are not *identical* to their verbal formulations, can be found in the *practice* of participants of the legal community.[57] While linguistic usage of proximity can confuse, a closer look at how the Singapore courts have used "proximity" in the *context* of the *Spandeck* framework suggests that it refers to certain principles of tort law.

Next, I sketch out how 'proximity' and the *Spandeck* framework are intrinsically tied to a *relational* view of tort law, and I address critiques of the relational view, arguing that it can accommodate instrumental concerns present in policy reasoning.

C. Proximity defined *qua* concept

(i) The Relational Theory of Tort and of Proximity

A perusal of cases demonstrates that the Singapore courts have used proximity to denote the existence of a "relationship between the tortfeasor and

[52] Benjamin C Zipursky, 'Pragmatic Conceptualism' (2000) 6 Legal Theory 457.
[53] ibid 473.
[54] Damiano Canale, 'Consequences of Pragmatic Conceptualism: On the Methodology Problem in Jurisprudence' (2009) 22(2) Ratio Juris 171, 173–74.
[55] ibid.
[56] ibid.
[57] Hanoch Dagan and Benjamin Zipursky, 'The Distinction between Private Law and Public Law' 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641950> accessed 27 September 2019.

the claimant insofar as it is relevant"[58] to the loss suffered by the claimant. Factors such as causal, physical and circumstantial proximity indicate when proximity is made out in a particular case.[59] Therefore, the *Spandeck* framework deals with the fundamental question of whether a relationship exists between the tortfeasor and claimant in the present case such that the law of negligence should apply.[60]

As I seek to sketch out in this section, and explain in Part IV, this is consistent with a relational, as opposed to an instrumentalist, view of tort law which conceives of tort law as a mechanism for pursuing "collective goals such as economic efficiency and loss spreading".[61] The problem with the instrumentalist view is that in explaining the *function* of tort law, it glosses over the importance of the concept of a duty of care.[62]

Relational theories, however, conceptualise tort law as regulating "certain kinds of interactions or transactions between" [63] people. A duty of care is owed if our behaviour would result in "some other aspect of a person's life being damage[d] or imperilled".[64] This is expressed in terms such as 'interactional', 'transactional', 'bipolar', 'bilateral' and 'correlative'.[65] A duty, if breached, gives rise to a corresponding right *in personam*.[66] Significantly, the relational view reveals the moral aspect of tort law based on corrective justice. Tort law is concerned with the relationship between "the defendant's doing and the plaintiff's suffering"[67] harm as a consequence.

That duties cannot be owed to strangers is one objection to the relational view.[68] Howarth observes that "defendants have had no relationship[s] at all with

[58] *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 [32]; see *Toh Siew Kee* (n 7) [53]; *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 [37]; *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 [243] ('Ramesh'); *NTUC Foodfare* (n 15) [43]; *Minichit Bunhom v Jazali bin Kastari and another* [2018] SGCA 22 [2].

[59] Norman Katter, 'Who Then in Law is My Neighbour? Reverting to First Principles in the High Court of Australia' (2004) 12 Tort L Rev 85, 97.

[60] See *Caparo v Dickman* [1990] 2 AC 605, 363.

[61] Stephen Perry, 'Torts, Rights, and Risk' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2018) 39.

[62] ibid 41. See Robert Stevens, *Torts and Rights* (OUP 2012) 2; Canale, (n 54) 484; Kenneth M Ehrenberg, *The Functions of Law* (OUP 2016) 5.

[63] Stephen Perry, 'Torts, Rights and Risk' (n 61) 38–64.

[64] John Gardner, *From Personal Life to Private Law* (OUP 2018) 50.

[65] Stephen Perry, 'Torts, Rights and Risk' (n 61) 40.

[66] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Canale (n 54) 463.

[67] Ernest Weinrib, 'The Special Morality of Tort Law' (1989) 34(3) McGill LJ 403, 408; John Gardner, *From Personal Life to Private Law* (n 64) 50.

[68] Nicholas J McBride, 'Duties of Care - Do They Really Exist?' (2004) 24(3) OJLS 417, 433.

their claimants".[69] Even if we can owe a duty of care to strangers, we cannot give reasons for owing such duties. Reasoning that a duty of care arises out of some relationship with a potential victim entails a perverse "view of what counts as a relationship".[70] Howarth thus concludes that some "tort duties derive from general law" and not from relations or relationships.[71] According to Howarth, where strangers are concerned, the relationship between the wrongdoer and sufferer only crystallises at the point the tort is occasioned.[72] Therefore, because no such relation existed prior to the commission of the tort, the relational view cannot explain why we owe duties of care to strangers.

However, counterfactuals can explain why a duty of care exists on a relational view.[73] Say, for example, I injure a pedestrian because of my negligent driving. *Pace* Howarth, absent a relationship between me and the victim when the tort was committed, the relational view cannot explain why a duty is owed.[74] Counterfactuals, the use of which is not alien to tort law (i.e., the "but-for" test in causation,[75] and the assessment of damages[76]), can explain this. In the counterfactual, we can imagine the identical situation of driving along the same road, except that no accident took place this time. With knowledge of the facts that an accident that resulted in injury *did* occur, one can ask whether a relationship should exist between the potential wrongdoer and sufferer such as to impose a duty of care on the potential wrongdoer. This is known as "conceptual blending".[77]

[69] David Howarth, 'Many Duties of Care - Or a Duty of Care? Notes from the Underground' (2006) 26(3) OJLS 449, 463.

[70] ibid 464.

[71] ibid.

[72] ibid 463–64.

[73] See Steven L Winter, 'Frame Semantics and the Internal Point of View'. in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues* Vol 15 (OUP 2013).

[74] See *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 (holding that procedural rules bar a claimant from suing a totally anonymous person).

[75] Michael Jones (ed), *Clerk and Lindsell on Torts* (20th edn, Sweet and Maxwell 2010) [2-09].

[76] ibid [28-07].

[77] Steven L Winter, 'Frame Semantics and the Internal Point of View' (n 73) 120.

