See Toh Siew Kee *v* Ho Ah Lam Ferrocement (Pte) Ltd and others
[2013] SGCA 29

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Decision Date	: 24 April 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; V K Rajah JA; Sundaresh Menon JA (as he then was)
Counsel Name(s)	: Suresh Damodara (Damodara Hazra LLP) for the appellant; Nagaraja S Maniam and Shelly Lim Lei-Yee (M Rama Law Corporation) for the first respondent; Srinivasan Selvaraj (Myintsoe & Selvaraj) for the second respondent; Magdalene Chew Sui Gek, Gho Sze Kee and Tay Min Si (AsiaLegal LLC) for the third respondent.
Parties	: See Toh Siew Kee — Ho Ah Lam Ferrocement (Pte) Ltd and others

TORT – Occupiers' Liability

TORT – Negligence

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 227.]

24 April 2013 Judgment reserved.

V K Rajah JA:

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in Suit No 474 of 2010 (see *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2012] 3 SLR 227 ("the Judgment")). The suit was instituted by the plaintiff, See Toh Siew Kee ("See Toh"), against three defendants – Ho Ah Lam Ferrocement (Private) Limited ("HAL"), Lal Offshore Marine Pte Ltd ("Lal Offshore") and Asian Lift Pte Ltd ("Asian Lift"). See Toh claimed damages against HAL and Lal Offshore under the law on occupiers' liability and against all three defendants (collectively, "the Defendants") under the tort of negligence for injuries caused to him while he was at a shipyard at 9/11 Tuas Basin Close ("9/11 TBC") which was leased by HAL from Jurong Town Corporation ("JTC"). The Judge dismissed See Toh's claims against all the Defendants. See Toh has appealed to this court against that decision.

2 For ease of reference and to facilitate understanding, I now set out the schematic arrangement of this judgment:

The parties to the dispute

3 See Toh was at the material time a service engineer with Norsk Marine Electronic, and was engaged by TCH Marine Pte Ltd ("TCH Marine") as an independent contractor to service the radar on board its tugboat *Fortune II*. Prior to the accident, See Toh had been attending to vessels for about 26 years to repair and maintain radar equipment. *Fortune II* was at the material time used by TCH Marine to tow the barge *Namthong 27*, also owned by TCH Marine, from 9/11 TBC. *Namthong 27* was at 9/11 TBC to collect wood chips to be delivered to TCH Marine's customer, Biofuel Industries Pte Ltd.

4 HAL is in the business of building and repairing ships and other ocean-going vehicles. As mentioned above, 9/11 TBC was at the material time leased by HAL from JTC. HAL sublet 9/11 TBC to Lal Offshore pursuant to a Cooperation Agreement dated 14 April 2007. A small portion of 9/11 TBC, including the entire shoreline of 9/11 TBC, [note: 1] was reserved by HAL for it to carry out the work of repairing boats and engines, and to load machinery and wood chips onto barges for export. [note: 2] Lal Offshore later used part of 9/11 TBC to fabricate a set of living quarters for Keppel FELS Ltd ("KFELS"), which was to be delivered to an offshore oil rig.

5 Asian Lift was, in turn, engaged by KFELS to take delivery of the aforesaid living quarters ("the KFELS living quarters") at 9/11 TBC and bring it to the offshore oil rig. Asian Lift intended to use a crane barge, *Asian Hercules*, for this purpose.

The undisputed facts

6 On the day of the accident, *Asian Hercules* arrived at 9/11 TBC. After arriving at the shoreline of 9/11 TBC, the crew of *Asian Hercules* intended to affix two metal mooring wires from *Asian Hercules* to bollards on the shore of 9/11 TBC. While this was being done, the starboard mooring wire of *Asian Hercules* became stuck (in shipping parlance, "fouled") at the ramp of *Namthong 27.*

7 Despite knowing of this mishap and of the danger which might be posed to those present in the vicinity if the mooring of *Asian Hercules* ("the Mooring Operation") were continued despite her starboard mooring wire being fouled, the captain of *Asian Hercules* ("Captain Hamid") continued the Mooring Operation. As a precautionary measure, he sent seven to eight crew members to shore to clear the area and to secure *Asian Hercules*'s mooring wires to the bollards on shore. The area where *Asian Hercules* was to be moored and where the lifting of the KFELS living quarters was to take place shall, for convenience, be referred to in this judgment as "the Operations Site".

8 Prior to the accident, See Toh received a call from a director of TCH Marine, Andrew Tay Nguang Yeow ("Andrew Tay"), asking him to service the radar of *Fortune II*. See Toh believed that *Fortune II* was docked at 15 Tuas Basin Close ("15 TBC") because he had previously attended to *Fortune II* there.

9 15 TBC was occupied by Catermas Engineering Pte Ltd ("Catermas") at the material time. When See Toh went to the main office of Catermas, he was informed by its manager, Tan Puay Choon, that *Fortune II* was berthed not at 15 TBC, but at the adjacent 9/11 TBC.

10 See Toh left 15 TBC through 15 TBC's main gate and entered a second gate of 15 TBC ("the second gate"). After entering the second gate, See Toh walked to the shore. A fence separated 15 TBC from 9/11 TBC; there was an open space of about 5m between the end of the fence and the shoreline ("the Seafront Access Point"). See Toh then called Andrew Tay to verify *Fortune II*'s location. Andrew Tay told See Toh that *Fortune II* was in that area, but did not inform See Toh of the exact location of *Fortune II*. Andrew Tay also told See Toh that his supplier had gone to

Fortune II earlier that day and had encountered no difficulty in locating the vessel.

11 See Toh entered 9/11 TBC through the Seafront Access Point. The parties gave differing versions of what happened after See Toh crossed into 9/11 TBC. Nonetheless, it is undisputed that See Toh was hit by *Asian Hercules*'s fouled starboard mooring wire as he was walking towards *Namthong 27*'s ramp while proceeding to *Fortune II*. A loud bang was also heard around the same time.

The decision below

12 The Judge was of the opinion that the preponderance of English judicial and academic views pointed to the conclusion that the law on occupiers' liability formed part of the law of negligence. He therefore held that an occupier did not owe concurrent duties under the law on occupiers' liability and the law of negligence (see [109] of the Judgment).

13 In relation to HAL and Lal Offshore, the Judge found both to be occupiers of the Operations Site at the material time. He also found that See Toh had knowingly trespassed onto 9/11 TBC by entering through the Seafront Access Point and not 9 /11 TBC's main gate. Relying on *Clerk & Lindsell on Torts* (Sweet & Maxwell, 15th Ed, 1982), the Judge stated that an occupier would not owe a duty of care to an adult trespasser who trespassed knowingly and without any reasonable excuse (see the Judgment at [103]). As such, neither HAL nor Lal Offshore owed a duty of care to See Toh (see the Judgment at [138]). The Judge further held that even if HAL and Lal Offshore owed a duty of care to See Toh *qua* occupiers of the Operations Site, they would not have breached this duty (see the Judgment at [143]–[144] and [149]–[156]).

14 With regard to Asian Lift, whom See Toh did not allege to be an occupier (see [125] of the Judgment), the Judge was of the view that Asian Lift's status as a non-occupier was irrelevant: occupiers and non-occupiers owed the same duty of care to trespassers (see [134] of the Judgment). Accordingly, for the same reasons as those applicable to HAL and Lal Offshore, the Judge found that Asian Lift did not owe a duty of care to See Toh (see [157] of the Judgment).

15 The Judge added, however (also at [157] of the Judgment), that had Asian Lift owed a duty of care to See Toh, Asian Lift would have breached this duty by proceeding with the Mooring Operation despite *Asian Hercules*'s starboard mooring wire having been fouled on the ramp of *Namthong 27*. The Judge was of the opinion that if Asian Lift were liable to See Toh, the latter would have been 65% contributorily negligent in not paying attention to his surroundings after trespassing onto 9/11 TBC (see the Judgment at [92]–[94] and [172]–[173]).

16 At the trial, Asian Lift also raised a time bar defence under s 8(1) of the Maritime Conventions Act 1911 (2004 Rev Ed). This defence failed as Asian Lift failed to establish that See Toh was on board a ship when he was injured (see the Judgment at [58]). It is unnecessary for this court to consider this issue as Asian Lift has not appealed against this finding by the Judge.

The issues before this court

17 This case raises the important question of whether the legal principles applicable in Singapore in respect of occupiers' liability should be subsumed under the general law of negligence. It also raises the question of whether and in what situations an occupier (or non-occupier) owes a duty of care to a trespasser.

18 There are two main issues before this court:

(a) First, should the law in Singapore on occupiers' liability be subsumed under the general law of negligence? If so, what should the applicable test(s) be for determining whether a duty of care should be imposed on an occupier, and what is the relevant standard of care?

(b) Second, did the Defendants owe See Toh a duty of care? If so, did they breach their duty?

19 Each of these issues (referred to hereafter as "Issue 1" and "Issue 2" respectively) will be considered in turn.

My decision

Issue 1: Should the law in Singapore on occupiers' liability be subsumed under the general law of negligence?

The genesis of the common law position

20 The law on occupiers' liability which currently applies in Singapore is based on the traditional common law rules applicable in England prior to the enactment of the Occupiers' Liability Act 1957 (c 31) (UK) ("the 1957 English Act"). Under these traditional common law rules (referred to hereinafter as "the traditional common law rules"), there are two sets of rules which ordinarily might apply whenever a person is injured on property. The first set comprises the rules governing occupiers' liability, which apply to an occupier *qua* occupier *simpliciter* – in other words, rules pertaining to the *static condition* of property. The second set comprises rules based on the general principles of the law of negligence, which do not apply to an occupier *qua* occupier as such – in other words, rules pertaining to *dynamic activities* done on property (see, *eg*, *Dunster v Abbott* [1954] 1 WLR 58 at 62; *Riden v A C Billings & Sons Ltd* [1957] 1 QB 46 at 56). It is the former category which is properly termed occupiers' liability.

(1) A brief interlude on the "neighbour" principle

21 This arbitrary division between the static condition of property ("the static") and dynamic activities done on property ("the dynamic") is not founded on logic or principle; rather, it is rooted in convoluted English legal history. The traditional common law rules on occupiers' liability pre-date the historical decision of the House of Lords in *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 (more commonly cited as "*Donoghue v Stevenson*" and hereinafter referred to as "*Donoghue*"). *Donoghue* is today acclaimed as the herald of an enormous sea change in tort law (although the case was not generally recognised as such initially: see [36]–[38] below). Prior to *Donoghue*, it would have been a misnomer to speak of the general principles of the law of negligence as the courts were then "concerned with the particular relations which c[a]me before them in actual litigation" (see *Donoghue* at 579) and had "engaged upon an elaborate classification of duties" (*ibid*). It bears mention that *Indermaur v Dames* (1866) LR 1 CP 274 ("*Indermaur*"), long regarded as the leading case on occupiers' liability, pre-dated *Donoghue* by more than 60 years purely by a historical accident. *Indermaur* was thereafter unquestioningly applied, perhaps because of the highly venerated status of Willes J, who authored that judgment. Lord Atkin's celebrated judgment in *Donoghue* erased the rigid distinctions between hitherto unconnected categories of tort and inductively rationalised the disparate categories as mere instances of the now famous "neighbour" principle (see *Donoghue* at 580):

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found

> in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. *The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.* **Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.** … [emphasis added in italics and in bold]

22 The notion of not doing to others what you do not want them to do to you is merely the flip-side of loving thy neighbour as thyself (referred to hereinafter as "the Golden Rule"). Some academics have claimed that Lord Atkin's "neighbour" principle is Biblically inspired (see, *eg*, Richard Castle, "Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in Donoghue v Stevenson" (2003) 7 Ecclesiastical Law Journal 210). However, I would like to point out that the Golden Rule is not peculiar to any one belief system or culture. As Harry J Gensler has opined in *Ethics and the Golden Rule* (Routledge, 2013) at p vii, the Golden Rule "is a global standard – endorsed by nearly every religion and culture … for many centuries". Pertinently, Confucius, when asked whether there was a teaching which could serve as the guiding principle for conduct, replied: "What you do not want others to do to you, do not do to others" (see *Analects* 15.24 in *The Analects of Confucius* (Burton Watson trans) (Columbia University Press, 2007) at p 109). It is thus evident that Lord Atkin's "neighbour" principle also emphatically reflects the mores of Asian societies (such as Singapore). Pertinently, distinguished jurists have persuasively shown that the "neighbour" principle is a universal communitarian value (see, *eg*, Richard W Wright, "The Principles of Justice" (2000) 75 Notre Dame Law Review 1859 at n 39). Indeed, John Finnis ("Finnis") has unabashedly declared that "love of neighbour as oneself" is the master principle of morality from which all other moral principles can be inferred or deduced (see John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998) at pp 127–128 and 138–139).

