

TORT LAW IN THE FACE OF LAND SCARCITY IN SINGAPORE

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“[T]he unique context pertaining to the scarcity of land in Singapore has, in fact, been recognised judicially by the local courts in a diverse variety of areas of Singapore law.”²

ABSTRACT

The notion that the legal content of a jurisdiction is shaped and conditioned by the societal conditions of that jurisdiction finds special expression in Singapore tort law. Land is scarce in Singapore and this scarcity has three varying implications: (a) a high cost of housing, (b) a high building density, and (c) a high population density. Each aspect of the land scarcity problem has in turn led to responses from the Singapore courts in the area of tort law. This paper seeks to demonstrate the unique legal decisions in three selected areas of tort law (each corresponding to the three aspects of the land scarcity problem explained above) which have resulted from the land conditions in Singapore. In essence, this paper will argue that in tort law, the Singapore courts have hitherto adopted an approach that is both pragmatic and robust to achieve social and practical justice, with legal refinements coming only at a later stage when the practicalities of the situation have been resolved.

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2. *City Devs. Ltd. v. Chief Assessor*, [2008] 4 S.L.R. 150, 157 (Sing.). Apart from tort law, which is the focus of the present paper, other areas of Singapore law affected by land scarcity include land acquisition and tax cases. *See infra* Part IV.D.

I. INTRODUCTION

A. The Little “Red Dot”

In 1998, former Indonesian President B.J. Habibie famously called Singapore a “red dot” on the world map.³ The reason why he did so has been speculated to be from political dissatisfaction with Singapore to a misinterpreted attempt to inspire his own countrymen,⁴ but there is little doubt that, *factually* at least, President Habibie was far from incorrect. Indeed, while the expression has since been accepted and even embraced by the Singapore people, following an earlier period of discontentment,⁵ it does draw attention to a *factual truth* that is inescapable when one looks at Singapore at any world map: it *is* small, and *very* small indeed.⁶

The small size of Singapore gives effect to the notion that the legal content of a jurisdiction is shaped and conditioned by the societal conditions of

3. See Wikipedia, Little Red Dot, http://en.wikipedia.org/wiki/Little_red_dot (last visited Mar. 23, 2009) (“It was reported that President Habibie had remarked that he did not have the feeling that Singapore was a friend, and had pointed to a map, saying: ‘It’s O.K. with me, but there are 211 million people [in Indonesia]. All the green [area] is Indonesia. And that red dot is Singapore.’” (alterations in original) (citing ASIAN WALL ST. J., Aug. 4, 1998)).

4. Indeed, President Habibie later explained to “reporters that far from dismissing tiny Singapore, he had meant to highlight Singapore’s achievements despite its small size. He said that he had made the remark while speaking . . . with members of an Indonesian youth group and trying to ‘give them spirit.’ He said he told them: ‘If you look at the map of South-east Asia, you (Indonesia) are so big, and Singapore is just a dot. But if you come to Singapore, you see people with vision.’” He also said that “I have corrected [myself] many times, but they have never put it [sic] And I could not prove it in writing because I was talking freely.” See *Habibie: What I Meant by Little “Red Dot,”* STRAITS TIMES (SING.), Sept. 20, 2006.

5. Interestingly, the term “red dot” has come to be accepted and even embraced by Singaporeans. Politicians have used the term as a rallying call. The present Prime Minister of Singapore, Lee Hsien Loong, has said of President Habibie’s terminology: “This was a vivid and valuable reminder that we are indeed very small and very vulnerable. The little red dot has entered the psyche of every Singaporean, and become a permanent part of our vocabulary, for which we are grateful.” See *Sound Relations with Malaysia Vital, Says Hsien Loong*, UTUSAN ONLINE, May 4, 2003, http://pgoh13.free.fr/spore_vital.html. In other areas of Singapore, “red dot” has assumed various aspects of usage. See THE LITTLE RED DOT: REFLECTIONS BY SINGAPORE’S DIPLOMATS (Tommy Koh & Chang Li Lin eds., 2005) (book title about the rise of Singapore); *Big Help from ST’s New Little Paper*, STRAITS TIMES (SING.), Apr. 18, 2005 (name of publication for primary school students).

6. Indeed, it is also true that Singapore is usually represented by a dot (although, it must be said, the color differs) on most world maps. Its land mass is simply too small to be represented by way of an actual outline of its shape. See, e.g., Mapsofworld.com, Singapore Location Map, <http://www.mapsofworld.com/singapore/singapore-location-map.html> (last visited Mar. 23, 2009).

that jurisdiction.⁷ This paper seeks to showcase the unique legal decisions in selected areas of tort law which have resulted from land scarcity in Singapore. It takes three examples of Singapore tort law, all related to different aspects of the land scarcity problem resulting from Singapore's small size.

The *first* example concerns the recovery of pure economic loss in negligence and the aspect of the land scarcity problem highlighted is the high cost of housing. Here, while the Singapore courts are no less spared from the difficulties affecting English (and other⁸) courts in formulating a test to ascertain duty of care (and hence find liability), the approach taken is interestingly affected by the problem of land scarcity, a problem not generally found in England. Thus, although the Singapore courts have usually followed English decisions with uncompromising fortitude,⁹ it expressly departed from the decisions in England *not* to award damages for pure economic loss in building defects cases.¹⁰ This led to a conceptually unsatisfactory adoption of two different tests to ascertain duty based on the type of damages suffered, the consequences of which the Singapore courts have only recently, in a series of seminal decisions, begun to rectify.¹¹

The *second* example concerns the right of support in respect to buildings and highlights the aspect of the land scarcity problem that is somewhat related to the cost of housing, but also relates in part to the close proximity or high density of buildings. In this respect, the Singapore courts have likewise departed from the English position by recognizing that there is not only a right of support to land in its natural state, there is also a right to support for buildings or other constructions on the land concerned, thereby leading to possible claims in property-related torts such as nuisance. This is profoundly important in a densely inhabited land area, where buildings are not only located so close together that one might depend on another for support, but also in a developing country like Singapore where there are many construction projects going on at any given time.¹²

Finally, the *third* example concerns the development of the tort of harassment in Singapore and emphasizes that aspect of the land scarcity problem relating to the high density of population. This particular example shows that the effect of the unique local environment is by no means restricted to negligence. Here, the Singapore courts have not only departed from the English position, they have, in fact, expressly *recognized* and *created* a tort protecting the privacy of persons (e.g., harassment) in a densely populated urban environment, an issue which required statutory intervention to resolve in England.¹³

7. See, e.g., STEVEN VAGO, *LAW AND SOCIETY* (8th ed. 2006).

8. See, e.g., *PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW* (Mauro Bussani & Vernon Valentine Palmer eds., 2008).

9. See *infra* Part III.B.

10. The position with respect to the recoverability of other categories of pure economic loss remains somewhat in a state of flux. See *infra* Part V.

11. See *infra* Part IV.A–B.

12. See *infra* Part IV.B–C.

13. See *infra* Part IV.C–E.

In essence, this paper will suggest that in tort law, the Singapore courts have hitherto adopted an approach that is both pragmatic and robust to achieve social and practical justice caused by the land scarcity problem, with legal refinements coming only at a later stage when the practicalities of the situation have been resolved. Even so, some conceptual problems still remain, no doubt awaiting clarification at a later time. To that extent, therefore, the central suggestion of this paper would be that, for better or worse, the land scarcity problem in Singapore has played a direct, if not wholly intentional, role in the development of an arguably unique Singapore tort law.