It involves projecting oneself into an alternate mental space whilst retaining knowledge of the facts at hand in a manner described above.[78]

Our use of counterfactuals reveals deeper implications,[79] capturing our view of moral responsibility.[80] Our ability to empathise enables us to consider the counterfactual.[81] It demonstrates that we are not *merely* neighbours in a "temporal or spatial sense".[82] While the law "does not make everyone responsible for everyone else",[83] it should not "veer towards an asocial view of responsibility".[84] We grasp this intuitively by standing in the defendant's shoes and reflecting on whether reasonable care should have been taken. In this manner, questions of what we owe each other as human beings are constantly implicated in the morality at the heart of the tort of negligence.[85] This can be explained and justified using the norms of friendship.[86] Friendship contains two norms: legitimate expectations and intrinsic worth.[87] The former demands that we recognise the claims we have on our friends and the reciprocal claims they make on us.[88] The latter informs us that friendship, "in which each is loved as an end, attests to the intrinsic worth of each person".[89] Law is also concerned with these two norms. The rights and obligations arising from a legal relationship have the nature of norms similar to those in friendship (i.e., legitimate expectations and reciprocity).[90] Once law recognises these norms in certain relations, they cannot be "denied in other relationships involving similar persons".[91] To illustrate, once the law holds that a duty of care exists between a doctor and a patient, it creates a set of rights and obligations between them. This set of rights and obligations should also exist between other doctors and their

78 Mark Turner and Giles Fauconnier, 'Conceptual Integration in Counterfactuals'. in Jean-Pierre Koenig (ed), *Discourse and Cognition: Bridging the Gap* (University of Chicago Press 1998).

79 Ruth MJ Bryne, 'Counterfactual Thinking: From Logic to Morality' (2017) 26(4) Current Directions in Psychological Science 314, 318–20; Nicole Van Hoeck, Patrick D Watson and Aron K Barbey, 'Cognitive Neuroscience of Human Counterfactual Reasoning' (2015) 9 Frontiers in Human Neuroscience 1.

80 Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) 371.

81 Gary Low, 'Emphatic Plea for the Empathic Judge' (2018) 30 SAcLJ 97 [15].

82 John Gardner, *From Personal Life to Private Law* (n 64) 47.

83 Tan Seow Hon, *Justice as Friendship* (Ashgate 2015) 155.

84 ibid. See also Manderson (n 44) 36.

85 ibid 156; John CP Goldberg and Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54(3) Vanderbilt L Rev 657, 735; Samuel Scheffler, *Human Morality* (OUP 1992) 68–69.

86 Scheffler (n 85) 75–109.

87 Tan (n 83) 89; see *Toh Siew Kee* (n 7) [22].

88 ibid.

89 ibid.

90 ibid.

91 ibid.

patients. Moreover, law is also concerned with the "dignity of human beings in general".[92] In serving as a guide to human conduct, it is based on the conception of man as a "responsible agent with dignity".[93] Therefore, the norms in friendship can serve to justify law.[94] In doing so, it reflects the "relational nature of justice attach[ing] to"[95] the particular relationship between the parties.

(ii) Accommodating the Instrumental View within the Relational View

That said, the instrumental and relational views are not necessarily mutually exclusive.[96] The instrumental view can also be accommodated within a framework that is based on a relational view.[97] In saying that instrumentalist concerns can influence the relationship between the tortfeasor and claimant when social welfare considerations are considered in deciding whether a duty of care should be imposed,[98] I depart from Weinrib's view that arguments seeking to "have the law achieve goals external to the parties' relationship – whether instrumental, distributive, or economic – are all structurally inconsistent with fair and coherent determinations of liability".[99] As Gardner points out, legal recognition of this relationship between the parties is a question of distributive justice.[100] How, then, can this be consistent with a relational view of tort law which deals with interpersonal justice? The answer is apparent if one considers that policy reasons can modify the legitimate expectations of parties,[101] thereby affecting the bilateral relationship between such that this relationship cannot justifiably be recognised at law. Instrumentalist concerns of distributive justice are typically reflected in policy reasons which deal with collective welfare and social goals. The availability of insurance, which encapsulates the instrumentalist concern of loss-spreading, is one example.[102] To be clear, policy reasons feature in modifying the legitimate

92 ibid.

93 Lon Fuller, *The Morality of Law* (Yale University Press 1964).

94 Tan (n 83) 89.

95 ibid 92.

96 Marco Jimenez, 'Finding the Good in Holmes's Bad Man' (2011) 79 Fordham L Rev 2069, 2117–18.

97 See John Oberdiek, 'Method and Morality in the New Private Law of Torts' (2012) 125 Harvard L Rev Forum 189, 190–91; John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2018) 346.

98 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, 38; Tan (n 83) 89; John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (n 97); Andrew Robertson, 'On the Function of the Law of Negligence' (2013) 33(1) OJLS 31, 36–37.

99 Ernest Weinrib, 'Private Law and Public Right' (2011) 61 U of Toronto LJ 191, 192.

100 John Gardner. 'What is Tort Law For? Part 2. The Place of Distributive Justice' (n 97) 341.

101 ibid 159.

102 *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 [87]; *NTUC Foodfare* (n 15) [55]–[56].

expectations of parties.[103] The issue is not whether imposing a duty of care would result in increasing insurance premiums; rather, if insurance is available, both parties cannot legitimately expect that they can have recourse to tort as there is an insurance policy in play. And because they cannot legitimately expect to have recourse to tort, this justifies the court's non-recognition of the bilateral relationship at law.

How then does the relational view advanced above gel with the *Spandeck* framework? At the first stage, the concept of proximity establishes the bilateral relationship between tortfeasor and claimant. At the second stage, policy factors either favour or militate against the recognition of this bilateral relationship at law by modifying the legitimate expectations as between tortfeasor and claimant.

To be clear, the sort of policy reasoning at the second stage of *Spandeck* differs from that which Weinrib staunchly criticises.[104] Rather, it resembles the second notion of policy which Weinrib argues is not only "consistent with but also required by the general conception of duty".[105] In considering whether policy factors justify imposing a duty of care, the Singapore courts not only "explicate the legal meaning of that relationship in its particular circumstances"[106] but also demonstrate how it *modifies* the legitimate expectations parties have and, in so doing, provide a justification for imposing a duty of care.

Two implications follow from adopting a relational view. First, as alluded to, it illustrates the moral element within the tort of negligence: the breach of a duty is a wrong in and of itself. Second, and following from the first point, because the breach of a duty is a wrong, duties of care carry normative import. I deal with both points *seriatim*.