23 Although Finnis may have overstated his case somewhat, the Golden Rule is unarguably a core principle in all deontological systems of ethics. The Categorical Imperative is *the* central plank of Kantian (deontological) ethics, and proceeds thus: "act only in accordance with that maxim through which you can at the same time will that it become a universal law" [emphasis in original omitted] (see para 4.421 of Immanuel Kant's "Groundwork of the Metaphysics of Morals" in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Mary J Gregor ed & trans) (Cambridge University Press, 1999) ("*Practical Philosophy*") at p 73). The similarities between the Categorical Imperative and the Golden Rule are immediately self-evident. Kant himself states that "*quod tibi non vis fieri*" (Latin for not doing to others what you do not want others to do to you) is a deduction from the Categorical Imperative (see footnote* to para 4:430 of Immanuel Kant's "Groundwork of the Metaphysics of Morals" in *Practical Philosophy* at p 80).

24 Regardless of one's persuasions, it is therefore undeniable that the Golden Rule is of cardinal import as both a moral and a legal principle.

25 Lord Atkin, in propounding the "neighbour" principle, was therefore, in actuality, making a statement of universal application that was intended to be the cornerstone of the law of negligence. Interestingly, in a speech made extra-curially six weeks before arguments were heard in *Donoghue*,

Lord Atkin observed (see G Lewis, *Lord Atkin* (Butterworths, 1983) at pp 57–58):

> *It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man* … He is not to injure his neighbour by acts of negligence; and that certainly covers a very large field of the law. *I doubt whether the whole of the law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should unto you*. [emphasis added]

(2) The undue formalism of the traditional common law rules on occupiers' liability

26 At the time *Donoghue* was decided, the law concerning occupiers' liability was in disarray: there was no overarching general principle, and the content of the duty owed by an occupier to a person who entered his property (an "entrant") – who could be an invitee, a licensee or a trespasser – was determined solely by reference to formalistic legal categories of relationship. The invitee-licensee-trespasser trichotomy indubitably created a complex, confusing and unpredictable legal landscape.

27 A major reason for this unhappy legal landscape was because of the marked difference in the content of the duty owed by an occupier to entrants in each of the above three categories. Invitees were owed the highest duty and were "entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, [of] which he knows or ought to know" (see *Indermaur* at 288). In contrast, licensees "must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them" (see *Latham v R Johnson & Nephew, Limited* [1913] 1 KB 398 at 411). As for trespassers, occupiers were traditionally only liable to them if they wilfully injured them or acted in reckless disregard of their presence (see *Robert Addie and Sons (Collieries), Limited v Dumbreck* [1929] AC 358 ("*Addie*") at 365 and 370); subsequently, a cryptic duty of "ordinary humanity" towards trespassers was enunciated in *British Railways Board v Herrington* [1972] AC 877 ("*Herrington*") at 922H–923A. Leading legal commentators have long been dismayed at this murky state of affairs, and have been strident in their criticism of it. For instance, Sir John Salmond, in J W Salmond, *Law of Torts* (Sweet & Maxwell, 10th Ed, 1945), opined (at p 471) that:

> The law on the whole subject is still in a confused state. The delimination between the different categories is far from settled, nor is it possible to state with certainty the duties owed to persons falling under those categories.

28 The traditional common law rules on occupiers' liability have further been described as complex, cumbersome and expensive to administer because they require elaborate arguments in court (see Australian Capital Territory Law Reform Commission, *Occupiers' Liability* (Report No 42, 1988) at para 13). [note: 3] It has also been observed in *Fleming's The Law of Torts* (Carolyn Sappideen & Prue Vines eds) (Lawbook Co, 10th Ed, 2011) at para 22.10 that under the traditional common law rules, the distinctions between the different kinds of entrants were increasingly manipulated and distorted by the courts in the light of changing notions of social responsibility. This was especially the case as the distinction between invitees and mere licensees, on paper, turned on whether or not their presence on the occupier's premises brought any material benefit to the occupier. Lord Reid, with his customary acuity, observed in *A C Billings & Sons Ltd v Riden* [1958] AC 240 at 249:

> The only reasonable justification I know of for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth.

29 This led to harsh and unjust outcomes (by modern standards) – a friend who was invited over for dinner *simpliciter* would be owed a lesser duty of care as compared to a friend who was invited over for dinner to discuss business. To achieve just outcomes in the face of the confusing patchwork of legal classifications, courts in several common law jurisdictions often responded by shoehorning either the facts or the law (sometimes both). Hard cases make bad law. Occupiers' liability is certainly one area of the law where this legal adage loudly resonates. Attempts to reach just results were frequently underpinned by meretricious rationales teetering on the edge of absurdity. Tellingly, the UK Law Reform Committee, in *Third Report (Occupiers' Liability to Invitees, Licensees and Trespassers)* (Cmd 9305, 1954) (Chairman: Jenkins LJ), was unable to countenance these embarrassing legal anomalies and opined (at para 73) that:

> Where, on the facts of the particular case, an occupier has been culpably careless and his visitor has been thereby injured, the courts have usually contrived to fix him with liability, and conversely have been able to absolve the occupier in cases where the accident could not, in popular language, fairly be said to have been his fault. *But this has been done in spite of, rather than with the assistance of, the categories [of visitors] which, as it seems to us, tend to embarrass justice* by requiring what is essentially a question of fact to be determined by reference to an artificial and irrelevant rule of law. [emphasis added]

30 Lord Wilberforce, in *Herrington* at 912H–913A, expressed similar dissatisfaction with the traditional common law rules on occupiers' liability:

> … [H]uman conduct can rarely be squeezed neatly into a predetermined slot; and if this is what courts are told to do, they will find ways, according to their views of the merits, of crossing the lines. So they have found means of converting trespassers into licensees by imputing licences, and in the case of children they have improved their status by a finding of allurement or by straining the facts.

31 The leading Canadian textbook on tort law is equally blunt. In Allen M Linden, *Canadian Tort Law* (Lexis Law Publishing (VA), 5th Ed, 1993), it is stated (at p 612) that:

> Many of the cases on this issue are difficult to reconcile and are best understood as contortions of the applicable legal principles for the purpose of achieving what the courts perceive to be an equitable and just result in factual situations that do not easily fit the rigid category system.

32 The formalism of the traditional common law rules on occupiers' liability appeared to be largely due to path dependence (which resulted in the outcome of each case turning on how the entrant in question was classified within the invitee-licensee-trespasser trichotomy), the existence of inconvenient historical legal precedents and, significantly, the peculiarities of the previously extant jury system in England. In *Toomey v The London, Brighton, and South Coast Railway Company* (1857) 3 CB (NS) 146; 140 ER 694, where the plaintiff sued the defendant railway company for injuries which he sustained when he fell down some steps at the defendant's railway station, Williams J commented (at 150; 696) that:

> … [E]very person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. …

33 The broad overview above underscores the unsatisfactory nature of the dysfunctional historical classification adopted in this area of the law. Under the traditional common law rules on occupiers' liability, the classification of an entrant was essentially a question of *law*. The questions to be put to the jury were controlled by the device of classifying entrants into different legal categories, towards

whom different standards of conduct were demanded. In this fashion, the judiciary retained more control over the issue of liability. Without this device, the question of whether or not a particular occupier (who, at the time the traditional common law rules on occupiers' liability emerged, would typically also have been the owner of the property concerned) was negligent would be a question of *fact* – in other words, juries would more or less have had *carte blanche* to find liability. As Norman S Marsh perceptively noted in his article "The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 LQR 182 at p 185, judges "would not have been willing to leave the landowner to the verdict of a jury belonging, as a general rule, to the class of potential visitors to property rather than to that of landowners". Dan B Dobbs, in *The Law of Torts* (West, 2000) at p 615, agrees and states that in the United States, "it is quite possible that courts intend by these classifications … to displace the jury's role in favor of tight control by the judges". It is safe to infer that because of the existing class divisions and prevailing social norms in England at the time the traditional common law rules on occupiers' liability emerged, the invitee-licensee-trespasser trichotomy was created to circumscribe the jury's power by either allowing the judge to determine a case based on a legal ruling as to the status of the entrant (*viz*, whether he was an invitee, a licensee or a trespasser) or enjoining the jury to apply the mechanical rules of the trichotomy (see *John Harvey Nelson v Daryl Dean C Freeland and Belinda Brittain Freeland* 507 SE 2d 882 (1998) ("*Nelson*") at 887; see also Michael Sears, "Abrogation of the Traditional Common Law of Premises Liability" (1995–1996) 44 U Kan L Rev 175, in particular, at pp 192–195, where the trichotomy is cited as a jury control device). The fundamental issue of whether the occupier had acted reasonably *vis-à-vis* the particular entrant concerned was never placed before the jury because principles of negligence were not then in existence. Pertinently, England has in recent times abolished jury trials for most civil causes of action; Singapore has abolished jury trials *in toto*. Indeed, jury trials were never employed for civil matters in Singapore. In my view, the antiquated approach under the traditional common law rules on occupiers' liability of making elaborate legal distinctions between different categories of entrants has outlived its usefulness.

34 Plainly, an inductive framework based on Lord Atkin's "neighbour" principle offers a coherent route to resolving many of the existing classificatory problems in the law on occupiers' liability. The formalistic, confusing and complex distinctions between invitees, licensees and trespassers would simply be rendered otiose in the light of a general overarching principle. Indeed, the case for the Atkinian concept of "neighbour" to be used as the clarion unifying principle is compelling; under such a framework, the law on occupiers' liability would merely be a subset of the general law of negligence.

35 It is trite to state that the common law is incremental in nature: the doctrine of *stare decisis* obliges judges to adjudicate with reference to decided *cases*. As stated by the English Court of Appeal in *Velazquez, Limited v Commissioners of Inland Revenue* [1914] 3 KB 458 at 461, "when there has been a decision of [a superior court] upon a question of principle it is not right for this Court, whatever its own views may be, to depart from that decision". Cases are the atomistic building blocks of the common law. This is in sharp contradistinction with the civil law, where *stare decisis* does not apply and where general *principles* of law, as embodied in systematic codes, are the building blocks. At the risk of oversimplification, common law systems primarily engage in inductive reasoning, while civil law systems primarily engage in deductive reasoning.

36 As such, in common law systems, the true scope of any purported principle of law, inductively derived, is inherently uncertain. Principles of law – including the Atkinian "neighbour" principle – are only valid in so far as they are recognised to govern particular factual matrices and are actually applied in subsequent cases. To illustrate: for years after *Donoghue* was decided, it languished in obscurity. Many narrowly construed *Donoghue* to stand only as precedent that manufacturers of goods were liable for injuries caused to ultimate consumers. In particular, *Candler v Crane, Christmas & Co* [1951] 2 KB 164 ("*Candler*") (since overruled by *Hedley Byrne & Co Ltd v Heller & Partners Ltd*

[1964] AC 465) held that *Donoghue* did not affect the principle that a false statement made negligently by one person to another, although acted on by the latter to his detriment, was not actionable in tort. In *Candler*, Cohen LJ reasoned that the factual matrix before the court was on all fours with that of the earlier case of *Le Lievre and Dennes v Gould* [1893] 1 QB 491, which concerned carelessly drawn architectural certificates, and declined to apply an expansive notion of the Atkinian "neighbour" principle. With the benefit of hindsight, *Candler* and other cases of its ilk are, in a sense, unsurprising: "the process of reasoning adopted by many of the judges was not untypical of the era [*ie*, the 80-odd years following the decision in *Indermaur* in 1866] …, being marked by reliance on precedents rather than principle" (see S H Bailey, "Occupiers' Liability: the Enactment of 'Common Law' Principles" in *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (T T Arvind & Jenny Steele eds) (Hart Publishing, 2013) ("*Tort Law and the Legislature*") ch 9 at p 191).

37 Some leading academics went even further, and doubted the very existence of the Atkinian "neighbour" principle. For instance, W T S Stallybrass, in *Salmond on Torts* (Sweet & Maxwell, 8th Ed, 1934), said at (p 459) that:

> We cannot do more than take Lord Atkin's general principle as a useful guide and it cannot be regarded as an authoritative proposition of law …

38 In a similar vein, P A Landon ("Landon"), in *Pollock on Torts* (Stevens & Sons, 15th Ed, 1951), stated (at p 333) that:

> It is inconceivable that all these doctrines have been overruled by the ipse dixit of a single Lord of Appeal, and the House of Lords must one day either reject the Atkin definition as an accurate criterion or tell us how it can be reconciled with accepted rules of law.

Indeed, Landon pertinently proceeded to point out that "the duty owed to a bare licensee – clearly a 'neighbour'" (at p 332) was one such area of law where the then accepted rules on occupiers' liability were inconsistent with the Atkinian "neighbour" principle.