B. Layout of Paper

To do this, it is immediately apparent that several overlapping themes need to be further explored. The first immediately relevant issue concerns the actual problem of land scarcity in Singapore. In this regard, Part II will elaborate upon the land scarcity problem itself, along with three attendant aspects of this problem briefly referred to above: (a) a high cost of living, (b) a high building density, and (c) a high population density.¹⁴

But to say that the development of tort law has been “uniquely” affected by these three aspects is only to beg the question: unique *compared* to what? In other words, why is the resulting Singapore tort law “unique?” Part III will lay down the background to answering this question. It will be suggested that Singapore tort law is unique compared to other areas of local law because the Singapore courts have shown much greater willingness to depart from the highly influential English decisions in cases involving land scarcity.¹⁵ In this respect, not only is there a need to understand the *actual* problem of land scarcity in Singapore, there is also a need to briefly understand the structure of the Singapore legal system, the strong influence of English law, and the *extent* to which the courts *normally* depart from English decisions. Therefore, to appreciate the significance of their departure in cases involving land scarcity, Part III will first briefly discuss the history of the Singapore legal system and the practice of the courts in following English decisions. It is only when seen in this light that one can ascertain if the Singapore courts’ approach to tort cases involving aspects of the land scarcity problem is driven by underlying policy considerations.

Following from this discussion on the actual *significance* of the Singapore courts’ departure from the English position, Part IV of this paper will go on to explore the tort law which has developed from the three aspects of land scarcity mentioned above.¹⁶ This paper will attempt to show that the courts’ responses to these three aspects are pragmatic and case-specific. The resulting

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

problems will also be discussed, *viz.*, the ramifications of such an approach on the coherence of the entire legal structure and theory. In other words, if indeed the courts saw the need to respond to the three aspects of the land scarcity problem by way of the unique development of tort law in Singapore, is this *approach* theoretically satisfactory, and if not, how so?

Finally, Parts V and VI will bring all the overlapping threads together and attempt an update and evaluation of the present position in these selected areas of tort law.¹⁷ It will be seen that, in at least one example, not only have the Singapore courts become more attuned to the theoretical problems arising from their approach hitherto described, they have now formulated broader and bolder principles than, arguably, any other Commonwealth jurisdiction. The conclusion would then be that the land scarcity problem has driven the development of Singapore tort law, particularly in (arguably) the most important branch: the tort of negligence.

II. THE UNIQUE PROBLEM OF LAND SCARCITY IN SINGAPORE AND THE LAW

A. Geography and Land Area of Singapore

Singapore is a small independent island nation state which is situated at the tip of the Malayan peninsula. It used to be a British colony, which was founded by Sir Thomas Stamford Raffles in 1819, until its independence in 1965. Apart from the main island, Singapore also consists of several other much smaller islands. The main island is extremely small in land area: approximately 42 kilometers (about 26 miles) in length from east to west and 23 kilometers (about 14 miles) in breadth from north to south, making for a total land area of approximately 617.1 square kilometers (238.2 square miles). If the other smaller islands are included, the total land area increases to a mere 707.1 square kilometers (272.9 square miles).¹⁸ To put this into its proper perspective, the land area of the United States of America is estimated to be about 9,161,880 square kilometers (3,537,422 square miles).¹⁹ Compared side-by-side on a world map, the outline of Singapore is almost impossible to spot next to the great landmass of the United States.

However, the small size of Singapore, on its own, is not the problem. The problem arises only when this small size is subjected to a disproportionately

17. See *infra* Part V–VI.

18. See Singapore Infomap, Country Profile: Land and Climate, http://www.sg/explore/profile_land.htm (last visited Mar. 23, 2009); see also ANDREW B.L. PHANG, INTERNATIONAL ENCYCLOPEDIA OF LAWS SINGAPORE: CONTRACTS 23 (2000).

19. See National Atlas.gov, Profile of the People and Land of the United States, http://www.nationalatlas.gov/articles/mapping/a_general.html (last visited Mar. 23, 2009).

high population of 4.84 million people,²⁰ such that not only does the population density become very high,²¹ but demand for the limited land also (correspondingly) becomes exceedingly high. This leads to the problem of land scarcity. Indeed, land scarcity in Singapore has had many implications in many aspects of its inhabitants' lives, most of which are economic. These economic implications of land scarcity have had a "spill over" effect into the legal sphere, which forms the focus of the present paper, with special emphasis on Singapore tort law. But for now, three related aspects of the land scarcity problem in Singapore must be highlighted.

B. Three Aspects of Land Scarcity in Singapore

1. High Cost of Housing in Singapore²²

The first aspect of the land scarcity problem is the high cost of housing in Singapore. While the *absolute* cost of housing in Singapore is not as high as in many other countries in the world, this has to be considered in the light of the average citizen's lifetime income and his or her relative investment in housing. The housing situation in Singapore, where a vast majority of the population lives in public housing, needs some elaboration.²³

Turning first to public housing, which must form the main focus of the discussion if only because the vast majority of Singapore residents live in such housing, the story begins in 1960. Then, Singapore faced a housing crisis with much of its population living in slums and squatters packed in the city centers.²⁴ The problem was exacerbated by the rapidly increasing population and the lack of space. A government body, the Housing Development Board ("HDB"), was tasked with solving the nation's housing crisis. The aim was to provide affordable housing to a vast majority, if not all, of the population. Pursuant to this aim, the HDB built some 21,000 units in less than three years. By 1965 it had built 54,000

20. See Singapore Infomap, Country Profile: People, http://www.sg/SG_Glance/profile_people.htm (last visited Mar. 23, 2009).

21. The population density of Singapore is approximately 6,489 persons per square kilometer. See *id.*

22. See BELINDA YUEN ET AL., SINGAPORE HOUSING: AN ANNOTATED BIBLIOGRAPHY (1999), for a general overview of housing in Singapore.

23. As such, the main focus of the present article will be based on data relating to public housing. Related aspects of private housing can then be extrapolated from such available data.

24. See HDB InfoWEB, A Brief Background: HDB's Beginnings, http://www.hdb.gov.sg/fi10/fi10296p.nsf/WPDis/About%20UsA%20Brief%20Background%20-%20HDB's%20Beginnings?OpenDocument&SubMenu=A_Brief_Background (last visited Mar. 23, 2009).

units,²⁵ and at present, some 2.8 million residents, or 84% of Singapore's resident population, live in public housing.²⁶ Indeed, the public housing policy of Singapore "is often cited as a successful example of affordable housing production in Asian cities."²⁷ As has been observed, the Singapore public housing policy intervention for resident population has progressively led to society-wide enjoyment of the right to adequate housing. More than 850,000 housing units in 23 "new towns," or centralized town centers, have been constructed. In contrast to the situation elsewhere, "the poorest 20 per cent [sic] of households in Singapore have equal access to housing resources . . . and many are homeowners."²⁸

Notwithstanding the widespread access to public housing in Singapore, it is inescapable that the cost of housing is still high relative to the average resident's income. Public housing comes in different configurations in Singapore. There are four basic types: 3-room, 4-room, 5-room, and executive.²⁹ Two other types, the 1-room and 2-room units, built in the 1960s as a quick response³⁰ to escalating housing demand, have been phased out following low demand. As their names suggest, the types of housing are divided according to the number of rooms (including living rooms and dining rooms) in the unit. As the number of rooms increases, the space increases, but so does the cost.³¹ The average cost of a 3-room unit is about S\$232,000 (about US\$152,000³²). In contrast, a 4-room unit costs about S\$313,000 (about US\$205,000³³), a 5-room unit costs about S\$380,000 (about US\$249,000³⁴), and an executive unit costs about S\$455,000

25. *See id.*

26. *See* HOUSING & DEV. BD., PUBLIC HOUSING IN SINGAPORE: RESIDENTS' PROFILE AND PHYSICAL ASPECTS: HDB SAMPLE HOUSEHOLD SURVEY 2003 (2005); HDB InfoWEB, *supra* note 24.