(iii) The Morality of a Duty of Care

The concept of a duty of care represents the moral element within the tort of negligence.[107] And, as explained earlier,[108] because distributive and policy criteria equally affect what both parties can legitimately expect or demand of each other, it also influences the moral relationship between them. Breach of this duty means that the tortfeasor has violated the moral relationship founded on equality

[103] ibid.
[104] Ernest Weinrib, 'The Disintegration of Duty' (n 10) 238–39.
[105] ibid 253.
[106] ibid.
[107] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 196; Avihay Dorfman, 'Can Tort Law be Moral?' 23(2) Ratio Juris 205, 210–11.
[108] See Section C (ii) "Accommodating the Instrumental View within the Relational View" above.

between both parties by risking the claimant's valuable interest.[109] Examples of these interests, which according to Perry are deserving of protection because they are central to human well-being, include, *inter alia*, life, health, dignity and "certain kinds of property interest".[110] This moral relationship recognises the rights people have "against interference [with their interests] by other persons".[111] Gardner labels this as "a raw moral duty" [112] that is distinguishable from a moral norm of corrective justice. Breach of this moral duty "creates a secondary duty to the same rightsholder".[113] Performance of this secondary duty reduces the "deficit in one's reason conformity that was left by one's non-performance"[114] of the original raw moral duty. Mapping this to the tort of negligence, breach of a duty of care is a breach of a moral duty owed to the claimant. The defendant has risked the plaintiff's valuable interest.[115] This therefore creates a *secondary* duty to repair the "deficit in one's conformity" with the duty owed. This secondary duty contains the moral norm of corrective justice; we are *obligated* to repair the wrong occasioned by the breach of our duty.[116] There are therefore two moral obligations: the original obligation that was breached and the secondary obligation to attempt to repair the breach of the original obligation.[117]

However, this "raw moral duty" has been obfuscated by instrumentalist views which focus on compensation for damage or loss as the only means of discharging this secondary obligation.[118] After all, actionable damage,[119] and

[109] John Oberdiek, 'The Moral Significance of Risking' (2012) 12 Legal Theory 339. See also Special Morality of Tort Law (n 66) 409. Deciding what interests are valuable and worthy of protection implicates our views on the good life. See Nicholas J McBride, "Tort Law and Human Flourishing" in Pitel, Neyers and Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing 2013) 34–57; J.M. Finnis, *Natural Law and Natural Rights* (OUP 2011) 81–97. McBride, however, disagrees with Finnis's conception of human flourishing.

[110] Stephen Perry, *Torts, Rights and Risk* (n 61) 54–55. Perry derives his list of interests from the idea that harm is a "relatively specific moral concept which requires that a person have suffered serious interference with one or more interests that are particularly important to human well-being".

[111] Stephen Perry, 'On the Relationship Between Corrective and Distributive Justice'. in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP 2002) 239.

[112] John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (n 97) 339.

[113] ibid 338; What is Tort Law for? Part 1 (n 25).

[114] ibid 339; What is Tort Law for? Part 1 (n 25) 34.

[115] John Oberdiek, 'The Moral Significance of Risking' (n 108).

[116] John Gardner, 'Backwards and Forwards with Tort Law' 29 – 30 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397107> accessed 3 May 2021.

[117] John Gardner, 'Torts and Other Wrongs' University of Oxford Legal Research Paper Series (August 2011) 25.

[118] Jules Coleman, 'Tort Law and Tort Theory, Preliminary Reflections on Method'. in Gerald Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2002) 189.

[119] Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59. See Christian Witting, *Street on Torts* (OUP 2015) 5–7.

causation must also be proven.[120] This reflects the divergence between a moral wrong arising from the breach of a duty owed *simpliciter* and a legal wrong. The focus on legal wrongs glosses over the consequences of breaching a duty of care, which is itself a wrongful act, and our obligation to set things right, regardless of whether harm has been occasioned. As Radzik posits, a wrongful act may not necessarily result in harm because the harm has either been (a) repaired by a third party or (b) avoided through sheer luck.[121] However, absence of harm occasioned does not detract from the fact that the act, or failure to act, itself is *wrong* or that we no longer have a moral obligation to remedy our breach of the duty of care. Availability of a legal remedy does not necessarily absolve us of the secondary obligation of repair. Money cannot fix everything, including repairing moral wrongs.[122] An apology, however, might suffice.[123]

This divergence is evident from cases where courts dismissed the claim on grounds that causation was not proven, despite finding a breach of the duty owed. In *Gregg v Scott*,[124] Lord Nicholls recognised that it was irrational to hold that a patient could only claim damages arising from a loss of chance when he had "lost a 55% [chance] of recovery but not a 45% [chance] of recovery".[125] In *both* cases, the doctor was "in breach of his duty to the patient".[126] Disallowing the claim on the difference between a 45% chance of recovery and a 55% chance would result in an "a duty [devoid] of content".[127] Clearly Lord Nicholls recognised that a doctor's breach of the duty was a *wrong*.[128] To his mind, a wrong occasioned should entitle the claimant to a remedy, or otherwise would strip the duty of care of any meaning. In so doing, Lord Nicholls seemed to equate legal wrongs with moral

[120] Michael Jones (ed), *Clerk and Lindsell on Torts* (n 75) [2-01].

[121] Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2018) 245–48. See also CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88(5) Texas L Rev 917, 935.

[122] Compensation may sometimes suffice to repair a moral wrong, see William Lucy, *Philosophy of Private Law* (OUP 2007) 314–16.

[123] Linda Radzik, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2018) 238.

[124] [2005] 2 AC 176.

[125] ibid [3].

[126] ibid.

[127] ibid [4].

[128] John Oberdiek, 'The Moral Significance of Risking' (n 109) 350–54.

wrongs when both are distinct. This may explain why the moral aspect of a duty of care has been overlooked.

(iv) The Normative Dimension of Duties Owed

Second, because the breach of a duty of care is, in and of itself, a wrong, duties of care carry normative import. This can be gleaned from the "critical reflective attitude"[129] of society. Adopting the internal observer's viewpoint,[130] this internal aspect is manifest in deviation from the rule.[131] This is expressed in the language of normative vocabulary. For instance, one might say: "A *ought* to have taken reasonable care in this situation" or that "A was *wrong* for failing to take reasonable care in such a situation". Because the breach of this duty of care is a wrong, it carries normative import from an internal viewpoint. As McBride put it, "if A is said to owe B a duty to take care not to do x in a given situation, A will *actually* have a duty to take care not to do x, which duty will have been imposed on A for B's benefit".[132] It is in this manner that the law serves as a guide to human conduct[133] and, therefore, judicial pronouncements of the existence of a duty of care hold normative force. If a court finds that a duty of care is owed in a particular situation, and a breach of a duty of care is a wrong, then other people *ought* to take reasonable care in similar circumstances. This reflects the relational view of tort explained above; there is an expectation that others would also take reasonable care in similar circumstances as well. In the process, rules influencing the critical reflective attitude of members of society are laid down, signalling that a duty of care is owed in that particular situation.[134]

That this view reflects how participants practise and understand tort law is apparent from the judgements.[135] In *Noor Azlin Binte Abdul Rahman v Changi General Hospital Pte Ltd* ('Noor Azlin'),[136] the court held that the senior respiratory physician

[129] Scott J Shapiro, 'What is the Internal Point of View' (2006) 75 Fordham L Rev 1157, 1164–65.