39 It thus comes as no surprise that as at 1957, the traditional common law rules on occupiers' liability had not been subsumed under the general rubric of negligence (in so far as there was such a rubric at that time). The English Legislature, responding to widespread dissatisfaction with the confusing and unpredictable state of this area of the law, stepped in and promulgated the 1957 English Act (see [20] above). That Act swept away the formalistic categories of relationship adopted under the traditional common law rules (with the exception of trespassers) and imposed a "common duty of care" (see s 2(1)) on an occupier towards all "visitors" (defined in s 1(2) as invitees and licensees) on his premises. However, it did not obliterate the distinction between the static and the dynamic which I outlined earlier at [20]–[21] above (referred to hereinafter as "the static-dynamic dichotomy"): s 1(1) specifically referred to "dangers due to the state of the premises". In *Fairchild v Glenhaven Funeral Services Ltd and others* [2002] 1 WLR 1052 at [129]–[130], the English Court of Appeal confirmed that the language used in the 1957 English Act strongly indicated that the English Parliament intended the Act to apply only to static duties (*ie*, duties arising from the static condition of property). Thus, even after legislative intervention, the law in England on occupiers' liability was still not fully rationalised as part of the general law of negligence.

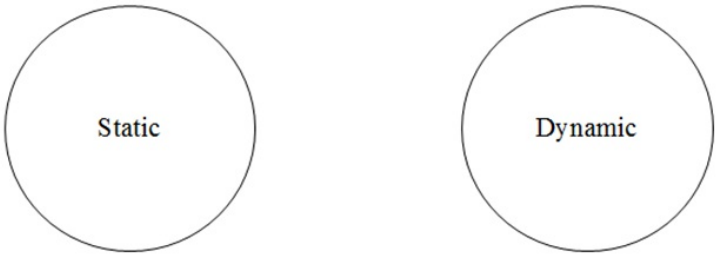
40 The 1957 English Act is not listed in the First Schedule of the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("the AELA"). As such, pursuant to s 5 of the AELA, the 1957 English Act is not part of Singapore law (see also *Industrial Commercial Bank v Tan Swa Eng and others and another appeal* [1995] 2 SLR(R) 385 at [15]). In Singapore, the common law still applies in the area of

occupiers' liability; but, as I shall explain below, the autochthonous common law of Singapore today need not and should no longer be the same as the traditional common law rules on occupiers' liability.

The illogicality of the static-dynamic dichotomy

41 In my view, the antiquated English common law distinction (which still prevailed at the time of the 1957 English Act) between the law on occupiers' liability and the general law of negligence is not and should not be conclusive of the common law position in Singapore today.

42 The analysis above has already touched on the genesis of the traditional common law rules on occupiers' liability. I shall now examine whether the static-dynamic dichotomy is logically justified. A distinction between the static and the dynamic *could* be warranted if one could cleanly delineate *all* potential factual matrices (regarding wrongs situate on property) into one category or the other *with no overlap* (as illustrated in the Venn diagram below):



$$Static \cap Dynamic = \phi$$

Set of all factual matrices regarding wrongs situate on property

43 However, it is not always possible, in practice, to cleanly delineate between the static and the dynamic in the above manner. There are some (although not all) factual matrices which are susceptible to both classifications. Take, for instance, the facts of the instant case. HAL and LAI Offshore were occupiers of 9/11 TBC, and consequently came under certain static duties: they were to ensure that reasonable efforts were made to ensure that nobody would suffer harm from the condition of the land (which would potentially entail fencing up 9/11 TBC), and so on and so forth. See Toh entered 9/11 TBC through a gap in the fence separating 9/11 TBC and 15 TBC, and this had nothing to do with any activity on 9/11 TBC. On the other hand, HAL had sublet a certain part of 9/11 TBC to LAI Offshore, whose client (*viz*, KFELS) had in turn engaged Asian Lift to take delivery of the KFELS living quarters being built at 9/11 TBC by LAL Offshore. Asian Lift was an independent contractor who engaged in potentially dangerous operations on 9/11 TBC, *viz*, the Mooring Operation described at [6]–[7] above. As this was a dynamic activity, HAL and LAI Offshore were under a non-delegable duty to take reasonable care to ensure that nobody would suffer harm as a result of the Mooring Operation, and this would potentially entail ensuring that their respective employees were denied access to the Operations Site, and so on and so forth. See Toh was injured because of the dangerous mooring activity, and this had nothing to do with the static condition of 9/11 TBC. In such a case, one portion of the factual matrix would seem to be more susceptible to one classification, while another portion of the factual matrix would seem to be more susceptible to another classification.

44 Another example of a case where a clean divide between the static and the dynamic is not possible would be the seminal case of *Australian Safeway Stores Proprietary Limited v Zaluzna* (1987) 162 CLR 479 ("*Zaluzna*"). The plaintiff in *Zaluzna* slipped in the foyer area of the defendant supermarket because of a wet floor and was injured. The vinyl-tiled floor of the foyer had become

wet due to the rain. The majority of the High Court of Australia (*viz*, Mason, Wilson, Deane and Dawson JJ) opined (at 486) that:

> The present case illustrates the neat issue that such a question [*ie*, the question of whether the static-dynamic dichotomy serves any useful purpose] can raise: on the one hand, the [defendant] argues that because the condition of the floor was caused by wet weather it was unrelated to any activity of the [defendant] and therefore the special duty [under the traditional common law rules on occupiers' liability] supplied the relevant test; on the other hand, it was the activity of conducting a commercial operation on the premises that provided the context for the accident and what could be more dynamic than the constant movement of rain-soaked shoppers over the floor of a supermarket on a Saturday morning?

45 In cases similar to *Zaluzna*, there is an even deeper level of ambiguity: the *entire* factual matrix seems to be equally susceptible to both classifications.

46 Trying to distinguish between the static and the dynamic is tantamount to attempting to untie an intractable Gordian knot. Unlike purely philosophical predicaments like the Ship of Theseus, which touch on problems of classification that have no practical impact (in everyday life, it does not matter whether or not the Ship of Theseus remained the same after being entirely replaced piece by piece), the static-dynamic dichotomy has a real impact on the content of the duty (if any) owed by an occupier.

4 7 *Even if* the static-dynamic dichotomy were logically workable, the delineation between the static and the dynamic might practically turn on seemingly inconsequential details. For instance, in *Revill v Newbery* [1996] QB 567, it was pointed out (at 575) that:

> … [I]t would seem that if an occupier of land arranges for a party to shoot on his land and one of the party negligently injures a trespasser the occupier might be liable [for static duties] under section 1 of the [Occupiers' Liability Act 1984 (c 3) (UK)] … On the other hand if he goes out shooting alone his liability, if any, would be determined under the common law of negligence. …

On the hypothetical facts above, there is a (technically speaking) logically workable distinction between the occupier who arranges for a third party to shoot on his land and the occupier-shooter. However, the distinction is arbitrary and *does not comport with justice.* In respect of the injured trespasser, Occupier A, who fortuitously arranges for a third party to shoot on his land, would be held to the lower standard of "ordinary humanity" enunciated in *Herrington* (see [27] above), whereas Occupier B, who does not arrange for a third party to shoot on his land but instead goes shooting himself, would be held to the ordinary standard of reasonable care under the law of negligence. This could also have the unintended consequence of perversely incentivising occupiers to arrange for third parties to carry out potentially dangerous activities on their property. There seems to be no defensible reason for distinguishing between Occupier A and Occupier B, save for the brute fact of the static-dynamic dichotomy. Put another way, the static-dynamic dichotomy obscures the ultimate question of whether a particular occupier ought to be liable in tort to a particular entrant; the process of classification may be based on facts that are plainly irrelevant to this ultimate question, and is apt to lead to injustice.

48 For the sake of completeness, I would like to add that similar problems of classification plague the invitee-licensee-trespasser trichotomy. In *Nelson*, it was trenchantly pointed out (at 889–890):

> Consider, for example, the following scenario: A real-estate agent trespasses onto another's land to determine the value of property adjoining that which he is trying to sell; the real-estate agent

is discovered by the landowner, and the two men engage in a business conversation with respect to the landowner's willingness to sell his property; after completing the business conversation, the two men realize that they went to the same college and have a nostalgic conversation about school while the landowner walks with the man for one acre until they get to the edge of the property; lastly, the two men stand on the property's edge and speak for another ten minutes about school. If the real-estate agent was injured while they were walking off the property, what is his classification? Surely, he is no longer a trespasser, but did his status change from invitee to licensee once the business conversation ended? What if he was hurt while the two men were talking at the property's edge? Does it matter how long they were talking?

The invitee-licensee-trespasser trichotomy is thus open to the same objections enumerated above: first (from the viewpoint of logic), it is potentially ambiguous whether an entrant is to be classified as an invitee, a licensee or a trespasser; and second (from the viewpoint of practice), the distinctions between the categories could turn on inconsequential details that potentially lead to injustice.

(1) Resolving the static-dynamic dichotomy

49 I leave the trichotomous distinction between licensees, invitees and trespassers aside for the moment. Faced with intractable problems of classifying factual matrices as either static or dynamic, the court can opt for one of two solutions. The court can take a "disjunctive" approach, attempt to shoehorn an ambiguous factual matrix into the classification which it seems to be closer to and hold that a legal duty is owed only under one rubric. Alternatively, the court can take a "conjunctive" approach, hold that both classifications are equally valid and find that duties are concurrently owed under both the law on occupiers' liability (properly so-called) *vis-à-vis* the static and the general law of negligence *vis-à-vis* the dynamic.

50 The "disjunctive" approach is clearly unacceptable: the ambiguities involved in classification would inexorably lead to arbitrary outcomes. This is because the court is not guided by rational criteria in shoehorning an ambiguous factual matrix into one particular classification – taking the factual matrix of *Zaluzna* as an example, what rational criteria can possibly be used to determine whether an injured supermarket shopper who slipped on the rain-soaked floor of a supermarket is to be owed duties under one classification or the other? Any declaration that such a factual matrix falls under one classification or the other would be a mere *ipse dixit.*

51 The "conjunctive" approach is not without its own objections. If concurrent duties are owed under both the law on occupiers' liability and the general law of negligence, it poses the question as to whether two disparate sets of rules are strictly necessary, especially when the general law of negligence is premised on the general Atkinian "neighbour" principle, which, *ex facie*, should apply with equal force to occupiers of property *qua* occupiers. I should point out here that this question of whether it is necessary to have two disparate set of rules to govern a particular legal duty does not always arise where concurrent duties are owed under the law: for instance, a professional may owe concurrent duties to take care in both tort and contract. However, this does not raise the question of whether the duties in tort should be subsumed under the duties in contract (or vice versa), because each set of duties is governed by its own distinct and non-reconcilable principles.

52 In my view, the time is now ripe for Singapore to cut the Gordian knot shackling the traditional common law rules on occupiers' liability, rather than attempt to unravel it. Eliminating the static-dynamic dichotomy would prevent classificatory problems from arising at two levels: first, at the static-dynamic level; and second (assuming that the duty owed by the occupier relates to the static), at the status level, where the traditional common law rules distinguish between invitees, licensees and trespassers.

53 In Singapore, it is well-settled that the landmark decision of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") has authoritatively laid out the framework for the imposition of a duty of care in claims arising out of negligence. Under the test set out in *Spandeck* (referred to hereinafter as either "the *Spandeck* test" or "the *Spandeck* approach"), three elements must be established before a duty of care can be imposed on a defendant:

(a) factual foreseeability, which this court described as "*not* a necessary element in any claim in negligence, [but] *just … a threshold question* which the court must be satisfied is fulfilled, failing which the claim does not even take off" [emphasis added] (see *Spandeck* at [76]);

(b) sufficient legal proximity between the plaintiff and the defendant so as to justify imposing a *prima facie* duty of care on the latter (referred to by this court at [77] of *Spandeck* as "[t]he *first* stage of the [*Spandeck*] test" [emphasis in original]); and

(c) the absence of policy considerations that ought to negate a duty of care (which is the second limb of the *Spandeck* test).

With regard to the element of proximity, this court stated (*per* Chan Sek Keong CJ at [79] of *Spandeck*) that it "import[s] the whole concept of the necessary relationship between the claimant and the defendant as described by Lord Atkin in *Donoghue*".

54 Unlike the position in 1957, it is now undeniable that the common law tort of negligence is, at its core, supported by a substratum of general principles of law. It is also indisputable that in the context of the law of negligence in Singapore, the *Spandeck* test is the *Grundnorm* – the sole, ultimate set of principles upon which a duty to take reasonable care under the law of negligence rests. Pertinently, Chan CJ held in *Spandeck* (at [71]) that:

… [I]n our view, a *single* test is preferable in order to determine the imposition of a duty of care in all claims arising out of negligence, *irrespective* of the *type* of the damages claimed … [emphasis in original]

55 The crux of Issue 1 boils down to this: either the *Spandeck* test is comprehensive, with the rules governing occupiers' liability being particular manifestations of the *Spandeck* test; or, the *Spandeck* test has a narrower remit and does not apply to the milieu of occupiers' liability. In my view, the law of negligence must be "a coherent body of rules, and not consist of singular instances of judicial decisions unrelated to each other" (see *Spandeck* at [28]). In this regard, I find the evolutionary path taken by the common law in the jurisdictions examined at [56]–[75] below instructive.