27. Belinda Yuen, *Squatters No More: Singapore Social Housing*, GLOBAL URB. DEV. MAG., Nov. 2007, <http://www.globalurban.org/GUDMag07Vol3Iss1/Yuen.htm>.

28. *Id.*

29. *See* Wikipedia, Public Housing in Singapore, http://en.wikipedia.org/wiki/Public_housing_in_Singapore (last visited Mar. 23, 2009) ("A three-room flat has two bedrooms in about 70 m² (750 sq ft). A four-room flat has three bedrooms with about 90 m² (970 sq ft) of space. A five-room flat is about 110 m² (1,200 sq ft). Some have an extra room that is used as a study; others have a dining area. An executive apartment has three bedrooms and separate dining and living rooms. They are the largest apartments built by the Housing Board, with 150 m² (1,600 sq ft) of space.")

30. These unit types were quicker to build because they were smaller.

31. *See generally* HOUSING & DEV. BD., *supra* note 25, at xii, 38. While the costs increase, this is met in part by the higher monthly household income earned. The average household income for those living in 5-room units was S\$5,648 per month, as compared with S\$3,864 for those living in 4-room units. *See id.* (2003 figures).

32. *See* XE: The World's Favorite Currency Site, <http://www.xe.com> (based on exchange rates used as of Nov. 19, 2008).

33. *See id.*

34. *See id.*

(US\$298,000³⁵).³⁶ Recently in 2007, it was reported that a 5-room unit sold for a record-breaking S\$750,000 (about US\$491,000³⁷), a price closer to the cost of private housing.³⁸ In this respect, while the government generously provides subsidies, the residents still bear the burden of having to pay for large portions of their housing cost.³⁹ Also, these figures must be compared to the average housing income of public housing residents. In this regard, “[t]he average monthly household income from work continued in an upward trend from S\$3,719 in 1998 to S\$4,238 in 2003.”⁴⁰

In contrast, for the rest of Singapore residents who live in private housing, the cost of housing is limitless. As distinct from public housing, wherein the government retains a policy consideration of and exercises its influence in keeping prices relatively affordable, there are no such constraints with regard to private housing. Private housing in Singapore is typically classified, for reasons of convenience, into five types, *viz.*, detached, semi-detached, terrace, apartment, and condominium.⁴¹ Data released by the government shows that the cost of private housing in Singapore has been increasing steadily since 2001. In the third

35. *See id.*

36. These figures are based on the average resale prices of all units in Singapore in the 3rd quarter of 2008. Prices vary according to the location of the unit as well. *See* HDB InfoWEB, Median Resale Prices by Town and Flat Type, <http://www.hdb.gov.sg/> (follow “View The HDB Housing Market Statistics” hyperlink; then follow “Median Resale Prices by Town and Flat Type” hyperlink; then follow “3rd Quarter 2008” hyperlink) (last visited Mar. 23, 2009).

37. *See* XE: The World’s Favorite Currency Site, *supra* note 32.

38. There are more instances of the ever increasing costs of public housing. *See, e.g.*, Leong Kit, *High Property Prices Affect Us All*, STRAITS TIMES (SING.), Nov. 1, 2008 (reader records discontent over public housing units reselling S\$200,000 over their starting prices).

39. *See* Yuen, *supra* note 27. As Yuen points out in her study, the provision of financial assistance forms a cornerstone towards the implementation of widespread public housing in Singapore. *See id.* The policy in the 1960s was for low rent. (“In the 1960s, rents were at S\$20 per month, S\$40 per month and S\$60 per month for the 1-, 2- and 3-room flats respectively (no more than 15 per cent [sic] of the average wage-earner’s monthly income). . . . The low rent is a deliberate policy of the government to improve the standard of living of the people. On social grounds, current rents have continued to remain low: S\$26-33 a month for 1-room flat and S\$44-75 a month for 2-room flat for households with monthly income of S\$800 or below, notwithstanding the increase in per capita GDP at current market prices, from S\$1306 in 1960 to S\$39,585 in 2000. The rental costs compare favorably with those provided by the US Department of Housing and Urban Development (1995): in 1991, 33 per cent [sic] of very low income renters in USA paid more than 50 per cent [sic] of their income on housing.”) *Id.* (internal quotation marks omitted) (citation omitted).

40. HOUSING & DEV. BD., *supra* note 25, at 36. The above figures equal US\$2,430 and US\$4,238, respectively. *See* XE: The World’s Favorite Currency Site, *supra* note 32.

41. *See* URBAN REDEVELOPMENT AUTH., PROPERTY MARKET INFORMATION: PRIVATE RESIDENTIAL PROPERTIES, 3RD QUARTER 3 (2008) (refer to Table 4).

quarter of 2008, average prices ranged from S\$10,637 (about US\$6,950⁴²) per square meter (10.76 square feet) for a condominium to about S\$5,971 (about US\$3,905⁴³) per square meter for a detached house.⁴⁴ In absolute terms, the typical price of a condominium unit may be upwards of S\$750,000 (about US\$491,000⁴⁵) and a detached house upwards of S\$1.2 million (about US\$785,000⁴⁶). Data for the income of private housing residents is not available, but it is safe to assume that they will be higher than those showed above in respect to public housing residents.⁴⁷

Briefly presented, these figures speak for themselves. Taking a public housing 3-room unit which costs about S\$232,000 and comparing this with the monthly household salary of about S\$4,238, it is clear that the cost of housing is likely to form one of the main investments of the average Singapore resident. Indeed, while Singapore's real GDP growth has been positive for the last eight years or so,⁴⁸ this simply means that the cost of living has also gone up. While it would be expected that the property prices in Singapore are likely to stagnate following a high period of growth last year,⁴⁹ this does not change the fact that the relatively high cost of housing in Singapore will form a major investment on the part of the average Singapore resident.

2. High Building Density in Singapore

The second aspect of the land scarcity problem is the high building density in Singapore. Insofar as public housing is concerned, these are usually arranged in "new towns," which are a cluster of densely packed housing units grouped together with daily amenities such as commercial shops and recreational facilities.⁵⁰ In order to make full use of all available land, every area of land is

42. See XE: The World's Favorite Currency Site, *supra* note 32.

43. See *id.*

44. See URBAN REDEVELOPMENT AUTH., *supra* note 41.

45. See XE: The World's Favorite Currency Site, *supra* note 32.

46. See *id.*

47. See HOUSING & DEV. BD., *supra* note 25, at 101 (noting that the desire for private properties is an indication of greater economic prosperity). For completeness, commercial land is also expensive in Singapore. Office space in Singapore is among the most expensive in the world. The rent per square meter per month was S\$121.30 in the third quarter of 2008. See URBAN REDEVELOPMENT AUTH., PROPERTY MARKET INFORMATION: COMMERCIAL PROPERTIES, 3RD QUARTER 1 (2008) (refer to Table 2).

48. See HOUSING & DEV. BD., *supra* note 26, at 36 (refer to Chart 3.6).

49. See, e.g., Fiona Chan, *Sharp Fall in Prices Unlikely*, STRAITS TIMES (SING.), August 26, 2008; Nicholas Fang, *Property Prices Expected to Moderate*, STRAITS TIMES (SING.), May 24, 2008.