[130] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 88–90.

[131] See also Philip Pettit, 'Social Norms and the Internal Point of View: An Elaboration of Hart's Genealogy of Law' (2019) 39(2) OJLS 229, 245, 251.

[132] Nicholas J McBride, 'Duties of Care – Do they Really Exist?' (2004) 24(3) OJLS 417 (emphasis added).

[133] John CP Goldberg, Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75(3) Fordham L Rev 1563, 1577; Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25(1) OJLS 33, 42.

[134] Stephen A Smith, 'The Normativity of Private Law' (2011) 31(2) OJLS 215, 231.

[135] John CP Goldberg, Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75(3) Fordham L Rev 1563, 1575; John CP Goldberg, Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54(3) Vanderbilt L Rev 657, 732.

[136] [2019] 1 SLR 834.

that examined the plaintiff had breached his duty of care.[137] However, causation was not established on the facts. In *Yeo Peng Hock v Pai Lily* ('*Yeo Peng Hock*'),[138] the court similarly held that the doctor had breached his duty of care in failing to send the patient to the Accident & Emergency department. However, the claim failed as causation was not established. The language used expresses the normative dimension of the duty of care. In *Noor Azlin*, the court opined that the senior respiratory physician "*ought* to have taken the more cautious route of scheduling a follow-up" if he was unsure of the diagnosis.[139] Similarly, in *Yeo Peng Hock*, the court concurred with the trial judge's finding that "any competent GP *would* have advised his patient to go immediately to a hospital".[140] This demonstrates McBride's point: If A is said to owe B a duty, A *actually* has a duty to take reasonable care in relation to B. The language of the judgement reflects that this duty exists, illuminating its normative dimension in the form that the defendant 'ought' to have done X or that any reasonable man in that position 'would' have done X. Although causation in both cases was not established, the finding of a breach of a duty of care demonstrates that a duty of care is indeed owed under such circumstances and reflects the court's opinion as to what must be done to discharge that standard of care. Consequently, the finding of a duty of care clearly has a normative dimension.

Because a duty of care carries normative import, it is unsurprising that judges have relied on it *qua* control mechanism.[141] Properly understood, the elements of the tort of negligence may overlap,[142] but should remain distinct inquiries. However, in utilising the duty of care as a control mechanism, the court has collapsed the analysis. In the UK, for example, judges have preferred to treat cases involving a breach of the standard of care as cases where no duty of care exists.[143] The case of *Darnley v Croydon Health Services* illustrates this.[144] The claimant was struck on the head after unknown assailants attacked him. He went to the hospital. He was informed by the receptionist that the waiting time was approximately 4–5 hours and was told to wait. After waiting for 20 minutes, he went home. His condition deteriorated. He was sent back to the hospital by ambulance. Unfortunately, by then, he had already suffered serious and permanent injury because of the delay in

[137] ibid [91].
[138] [2001] 3 SLR(R) 555.
[139] [2019] 1 SLR 834 [89] (emphasis added).
[140] [2001] 3 SLR(R) 555 [18] (emphasis added).
[141] Ken Oliphant, 'Against Certainty in Tort Law'. in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing 2013) 5.
[142] James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) Cambridge LJ 480, 480.
[143] ibid 481.
[144] [2018] QB 783.

treatment. The UK Court of Appeal ('UKCA'), instead of focussing on the breach of duty owed, focussed on whether a duty was even owed in the first place. This was surprising as "*Darnley* was completely lacking in features that could possibly be thought to have given rise to any duty issue".[145]

While *Darnley* was overturned on appeal,[146] the UKCA's decision remains highly unsatisfactory as it distorts the duty of care analysis by examining whether a factual duty, which deals with whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct,[147] exists. However, because remoteness already deals with the same question, defining a duty of care in this manner renders it otiose.[148] To avoid this, the duty of care should be concerned with notional duties. The question is a normative one: should the law of negligence be applied to the present case?[149] To answer that question, the courts have relied on proximity *qua* concept.

(v) A Desire for Certainty

In summary, much of the confusion surrounding the proximity requirement can be traced to the linguistic usage of the word 'proximity'. Utilising Zipursky's pragmatic conceptualism, "proximity" and the *Spandeck* framework denote a relational view of tort law which also encompasses typically instrumentalist concerns. One might further note that the overriding concern with compensation has obfuscated the relational view of tort and the significance of a duty of care; *viz.* that the breach of a duty of care is a wrong. The conflation between notional and factual duties is problematic. Attempting to rein in liability, courts conflate the duty of care inquiry with other elements of negligence. One might attribute this to the desire for certainty over the outcomes of individual cases.[150] Given the normative dimensions of finding that there is a duty of care, courts are naturally wary of sending a wrong signal to society. This attitude can be traced to the tentative nature in which the tort of negligence was developed.[151]

That said, the lack of certainty in terms of *outcomes* is certainly not deleterious. Courts should "state the principles according to which a duty of care should be

[145] James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (n 140) 482.

[146] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50.

[147] Plunkett (n 26) 82; Clerk and Lindsell on Tort (n 75) [8-07]; Colin Liew, 'Keeping it Spick and Spandeck: A Singaporean Approach' (2012) 20 Torts LJ, 9–10.

[148] Plunkett (n 26) 89.

[149] ibid 111; Michael Jones (ed), *Clerk and Lindsell on Torts* (n 75) [8-06].

[150] Ken Oliphant, 'Against Certainty in Tort Law' (n 141) 4.

