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As with classics in the contemporary mass-market theatrical scene, legal classics appear to come in trilogies as well. Nowhere is this more aptly demonstrated than in tort law, where the three most important cases defining the test for duty of care in negligence are Donoghue v Stevenson [1932] A.C. 563, Anns v Merton LBC [1978] A.C. 728 and Caparo Industries Plc v Dickman [1990] 2 A.C. 605. However, to suggest that the difficulties in negligence law have been clarified by these cases would be inaccurate. Indeed, not only is the actual test for duty of care unclear in England (see, e.g. Customs and Excise Commissioners v Barclays Bank Plc [2007] 1 A.C. 181), the test for duty of care in psychiatric harm cases is even more unsatisfactory. The Singapore Court of Appeal has recently attempted to resolve these difficulties. It first held in Spandек Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] 4 S.L.R. 100 that the generally applicable test for duty of care in Singapore is essentially the two-stage Anns test (of proximity and policy considerations) irrespective of the type of damage claimed. It has now in Ngiam Kong Seng v Lim Chiew Hock [2008] SGCA 23 extended the Anns test to duty of care in psychiatric harm cases, while rejecting the English position in Page v Smith [1996] 1 A.C. 155.

The facts in Ngiam were that the first appellant was involved in a road accident allegedly caused by the respondent. The nature of the accident not being known to the second appellant (the wife of the first appellant), the respondent represented himself as a bystander who had assisted the first appellant. Eventually, the second appellant discovered the respondent’s involvement in the accident and suffered from major depression resulting from her perceived “betrayal”. She sued the respondent for negligence on the basis that her depression resulted from the respondent’s misinformation as to his involvement in the accident.

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Banks; Casinos; Dishonour of cheques; International banking

The Court of Appeal upheld the trial judge’s decision to dismiss the second appellant’s claim as the respondent owed no duty of care to her, and declined to follow Page in the process. As is well known, the majority’s approach in Page distinguished between primary and secondary victims: the former being one who suffered psychiatric harm from fear of physical injury to himself, whereas the latter one who suffered psychiatric harm from fear of the safety of others. Pursuant to this distinction, a duty of care is owed to a primary victim if physical damage was reasonably foreseeable, even if psychiatric damage was not. On the other hand, secondary victims needed to show that psychiatric harm was reasonably foreseeable. In Ngiam, the Court of Appeal disregarded the distinction between primary and secondary victims and held that the Anns test applied for duty of care in psychiatric harm cases, although certain factual prerequisites must first be met. First, the type of injury suffered must be a recognisable psychiatric illness, and secondly, it must be factually foreseeable that harm of some kind would be sustained as a result of the negligence, although (as will be seen) the exact kind of harm required is unclear.

While the rejection of Page is unlikely to be controversial, Ngiam itself is not without difficulties. In applying the Anns test to psychiatric harm cases, the Court of Appeal reiterated that the requirement of foreseeability is merely a “factual” one. While it has been said that reasonable foreseeability has long been at the heart of duty of care jurisprudence (see Amirthalingam, “Refining the Duty of Care in Singapore” (2008) 124 L.Q.R. 42), it may well be that the concept of proximity itself represents a legal (or normative) concept of reasonable foreseeability. In other words, where there is legal proximity, the requirement of foreseeability would already have been fulfilled insofar as it is a facet (but not direct mirror) of the former, with the consequence that foreseeability serves no independent value on its own as a legal requirement. This approach is a defensible one so long as the definition of what is to be foreseen is a wide one. Foreseeability in psychiatric harm cases has hitherto been defined in a rather specific (and narrow) manner and in fact parallels the test for remoteness (i.e. that the kind of harm suffered must be foreseeable although its particular nature, extent or manner of its infliction need not: see The Wagon Mound (No.1) [1961] A.C. 388). If the requirement of foreseeability is so narrowly defined as to constitute a separate legal requirement which no longer finds expression within the requirement of proximity, then it arguably could be reinstated as such (subject to the problem of replicating the test for remoteness). This would occur if, for example, notwithstanding very close relational and spatial proximity, psychiatric harm were not reasonably foreseeable owing to the nature of an incident. In such a case, foreseeability would serve the distinct
function of conditioning liability by reference to the criterion of specific harm, one not reflected in the requirement of proximity. Accordingly, the characterisation of foreseeability as a “factual” requirement in Ngiam only makes sense if what is to be foreseen is defined widely.