50. See Wikipedia, *New Towns of Singapore*, http://en.wikipedia.org/wiki/New_Towns_of_Singapore (last visited Mar. 23, 2009) ("The new town planning concept was introduced into Singapore with the building of the first

utilized to achieve a balance between comfort and utility. The result is a densely packed array of residential buildings. The same pattern is repeated for commercial and industrial buildings.⁵¹

3. High Population Density in Singapore

Closely related to the second aspect is the third aspect of the land scarcity problem: the high population density in Singapore. The population density of Singapore is approximately 6,489 persons per square kilometer.⁵² The most obvious manifestation of this fact is seen in the nature of public housing. Public housing in Singapore is “often associated with high-rise high-density living” because eight in ten public housing blocks are ten stories or higher.⁵³ Today, residents typically live in 30-story blocks and there are even 40-story blocks under construction.⁵⁴ All of these contribute to a fairly obvious point: not only is housing expensive in Singapore, it is also clear that building and population densities are correspondingly high in a highly urbanized country.

As discussed above, each of these three aspects discussed have contributed to the unique development of tort law in Singapore. However, before the substantive content of the resulting tort law is examined,⁵⁵ it is necessary to examine the history of the Singapore legal system to lend the proper context to the subsequent discussion.

New Town, Queenstown, from July 1952 to 1973 by the country’s public housing authority, the Housing and Development Board. Today, the vast majority of the approximately 11,000 public housing buildings are organised into 22 new towns across the country.”).

51. *See generally* Boon-Lay Ong & Chi-Nguyen Cam, *BEAMs and Architectural Design in Singapore Public Housing*, in *TROPICAL SUSTAINABLE ARCHITECTURE: SOCIAL AND ENVIRONMENTAL DIMENSIONS* 91–92 (Joo-Hwa Bay & Boon-Lay Ong eds., 2006).

52. *See* Singapore Infomap, *supra* note 20; *see generally* Yuen, *supra* note 27.

53. HOUSING & DEV. BD., *supra* note 25, at 73.

54. *See id.* In May 2004, HDB launched a “50-story housing development, comprising seven linked residential blocks with 1,848 units.” *Id.*

55. *See infra* Part IV.

III. A BRIEF HISTORY OF THE SINGAPORE LEGAL SYSTEM⁵⁶

Indeed, in order to appreciate the uniqueness of the development of tort law in Singapore due to the land scarcity problem described in the preceding part, a *brief* mention (owing to the constraints of space) needs to be made about the history of the Singapore legal system. In particular, the very close relationship between Singapore and English law must be understood, for it is in this context that the significance of the Singapore courts' development of local tort law in the face of land scarcity can be better understood.

A. The Sources of Singapore Law

The foundation of the Singapore legal system is clearly based on English law.⁵⁷ For a long time after Sir Thomas Stamford Raffles' arrival in 1819 and even after Singapore's independence in 1965, English law was regarded as being of very strong influence. In essence, English law has always been perceived as being "received" into Singapore, therefore explaining the connection between Singapore and English law, even up to the present time. The mechanics of this reception is rather complicated, but may be divided broadly into two distinct periods: the first of which was prior to the passage of the Application of English Law Act ("AELA")⁵⁸ by the Singapore Parliament in 1993, and the second period, after.

56. See Eugene Tan & Gary Chan, Chapter 1: The Singapore Legal System, <http://www.singaporelaw.sg/content/LegalSyst1.html#Section3> (last visited Mar. 23, 2009), for a very useful summary of the Singapore legal system generally (including its history as well as its general structure). See also R.H. HICKLING, *ESSAYS IN SINGAPORE LAW* 53 (1992); Kevin Y.L. Tan, *A Short Legal and Constitutional History of Singapore*, in *THE SINGAPORE LEGAL SYSTEM* 26 (Kevin Y.L. Tan ed., 2d ed. 1999); Andrew Phang, *The Singapore Legal System – History, Theory and Practice*, 21 SING. L. REV. 23 (2001). For a more detailed work, see ANDREW PHANG, *THE DEVELOPMENT OF SINGAPORE LAW: HISTORICAL AND SOCIO-LEGAL PERSPECTIVES* (1990).

57. The local literature pertaining to the reception of English law in Singapore is too numerous to list here completely. See Andrew Phang, *Reception of English Law in Singapore: Problems and Proposed Solutions*, 2 SING. ACAD. L.J. 20, 20 n.1 (1990), for a sampling of the available literature.

58. Application of English Law Act, 1994, c. 7A (Sing.); see generally Andrew Phang, *Cementing the Foundations: The Singapore Application of English Law Act 1993*, 28 U. BRIT. COLUM. L. REV. 205 (1994); Victor Yeo, *Application of English Law 1993: A Step in the Weaning Process*, 4 ASIA BUS. L. REV. 69 (1994).

1. Pre-1993: Reception by Three Means

As for the first period, the detailed history of the reception of English law in Singapore prior to the passage of the AELA need not concern us unduly for present purposes, but it was believed that English law was received into Singapore by three means: (a) general reception, (b) specific reception,⁵⁹ and (c) imperial legislation.⁶⁰ These three means govern the reception of English common law and legislation. In this connection, a significant portion of Singapore tort law is governed by common law.⁶¹ Therefore, in so far as tort law is concerned, and leaving aside the reception of English *legislation*, English *common law* was perceived to have been received in Singapore by way of *historical or general* reception through the Second Charter of Justice of 1826 (“Second Charter”).⁶² The date of the Second Charter is important because the period between Singapore’s founding in 1819, and the promulgation of the Second Charter in

59. This concerns the situation where the local statute expressly provides for the reception of English law. From 1824 to 1963, Singapore was part of the British Empire and any imperial statutes not repealed are still applicable. Again, a problem exists in that no comprehensive list of applicable statutes exists. *See generally* G.W. Bartholomew, *English Statutes in Singapore Courts*, 3 SING. ACAD. L.J. 1 (1991).

60. This means is simply legislation enacted at Westminster by the English Parliament and which has been expressly extended to (here) Singapore. In some cases, a statute in defining the powers, privileges and jurisdictions of various persons refers to their English counterparts. Some statutes specifically refer to English law to fill in *lacunae* in the statute. Then, there may also be specific reception in the statute, such as in section 5 of the Civil Law Act, 1988, c. 43 (Sing.). Section 5 of the Civil Law Act itself provides for the *continuous* reception of English *commercial* law. Section 5 received English law with respect to mercantile law with several exceptions. English land law does not apply: (a) where the law in question gives effect to a treaty or international agreement that Singapore is not part of, it does not apply; (b) where the statute regulates the exercise of any business through penalties or providing licenses, it does not apply; and (c) where there is corresponding Singapore written law. “For a sampling with regard to the *specific* reception of English commercial law under section 5 of the Civil Law Act,” see the list in Phang, *supra* note 57 (emphasis added).

61. Singapore tort law is generally governed by the common law, as received from England and later modified to suit local conditions. However, certain areas of tort law, which do not form the focus of the present paper, have been modified by local legislation. In these areas, there is quite clearly a *legislative* departure from the English position as embodied at common law. For example, in economic torts and defamation, there have been, in Singapore, important legislative developments affecting both these areas. Thus, particular aspects of the common law on defamation have been modified by the Defamation Act, 1985, c. 75 (Sing.), and the extent to which the law on economic torts regulates market competition must now be understood in the light of the regulatory framework set out in the Competition Act, 2004, c. 50B (Sing.). *See* Gary Chan & Lee Pey Woan, *Economic Torts*, <http://www.singaporelaw.sg/content/EconomicTorts.html> (last visited Mar. 23, 2009).