[151] *Langridge v Levy* (1842) 150 ER 863; *Winterbottom v Wright* (1842) 10 M & W 109; *Longmeid v Holliday* (1851) 6 Ex 761; *George v Skivington* (1869) LR 5 Ex Rep 1; *Heaven v Pender* (1883) 11 QBD 503.

determined" and "engage in a flexible weighing up of all normatively relevant factors".[152] As I have sought to demonstrate, the key inquiry where the duty of care is concerned is the concept of proximity.[153] This is because it accurately reflects the underlying conceptual understanding that the tort of negligence is primarily relational.

We turn now to examine how *Spandeck* has been applied in practice, focussing mainly on Court of Appeal judgements because of the authoritativeness of its rulings, to determine if it indeed reflects the understanding of proximity that reflects the relational view as sketched out above. Where *Spandeck* departs from the relational view, I propose changes.

IV. *Spandeck*'s Conceptual Coherence

A. Factual foreseeability

(i) Case Law

In this Part, I examine whether factual foreseeability is consistent with a relational view and its logical coherence with the other elements of the *Spandeck* framework.[154] *Spandeck* conceptualised factual foreseeability as a threshold test. If the facts did not evince that it was foreseeable that the plaintiff would suffer harm if the defendant failed to take reasonable care, this threshold requirement would not be crossed.[155] *Ngiam Kong Seng v Lim Chiew Hock* ('*Ngiam*')[156] is one example. The first appellant was involved in a traffic accident allegedly caused by the respondent who represented himself as a good Samaritan that rendered aid to the first appellant. Consequently, the second appellant developed feelings of gratitude towards him[157] but, upon discovering the respondent's role in the accident, she developed depression and suicidal tendencies resulting from a sense of betrayal.[158] In considering whether the respondent owed a duty of care to the second appellant, the court held that the factual foreseeability requirement was not satisfied as "it was not reasonably foreseeable that the mere communication of the information in question without more could result in harm to a party".[159] Nevertheless, the court proceeded to analyse the existence of a duty of care based on the first stage of the

[152] Ken Oliphant, 'Against Certainty in Tort Law' (n 141) 18.
[153] See Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25(1) OJLS 33, 38–42.
[154] See Gary Chan, *The Law of Torts in Singapore* (2nd edn, Academy Publishing 2016) [03.041].
[155] *Spandeck* (n 7) [75]–[76].
[156] [2008] 3 SLR(R) 674.
[157] ibid [7].
[158] ibid.
[159] ibid [132].

Spandeck framework. Absent a professional relationship between the plaintiff and the defendant (as was the case in *Ngiam*), there was no duty of care not to pass on information that could cause psychiatric shock.[160]

(ii) Problems

This conceptualisation of factual foreseeability is problematic. Distinguishing between the foreseeability of harm and the foreseeability of the *type* of harm is hardly possible.[161] In pointing out that harm to the second appellant was unforeseeable, the court in *Ngiam* discussed the type of harm, *viz.*, psychiatric harm. This confuses the duty of care inquiry with the remoteness rule, despite the warning in *Spandeck*.[162] The case of *AYW v AYX* ('*AYW*')[163] demonstrates this. In *AYW*, the High Court struck out the claim on the ground that it did not meet the threshold requirement of factual foreseeability.[164] The plaintiff in *AYW* sued the school in negligence for failing to deal with alleged acts of bullying. Considering whether the school owed a duty of care to the plaintiff, the court held that, while schools owed a duty of care towards their pupils, they had no duty to take reasonable care in protecting students from *all* types of harm.[165] The duty of care did not extend to intervening in the "bullying" as alleged in the statement of claim. In totality, the court opined that it was not factually foreseeable that the plaintiff would suffer any physical/psychiatric injury or economic loss arising from the bullying. There was "no suggestion of a persistent pattern of physical gestures (let alone threatening gestures) over a period of time [that would] give rise to a foreseeable risk of harm if steps were not taken to intervene".[166] Moreover, the court in *AYW* also seemed to equate the failure to cross the factual foreseeability threshold with grounds for striking out.[167]

This conceptualisation of factual foreseeability puts the cart before the horse. A duty of care can exist despite the damage being too remote. This understanding of factual foreseeability collapses the duty of care inquiry into a single stage: was the damage caused a reasonably foreseeable consequence of the defendant's actions? [168] Because the court also held that schools owed a duty to take

[160] ibid [142].
[161] Plunkett (n 26) 98–104.
[162] *Spandeck* (n 7) [89].
[163] [2016] 1 SLR 1183.
[164] ibid [91], [94].
[165] ibid [69]–[70]. The court was not referring to non-delegable duties. It considered this under the heading: "Did the School owe the Plaintiff a duty of care".
[166] ibid [86].
[167] ibid [91], [94].
[168] Plunkett (n 26) 84–89.

reasonable care to protect students, the real issue in *AYW* was remoteness rather than the existence of a duty of care.

(iii) Clarifying Factual Foreseeability

Therefore, at the factual foreseeability stage, the court examines the *facts* to determine if it was foreseeable to the defendant that the plaintiff's *interest* would be endangered if reasonable care were not taken.[169] This is consistent with a relational view. If it were foreseeable that the defendant's actions would endanger the interests of a class of people to which the plaintiff belongs ('foreseeability requirement'),[170] this would create a legitimate expectation that he takes reasonable care when acting. Minimally, the foreseeability to the plaintiff that his actions might affect the interests of a class of people to which the plaintiff belongs is the ingredient needed to indicate that a potential legal relationship exists between both the plaintiff and defendant.

As Plunkett argues, citing *Smith* as an example,[171] requiring foreseeability that the plaintiff's interest might be endangered does not encounter the same problems as requiring foreseeability of harm to the plaintiff. In that case, the defendant train company had allowed dry grass to accumulate near its railway tracks.[172] Sparks from a passing locomotive ignited the grass. The fire spread. The adjoining stubble field and the plaintiff's cottage were destroyed. According to the interest theory, because the cottage was located quite a distance from the tracks, and the plaintiff did not own the stubble field, the defendant "had not been negligent vis-à-vis the plaintiff's property interest in his cottage".[173] Plunkett argues that difficulties arise if we hypothesise that the plaintiff had also owned the stubble field as he would be able to claim for damage to the cottage as his property interest was affected. This would be a "capricious result" as the plaintiff's claim depended on who owned the stubble field.[174] One might attempt to distinguish an interest in the stubble field as being different from the interest in the cottage, but this requires flexibility and discretion. There is therefore no meaningful distinction between "interest and kinds of harm".[175]

However, applying the foreseeability requirement based on the interest theory, the plaintiff might not be able to claim for the damage to the cottage even if