(2) The evolutionary path in other jurisdictions

(A) England

56 As alluded to above, in England, the English Parliament stepped in to promulgate the 1957 English Act. This Act eliminated the distinction between invitees and licensees by defining (in s 1(2)) both of these categories of persons as "visitors" (*ie*, lawful visitors), but left the common law distinction between trespassers and lawful visitors intact. The latter distinction was subsequently abrogated by the Occupiers' Liability Act 1984 (c 3) (UK) ("the 1984 English Act"), which codified the duty of care owed by an occupier *qua* occupier to a trespasser. The static-dynamic dichotomy, however, remained intact under both the 1957 English Act and the 1984 English Act. The English

courts thus have not had the opportunity to definitively consider whether the rules governing occupiers' liability should be subsumed under the general principles of the law of negligence. Given that the 1957 English Act and the 1984 English Act have codified static duties, it is even arguable that the English courts are *de jure* constrained (because of Parliamentary supremacy) from even considering the question. In any event, there is little to no practical utility in considering the question. As *Clerk & Lindsell on Torts* (Michael A Jones & Anthony M Dugdale eds) (Thomson Reuters (Legal) Limited, 20th Ed, 2010) ("*Clerk & Lindsell on Torts (2010)*") states at para 12-04:

> *… [W]here the claimant's status is not in issue there is often little practical difference between his remedy under the [1957 English] Act and that at common law [under the law of negligence]*. The issue in many cases will be one of fact: was the claimant foreseeable, and has the duty to take reasonable care been broken? [emphasis added]

57 The case of *Slater v Clay Cross Co Ltd* [1956] 2 QB 264 is the closest that the English courts have come to taking a position on the issue of whether the law on occupiers' liability should be subsumed under the general law of negligence. There, Denning LJ (as he then was) stated in *obiter dicta* (at 269) that:

> The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts. *The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point. … The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees*. [emphasis added]

58 At this juncture, I would also like to point out that Lord Wilberforce declared, *obiter*, in *Herrington* that "[t]here can be no doubt that the law regarding occupiers' liability forms part of the general law of negligence" (at 912F). However, *Herrington* was decided in 1972, by which time the law in England on occupiers' liability had already been partially codified (*vis-à-vis* invitees and licensees) by the 1957 English Act. Thus, in so far as the English Parliament had by then already prescribed a *statutory* duty of care (which is hierarchically superior to a common law duty of care), it would be inaccurate to state that in England, the law on occupiers' liability forms part of the general *common law* of negligence. Nevertheless, I regard Lord Wilberforce's comment to be persuasive as to what the English common law position on occupiers' liability might hypothetically have been, circa 1972, had the English Parliament not intervened.

59 It is also interesting to note that some English cases have ignored the 1957 English Act altogether, as can be seen from *Davies v The Mayor, Aldermen and Burgesses of The Borough of Tenby* [1974] 2 Lloyd's Rep 469 ("*Davies*") and *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 ("*Ward v Tesco Stores*"). *Davies* concerned a plaintiff who became a quadriplegic as a result of striking his head on the sea bottom after diving from the defendant's loose diving-board, while *Ward v Tesco Stores* concerned a plaintiff who slipped and fell when she trod on spilt yoghurt on the defendant supermarket's floor. In both cases, there is no mention whatsoever of the 1957 English Act – further fortifying the proposition that the law on occupiers' liability is, at its root, a mere subset of the general principles of the law of negligence. *Clerk & Lindsell on Torts (2010)* have therefore good reason to observe that "[i]ndeed, even in clear 'occupancy duty' cases the courts have on occasion simply ignored the [1957 English] Act" (at para 12-04). I conclude this overview of the complex labyrinth of the English common law rules on occupiers' liability – which has created confusion and dissension among judges, lawyers and the public – by making reference to recent penetrating

observations made by S H Bailey in *Tort Law and the Legislature* (at ch 9, p 211):

> The common law of occupiers' liability illustrates the desirability of developing principles whose purposes are fully analysed and understood. **It illustrates the undesirability of an excessive focus on the facts of cases and how they compare with the precedents; of the use of catchphrases (such as 'unusual danger' and 'concealed trap') which began to have a life of their own; of excessive complication in the law (with many distinctions to be litigated); of a rule that the highest court in the legal system is bound by its own previous decisions (a number of the decisions in the House of Lords in this area being among the least distinguished of that body); and of an approach to decision-making in the final appellate court that can lead to a plurality of opinions with variations of language that leave it unclear whether there are differences of view as to the substance of the law. There were recurring situations where at least some judges took the view that the strict rules operated harshly. They could not change the law and so the only way they could secure a just outcome was by adopting a strained interpretation of the facts, or simply asserting that the law was different from what it was generally accepted to be. This promoted confusion.** *Herrington* is also open to the further criticism that too much in the opinions was focussed on justifying an outcome in favour of the plaintiff rather than on articulating principles to guide future courts. ...
>
> The intervention of statute has been largely successful. Indeed the 1957 [English] Act has served as a model for other common law jurisdictions. ***However, the structure of the law that has emerged is one which could have been produced by a final appellate court freed of the shackles of precedent*** and less inhibited from being seen in effect to legislate than the House in *Herrington*. …
>
> [emphasis added in bold and in bold italics]

(B) Australia

60 In Australia, two of the six States – *viz*, Victoria and Western Australia – have promulgated statutes similar to the 1957 English Act (see, respectively, the Wrongs Act 1958 (No 6420 of 1958) (Vic) ("the Wrongs Act 1958 (Vic)") at ss 14A–14D and the Occupiers' Liability Act 1985 (WA)). The position on occupiers' liability in the other four Australian States thus remains governed by common law.

61 Australian common law has, however, now fully rationalised occupiers' liability as a proper subset of the general principles of the law of negligence. The *locus classicus* is the Australian High Court case of *Zaluzna* (decided based on common law principles pre-dating the enactment of amendments to the Wrongs Act 1958 (Vic)). It would be apposite, at this stage, to set out the procedural history of that case.

62 The plaintiff in *Zaluzna* sued the defendant supermarket in the Supreme Court of Victoria, pleading both a breach of the general duty of care founded on the tort of negligence and a breach of the duty owed by an occupier *qua* occupier to an invitee. The trial judge confined himself to the static paradigm, and held that the defendant did not owe a duty stemming from the general principles of the law of negligence. The trial judge also found that the defendant had not breached the static duty owed by an occupier to an invitee. The plaintiff appealed to the Full Court of the Supreme Court of Victoria. Her appeal was allowed on the basis that the trial judge ought to have considered whether the defendant had been in breach of a general duty of care under the tort of negligence; a retrial was ordered. The defendant then appealed by way of special leave to the High Court of

Australia. The majority dismissed the appeal, with Brennan J the sole dissenter.

63 After a review of the prior cases, the majority held that (at 486–487):

> These judgments raise important issues. Does a theory of concurrent general and special duties, giving rise as it does to complications that raise "some intricate and possibly confusing arguments" (the Judicial Committee in *Southern Portland Cement Ltd. v. Cooper* [[1974] AC 623]) serve any useful purpose as the law of negligence is now understood? ***Is there anything to be gained by striving to perpetuate a distinction between the static condition of the land and dynamic situations affecting the land as a basis for deciding whether the special duty is more appropriate to the circumstances than a general duty?*** ... If it was always the case that the formulations of an occupier's duty in specific terms contributed to the easy ascertainment of the law there would be a case for their retention, as Wilson J. acknowledged in [*Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 23)], but the pursuit of certainty in this way loses its attraction if its attainment depends on the resolution of difficult questions based on artificial distinctions. It seems to us that the utility of the theory of concurrent duties could be accepted only if a situation could arise in which it was possible to establish a cause of action in reliance upon *Indermaur v. Dames* [*ie*, in reliance on the traditional common law rules on occupiers' liability] which could not be pursued by reference to the general duty of care postulated in *Donoghue v. Stevenson*. ***And yet case after case affirms, as the reviews to which we have referred demonstrate, that the special duties do not travel beyond the general law of negligence. They are no more than an expression of the general law in terms appropriate to the particular situation it was designed to address.*** [emphasis added in bold italics]

64 The Australian High Court went on to hold (by a majority) that the relationship between occupiers and all types of entrants (including trespassers) should be dealt with on the basis of the general law of negligence. I find the reasoning of the majority in *Zaluzna* particularly persuasive. Those in favour of maintaining the distinction between the law on occupiers' liability and the general law of negligence may argue that there would be greater certainty if the content of an occupier's duty is determined *de jure* solely by reference to the different classes of entrants. In my view, this is a mistaken approach, and presupposes that there can be certainty in the initial classification of an entrant. In truth, categorisation has historically been a protracted legal issue riddled with technical intricacies and inconsistent application (see [48] above). Much time and energy has been expended on the minutiae of whether a particular entrant did or did not fall into a particular category, and this has detracted from the true issue of whether *a particular* occupier ought to be held accountable for *his* actions. The approach taken by the majority in *Zaluzna* gives greater flexibility to the courts and departs from "the rigidity of the classification of entrants, and the artificiality of distinguishing between the static condition of premises and activities conducted on the premises" (see *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at 243).

65 It is apposite to note that under the approach of the majority in *Zaluzna*, the content of the duty owed by an occupier "will [still] vary with the circumstances of the plaintiff's entry upon the premises" (see *Zaluzna* at 488). The entrant's circumstances of entry remain *de facto* pertinent: the court is entitled to have regard to all the relevant circumstances of the case to determine whether a duty of care is owed by the occupier to the entrant, and if so, whether the duty of care owed by the occupier has been breached.

66 I would further add that subsuming the law on occupiers' liability under the general law of negligence would actually promote certainty in the law. The antiquated and overly complex rules governing occupiers' liability would be replaced by the relatively more straightforward and

understandable tests under the general law of negligence. On this note, I wholeheartedly agree with the observations of the New South Wales Court of Appeal in *Gorman v Williams* [1985] 2 NSWLR 662 (at 665E) that:

> **It should not be forgotten that the law on a subject such as this is ultimately designed to be understood and obeyed by citizens.** *It has relevance to the determination of liability for compensation[,] to the taking of precautions by occupiers and to the fixing of insurance premiums in large numbers of cases.* These are powerful arguments for simplicity and clarity in the law and for adoption of a principle which will appear immediately justifiable and understandable to those principally affected. [emphasis added in bold and in italics]

(C) Canada

67 In Canada, of the nine provinces which apply the common law (*ie*, all ten provinces of Canada excluding Quebec), six provinces – *viz*, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Prince Edward Island – have enacted occupiers' liability legislation. Saskatchewan still applies the traditional common law rules on occupiers' liability, while New Brunswick has abolished the common law principles on occupiers' liability altogether.

68 Notably, in Newfoundland, its Court of Appeal has declared the rules governing occupiers' liability to be a subset of the general law of negligence. In *Stacey v Anglican Churches of Canada (Diocesan Synod of Eastern Newfoundland & Labrador)* (1999) 47 CCLT (2d) 153, a unanimous coram cited a number of cases where the boundaries between the various categories of entrants had been blurred, and held (at [29]–[30]):

> 29 … [W]hat we would propose as the test for the evaluation of the liability of an occupier … is that:
>
> > An occupier's duty of care to a lawful visitor to his or her premises is to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there.
>
> 3 0 *The above is no more than a logical extension to the law of occupier[s'] liability of the general duty of care owed by one person to another* – in this instance, persons who were formally classified as license[e]s, invitees and contractees. "Occupier" could also mean landowner if as owner he or she has responsibility for, and control over, the premises. It would obviously be equally applicable to the condition of the premises and to activities being carried out on the premises. …
>
> [emphasis added]

(D) The United States

69 In the United States, the Supreme Court of California was the first to abolish, in 1968, the traditional tripartite distinction between trespassers, licensees and invitees. In *James Davis Rowland Jr v Nancy Christian* 443 P 2d 561 (1968) ("*Rowland*"), the court referred to various reasons for abolishing this distinction. First, the American courts had broadly defined "active" operations (the American term of art for dynamic activities on land), at times giving the term a strained construction in an apparent attempt to avoid the general rule limiting liability (at 565). Secondly, the traditional tripartite distinction between trespassers, licensees and invitees was unrealistic, arbitrary and

inelastic; the exceedingly fine distinctions had resulted in confusion, with many cases in fact applying the general doctrine of negligence (at 567). Third, this distinction was not justified in the light of modernity; it was apparent that the three-fold classification did not reflect the major factors which should determine whether or not immunity should be conferred upon an occupier of land in respect of damage or injuries sustained by an entrant (at 567).

70 Most pertinently, the court held (at 568):

> … *The proper test to be applied to the liability of the possessor of land in accordance with [general principles of negligence] is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others*, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.
>
> Once the ancient concepts as to the liability of the occupier of land are stripped away, the status of the plaintiff relegated to its proper place in determining such liability, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. …
>
> [emphasis added]

71 I agree with the reasons stated by the Supreme Court of California. In particular, I shall expand on its third reason (*viz*, policy considerations for abolishing the traditional tripartite invitee-licensee-trespasser distinction) in the discussion below (at [86]–[97]).