62. *See generally* ANDREW PHANG BOON LEONG, *FROM FOUNDATION TO LEGACY: THE SECOND CHARTER OF JUSTICE* (2006).

1826 is generally regarded as being mired in “legal chaos,” for no uniform system of law governed the fledging colony, let alone English law.⁶³ To resolve the chaotic state of events that ensued, the Second Charter was issued under Letters Patent establishing the Court of Judicature at Prince of Wales’ Island, Singapore, and Malacca.⁶⁴ Overnight, a single legal system for everyone was put in place,⁶⁵ with established laws and institutions that were able to provide “Justice and Right.”⁶⁶ The controversy which ensued concerned the *body of law* which was received into Singapore: in particular, what did the relevant “Justice and Right” clause in the Second Charter really import into Singapore, given that there was no *explicit* reference to the reception of the *English* common law?

63. *See id.* at 1–4. In fact, as Phang notes, in the period between 1819 and 1826, Sir Stamford Raffles did attempt to formulate some regulations, the legality of which is dubious and, therefore, not of particular moment in the context of Singapore legal history. *See id.* at 4 & n.5 (citing M.B. Hooker, *Raffles’ Singapore Regulations – 1823*, 10 MALAYA L. REV. 248, 249 (1968)); *see generally* M.B. Hooker, *The East India Company and the Crown*, 11 MALAYA L. REV. 1, 26–28 (1969); SIR WALTER NAPIER, AN INTRODUCTION TO THE STUDY OF THE LAW ADMINISTERED IN THE COLONY OF THE STRAITS SETTLEMENTS (1898), *reprinted in* 16 MALAYA L. REV. 4 (1974).

64. *See* PHANG, *supra* note 62, at 4–7. The court consisted “of the Governor, the Resident Counsellors as well as a Recorder as Judges, with the Recorder taking precedence next to the Governor.” *Id.* at 7. A detailed account of the arrival of the Second Charter to the Straits Settlements can also be found in J.W. NORTON KYSHE, A JUDICIAL HISTORY OF THE STRAITS SETTLEMENTS 1786–1890, *reprinted in* 11 MALAYA L. REV. 38 (1969). The Proclamation of the Second Charter took place on August 9, 1827, which coincides with the date Singapore achieved full independence from British rule on August 9, 1965. *See* PHANG, *supra* note 62, at 5.

65. *See* PHANG, *supra* note 62, at 7.

66. *See id.* at 4–18. The material part of the Second Charter reads as follows:

And We do further give to the said Court of Judicature of *Prince of Wales’ Island, Singapore and Malacca*, full Power and Authority, upon examining and considering the several Allegations and Proofs of the said Parties to each Suit, or to such of them as shall appear at the Trial or Hearing thereof, or of the Complainant or Complainants, or Parties promoting such Suit alone, in case the Defendant or Defendants shall make Default after Appearance, or say nothing, or confess the Petition of Complaint or *ex parte* the Petitioner, if Justice shall so require, and on examining and considering the Depositions of the Witnesses, *to give and pass Judgment and Sentence according to Justice and Right*. And in any case of any Proceeding removed from or originating in any inferior Court of Judicature, to remit the same thereto, as substantial Justice shall best be attainable; and also to award and order such Costs to be paid by either or any of the Parties to the other or others, as the said Court shall think just.

Id. at 8 (emphasis added).

In the landmark case of *Regina v. Willans*,⁶⁷ it was held by Sir Peter Benson Maxwell R. that the law of England, as it existed in 1826, was to be applied to the Straits Settlements, subject to modifications to suit the circumstances of the place and the customs, religions, usages, and manners of the native inhabitants.⁶⁸ Therefore, with this decision, it was accepted that principles and rules of English common law and equity (as well as pre-1826 statutes of general application) were received into Singapore, as of 1826, with suitable modifications. While this has, for a long time, been thought to be the correct view,⁶⁹ there has been relatively contemporary academic opinion that English law was not actually received into Singapore, even during the time Singapore was a British colony.⁷⁰ However, whatever the theoretical challenges to the

67. (1858) 3 Kyshe 16. Although the case was one from Penang, the three Settlements were effectively one political unit and thus its reasoning could be extended to Singapore. In a considered judgment, Maxwell R. eventually held that:

The Charter directs that the Court shall, in those Cases, “give and pass judgment and sentence according to Justice and Right”. The “Justice and Right” intended, are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. The words are obviously used in the same sense as in the well known Chapter of Magna Charta from which they were probably borrowed: “*nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.*” They are, in jurisprudence, mere synonymes for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England.

Id. (citations omitted).

68. See, e.g., Phang, *supra* note 58, at 208.

69. There have been many which have followed *Willans*, (1858) 3 Kyshe 16, in holding that 1826 is the correct “cut-off” date. See, e.g., *In re Lu Thien*, [1891] S.L.R. 10; *Ismail bin Savoosah v. Madinasah Merican*, (1887) 4 Kyshe 602; *Mahomed Ally v. Scully*, (1871) 1 Kyshe 254.

70. See Mohan Gopal, *English Law in Singapore: The Reception That Never Was*, 1 MALAYAN L.J. XXV, XXXVIII (1983). Briefly, Gopal’s argument was that English law was never received into Singapore because the language of the Second Charter “is consistent with the view that English law was not received.” He further points out that “[c]ommentators and courts have erroneously ignored the arguments in favour of the non-reception thesis” In this regard, British colonial practice shows that where English law was introduced into conquered territories it was done so expressly. Furthermore, the phrase “justice and right” was never used to introduce English law elsewhere. Finally, “[e]ven if reception was achieved its continuity was broken by subsequent instruments and events.” See *id.* (emphasis added); but see Andrew Phang Boon Leong, *English Law in*

conventional view, it can now be confidently said that most of the prevailing problems⁷¹ in this first period of “reception” have been resolved by the passage of the AELA in 1993.

2. The Application of English Law Act 1993

Indeed, the second period of reception, which (as will be seen) arguably supersedes the first period, came with the passage of the AELA, a watershed moment in Singapore law. Passed on November 12 1993, the AELA seeks to clarify the position of English law in Singapore. The then Minister for Law, Professor S. Jayakumar, announced its purpose as being to “clarif[y] the application of English law, particularly English statutes, as part of the law of Singapore and remove the considerable uncertainty that currently exists in this regard.”⁷² He also highlighted that the AELA “is one of the most significant law reform measures since [Singapore’s] independence.”⁷³ Indeed, the first part of the Preamble states that the AELA is “to declare the extent to which English law is applicable in Singapore and for purposes connected therewith.” While the aims of

Singapore: Precedent, Construction and Reality or The Reception That Had to Be, 2 MALAYAN L.J. CIV (1986) (systematically refuting Gopal’s arguments).

71. Among the other problems, one concerned the “cut-off date” for the general reception of English Law. Phang has suggested that there has been some controversy with regard to the precise point in time, although the better view appears to be that the “cut-off date” should be 1826, the date the Second Charter was promulgated. It is desirable that a “cut-off date” be formally instituted in order to define a “fixed pool” of the received English law that would constitute the initial corpus of Singapore law from which further development can be effected. Problems might, however, arise with regard to the *common law*, the main argument being that the common law, being “timeless,” ought not to be subject to such a “cut-off date.” Taking on the discussion, the issue then arises whether post-1826 cases were binding because the local courts seem to follow the English decisions on common law. Theoretically, any subsequent developments of the common law by English courts do not automatically become law in Singapore. Indeed, a Singapore court is free to reject an English decision in favor of its own interpretation. See Andrew Phang Boon Leong, *Of Cut-Off Dates and Domination: Some Problematic Aspects of the General Reception of English Law in Singapore*, 28 MALAYA L. REV. 242, 243–49 (1986). In fact, the Privy Council has noted that the common law may run in different streams in different jurisdictions. See *Austl. Consol. Press Ltd. v. Uren*, [1969] 1 A.C. 590 (P.C. 1967) (appeal taken from Austl.); see also Robert C. Beckman, *Divergent Developments of the Common Law in Jurisdictions Which Retain Appeals to the Privy Council*, 29 MALAYA L. REV. 254 (1987).