[169] John Gardner, *From Personal Life to Private Law* (n 63) 50–51.
[170] Gary Chan, *Law of Torts in Singapore* (n 154) [03.042]–[03.043]. See Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007) 133.
[171] Plunkett (n 26) 102.
[172] ibid.
[173] ibid.
[174] ibid.
[175] ibid 103.

he owned the stubble field. The defendant would owe a duty of care as it would be foreseeable that the plaintiff's property interest, which covers both the stubble field and the cottage, would be affected if they failed to take reasonable care. However, the claim for damage to the cottage can be denied on grounds of remoteness. One might argue that it was unforeseeable that the fire would spread that far and damage the cottage. Thus conceived, our foreseeability requirement at the duty of care stage examines whether the plaintiff's interest has been endangered. Because factual foreseeability is a threshold requirement, the plaintiff's interest should be broadly construed and dealt with at a high level of generality. The *extent* to which the plaintiff's interest has been injured is reflected by the remoteness inquiry which deals with the foreseeability of harm. Here, damage to the stubble field was foreseeable. Damage to the cottage was not. Therefore, the plaintiff's property interest (in both the stubble field and cottage) was not *wholly* damaged.

The role of factual foreseeability, then, is simply this: if the facts do not evince that it was foreseeable that the plaintiff's interest would be endangered, there is no need to apply the *Spandeck* framework. That said, it is good practice to proceed with the proximity analysis under the first stage of *Spandeck* as it provides valuable guidance as to when the factual foreseeability threshold is crossed, and when a duty of care is established.[176] So conceptualised, factual foreseeability weeds out cases where there is no relationship between the parties at all and the law of negligence simply does not apply. Factual foreseeability can therefore serve as grounds for striking out. If the facts do not even disclose the existence of a relationship between the parties, which is the crux of negligence, it is plain and obvious that the claim has no substance.[177] Applying the reformulated conception of factual foreseeability to *AYW*, the claim would not have been struck out on the ground that the factual foreseeability threshold was not met. Arguably, it was foreseeable on the facts that the plaintiff's interest in her well-being or dignity would have been put at risk by the defendant's failure to take reasonable care in stopping the alleged acts of bullying. The claim, however, could have been struck out on grounds of *remoteness* instead.[178]

B. Stage 1: legal proximity

While cases have alluded to the concept of proximity having some substantive content,[179] little has been said about what this substantive content is. Earlier, we explained how proximity reflected a relational view of tort law based on corrective

[176] Ngiam (n 156) [32]. The court proceeded on the assumption that factual foreseeability could be established.

[177] *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 [21]–[22].

[178] *AYW v AYX* [2016] 1 SLR 1183 [89].

[179] *Spandeck* (n 7) [80].

justice. Having established that factual foreseeability is a filtering mechanism, the analysis at the legal proximity stage can be conceptualised accordingly: the court should explain *why* it is foreseeable that the defendant's actions would endanger the plaintiff's interests. This gives the duty of care its normative dimension by justifying why the plaintiff had to take reasonable care. We might express it as follows: "if it is foreseeable that the defendant's actions would have endangered the plaintiff's interest, then he *ought* to have taken more care in acting".

Notably, *Spandeck* highlighted that this stage was to be applied incrementally. This incremental approach has been described as a disguise for policy reasoning.[180] However, properly understood, the incremental approach is nothing more than applying the common law method of analogical reasoning. Cases from other common law jurisdictions can be used if the facts are indicative of the ways in which the plaintiff's interest may be endangered by the defendant.[181] Based on the manner in which *Spandeck* has been applied, the ways in which the plaintiff's interest may be endangered by the defendant have been categorised under the following proximity factors of VAR-R,[182] *Sutherland* proximities,[183] and knowledge.[184]

Usage of proximity factors also reflects the relational view described above. Take, for instance, VAR-R, which was defined in *Go Dante Yap v Bank Austria Creditanstalt AG*.[185] The plaintiff in that case had some investments with the defendant bank that went south. He sued, alleging that the bank owed him a duty of care in relation to the provision of services and executing his instructions.[186] The court held that, notwithstanding the contractual framework, there was VAR-R that sufficed to establish sufficient proximity between the parties. This was because the defendant bank had "accepted the [plaintiff] as someone whose money and assets were under its control and on whose behalf it could and was expected to expend considerable sums to acquire various investments".[187] By "offering private banking and wealth-management facilities", the bank "held itself out as possessing special skill or expertise".[188] Relying on this skill and expertise, the plaintiff allowed the bank to act on his behalf. Reliance on the defendant's skill, coupled with the defendant's acceptance of that reliance by assuming responsibility, means that the actions of the defendant would directly impact the plaintiff's valuable interest.

[180] Beever (n 170) 183–89.
[181] David Tan and Goh Yihan, 'The Promise of Universality' (n 8) 18.
[182] *NTUC Foodfare* (n 15) [40]; *Animal Concerns* (n 13) [60].
[183] *Spandeck* (n 7) [78]–[79].
[184] See David Tan and Goh Yihan, 'The Promise of Universality' (n 8) 26.
[185] [2011] 4 SLR 559; Justin Tan, 'Proximity as Reasonable Expectations' (n 36) 151.
[186] ibid [2].
[187] ibid [35].
[188] ibid.

There is a legitimate expectation that the defendant, being in a position where his actions could affect the plaintiff's valuable interest, would act with reasonable care to avoid endangering it.

We turn next to the *Sutherland* proximities. Causal proximity refers to the "causal connection" between the defendant's actions and the harm suffered by the plaintiff.[189] However, this is different from the idea of a causal connection between the defendant's actions and the risk posed to the plaintiff's valuable interest which goes towards establishing the breach of a duty. As explained above, the breach of a duty is a moral wrong that is distinct from a legal wrong. There must therefore be a causal link between the defendant's actions and the risk posed to the plaintiff's valuable interest. Here, we are concerned with explaining *why* the defendant's actions could endanger the plaintiff's interest; a causal link between the defendant's actions and harm suffered by the plaintiff clearly indicates that the defendant's actions could endanger the plaintiff's interest.