72 The North Carolina Supreme Court, in the 1998 decision of *Nelson*, abolished the invitee-licensee-trespasser trichotomy (at 892), and noted (at 886) that 12 other American jurisdictions (exclusive of North Carolina) had eliminated this trichotomy (those 12 jurisdictions being Alaska, Colorado, California, District of Columbia, Hawaii, Illinois (with respect to children), Iowa, Louisiana, Montana, Nevada, New Hampshire and New York). 14 other jurisdictions (at 886–887) had eliminated the distinction between licensees and invitees (those 14 jurisdictions being Florida, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, North Dakota, Oregon, Rhode Island, Tennessee, Wisconsin and Wyoming). As such, as of 1998, 27 of the 51 American jurisdictions (*ie*, the 50 States and the District of Columbia) no longer followed the traditional common law rules on occupiers' liability. The North Carolina Supreme Court emphatically declared (at 892) that:

> In sum, there are numerous advantages associated with abolishing the trichotomy. *First, it is based upon principles which no longer apply to today's modern industrial society. Further, the … cases demonstrate that the trichotomy has failed to elucidate the duty a landowner owes to entrants upon his property. Rather, it has caused confusion amongst our citizens and the judiciary* – a confusion exaggerated by the numerous exceptions and subclassifications engrafted into it. … [emphasis added]

73 Notably, this seismic shift away from the traditional English categories occurred *despite* the fact that it would relinquish tight judicial control in favour of the still extant jury system in the United States (see [32]–[33] above).

(E) Other jurisdictions

74 Scotland has enacted legislation dealing with occupiers' liability which is broader in scope that its English counterpart (*viz*, the 1957 English Act), in that the Occupiers' Liability (Scotland) Act 1960

(c 30) also extends an occupier's duty of care to trespassers. New Zealand has passed legislation substantially modelled on the 1957 English Act (*viz*, the Occupiers' Liability Act 1962 (NZ)).

75 It bears mention that the above legislative changes quickly followed the changes made in England by the 1957 English Act, well before the subsequent maturing of the general principles underpinning the law of negligence. Further, both Scotland and New Zealand then had English legal apron strings.

The Spandeck test applied to occupiers

76 A comparative survey of the various common law jurisdictions clearly indicates that the vast majority of them have, at the bare minimum, eliminated the invitee-licensee dichotomy (whether by evolution of the common law or by statute). This is not a mere *argumentum ad verecundiam*: the foregoing fortifies my belief that *as a matter of logic*, the principles governing occupiers' liability are a proper subset of the general principles of the law of negligence. The law in Singapore on occupiers' liability can and should be subsumed under the tort of negligence. I now apply the *Spandeck* test to occupiers to demonstrate this.

(1) Reasonable foreseeability

77 The threshold factual test of reasonable foreseeabilty is readily met in the case of occupiers. It is eminently foreseeable that entrants will suffer damage if occupiers do not take reasonable care to eliminate danger, whether static or dynamic, on their premises.

(2) Proximity

78 As was explained in *Spandeck* at [78], proximity embraces physical, circumstantial and causal proximity, and includes proximity arising from the voluntary assumption of responsibility and concomitant reliance.

79 There is undoubtedly physical proximity between an occupier and an entrant to his property merely by virtue of the fact that the entrant is physically situated on the occupier's property.

80 In so far as cases of *lawful* entrants are concerned (*ie*, entrants whose circumstances of entry to an occupier's property can be definitively said, on a balance of probabilities, to be lawful), circumstantial proximity is tautologically present in the occupier-lawful entrant relationship. To elaborate, the hallmark of a lawful entrant's presence on an occupier's premises is consent to his presence on the part of the occupier; it is this consent, which grounds the occupier-lawful entrant relationship and justifies a legal finding that there is proximity between the occupier and the lawful entrant. **I thus hold that under the first limb of the *Spandeck* approach, the *vast majority* of occupiers having control of the property which they occupy and/or the activities carried out there *de jure* owe a *prima facie* duty of care to lawful entrants.** At the same time, it bears emphasis that *not* all "occupiers" (in the generic non-technical sense of persons who occupy property, regardless of the extent of their control over the property concerned and/or the activities carried out there) owe a *prima facie* duty of care to lawful entrants – essentially, this turns on the degree of control which an occupier has over the property concerned and/or the activities carried out there. There may be cases where an "occupier" has so little control over the property and/or the activities carried out there that, for all intents and purposes, he effectively does not have control over that property and/or those activities. Leaving aside this category of "occupiers", *vis-à-vis* occupiers who *do* have control over the property which they occupy and/or the activities carried out there, I should emphasise that they are not to be viewed as insurers of the safety of their property.

Their duty is merely to exercise reasonable care.

81 In contrast to a lawful entrant, a trespasser is one who "goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to" (see *Addie* at 371). The term "trespassers" denotes, in actuality, a residual class of persons who do not have any legal justification for being on an occupier's premises. It is an unsatisfactory protean term as "it covers the wicked and the innocent: the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child" (*per* Lord Morris of Borth-y-Gest in *Herrington* at 904A). As such, unlike the case of lawful entrants, it is impossible to hold that occupiers *de jure* owe a blanket duty of care to all trespassers. In this regard, I am alive to the fact that there remains a species of Gordian knot (albeit smaller than that which shackled the traditional common law rules on occupiers' liability and therefore manageable), namely: who is a "trespasser"? To illustrate this sometimes awkward difficulty, I revert once again to the example given in *Nelson* of a real estate agent who initially trespasses onto another's land, seemingly becomes an invitee because he starts a business conversation with the occupier and finally morphs into a licensee because he engages in social pleasantries with the occupier (see above at [48]).

82 Nevertheless, I think that a *de facto* distinction between cases of *lawful entrants* on the one hand and a *residual category of entrants* whose circumstances of entry to an occupier's property cannot be definitively said, on a balance of probabilities, to be lawful ("residual entrants") on the other ought to be maintained under the *Spandeck* approach as abolishing it may place an unnecessary and unfair burden on occupiers who have no reason to expect a residual entrant's presence. Cases involving residual entrants would range from cases where it is uncertain (applying the civil standard of proof) whether the circumstances of the particular entrant's entry to the occupier's premises are lawful to, at the other end of the spectrum, cases where it can be definitively said, on a balance of probabilities, that the circumstances of the entrant's entry are unlawful (see, *eg*, the example given by Lord Morris in *Herrington* of a burglar (at [81] above)). *Whether or not a* prima facie *duty of care arises* vis-à-vis *a residual entrant must depend on all circumstances of the case*. I would like to reiterate that this is not a return to the old common law *de jure* "categorisation" approach, under which liability turned dramatically on whether the court slotted an entrant into the "lawful visitor" or the "trespasser" category. Rather, under the *Spandeck* approach to occupiers' liability, the court makes a preliminary inquiry into the classificatory issue of whether a particular entrant's circumstances of entry to the occupier's premises are (on a balance of probabilities) lawful: if they are lawful, a *prima facie* duty of care is owed by the occupier in control of the premises in accordance with the first limb of the *Spandeck* test (set out at [53(b)] above) because *sufficient legal proximity must, by definition, be present*. It is only in cases where it *cannot be said (on a balance of probabilities)* that the circumstances of an entrant's entry are lawful (*ie*, where an entrant is a residual entrant) that the court then goes on to consider the issue of whether the particular facts of the case before it justify imposing a *prima facie* duty of care pursuant to the first limb of the *Spandeck* test. In this manner, the Gordian knot of classification is resolved, and one is left with a question of fact as to whether *a particular occupier ought to owe a particular entrant a* prima facie *duty of care.* Put simply, the lawful entrant/residual entrant dichotomy is not a true classificatory dichotomy logically mandated by *Spandeck*, but is merely a convenient (shorthand) way of applying the *Spandeck* test to particular facts. In short, when the circumstances of an entrant's entry cannot be definitively said (on a balance of probabilities) to be lawful, the first limb of the *Spandeck* test is applied in full – *ie*, instead of only considering whether or not the circumstances of the entrant's entry were lawful and whether or not the occupier had control of the property so as to justify the *de jure* imposition of a *prima facie* duty of care on the occupier (see [80] above), the court will consider all the factors relevant to the first limb of *Spandeck*.

83 In this regard, two diametrically opposed post-*Zaluzna* Australian cases are illustrative. In *Stone v Clarence Municipality* (1993) 79 LGERA 392 ("*Stone*"), the plaintiff, then an 11-year-old boy, was injured while climbing (together with a friend) a rock face in a disused quarry. He sued the defendant municipal council, which was the owner and occupier of the land where the quarry was located. It was found as a fact that the quarry was not effectively and securely fenced off (at 400). The finding that there was a duty of care on the defendant's part hinged on two features: first, that wandering, active and mischievous children were involved (at 399); and second, that one particular (not as steep) rock face was an allurement (*ibid*). The Supreme Court of Tasmania (*per* Wright J) held that the defendant "should have foreseen a distinct possibility that [that particular rock face] would present an attractive climbing challenge to normally active and adventurous children" (*ibid*). Most pertinently, Wright J held that "I can well imagine that two normal eleven year olds may readily undertake this venture *without being alive* to the potential danger from loose rock at the top end of their route" [emphasis added] (*ibid*).

84 In *State of South Australia v Wilmot* (1993) 62 SASR 562 ("*Wilmot*"), the respondent was an inexperienced trail bike rider who rode uninvited on unalienated Crown land, and subsequently got injured. At first instance, she succeeded in her claim against the Crown. On appeal by the Crown, the Supreme Court of South Australia held that the Crown did not owe the respondent a duty of care because of various factors. Firstly, the Crown had not created any danger on the land: the dangers arose from the topography of the land (at 575), were eminently self-evident (*ibid*) and were, indeed, precisely what made negotiating the difficult terrain exciting for trail bike riders (see *Wilmot* at 571 and 576). Secondly, it would be impractical and unreasonable for the Crown to convert the land into a managed park (at 575; this holding was made in the context of the respondent's argument that the Crown should have taken over supervision of the land and converted it into a managed park). Thirdly, it would be futile to erect fences or warning signs blocking off particular riding tracks on the land as these would be quickly destroyed (at 570–571); the lack of signs was, in any case, not causative of the respondent's injuries (at 576).

85 The key distinguishing feature between *Stone* and *Wilmot* seems to be that of culpability on the part of the respective entrants. In *Stone*, the then 11-year-old plaintiff did not know better and was allured by a particular rock face in the disused quarry. In *Wilmot*, the respondent trial bike rider rode on the disused land *precisely* because she knew it was dangerous: it was the peril that made it exciting to ride there. In a *Wilmot*-type situation, the law would be loathe to reward a reckless thrill-seeker (for completeness, this would also be relevant to the defence of *volenti non fit injuria*). Without laying down a cast-iron principle of law, I would like to state that the culpability of the entrant is one of the factors which is *de facto* relevant to the inquiry into whether there is, in law, a sufficiently proximate relationship between the occupier and the entrant to justify imposing a *prima facie* duty of care on the former.

(3) Policy considerations

86 I now consider the second limb of the *Spandeck* test – *viz*, whether, if the first limb of the test is satisfied, policy considerations ought to negative the existence of the *prima facie* duty of care imposed under the first limb. It would be apposite to note that under the second limb, the courts are not prohibited from having due regard to positive policy considerations (*ie*, policy considerations militating in favour of imposing a duty of care), for courts may sometimes need to deploy countervailing positive policy considerations to dismiss negative policy considerations (*ie*, policy considerations militating against imposing a duty of care): see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [77].

87 At this juncture, I would also like to add that I agree with the following observations made

recently by Andrew Robertson in his article "On the Function of the Law of Negligence" (2013) 33 OJLS 31 at p 32:

> … [B]y doing justice between individuals, the law of negligence serves a broader community welfare purpose, which is perhaps best understood as the maintenance of civil peace through the provision of civil recourse for particular interpersonal wrongs.

88 As I alluded to at [86] above, the second limb of *Spandeck* only comes into play when the first limb is satisfied – that is, when the court has already found that the parties are in a relationship of sufficient legal proximity such that (in the context of an occupiers' liability case) the occupier is *prima facie* held to be the entrant's keeper. As such, if the court subsequently finds, under the second limb of *Spandeck*, that policy considerations ought to negative the existence of this *prima facie* duty of care, this would be tantamount to the court denying interpersonal justice in the name of broader societal considerations.

89 It must be remembered that the *raison d'être* of the tort of negligence is to render interpersonal justice. In this regard, I fully agree with Lord Browne-Wilkinson's comment in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (at 749G) that:

> … [T]he public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy …

90 Thus, cogent policy considerations must be adduced to displace the *prima facie* position that interpersonal wrongs should be remedied.