72. 61 PARL. DEB., (1993) 609 (Sing.).

73. *Id.*

the AELA were lofty, in truth, it did not resolve all of the matters relating to the reception of English law in Singapore.⁷⁴

For present purposes, however, our concern is primarily with the reception of English common law, having regard to the overarching question of tort law in Singapore. In this regard, Section 3 of the AELA means that the common law of England, so far as it was part of the law of Singapore immediately before the commencement of this Act, shall continue to be the law of Singapore, subject to such modifications as applicable to the circumstances of Singapore and its inhabitants.⁷⁵ Leaving aside the theoretical problems which persist, notwithstanding Section 3 of the AELA, the practical effect of this section is that, even where English common law was received, the Singapore courts retained the residual power to depart from such law if the local conditions require such a departure.⁷⁶ This continues with the “exception” recognized even prior to the

74. See Phang, *supra* note 58, at 217–44. Indeed, as for legislation, Phang views it as unfortunate that the AELA chose to list the English statutes which would still be applicable in Singapore, rather than to re-enact them again in the local context. He argues that it would not be too difficult to do this in view of the limited number of statutes actually listed in the AELA. He further states that re-enactment of the statutes in the local context would be more consistent with the status of the independence of Singapore and its legal system. Indeed, one is inclined to agree with Phang but it ought to be said that the main purpose of the AELA was to introduce certainty into the applicability of English law in Singapore, and by listing the statutes applicable in Singapore, that purpose has certainly been achieved. While the independence of the Singapore legal system is no less important, the main issue of certainty ought to be addressed first, and the quickest means of doing that was to list out all the statutes still applicable in Singapore. Local re-enactment of the statutes can come later when the main purpose of the AELA has been achieved and the status of the applicability of the English law in Singapore becomes clearer with time.

75. For completeness, section 3 of AELA provides as follows:

Application of common law and equity.

3. —(1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.

(2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

Application of English Law Act, 1994, c. 7A, § 3 (Sing.). It has been speculated that the probable source of section 3 is section 5 of the New Zealand Imperial Laws Application Act 1988, 1988 No. 112. See Phang, *supra* note 58, at 229.

76. Unfortunately, this does not clarify the position with regard to post-1826 common law in Singapore. In other words, while the AELA provides that the common law of England shall “continue” to be part of the law of Singapore before the enactment of the AELA, it does not say what the *content* of this body of law is: is it the English common law received at 1826 (the time the Second Charter was received), 1993 (the time of the

passage of the AELA following the decision in *Regina v. Willans*:⁷⁷ any application of English law before the AELA would have to be made *voluntarily* by the courts, if it is thought to be appropriate.⁷⁸ Thus, in this sense, Section 3 of the AELA actually encourages the development of an independent Singapore legal system in which the courts have the power to reject or accept law originating from elsewhere.⁷⁹

B. The Strong Influence of English Law

Notwithstanding the statutory permission to take local conditions into consideration, that is only half of the *theoretical* story. In *practice*, the courts generally accept English decisions without question. Thus, to have the courts depart from the English position would take an unusually strong local condition, rather than just a difference in conditions from England *per se*.⁸⁰ Indeed, while it

enactment of the AELA), or some other time (resting on the possible Blackstonian argument that the common law is “timeless” and hence no “cut-off” date is feasible)? While theoretically an interesting question to consider, the result is of no practical moment for our purposes. Whether the English common law received was as of 1826 or 1993, the courts have always retained for themselves the ability to make modifications to the received (or voluntarily followed) law so as to take into consideration the local conditions and customs. See Phang, *supra* note 58, at 234–39.

77. (1858) 3 Kyshe 16.

78. See Phang, *supra* note 71, at 249–52.

79. In the final analysis, the AELA is undoubtedly an important statute as it clarifies the status of applicability of English law in Singapore. By providing a firm foundation of rules from which to start from, the AELA has provided the legal profession in Singapore with much clarity amidst the conceptual uncertainty prior to its passage. The platform for the Singapore legal system to become a truly independent one was indeed set with the AELA, and the merit of its passage is to be seen in more recent times. See *infra* Part III.C.

80. A similar problem exists for the statutes introduced by the Second Charter. Under the Second Charter, all statutes that were in force in England on November 26, 1826 were potentially applicable. However, it was noted by the Privy Council that statutes that were peculiar to the local conditions of England were not to be received, although the general law of England may be introduced. Thus, statutes of a purely local or parochial character would not have become part of Singapore law. See *Yeap Cheah Neo v. Ong Cheng Neo*, (1875) 6 L.R.-P.C. 381 (P.C.) (appeal taken from Sup. Ct. of Straits Settlement). Therefore, even if one is to put aside Phang’s argument about the validity of the reception of English law and what the cut-off date ought to be, there remain many problems pertaining to statute law. The situation discussed earlier has resulted in several ancient English statutes becoming part of Singapore law. Statutes that become so applicable, such as the Statute of Frauds 1677, remain so, notwithstanding their discontinued status in England. Indeed, there cannot be any certainty as to what English statute would apply, since there are thousands of English statutes available, given the traditional cut-off date of 1826. See generally Andrew Phang Boon Leong, “Overseas Fetters:” *Myth or Reality?*, MALAYAN L.J. cxxxix (1983).

has been noted that the earliest opinions favored giving the local population the full benefit of their own laws, religions, and customs,⁸¹ such modifications were later rarely forthcoming, especially in land law and commercial law, where the greater commercial interests of the British empire (as given effect by a uniform application of English law) prevailed.⁸² The only area where such modifications existed was in personal laws.⁸³

These general observations are given real effect when one considers the actual numbers of English cases cited as authority in the local decisions. In a study of the 527 Singapore High Court decisions reported locally between 1965 and 1985, it was noted that 1,383 cases were cited as authorities. Of these 1,383 cited cases, 329 were local, whereas 923 were English. In percentage terms, 66.7% of the cases cited were English cases, 27.1% were local cases, and a mere 9.5% were cases from other jurisdictions.⁸⁴ Over the same period, 297 decisions of the appellate courts⁸⁵ were reported. In these decisions, 603 cases were cited as authorities, and, of these, the breakdown is as follows: 105 local cases (17.4%),

81. See HELENA H.M. CHAN, *ASEAN LAW ASS'N, AN INTRODUCTION TO THE SINGAPORE LEGAL SYSTEM* 8 (1986). Thus, Chan notes that in a decision by the third Recorder, Sir Ralph Rice, the view was expressed that the First Charter of Justice only imported English *criminal* law and that civil matters were governed by the native laws and customs. In a later example, Sir Richard McCausland R. opined that it was "the policy of the framers of the Charter to induce as many persons as possible to become resident(s) in the Settlement and not to interfere with the observance of their several religions, manners and customs, nor with the free dispositions of their houses, lands, or moveable property." See *id.* at 9 (citing ROLAND BRADDELL, *THE LAW OF THE STRAITS SETTLEMENTS: A COMMENTARY* 79, 81 (3d ed. 1982)).