However, Ngiam seemingly left open the question of what is to be foreseen. On the one hand, in rejecting the distinction between primary and secondary victims in Page, the Court of Appeal might have taken the narrower view that foreseeability of psychiatric harm was required. In fact, it had referred to the need to establish factual foreseeability “in the context of psychiatric harm” (at [110]). Yet, on the other hand, in applying the “factual” requirement of foreseeability, the court apparently adopted a wider definition of what was to be foreseen: the foreseeability of “harm” as opposed to a specific kind of harm (at [132]). Moreover, the court alluded to the “naturally wide ambit of (factual) foreseeability”: surely the foreseeability of a specific type of harm is unlikely to be satisfactorily described as “naturally wide”? If the wider definition was what the court intended, there is no harm in relegating foreseeability to a merely “factual” requirement. This in fact mirrors the approach in Spandeck, in which was held that the foreseeability of economic loss, a specific kind of harm, belonged to the realm of remoteness. This may represent a subtle if significant departure from existing jurisprudence by defining the scope of duty widely while leaving the question of whether a specific kind of harm is compensable to the stage of remoteness (an approach adopted in Attia v British Gas Plc [1988] Q.B. 304 at 314, 319; King v Phillips [1953] 1 Q.B. 429 at 440). This was also arguably the approach adopted in the recent Canadian Supreme Court decision of Mustapha v Culligan of Canada Ltd [2008] SCC 27. In that case, which concerned a claim for psychiatric harm owing to the plaintiff seeing a dead fly in a bottle of water, the Supreme Court adopted the Anns test at the duty stage without considering whether psychiatric harm was foreseeable. Instead, it too had left that question to the remoteness stage (at [18]). Conceptually, there is some attractiveness to defining the scope of duty of care widely and leaving the foreseeability of the specific kind of harm suffered to the remoteness stage. Indeed, if the scope of duty is defined so precisely as to reflect the kind of harm which should be recoverable, then this replicates the function of the remoteness test as currently envisaged under The Wagon Mound (No.1) and serves no independent utility of its own. It is noteworthy that in cases such as Caparo, the “foreseeability” requirement was referred simply to that of “damage”, without any express specification. If the concern in formulating these legal control mechanisms is to prevent a flood of litigation, then it would not matter when the objection is raised but it may be important to ensure a conceptually consistent and non-repetitive analytical legal framework.
It was also indicated in Ngiam that the hitherto “threshold” requirement of a recognisable psychiatric illness be regarded as a consideration “under the rubric of ‘damage’” (at [97]). It is true that decisions have characterised the requirement of recognisable psychiatric illness as a threshold one (see, e.g. McLoughlin v O’Brian [1983] 1 A.C. 410 at 431), implying that it is considered even before issues of liability and damage. However, it could be conceptually beneficial to clarify that this “threshold” requirement is, in fact, founded on the trite principle that the plaintiff ought to prove his loss, and such loss, in psychiatric harm cases, is simply a recognisable medical condition and not everyday sorrow. The requirement is only a “threshold” one insofar as there exists in most jurisdictions a summary procedure for the defendant to strike out the plaintiff’s claim for it as completely baseless at the outset instead of waiting for the full trial.

The Court of Appeal in Ngiam has continued to move towards a general two-stage legal framework for duty of care analysis as envisaged in Spandeck for all claims in negligence regardless of the type of damage. This is a laudable approach. There is nothing inherent in the type of damage (whether physical, psychiatric or economic) that necessitates a different legal approach, and to continue with a different approach depending on the type of damage claimed would be doctrinally untidy and, more pertinently, would not address the concern of indeterminate liability that sometimes (but not always) results from claims of differing natures. Where foreseeability is defined widely, then, having recourse to the “neighbour principle” and restricting duty of care to its most essential characteristics, viz. proximity and policy considerations, the Anns test (as adopted in Spandeck and Ngiam) would achieve the same result as the three-part Caparo test given that the factual conception of reasonable foreseeability is almost always satisfied. There is no reason why this cannot be applied in cases of psychiatric harm, as the Court of Appeal demonstrated in Ngiam. The challenge is to recognise that the concept of “proximity” is not easily defined, and that there could arise different kinds of proximity in different factual scenarios. However, this is a factual differentiation within the legal requirement of proximity, which insists on the closeness of the relationship between the parties, and which can be supported, in psychiatric harm cases, by the tripartite proximities of relational, spatial and manner of infliction identified by Lord Wilberforce in McLoughlin. The focus on proximity, while difficult, is inevitable given that very basis of a duty of care lies in the relationship between two parties.

Ultimately, the analysis undertaken by the Court of Appeal in Ngiam, in rejecting Page and analysing duty of care in psychiatric harm cases under a general legal framework equally applicable to other claims in negligence, is a fresh approach to an old problem. Instead of opening new difficulties by way of the introduction of new tests to new scenarios,
the approach in Ngiam (as derived from Spandeck) returns to the root of the “neighbour principle” in Donoghue and puts the focus squarely and sharply on the requirement of “proximity” to establish a duty of care in all cases. This does bring with it some measure of certainty in that only one test applies to all types of damage claimed, but the difficulties of defining “proximity” will have to be confronted on a case-by-case basis. However, there remains scope for further clarification, particularly with respect to whether the Court of Appeal intended to relegate specific foreseeability to an issue of remoteness, or if the same is still retained at the duty of care stage defining the scope of such duty, albeit as a “factual” requirement. Perhaps, as with legal classics elsewhere, a third instalment in a trilogy of decisions from the same court is required.