91 It is also helpful to bear in mind the policy considerations underlying the traditional common law rules on occupiers' liability. As Francis H Bohlen ("Bohlen") noted in his article "The Duty of a Landowner Toward Those Entering His Premises of Their Own Right" (1920-1921) 69 U Pa L Rev 237 (at p 237):

> The decisions as to a landowner's liability to persons injured on his property group themselves into two classes: those in which the injuries are caused by the owner's act and those caused by the condition of his premises. In both there is a gradual but persistent weakening of *the original concept that the owner was sovereign within his own boundaries and as such might do what he pleased on or with his own domain. The King's law stopped at the boundary of the owner's sovereign territory except in felonies and in trespass actions*, which were originally punitive and extensions of the appeals for felonies to violent misdemeanours. When the comparatively modern law of negligence reached the relations of landowners to persons entering his property it found the field occupied by this *concept of the owner's right as sovereign to do what he pleased on or with his own property*. The history of [the law on occupiers' liability] is one of conflict between the general principles of the law of negligence and *the traditional immunity of landowners*. [emphasis added]

92 Bohlen's observations are corroborated by *Rowland*, where the Supreme Court of California held (at 564–565):

> It has been suggested that the special rules regarding liability of the possessor of land are due to *historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism*.

[emphasis added]

93 This is further supported by the United States Supreme Court case of *Joseph Kermarec v Compagnie Generale Transatlantique* 358 US 625 (1959), where a unanimous coram held (at 630), albeit in the context of injuries sustained on board a ship rather than injuries sustained on land:

> *The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism*. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. [emphasis added]

94 As can be seen from the extracts quoted at [91]–[93] above, the traditional common law rules on occupiers' liability reflect the wider socio-political norms and values which prevailed in England in the mid-19th century, when those rules first emerged with the decision in *Indermaur*. Although feudalism was by then no longer practised in England, the heritage of feudalism – in particular, the tradition of structuring societal relationships and obligations around ownership of land – still ran deep. Underlying this heritage of feudalism was the notion (albeit an eroding one) that landowners were a privileged class, almost completely immune from the King's law, and were mini-sovereigns of their own right within their domains.

95 The Industrial Revolution and the rise of capitalism in the 1800s continued the erosion of the aforesaid notion. However, the law on occupiers' liability continued to breathe feudalistic overtones: for instance, the delineation between invitees and licensees was solely premised on, respectively, the presence and the absence of material benefit accruing to the occupier from the entrant's presence on the premises (see [28] above). A mere licensee was akin to a donee, and did not offer anything in return to the occupier in exchange for his presence on the premises. In contrast, where there was a *quid pro quo* involved, the entrant was classed as an invitee and was accordingly owed a greater duty than a mere licensee.

96 Today, occupiers of property are certainly no longer feudal lords accorded near-absolute immunity in their personal fiefdoms in exchange for homage to the King. Indeed, the high population density of Singapore – 7,422 persons per square kilometre as at 2012 [note: 4] – militates in favour of breaking away from the restrictive standards of care applicable under the traditional common law rules on occupiers' liability and imposing on occupiers the ordinary duty of care owed under the law of negligence. After all, subject to the reservation at [80] above, it is the occupier who controls the premises which he occupies and who is thus in the best position to prevent injury to entrants. In economic terms, the occupier is the least-cost avoider, *ie*, the person who can act to prevent loss or injury at the lowest cost (see, *eg*, Harold Demsetz, "When Does the Rule of Liability Matter?" (1972) 1 J Legal Stud 13 for a brief overview of the concept of the least-cost avoider). The more dense a State, the more significant such "neighbourly" considerations become, and the greater the need for the tort of negligence to incentivise rational cost-avoiding measures.

97 In sum, modern conditions require a modern tort of negligence which subsumes within it the law on occupiers' liability. Policy arguments against the imposition of a duty of care on occupiers based on the general principles of the law of negligence no longer resonate in Singapore today. I fully agree with the following comments made in *Rowland* at 568:

> **A man's life or limb does not become less worthy of protection by the law nor a loss less**

> **worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose.** ***Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.*** *The [traditional] common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.* [emphasis added in bold, in bold italics and in italics]

A coda on other objections to abolishing the traditional common law rules on occupiers' liability

98 I now turn to one of the principal concerns raised by Brennan J in his lonely dissent in *Zaluzna*, namely, that the retention of special rules for occupiers' liability would establish, *de jure* without more, that the occupation of premises was a sufficient foundation *per se* for imposing on an occupier a duty of care. This, with respect, misses the point. As has already been shown, under the *Spandeck* approach, occupation of premises (subject to the element of control mentioned at [80] above) is a sufficient foundation *per se* for imposing on an occupier a *prima facie* duty of care *vis-à-vis* lawful entrants. I agree with the majority in *Zaluzna* (at 487) that the special duties imposed an occupier under the traditional common law rules on occupiers' liability "do not travel beyond the general law of negligence".

99 In this regard, there is a need to clarify the case of *Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 decided almost two decades ago. In that case, this court observed at [46] and [49]:

> 46 In both cases cited by counsel for the plaintiff (*Dunster v Abbott* [1953] 2 All ER 1572 and *Slater v Clay Cross Co Ltd* [1956] 2 QB 264), the proposition put forward was that where current operations were being carried out by the occupier on his land, his duty to licensees and invitees alike was to take reasonable care not to injure them. ***This does not translate into counsel's assertion that [the fourth defendant] may be held liable to the plaintiff on "ordinary principles of negligence", simply because [the fourth defendant] was the occupier of the premises*** . Contrary to what counsel suggests, the cases also do not say that an occupier may be liable to an invitee where third persons do acts on its premises which result in injury to the invitee.
>
> …
>
> 49 In the present case, there was no proximate relationship between the plaintiff and [the fourth defendant] to support the imposition of a general duty of care. ***A relationship of invitee and invitor will not be sufficient.*** …
>
> [emphasis added in bold italics]

100 This observation was made pre-*Spandeck*: (a) when the law on occupiers' liability was seen by our courts as separate from the general law of negligence; and (b) without consideration being given to the peculiar historical origins of the traditional common law rules on occupiers' liability. In so far as this court has now decided that it is desirable for the law on occupiers' liability to be subsumed under the general law of negligence, I am of the view that in the vast majority of cases, **control** of the premises concerned is a sufficient foundation *per se* for imposing on an occupier a *prima facie* duty of care under the *Spandeck* approach (*although not in all cases*: see the reservation at [80] above *vis-à-vis* occupiers who, in effect, have no control over the property which they occupy and/or the

activities carried out there). Prior Singapore case law relying on the traditional common law rules on occupiers' liability should no longer be followed. In this context, I refer to the Practice Statement (Judicial Precedent) issued on 11 July 1994 (reported at [1994] 2 SLR 689):

> …
>
> *Accordingly, it is proper that the Court of Appeal should not hold itself bound by any previous decisions of its own … in any case where adherence to such prior decisions* would cause injustice in a particular case or *constrain the development of the law in conformity with the circumstances of Singapore.*
>
> Therefore, whilst this court will continue to treat such prior decisions as normally binding, this court will, whenever it appears right to do so, depart from such prior decisions. …
>
> …
>
> [emphasis added]

Prior Singapore case law on occupiers' liability should now be reassessed on the basis of the views expressed here. I now turn to Issue 2 (see [18(b)] above).

Issue 2: Did the Defendants owe See Toh a duty of care, and if so, did they breach their duty?

101 In the present case, the Judge found as a fact that See Toh was a trespasser who had knowingly trespassed onto 9/11 TBC through the Seafront Access Point (see [67]–[73] of the Judgment). See Toh knew that certain formalities had to be completed before one could enter a shipyard and that a pass was required. I see no reason to disturb this finding as it was not plainly wrong or made against the weight of the evidence before the Judge.

102 As has already been mentioned, there is no blanket rule of law that occupiers do not owe a *prima facie* duty of care to residual entrants, including trespassers (see [82] above): all the circumstances of the particular case at hand must be taken into account to determine both the existence and the ambit of any duty of care *vis-à-vis* residual entrants. I turn now to consider the relevant circumstances in this case.

The circumstances surrounding See Toh's trespass

103 See Toh was not "wicked" in the Lord Morris sense (see *Herrington* at 904A, quoted above at [81]). He did not have any criminal intent, and was not a burglar or an arrogant invader of another's land. Simply put, he had no ill intent and in fact had a legitimate reason to be at 9/11 TBC. See Toh was searching for *Fortune II* to work on her radar, initially went to the wrong shipyard (*viz*, 15 TBC) and thereafter took an unauthorised route to enter the adjacent shipyard, 9/11 TBC, by using a gap in the fence separating the two shipyards. This is further corroborated by the fact that Andrew Tay did not inform See Toh of the exact location of *Fortune II*, and merely told See Toh that his supplier had not faced any problems in locating the vessel earlier that day (see above at [10]). Even if See Toh had knowingly crossed over from 15 TBC to 9/11 TBC, this does not change the innocent nature of his entry: the most that could be said is that he was taking an unauthorised shortcut to get to *Fortune II.* See Toh was not a reckless thrill-seeker in the vein of the trail bike-riding respondent in *Wilmot*. In these circumstances, I hold that a *prima facie* duty of care did arise towards See Toh in respect of dangerous activities carried on at 9/11 TBC. However, as I shall explain below, this duty was owed only by Asian Lift, and not by HAL and Lal Offshore.

HAL and Lal Offshore

104 HAL and Lal Offshore have not appealed against the Judge's finding that they were occupiers (or, for that matter, against the findings regarding the extent of their control) of 9/11 TBC. Nevertheless, had the point on control been pursued on appeal, it bears mention that neither HAL nor Lal Offshore had control of the relevant activity that resulted in See Toh's injury (*viz*, the Mooring Operation); therefore, on the facts, no *prima facie* duty of care would have arisen on their part.

105 In any event, the issue of a *prima facie* duty of care is academic where HAL and Lal Offshore are concerned because I agree with the findings of the Judge that they had taken all reasonable measures to prevent injury. In particular (see [143] of the Judgment):

(a) the main gate of 9/11 TBC was closed and the security guard stationed there had been instructed to stop anyone from entering;

(b) there was a barricade comprising one row of metal stands with safety tape running across to alert anyone coming from the back end of 9/11 TBC not to cross into the Operations Site;

(c) it was nearly impossible to extend the fence separating 9/11 TBC from 15 TBC all the way down to the seashore, especially at low tide; and

(d) even though there were no signs or security guards at the Seafront Access Point warning against or preventing access to 9/11 TBC, there was no need for either as there was insufficient evidence to establish that the Seafront Access Point was used frequently as a means of access between 15 TBC and 9/11 TBC.

106 On top of the foregoing, I would like to add that HAL and Lal Offshore were entitled to believe that Asian Lift, a highly experienced operator, would have taken all necessary precautions during the Mooring Operation to avoid danger to those present at and in the vicinity of the Operations Site.

107 Accordingly, HAL and Lal Offshore (assuming *arguendo* they did owe See Toh a duty of care) did not breach their duty of care to See Toh, and are not liable in the tort of negligence.

Asian Lift

108 In contrast to HAL and Lal Offshore, Asian Lift did, in my view, owe a *prima facie* duty of care to See Toh in respect of the Mooring Operation (see [103] above). I agree with the findings of the Judge that Asian Lift plainly did not take reasonable measures to prevent injury arising from that operation. In particular:

(a) Captain Hamid was in a rush to complete the lifting of the KFELS living quarters within the day and thus carried out the Mooring Operation even though, at the time the operation commenced, he was aware that part of *Asian Hercules*'s starboard mooring wire lay on the ramp of *Namthong 27* (at [27] and [168] of the Judgment) and "expected that [that mooring wire] would 'in all likelihood, get fouled'" (at [168] of the Judgment). Regrettably, Captain Hamid knowingly ran the risk of that mooring wire being fouled on *Namthong 27*'s ramp and the corollary risk of the fouled mooring wire springing up after being freed (at [170] of the Judgment). Captain Hamid should not have proceeded with the Mooring Operation until *Namthong 27*'s ramp had been lifted up as this would have eliminated the two aforesaid risks (at [169]–[170] of the Judgment).

(b) Captain Hamid was aware of the dangerous consequences of continuing the Mooring Operation after *Asian Hercules*'s starboard mooring wire became fouled on *Namthong 27*'s ramp, and purportedly stationed seven to eight able-bodied crew members to coordinate the Mooring Operation and prevent any mishap to anyone in the vicinity of the Operations Site. Assuming this had been properly done, surely, at least one of those crew members should have been specifically instructed to be stationed in the vicinity of *Namthong 27*'s ramp at all times during the Mooring Operation to ensure that nobody went near the fouled mooring wire on the ramp. The Judge found that See Toh had neither been observed nor warned (at [171] of the Judgment). This accounted for why See Toh was injured by *Asian Hercules*'s fouled starboard mooring wire when it unexpectedly sprang up and hit him.