82. See *id.* at 9–10.

83. See *id.*; see also L.C. Green, *Native Law and the Common Law: Conflict or Harmony*, 12 *MALAYA L. REV.* 38 (1970); Phang, *supra* note 71, at 252–62. In another study of the applicability of English law in Singapore, it was observed that in five instances, English decisions from the House of Lords were "as good as binding" in Singapore notwithstanding the lack of any formal relationship between the House of Lords and the courts in Singapore which might otherwise bind the latter courts by the doctrine of *stare decisis*. These five instances are: (a) decisions received under the Second Charter, (b) decisions adopted as a matter of policy, (c) decisions interpreting statutes which are re-enacted locally, (d) decisions on English common law received under a continuing reception statute, and (e) decisions on English statutes received under a continuing reception statute. Of these, instances (b), (c), and (d) are all cases where the Singapore courts have voluntarily chosen to apply or adopt English law for use in Singapore. See MICHAEL F. RUTTER, *THE APPLICABLE LAW IN SINGAPORE AND MALAYSIA* 283–86 (1989).

84. Walter Woon, *The Applicability of English Law in Singapore*, in *THE SINGAPORE LEGAL SYSTEM* 230, 230 (Kevin Y.L. Tan ed., 2d ed. 1999).

85. Consisting at that time of the Federal Court in Singapore, the Court of Appeal and the Court of Criminal Appeal. The court structure of Singapore (as with its reception of English law) has had a complicated history, and a useful summary can be found in Walter Woon, *The Doctrine of Judicial Precedent*, in *THE SINGAPORE LEGAL SYSTEM* 297 (Kevin Y.L. Tan ed., 2d ed. 1999).

427 English cases (70.8%), and 71 cases from other jurisdictions (11.8%).⁸⁶ Indeed, in the period studied, it is extremely difficult to find a local case in which a considered decision of the English courts was rejected as being wrong or unsuitable in Singapore. While this was a study of cases decided before the passage of the AELA in 1993, the trend seems to hold until the late 1990s, subject to a more recent willingness to depart from the English position. Therefore, whatever powers the courts have in theory to depart from English law to take into account the local conditions, in practice, there seems to be *de facto* continuous reception of English common law.⁸⁷

C. The Recent Development of an Autochthonous Singapore Legal System

However, balanced against the propositions in the preceding section is the emergence of a new direction taken by the Singapore legal system. This is a movement put in place several decades ago,⁸⁸ but which has only very recently

86. Woon, *supra* note 84.

87. Speculated reasoning falls into three categories: historical, legislative and practical. Of these, the first two meant that English law was applied because it was part of Singapore law. The third category meant that English law was applied by choice and that choice has been followed with remarkable fortitude because of the demographic makeup of the judges, who have all been trained in English law. English legal materials were much better organized than local materials and therefore in practical terms it was more efficient to look for English authority. *See id.* at 231, 240–42.

88. Autochthonous is simply the Greek equivalent of the Latin “indigenous.” It means “of the land” and is something not imported; it means independent. One of the very first advocates of the development of an autochthonous Singapore legal system was G.W. Bartholomew, former Dean of the Faculty of Law at the National University of Singapore. In an interview given in 1985, he stated that it was only a “question of time” before Singapore could have an autochthonous legal system, given its relatively young age. *See In Conversation: Prof G W Bartholomew*, 6 SING. L. REV. 56 (1985); *see also* G.W. Bartholomew, *English Law in Partibus Orientalium*, in THE COMMON LAW IN SINGAPORE AND MALAYSIA 29 (A.J. Harding ed., 1985); G.W. Bartholomew, *The Singapore Legal System*, in SINGAPORE: SOCIETY IN TRANSITION 84 (Riaz Hassan ed., 1975); G.W. Bartholomew, *Developing Law in Developing Countries* 1 LAWASIA N.S. 1 (1979); Kok Keng Lau et al., Note, *Legal Crossroads: Towards a Singaporean Jurisprudence*, 8 SING. L. REV. 1 (1987); Phang, *supra* note 71, at 260; Andrew Phang Boon Leong, *Of Generality and Specificity: A Suggested Approach Toward the Development of an Autochthonous Singapore Legal System*, 1 SING. ACAD. L.J. 68 (1989). Indeed, when the AELA was passed, the Minister for Law also noted the importance of developing an independent Singapore legal system. He stated that the Singapore government would be taking further steps to amend the local law in order to free it of dependence on English law: “[W]e must have certainty in our laws and move way from reliance on English law, because we do not know what are the conditions and circumstances which presently shape the enactment of laws in the United Kingdom.” *See* 61 PARL. DEB., (1993) 616 (Sing.).

seen concrete motion.⁸⁹ Indeed, it is rather significant that the Singapore Supreme Court recently put out a Practice Direction that mandates lawyers to cite a Singapore case whenever possible, *before* making reference to a foreign case.⁹⁰ This necessarily presupposes that there is now a sizeable body of Singapore case law from which to cite, and this is distinguished from the study done of the Singapore cases decided between 1965 and 1985, where there was a heavy dependence on English decisions.⁹¹

What, however, does this mean when one looks at the examples of the tort cases presented in the subsequent parts of this paper? On one hand, it is quite clear that the Singapore courts have always had the *theoretical ability* to depart from English law if the local conditions and customs demand such a departure. However, to state this as a general and blanket proposition would be incorrect. The more precise proposition, from the above discussion, appears to be this: depending on *when* the decision in question was decided, the court concerned might have been *more* willing to depart from the English position if the local conditions demanded it. In other words, it would take *more* to warrant a departure from the English position, *even if* local conditions demanded it, depending on when the decision was made. In asking when the decision was made, one would consider which of the two competing factors discussed above is more prevalent: (a) the very strong influence of English law *or* (b) the more recent development of an autochthonous Singapore legal system fostered by the growth of local case law. Therefore, in analyzing the cases presented below, this paper will also provide the

89. Indeed, most recently, the Singapore Court of Appeal stated that “local courts must simultaneously recognise that the days of a uniform common law are no longer a given. It is true that in the commercial context, there is more likelihood of (and desirability for) uniformity. However, even in the commercial setting, uniformity should not be taken too far.” *Man Fin. (S) Pte Ltd. v. Wong Bark Chuan David*, [2008] 1 S.L.R. 663, 712–13. The Court then turned to section 3(2) of AELA. *See id.* at 713. Section 3(2) of AELA, as discussed above, allowed the courts to depart from English law where necessary. *See supra* note 75.

90. *See* SING. SUP. CT. PRAC. DIRECTION 63, ¶ 4 (amended 2008). It provides that:

Judgments from other jurisdictions can, if judiciously used, provide valuable assistance to the Court. However, where there are in existence local judgments which are directly relevant to the issue, such judgments should be cited in precedence to foreign judgments. Relevant local judgments will be accorded greater weight than judgments from foreign jurisdictions. This will ensure that the Courts are not unnecessarily burdened with judgments made in jurisdictions with differing legal, social or economic contexts.

Id.