Causal proximity, however, is not the only way of explicating this. Take, for example, physical proximity, as discussed in *Animal Concerns Research & Education Society v Tan Boon Kwee*,[190] which refers to the closeness in time and space between the plaintiff and defendant. The plaintiff hired the defendant to serve as the site supervisor in the construction of an animal shelter. The shelter was not constructed according to specified building plans. Wood chips used to level the site decomposed, necessitating remedial action on the plaintiff's part.[191] The plaintiff sued, alleging that the defendant had "failed to supervise the levelling of the site" and that the "wood chips were [un]suitable landfill material".[192] The court held that there was physical proximity between the parties because the defendant was physically present at the site.[193] This reflects the relational view. Because the defendant was physically present, he could act to mitigate or eliminate the risk posed to the plaintiff's interest.

The last of the *Sutherland* proximities, circumstantial proximity, refers to the parties' "factual relationship".[194] In *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*,[195] VK Rajah JA held that circumstantial proximity is "tautologically present in the occupier [and] lawful entrant relationship".[196] Clearly, the occupier's failure to maintain his property could undoubtedly risk the lawful entrant's interest in

[189] Justin Tan, 'Proximity as Reasonable Expectations' (n 36) 149.
[190] [2011] 2 SLR 146 (n 13); see also *See* Toh Siew Kee (n 7).
[191] ibid [7].
[192] ibid [8].
[193] ibid [37].
[194] Justin Tan, 'Proximity as Reasonable Expectations' (n 36) 149.
[195] [2013] 3 SLR 284.
[196] ibid [80].

bodily integrity. Similarly, in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*,[197] the High Court held that circumstantial proximity was established because of the past employer-employee relationship between the plaintiff and defendant.[198] This reflects the relational view because, by being in an employer-employee or occupier-lawful entrant relationship, the parties are placed in a position whereby their actions could affect each other's interests.

Finally, we turn to knowledge, which was used as a proximity factor in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC* ('*Anwar*').[199] In *Anwar*, the defendant solicitor was hired by the plaintiff's father to restructure debts owed to the bank. The father told the solicitor that he did not want his sons to be personally liable for the debts.[200] However, the defendant solicitor failed to point out the presence of a clause in the Security Documents, under which the plaintiffs had agreed to personally guarantee their father's debts.[201] The Bank claimed against the plaintiffs under this clause. The plaintiffs subsequently sued the defendant solicitor for failing to inform them that such a clause was present. The court held that the defendant's knowledge of affairs "support[ed] a finding of proximity".[202] The defendant *knew* that he was being retained to ensure that the plaintiff's interests were protected.[203] There is therefore a legitimate expectation that the defendant solicitor would act with reasonable care, lest his negligence endanger the plaintiff's financial interest. Simply put, if we *know* that our actions could potentially place another's interest at risk, then the onus is on us to act with reasonable care. Undoubtedly, applying the Golden Rule, we would expect the same of others.

It is, however, important to note that the usage of proximity factors differs from the 'pockets approach'. Under that approach, cases are not "decided according to broad general tests or principles which underlie all duty cases".[204] Instead, reference is made to the underlying reasons for the outcome of cases with similar factual matrices.[205] However, the Singapore courts have applied more than one proximity factor in cases.[206] Moreover, as we have sought to argue, the core of *Spandeck* lies in proximity and the relational view. In that light, these proximity factors represent more of a categorical approach to the question of a notional

[197] [2015] 4 SLR 1.
[198] ibid [243].
[199] [2014] 3 SLR 761.
[200] ibid [15].
[201] ibid [25].
[202] ibid [148].
[203] ibid.
[204] Plunkett (n 26) 70.
[205] ibid.
[206] *NTUC Foodfare* (n 15) [47], [48], [50]; *Ramesh* (n 57) [251]–[255].

duty.[207] This method of analysis, coupled with the use of precedent, [208] allows judges to justify their finding on a duty of care. After all, both parties come to court, believing that they *have* a legitimate claim (even more so if the claim is not struck out at the interlocutory stage).[209] Justice must not only be done, but must also be *seen* to be done by explaining,[210] in clear and principled terms using common law reasoning, the conclusion reached at the duty of care stage.

This allows us to see the three components of the *Spandeck* framework as separate, yet logically linked stages. Factual foreseeability deals with the sufficiency of the facts to facilitate the duty of care inquiry. It has no normative force, unlike Stage I of *Spandeck*. One cannot derive an 'ought' from an 'is';[211] a "mere appeal to the facts alone" cannot justify the imposition of a duty of care.[212] Indeed, duties of care are imposed by law.[213] Applying common law reasoning at Stage I of *Spandeck*, we would, with reference to previous cases, infer that a duty of care should be imposed where material facts A and B are present.[214] Given the similarity of the present facts to material facts A and B, we can conclude that a duty of care *should* be imposed in this situation.[215] Therefore, duties of care do have a "normative dimension".[216] This further allows us to distinguish the proximity analysis from the assessment of policy considerations whilst recognising how both stages can interact.[217] As explained above, policy considerations can modify parties' legitimate expectations. Stage I of *Spandeck* sketches out what these legitimate expectations should be, with reference to previous cases. At the policy stage, one considers if these legitimate expectations have been modified such that the law of negligence should not recognise the bilateral relationship between tortfeasor and claimant.

However, one clarification must be made in relation to the operation of indeterminate liability *qua* policy consideration.[218] In *NTUC Foodfare*, the

[207] Plunkett (n 26) 140.

[208] Keith Stanton, 'Decision-making in the tort of negligence in the House of Lords' (2007) 15 Tort L Rev 93, 94.

[209] Beever (n 170) 186–87.

[210] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

[211] Rachel Cohon, 'Hume's Moral Philosophy' (Stanford Encyclopaedia of Philosophy, 20 August 2018) <https://plato.stanford.edu/entries/hume-moral/> accessed 14 November 2019.

[212] Andrew Phang, Cheng Lim Saw, and Gary Chan, 'Of Precedent, Theory and Practice - The Case for a Return to Anns' (n 28) 46.

[213] *Go Dante Yap* (n 58) [19].

[214] See J Montrose, 'The Ratio Decidendi of a Case' (1957) 20 MLR 587.

[215] ibid.

[216] Andrew Phang, Cheng Lim Saw, and Gary Chan, 'Of Precedent, Theory and Practice - The Case for a Return to Anns' (n 28) 45.

[217] ibid 54.