Contributory negligence

109 Even though I find that Asian Lift did breach its duty of care towards See Toh, I also find that See Toh was contributorily negligent. Being an engineer with 26 years of experience and having undergone the relevant safety training courses, See Toh must have known that dangerous operations (such as the Mooring Operation in the present case) could take place at a shipyard like 9/11 TBC. He also knew that it was part of the usual procedure, before entering a shipyard, to have his pass exchanged at the front security desk which served as a gatekeeper to either admit entrants or deny them entry based on the instructions of the shipyard's management. Despite this, See Toh crossed into 9/11 TBC through the Seafront Access Point.

110 In the same breath, I would like to reiterate the factors stated at [108] above. Asian Lift's Captain Hamid should not have been in a rush to complete the mooring of *Asian Hercules* so as to use her to lift the KFELS living quarters. Having decided to take the risk of continuing the Mooring Operation despite *Asian Hercules*'s starboard mooring wire being fouled on *Namthong 27*'s ramp, Captain Hamid was fully cognisant that the fouled mooring wire might suddenly spring up, and should have instructed one of the seven to eight able-bodied crew members stationed at the Operations Site to prevent persons from going anywhere near that mooring wire. If this had been properly done, See Toh would not have been injured.

111 In the circumstances, I find that the combined negligence of See Toh and Asian Lift (vicariously through Captain Hamid) contributed to the unfortunate accident. I am, however, unable to say which party is more culpable. Indeed, I would go further and state that the actions of both See Toh and Asian Lift are *causae sine quibus non* – in other words, the accident would not have happened but for the actions of both. I thus hold that liability should be apportioned equally between See Toh and Asian Lift (*ie*, 50% each) pursuant to s 3 of the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed).

112 In this regard, I am conscious that this is a departure from the Judge's findings on contributory negligence: see [172]–[173] of the Judgment, where the Judge held, without elaboration, that if Asian Lift had owed a duty of care to See Toh, he would have found See Toh 65% responsible for the accident. This court recently restated the principles governing appellate review of a trial judge's apportionment of liability in *Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another* [2012] 3 SLR 1038 ("*Goh Sin Huat*"). Appellate deference can only be given if "the apportionment decision of the trial judge is supported by cogent reasons alluding to the interaction of the respective parties' individual culpability in [the] myriad of identified causes from which the damages flowed" (at [54] of *Goh Sin Huat*). I find that this aspect is absent in the Judgment, where the Judge merely declared in a *petitio principii* that See Toh was "negligent in fact and in law and his negligence contributed to the accident" (at [172] of the Judgment) before apportioning liability (at [173] of the Judgment).

Conclusion

113 The traditional common law rules on occupiers' liability have long been and currently still remain riddled with archaic and confusing distinctions at both the initial level of the static-dynamic dichotomy and the subsequent level of the invitee-licensee-trespasser trichotomy (see [26]–[48] above). Unfortunately, for close to two centuries, this classificatory quagmire has been unquestioningly adopted as part of Singapore law. The roots of this approach can be traced to the Second Charter of Justice of 1826, which mandated the reception of English law in the Straits Settlements. For the reasons given above (at [49]–[76]), the dead hand of the traditional common law rules on occupiers' liability should now be buried. The time has come to unambiguously hold that the law on occupiers' liability in Singapore is a mere subset of the general law of negligence, and I so determine (see [76]–[100] above).

114 For completeness, I should add that the parties did not, *stricto sensu*, directly raise head-on the issue of whether the law on occupiers' liability should be subsumed under the general law of negligence. Nevertheless, the Court of Appeal, being the apex court of Singapore, is, in my view, *duty-bound* in the public interest to clarify the law when an appropriate opportunity to do so arises (as in the instant case). It should also be noted that See Toh pleaded a breach of (concurrent) duties owed under the rubrics of both occupiers' liability and general negligence. All the parties had ample opportunity to and did canvass the issue of whether the Defendants were liable in general negligence. Indeed, the Judge went so far as to state: "I conclude that an occupier does not have concurrent liabilities and his liability is part of the law of negligence" (at [109] of the Judgment).

115 In conclusion, See Toh's appeal is dismissed against HAL and Lal Offshore. The appeal is, however, allowed against Asian Lift, with liability to be apportioned equally between See Toh and Asian Lift. The damages are to be assessed by a judge. With regard to costs, I am of the view that See Toh should be entitled to all his costs here and below against Asian Lift. The costs of HAL and Lal Offshore here and below are to be borne equally by See Toh and Asian Lift. However, such costs are to be assessed on the basis that HAL's and Lal Offshore's liability should have been summarily disposed of as a preliminary issue as all the established facts unequivocally pointed to Asian Lift being solely responsible for the Mooring Operation which led to See Toh's injury. Although See Toh did not apply under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for the liability of HAL and Lal Offshore to be determined as a preliminary issue, these two defendants could and should have made either such an application or, alternatively, an application under O 18 r 19 for See Toh's action to be struck out as far as they were concerned. The usual consequential orders are to follow.

Sundaresh Menon CJ (concurring):

116 I have had the advantage of reading in draft the judgment that has been delivered by V K Rajah JA. Although I agree with much of what has been set out there, having regard to the fact that we will be departing from a rule of some vintage, I thought I should separately explain my views, even if only briefly.

117 The facts have been adequately set out in Rajah JA's judgment and I do not propose to repeat them, save that where it is necessary to do so, I will refer to specific facts. I will also use the same abbreviations as those used by Rajah JA.

118 See Toh brought this action against HAL and Lal Offshore on the basis that they should be liable for duties arising ***qua*** occupiers of 9/11 TBC. He also concurrently brought an action against them and Asian Lift for negligence.

119 The facts that See Toh pleaded against all the Defendants in his claim in negligence were identical. Although the allegations were framed in a number of different ways, they centred on the contention that the mooring wire by which he was hit on that fateful day had not been used properly or with adequate care; nor had adequate precautions been taken to prevent injury and damage by cordoning off the Operations Site or by giving due warning to persons in the vicinity of the site.

120 The claim in occupiers' liability was said to be constituted essentially by HAL's and Lal Offshore's failure to have rules in place for the safe conduct of the Mooring Operation and by their permitting the operation to proceed even though they knew or ought to have known that it was unsafe and dangerous.

121 In essence, See Toh's main complaint was that the manner in which the Mooring Operation had been carried out was unsatisfactory. See Toh also asserted that to the extent that the Mooring Operation was inherently dangerous, the Operations Site should have been cordoned off. Had See Toh maintained this focus in the action, it would have been apparent to him that there was little point in joining HAL and/or Lal Offshore as defendants because his allegations were directed principally at Asian Lift, who, at all times, was solely in charge of the Mooring Operation and who, if the facts warranted, would have been responsible for cordoning off the Operations Site beyond what had already been done.

122 As it transpired, See Toh did include HAL and Lal Offshore as defendants and, in the circumstances, he framed his primary claim against them under the law on occupiers' liability. Rajah JA has traced the historical development of this tort and the problems that have fascinated or, more likely, perplexed countless generations of lawyers and law students since its emergence in the mid-Victorian era. In his article "The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 LQR 182 ("*Marsh*"), Norman S Marsh makes the following points:

(a) When this tort emerged in the mid-19th century, there was no general liability for causing reasonably foreseeable harm or damage, and judges were therefore anxious to move very cautiously in recognising possible new sources of liabilities for landowners (at p 185).

(b) It may be also be inferred that even if judges of that era had been willing to recognise such liability in principle, they would have been unwilling to leave the landowning class susceptible to the verdicts of jurors who would generally have been of the class of those who might visit land owned by others (*ibid*).

(c) The law on occupiers' liability was meant to be worked out by weighing in the balance the competing interests of, on the one hand, preserving the sanctity of the land which one owned and what one did there with, on the other hand, protecting those who were injured by the negligence of others while they were on the land (see *Marsh* at p 198). But, as it transpired, the common law developed a series of distinctions between the various classes of entrants – invitees, licensees and trespassers – not so much by weighing these interests in a principled way, but by trying to work out limited extensions from existing principles based on which occupiers had hitherto been held liable (*ibid*).

123 It is evident even from this that the traditional common law rules on occupiers' liability lack a principled foundation, and this point has been comprehensively developed by Rajah JA. If we were nonetheless to retain these rules, it would be purely out of loyalty to the precedents. Precedents undoubtedly do command loyalty, but they may be exposed to scrutiny from time to time to establish their soundness in principle, and when so scrutinised and found wanting, they may be departed from. It is the essence of the common law that it develops in this way, incrementally and in keeping with

the times while remaining true to fundamental underlying principles.

124 The traditional common law rules on occupiers' liability developed in two principal ways:

(a) The first was by distinguishing between cases that concerned injury arising from the very state or condition of premises and those that concerned injury arising from activities carried out there. This has been termed the distinction between "occupancy duties" and "activity dut[ies]" (see *Clerk & Lindsell on Torts (2010)* at para 12-03), or as Rajah JA has done, "the static-dynamic dichotomy".

(b) The second principal way in which the traditional common law rules developed was, in relation to "occupancy duties" at least, by *limiting* the nature of the duties that an occupier owed according to the basis upon which the injured entrant had come onto his land. The highest extent of the duty was owed to invitees – those who, at the risk of some degree of oversimplification, were on the premises for the material benefit of the occupier (see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 10.013); then to licensees – those who were on the premises with the occupier's permission; and finally, to trespassers.

125 In relation to the first development, as observed by Rajah JA, the distinction is not a neat one because it is not always possible to draw a line between the static and the dynamic – see, for instance, the facts of *Zaluzna* and the observations of the majority of the High Court of Australia that have been quoted by Rajah JA at [44] above. I would just add that the distinction in a sense was necessitated in the first place because there could be no justification whatsoever for holding that the restricted bases of liability applicable to occupancy or static situations should also apply to activity or dynamic situations. Whatever an occupier might say about his freedom to enjoy his premises with a minimum of imposition, the same could not easily be said about his activities just because he happened to be engaging in them on his land.

126 But, it is in relation to the second development that the greatest difficulty arises. This may be summarised with two observations:

(a) First, the law on occupiers' liability, as it has developed, is unsatisfactory. The distinction between an invitee, a licensee and a trespasser may often be artificial and give rise to unpalatable results – as, for instance, where the same injury is suffered in the same way by two lawful entrants who come onto the same premises, but for somewhat different purposes. Rajah JA has summarised the critiques at [26]–[33] above and I do not propose to add to what he has said. He has also traced at [56]–[75] above how other jurisdictions have viewed and responded to these archaic rules.

(b) Second, and simply put, the law on occupiers' liability developed at a time when the common law had not yet devised a general tort that would allow recovery where a party suffered reasonably foreseeable harm. The development of the tort of negligence with the House of Lords' decision in *Donoghue* and, more recently and (for present purposes) more pertinently, this court's decision in *Spandeck* has displaced the need for us to preserve a set of artificial rules that pertain to limiting the liability of occupiers of property *unless*, upon a close analysis, we should come to the conclusion that the tort of negligence with its analytical framework is, for some reason, unsuitable for dealing with the potential claims that arise in the context of occupiers' liability.

127 This brings me to the decision of this court in *Spandeck*. The court stated there at [71] that "a *single* test is preferable in order to determine the imposition of a duty of care in all claims arising out

of negligence" [emphasis in original]. Admittedly, the court was concerned there with doing away with another variety of distinctions – namely, those between negligence claims that were founded on different *types* of damages. But, it is useful to recall this *dictum* because it underscores the view taken by this court that the test which it laid down in that case was sufficiently flexible to deal with the question of whether a duty of care should be imposed in a wide variety of circumstances. A claim based on occupiers' liability is ultimately one founded in negligence, save that historically, an occupier's duty of care *vis-à-vis* entrants to his premises was limited or even excluded in certain circumstances, depending on the nature of the entrant's reason for being on the premises. Is this such a complexity as to be beyond the workings of the *Spandeck* test? In my judgment, it plainly is not.

128 In *Spandeck*, this court held that in considering whether a duty of care should be imposed, the analysis began with a consideration of the threshold requirement of factual forseeability, and then legal proximity, and finally, assuming that both hurdles were crossed, with a consideration of whether there were any policy factors that negated the imposition of a duty of care (see *Spandeck* at [73]–[86]). For present purposes, I focus first on the requirement of legal proximity. In *Spandeck* (at [78]), this court approved of the following passage from the judgment of Deane J in the Australian High Court decision of *Sutherland Shire Council v Heyman and another* (1985) 60 ALR 1 ("*Sutherland*") at 55–56:

> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and ***embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant*** , circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. … The requirement of a relationship of proximity serves as a touchstone and control of the *categories* of case in which the common law will adjudge that a duty of care is owed. ***Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction.*** [emphasis in italics in original; emphasis added in bold italics]

129 Deane J identified a number of factors that he considered would give content to the inquiry into legal proximity, including physical proximity, circumstantial proximity, causal proximity, the extent to which either party had assumed the responsibility to take care or to avoid or minimise the risk of injury, and so on. These are not meant to be exhaustive factors; nor, as cautioned by this court in *Spandeck* (at [79]), is an attempt to *define* legal proximity going to be fruitful. But, these factors enable the court to assess each fact situation within a framework that affords a considerable measure of flexibility. In the context of occupiers' liability, one of the situations that has tended to give rise to particular difficulty is that of the trespasser. Although a single label is used, there are a variety of trespassing individuals running the gamut from the innocent toddler who wanders into a space he should not be in, oblivious to the dangers that may be present there; to the good Samaritan who runs into another's premises seeking help on behalf of an injured third party; to the thrill-seeking adventurer who goes onto land *because* it is dangerous and promises an adrenaline rush; to the

housebreaker sneaking in with every intention to cause harm to the occupier.