[218] Andrew Robertson, 'Policy-based reasoning in duty of care cases' (2013) 33(1) Legal Studies 119, 122.

court highlighted that the concept of proximity dealt with the question of indeterminate liability to an indeterminate class by "restrict[ing] recovery to a reasonably determinate class of persons".[219] However, indeterminate liability could feature under the policy stage.[220] While considerations of proximity and policy may overlap,[221] it seems illogical to consider the question of indeterminate liability to an indeterminate class as a policy factor. Logically, the proximity requirement eliminates this as a policy consideration. It would be illogical to hold that there is sufficient proximity between the parties and then to proceed to consider indeterminate liability to an indeterminate class under the policy rubric. Policy, then, necessarily deals with the question of indeterminate liability for an indeterminate amount. The inquiry here is slightly different from that in remoteness, which examines the foreseeability of the type of damage from the defendant's perspective. Policy situates the duty of care inquiry within the broader context of society: Could other people in a similar position to the defendant be said to have assumed the risk of indeterminate liability for an indeterminate amount in so acting? *Spandeck*, thus conceptualised, is logically coherent. Its three components are distinct and logically related to each other.

C. Stage 2: policy considerations

While policy is considered separately from proximity, we do not attempt to draw the same principle-policy divide as Lord Reed did in *Robinson*.[222] Lord Reed opined that policy reasons should only be applied to novel cases and not to cases falling within principles of the law of negligence as established through precedent. However, as argued above, policy considerations feature in the duty of care analysis by modifying the legitimate expectations of the parties. *Spandeck* recognised the role of policy factors in the duty of care analysis.[223] While it is hardly possible to wrest apart policy from principle,[224] separating the inquiry allows the court to be candid with policy reasoning to "avoid giving the impression that there [are] unexpressed

[219] *NTUC Foodfare* (n 15) [43].
[220] David Tan and Goh Yihan, 'The Promise of Universality' (n 8) [43].
[221] Andrew Phang, Cheng Lim Saw, and Gary Chan, 'Of Precedent, Theory and Practice - The Case for a Return to Anns' (n 28) 54.
[222] *Robinson* (n 2) [27].
[223] *Spandeck* (n 7) [84].
[224] Kenny Chng, Gary Chan and Goh Yihan, 'A Novel Development of Tort Law: Robinson v Chief Constable of West Yorkshire Police' (2019) 25 Torts LJ 184, 190–93.

motives [in] finding for or against a duty".[225] With this in mind, we explain how policy factors modify the legitimate expectations of parties.

One example of policy reasoning is the clash between a contractual duty and a tortious duty. In *Spandeck*, the policy reason for not imposing a duty of care was the need for caution before imposing a tortious duty onto a relationship which the parties had already chosen to regulate via contract.[226] This means that, in assessing the legitimate expectations between the parties, one should consider, in assessing whether the law of negligence *should* apply, that both parties had chosen to regulate their relationship via contract, having considered it more economically efficient to do so. In *Spandeck*, this was the case as the contract between the parties allowed the plaintiff claim to proceed under arbitration proceedings against the defendant. However, the court also concluded that there was no proximity for the very same reason: the presence of the arbitration clause.[227] The overlap between proximity and policy here is not problematic for two reasons. At a superficial level, it illustrates the need to be candid about policy considerations. Sans the policy stage, critics might argue that the court's finding of no duty in *Spandeck* was based on the policy ground that tortious duties should not be superimposed onto a contractual framework. Conceptually, the policy stage allows the court to articulate policy considerations inherent in the duty of care analysis and explain *why* a duty of care should not be imposed in the present case – the presence of a contract means that both parties should expect that their relations be governed by contract, rather than tort.

The consideration of statutory frameworks is another example. In *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd*,[228] the court held that consideration of the "underlying statutory scheme and parliament['s] intention" is done at the policy stage of the *Spandeck* framework. The statutory framework must be considered because common law duties should not undermine the "effectiveness of duties imposed by the statute",[229] or "distort the focus of the statutory decision-making process" and "the performance of the functions of the statutory body".[230] Where a statute conflicts with a common law rule, the statute should prevail. Consideration of statutory frameworks modifies the parties' legitimate expectations because the defendant should have acted in accordance with the statutory framework. Similarly, the plaintiff will likely expect the same of the defendant, affecting the bilateral relationship such that the law cannot justifiably recognise a duty of care in this

[225] *Spandeck* (n 7) [85].
[226] ibid [101], [114].
[227] ibid [83].
[228] [2014] 2 SLR 360.
[229] Gary Chan, *Law of Torts in Singapore* (n 154) [05.082].
[230] ibid.

instance. After all, if the imposition of a duty of care is a problem of distributive justice, why should the tort of negligence apply when the statute already provides a solution? Therefore, in assessing the parties' legitimate expectations on this view, one should consider that the plaintiff can resort to the statute or to a claim for breach of a statutory duty as a remedy. Similarly, the defendant is likely to expect this of the plaintiff.

In summary, the threshold requirement of factual foreseeability is a filter mechanism; the court must examine the facts to determine whether it was foreseeable that the plaintiff's interests would be endangered. If this threshold requirement is met, the re-conceptualised *Spandeck* framework applies:

Stage I: Legal proximity requires the court to explain *why* the defendant's actions could have endangered the plaintiff's interests.

Stage II: Policy factors affecting the legitimate expectations of the parties are considered. This affects the overall analysis as to whether there should be a duty of care.

V. Conclusion

This article has sought to demonstrate, in two major parts, that the modified *Spandeck* framework is rooted in the concept of proximity which reflects the relational view at the heart of tort law. The first half of this article began with a brief description of the *Spandeck* framework before diving in to explain how its major components were consistent with the conceptual foundations of tort law. Key support to the argument is drawing the distinction between proximity *qua* descriptor and proximity *qua* concept. Once this distinction is grasped, it becomes clear that, insofar as Singaporean jurisprudence is concerned, usage of "proximity" refers to underlying tort law concepts, *viz.*, the relational view. This has important implications for tort law, namely that the duty of care is an important and distinct point of analysis in the tort of negligence, and that a duty is still owed, even though the plaintiff may not be able to demonstrate a breach of the standard of care and causation. At a more fundamental level, it reveals the moral implications of a duty of care, and what we owe to each other as human beings.

Building upon the analysis in the first half of this article, the second half assessed whether the *Spandeck* framework was consistent with the underlying conceptual foundation of tort law. Although largely consistent, tweaks need to be made to how the factual foreseeability stage is understood and applied. Having argued that general frameworks, such as *Spandeck*, can provide a principled analysis for assessing whether there is a duty of care, it is hoped that this will spark a reconsideration of such frameworks post-*Robinson*.