130 In my judgment, the requirement of legal proximity affords sufficient flexibility to allow the courts to assess each of these (and other) situations and determine whether the first substantive requirement for the imposition of a duty of care (*viz*, the requirement of legal proximity) has been satisfied. Rajah JA has said at [80] above that in so far as *lawful* entrants are concerned, in ordinary circumstances, subject to the element of control, occupiers will *de jure* owe them a *prima facie* duty of care as there will be sufficient legal proximity between occupiers and lawful entrants. While this may well be correct as a matter of how the great majority of cases will *in fact* be resolved, I prefer to leave this as something to be worked out by reference to the specific facts that will arise on future occasions, rather than by articulating any legal rule or principle to this effect. This is especially so because of the further observations made by Rajah JA at [88]–[90] above to the effect that once sufficient legal proximity is found, there must be cogent policy grounds to warrant the negation of the *prima facie* duty of care which arises as a corollary. I agree with the latter observation, but would not wish this to be coupled with a perceived rule of general application so as to generate a presumptive duty of care on the part of occupiers of premises towards lawful entrants. Rajah JA has been at pains at [82] above to eschew any return to the "old common law *de jure* 'categorisation' approach", and in this regard, we are *ad idem*. But, I remain unconvinced that it is necessary or helpful to maintain a distinction between lawful entrants and residual entrants, given the flexibility that is inherent in the *Spandeck* approach. To take the case at hand, if the able-bodied crewmen from *Asian Hercules* who were involved in the Mooring Operation had been injured instead of or in addition to See Toh, I do not see that they would have had any basis for asserting a duty of care against HAL or Lal Offshore even though they were lawful entrants on the land occupied by these two defendants. This is because neither HAL nor Lal Offshore were actually conducting the Mooring Operation and their status as co-occupiers of 9/11 TBC is legally irrelevant in this context. In my view, the genius of *Spandeck* is that it presents a flexible framework that allows the court to assess each case according to the particular facts that arise, and yet do so in a consistent manner. It follows, for the same reason, that I prefer not to venture further than I have already done into the analysis that has been set out by Rajah JA at [81]–[82] above. On the facts presented in this case, See Toh was a trespasser at the material time, and the question that we need to resolve is whether the defendant occupiers (*viz*, HAL and Lal Offshore) owed a duty of care to a trespasser in See Toh's circumstances.

131 However, before turning to the question of whether HAL and Lal Offshore owed See Toh a duty of care on the facts of this case, there is a short further point to be made: the *Spandeck* test incorporates an exclusionary rule at the second stage (which is also the final stage) – *viz*, policy considerations may negate the *prima facie* duty of care imposed under the first stage of the test in cases where both the threshold requirement of factual foreseeability and the requirement of sufficient legal proximity are satisfied. On the basis of the view I have taken, which is that legal proximity would be the stage at which the housebreaking trespasser might be denied a claim to a duty of care, it may not be necessary to have recourse to the exclusionary rule in *Spandeck*. But, were it necessary to do so, this provides a further avenue to weed out any claims to a duty being owed which simply would not stand up to reasonable scrutiny. The foregoing, in my judgment, also affords a sufficient answer to the concerns which were raised by Brennan J in *Zaluzna* and which have been touched on by Rajah JA at [98] above.

132 It follows from this that there is no need for us to preserve the action based on occupiers' liability. All occupiers' liability claims can and should be assessed and dealt with within the framework of the tort of negligence, and it is to this that I now turn.

133 I begin by considering whether there was sufficient legal proximity between HAL and Lal

Offshore on the one hand and See Toh on the other. The Judge found that See Toh was a trespasser and, as has been noted, there is no basis for disturbing this. But, a number of other significant facts emerge from the Judgment and from the evidence, namely:

(a) The main gate to 9/11 TBC was closed and manned by a security guard who had been told not to permit entry at the material time (see [71] and [74] of the Judgment).

(b) See Toh entered 9/11 TBC through a gate which belonged to another property (*viz*, 15 TBC) and which was not a gate for 9/11 TBC (see [73] of the Judgment).

(c) See Toh made a deliberate decision to enter the gate of 15 TBC (see [10] above), walked past the corrugated iron fence separating 15 TBC from 9/11 TBC and then gained access to 9/11 TBC through the access point that was on the seaside – the Judge (and likewise, Rajah JA at [10] above) referred to this as the Seafront Access Point. The Judge thought See Toh did this because he wanted to get on with his task quickly and did not want to wait till the closed gate to 9/11 TBC was opened (see [74] of the Judgment).

(d) The Judge thought that in all the circumstances, See Toh's position was akin to that of a trespasser who deliberately climbed over a fence, even though, in this case, See Toh happened to walk around the end of the fence separating 15 TBC from 9/11 TBC (see [75] of the Judgment).

(e) 9/11 TBC is and was not a public venue, and only those with specific reasons to be there would be allowed in (see [76] of the Judgment).

(f) HAL and Lal Offshore did not know that anyone would or would be likely to use the Seafront Access Point to gain access to 9/11 TBC (see [81] of the Judgment).

(g) See Toh also gave evidence that he knew that access to a shipyard would be controlled, and that only those who had completed the Shipyard Training Safety Course and been issued with a Safety Pass would be allowed in. [note: 5]

134 It is not in dispute that the Mooring Operation which led to See Toh's injuries was conducted by Asian Lift, and that HAL and Lal Offshore had no part to play in that operation or in supervising it. Asian Lift was not an agent or servant of HAL and Lal Offshore. Nor is there any basis for suggesting that the very nature of the Mooring Operation was such that it should never have been permitted to take place at all. On the contrary, this was an operation of precisely such a sort that would normally be expected to take place at a shipyard. Admittedly, there was an element of danger in that type of operation, and this is why there were a number of restrictions in place to restrict access to 9/11 TBC. In these circumstances, did HAL and Lal Offshore owe a duty of care to See Toh?

135 In *Spandeck*, this court suggested at [82] that the answer to this question should be determined, in the first instance, in the following manner:

> … [I]n determining proximity … the court should apply these concepts first by analogising the facts of the case for decision with those of decided cases, if such exist …

136 In my judgment, the facts presented in this case are closer to those pertaining to the thrill-seeking trail bike rider in *Wilmot*, in respect of whom the Supreme Court of South Australia found that no duty of care was owed, than to the facts pertaining to the mischievous young child who wandered into the disused quarry in *Stone*, in respect of whom the Supreme Court of Tasmania found that a

duty of care was owed. Rajah JA has analysed these cases at [83]–[85] above, and in my judgment, using the analogical method commended in *Spandeck*, HAL and Lal Offshore did not owe See Toh a duty of care at all.

137 But, in my view, this is also the case as a matter of principle. This was not a case of a person who wandered into a setting not being alive to the dangers he was likely to encounter. On the contrary, See Toh was experienced in this type of work; he was familiar with shipyards and the working conditions there, as well as with the safety concerns that prompted the imposition of access restrictions. Indeed, he even knew why such restrictions had to be imposed. The Judge found that See Toh had deliberately decided to take the risk of entering 9/11 TBC via the Seafront Access Point (instead of via the main gate of 9/11 TBC, as he should have done) because he did not want to wait and instead wanted to get on with the task at hand. Undoubtedly, See Toh was not acting with malevolent intentions, but his impatience, albeit well intentioned, does not change the analysis.

138 Moreover, for all intents and purposes, HAL and Lal Offshore had done what they reasonably could to exclude all unauthorised persons from having access to the land which they occupied through a combination of the manned sentry-post at the main entrance of 9/11 TBC, the access-controlled main gate and the fence that surrounded the premises. In my judgment, the effect, even if perhaps not the explicit intention, of these measures was precisely to exclude the sort of proximate relationship that might otherwise be found to exist by reason of an entrant happening to sustain injury at 9/11 TBC. In a sense, HAL and Lal Offshore had done what they could to displace proximity by the physical barriers they had erected.

139 If anything, See Toh, by his actions, which the Judge likened to those of a trespasser deliberately climbing over a fence, in effect assumed the risk of being in a dangerous place, and he could not then be said to be relying upon HAL and/or Lal Offshore to discharge any duty of care, especially since the duty of care in question could ultimately only be directed at keeping unauthorised persons out of 9/11 TBC. Hence, having regard to the sort of considerations identified in *Sutherland*, which were endorsed by this court in *Spandeck*, in my judgment, HAL and Lal Offshore did not owe See Toh a duty of care.

140 In any event, for the reasons set out at [105]–[106] of Rajah JA's judgment, I also agree that HAL and Lal Offshore would have discharged any such duty (had it existed) in the circumstances in having exercised the care that they did exercise and in having taken the steps that they did in fact take to restrict access to 9/11 TBC.

141 In relation to Asian Lift, which in fact carried out the Mooring Operation that led to See Toh's injury, I agree with all that Rajah JA has said at [108] above. The Judge assessed that See Toh had himself contributed to his own injury through his own negligence to the tune of 65%. But, Asian Lift and its personnel were alive to the dangers of continuing the mooring of *Asian Hercules* despite her starboard mooring wire being fouled on *Namthong 27*'s ramp, and yet persisted in continuing that operation. Seven to eight of *Asian Hercules*'s crew members had been stationed at the Operations Site to look out for the possibility of harm befalling others. There was no reason why they should not have been observant enough to see See Toh. See Toh, of course, contributed to his own injury in equal measure by his own indifference to the danger. In the premises, I concur with Rajah JA that the more just assessment in this case is to apportion responsibility for the accident equally between Asian Lift and See Toh.

142 In the premises, I also agree with the consequential orders that have been set out at [115] above.

Chao Hick Tin JA (concurring):

Chao Hick Tin JA (concurring):

143 I agree with V K Rajah JA's findings on the issues of liability and contributory negligence; I also agree with the consequential orders set out at [115] above. I wish to say just a few words on the respective judgments which Rajah JA and Sundaresh Menon CJ have just delivered. In this regard, I shall use the same abbreviations as those used in their judgments.

144 Rajah JA has, in my view, convincingly shown that it is time for Singapore to move away from the traditional common law rules on occupiers' liability. I also embrace much of the observations made by Menon CJ in his separate judgment, where he agreed with the main theme in Rajah JA's judgment that we should discard the traditional common law rules on occupiers' liability and treat all occupiers' liability claims based on the principles of negligence as enunciated in *Spandeck*. There are just two points which I wish to make. The first concerns the issue of whether occupiers owe a *prima facie* duty of care towards *lawful* entrants. Rajah JA is of the view that, subject to the element of control by an occupier over the premises which he occupies, such a duty does arise as a general rule (see [80] and [82] above). In contrast, Menon CJ is of the view that whether a duty of care is owed in these circumstances should be decided on a case-by-case basis, applying *Spandeck* to the particular facts of the case at hand (see [130] above). On my part, I am inclined towards Rajah JA's view. However, as this issue does not need to be decided in the present case (because See Toh was not a lawful entrant to 9/11 TBC), I prefer to leave it for decision in a future case if and when it does become a live issue. My second point concerns the factual similarity (or otherwise) between See Toh and the thrill-seeking respondent in *Wilmot*. While, in Rajah JA's view, See Toh's position was not really like that of such a thrill-seeker (see [103] above), Menon CJ took the opposite view (see [136] above). I do not think I need to come to a specific finding on this issue as, more importantly, both Rajah JA and Menon CJ came to the conclusion (with which I agree) that in the circumstances of this case: (a) only Asian Lift, but not HAL and Lal Offshore, owed a duty of care to See Toh; (b) even if HAL and Lal Offshore had owed a duty of care to See Toh, they did not in fact breach that duty and are thus not liable to him for the injuries which he suffered; and (c) See Toh was 50% responsible for the unfortunate accident.

[note: 1] This was clarified during cross-examination: see the certified transcript of the notes of evidence ("NE") for Day 5 of the trial (9 September 2011) at p 35, lines 23–32.

[note: 2] See Tan Sun Kiang's affidavit of evidence-in-chief dated 12 May 2011 at para 5.

[note: 3] Available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc42.pdf> (accessed 14 April 2013).

[note: 4] See <http://www.singstat.gov.sg/statistics/latest_data.html#12> (accessed 14 April 2013).

[note: 5] See NE for Day 1 of the trial (5 September 2011) at pp 12–15.