91. *See supra* Part III.B.

context in which cases were decided. It is only then that the true significance of the courts' *choice* to depart from the English position can be appreciated.⁹²

IV. EFFECT OF LAND SCARCITY ON TORT LAW IN SINGAPORE: PRAGMATISM WITHOUT LEGAL COHERENCE?

Before this paper considers the effect of land scarcity in particular on tort law in Singapore, an interesting statistic deserves prior mention: out of the 71 *tort* cases reported between 1974 and 1985, 166 English and 51 local cases were referred to by the Singapore courts.⁹³ While the number of local cases cited was smaller than the number of English cases cited, the extent of the difference is *not* as pronounced when compared to the general percentage across *all* cases reproduced above, thereby suggesting a higher willingness on the courts' part to depart from English law in tort cases.⁹⁴ However, this statistic (and conclusion) must be interpreted in light of an analysis taken of the cases cited in the tort syllabus taught at the National University of Singapore in 1986.⁹⁵ In that study, of the 286 cases cited, 227 were English cases and only 22 were local.⁹⁶ Of the 22 local cases, only 13 enunciated any new principles of law, the remaining nine being "merely illustrative."⁹⁷ While an important objection might be raised that these figures show a greater willingness by Singapore courts to depart from the English position in tort law, two points can be made in response. *First*, although when considered *relative* to the numbers from the other areas of the law, these numbers show a greater willingness to depart, taken *absolutely*, 64.8% of all cases cited being English cases⁹⁸ does *not* show that the Singapore courts have taken an *ex facie* liberal approach in relation to tort cases. *Secondly*, the numbers cited unfortunately include administrative law cases with the tort cases. Administrative law cases, being more "local" than the tort cases, could have artificially inflated

92. In other words, if a case was decided at a time when there was still heavy dependence on the English position, then the *prima facie* position would be that the court would not have departed from the English position, even if there had been a difference in local conditions and English conditions. However, if the court nonetheless decided to depart from the English position, then it might be said that local conditions, as a factor in the court's decision, must have been very weighty.

93. See Woon, *supra* note 84, at 248B. Indeed, out of the 71 tort cases decided, 33.8% of them cited local cases, and 64.8% of them cited English cases. However, the study groups tort and administrative law cases together. This is unfortunate as administrative law cases may have skewed the data towards the more citation of local cases.

94. See *supra* Part III.B.

95. See Lau et al., *supra* note 88, at 43.

96. *Id.*

97. *Id.*

98. See *id.*

the numbers, thus showing a less pronounced aversion towards departing from English law. Therefore, it is suggested that these numbers generally give effect to the propositions advanced above that, *even in tort law*, the Singapore courts have shown general reluctance to depart from English law. With this contextual caveat in place, three examples showing how three aspects of the land scarcity problem have affected the development of tort law in Singapore can now be discussed.

A. High Cost of Living: Recovery of Pure Economic Loss in Negligence

Singapore has generally followed the English position that pure economic loss is not recoverable in tort for building defects cases, save in some limited circumstances.⁹⁹ However, as will be seen, the Singapore courts have fashioned out a pragmatic exception with respect to pure economic loss incurred in building cases as a result of negligence during the construction of the building. This is an interesting example of how land scarcity has shaped tort law in Singapore.

1. The Singapore Courts' Significant and Deliberate Departure from English Law

Indeed, in Singapore, the courts have expressly departed from the strict English position that excludes recovery for pure economic loss save in very limited circumstances.¹⁰⁰ On one reading of the latest cases, it may even be

99. See generally Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427 (David G. Owen ed., 1995). For a comparison of various approaches to the recoverability of pure economic loss in tort around the world, see PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW, *supra* note 8. Although not within the area of my expertise, it is interesting to observe that similar problems exist in the United States as well. See, e.g., Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006); Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713 (2006); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813 (2006); Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749 (2006); Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857 (2006).

100. Singapore law broadly follows English law in other areas of recoverability for pure economic loss. For present purposes, however, in English law, there is generally no recovery for pure economic loss in building defects cases of the kind to be discussed. There are three "exceptions" to this general rule, but they generally depend on there being physical damage, thereby transforming the pure economic loss into physical damage, which is recoverable. Thus, the first of such "exceptions" is where damage suffered is not pure economic loss but physical damage to other property or injury to persons caused by latent defects in the property. See *Murphy v. Brentwood Dist. Council*, [1991] 1 A.C. 398, 434

arguable that the Singapore courts have now gone to the other extreme and the position is that pure economic losses are *prima facie* recoverable unless shown otherwise. However, just how has the land scarcity problem led to this development? In examining this question, it is useful to have regard to two separate issues: first, why the exclusionary rule was first departed from, and secondly, how the courts have attempted to first keep the bounds of liability intact before articulating a general test that seems now to do away with any hint of exclusion.

(a) Departure From the Exclusionary Rule

The first departure from the exclusionary rule in respect of pure economic loss came in the landmark Singapore High Court case of *Management Corp. Strata Title Plan No. 1272 v. Ocean Front Pte Ltd.*,¹⁰¹ later upheld on appeal by the Singapore Court of Appeal. This was, as expected, a case concerning property. In that case, the plaintiff, the management corporation of a condominium development,¹⁰² sued the defendant, the developer of the condominium, for alleged faulty construction of certain areas of the common property.¹⁰³ One of the issues raised concerned whether the plaintiff could recover the cost of remedying the defects since such expenses were in the form of pure economic loss. Warren Khoo J., sitting on the High Court, decided that it could. Khoo J. reasoned that while the loss suffered was clearly pure economic loss and hence irrecoverable under English law in these circumstances (as held by the House of Lords in *Murphy v. Brentwood District Council*¹⁰⁴ and *D & F Estates Ltd. & Ors v. Church Commissioners of England*¹⁰⁵), he thought that the exclusionary rule was not an immutable one and that there may be situations

(H.L.) (appeal taken from Eng.) (U.K.). The second of such “exceptions” is the complex structure theory, in which one part of a complex structure which may be defective causes physical damage to another party. *See id.* at 445. Finally, the third exception, which may be characterized as a true exception, is when the building defect endangers neighboring land or public highways. *See id.* at 475. *See also* Debbie Ong Siew Ling, *Defects in Property Causing Pure Economic Loss*, SING. J. LEGAL STUD. 256, 263–66 (1995). This was arguably the position in Singapore before. *See, e.g.*, *Standard Chartered Bank v. Coopers & Lybrand*, [1993] 3 S.L.R. 712 (Sing.) (rejecting claim for pure economic loss suffered due to negligent misstatement); *Swiss Sing. Overseas Enter. Pte Ltd. v. Hornng Chang Enter. Pte Ltd.*, [1993] 2 S.L.R. 478 (Sing.) (rejecting claim for pure economic loss on the premise that the prerequisite “akin to contract” criterion was not satisfied).

101. *See* [1995] 1 S.L.R. 751 (Sing.).

102. And hence a type of private housing.

103. *See* Ong, *supra* note 100, at 256–57.

104. *See* [1991] 1 A.C. at 398–99.

105. *See* [1989] 1 A.C. at 177–78 (H.L. 1988) (appeal taken from Eng.) (U.K.).

where recovery was permissible.¹⁰⁶ In particular, Khoo J. relied on dicta in *Murphy* that recovery was possible where there was a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of duty of care owed by the builder to the owner is wide enough to cover pure economic loss.¹⁰⁷ Applying these principles to the case, and declining to enter into a “philosophical discourse” on whether pure economic loss is recoverable in tort,¹⁰⁸ Khoo J. held that there was sufficient proximity akin to contract in the present case since a developer of a condominium knows from the time of conceiving a plan to develop that the management corporation will come into existence.¹⁰⁹ He further held that to find a duty in these circumstances would not open the floodgates of liability.¹¹⁰

Some brief points about Khoo J.’s decision in *Management Corp. Strata Title Plan No. 1272* may be made at this stage. First, it must be remembered that the decision was made in 1995, a time when the hold of English law was still tight on the Singapore legal system, notwithstanding the passage of the AELA just two years previous.¹¹¹ Indications of this can be seen in Khoo J.’s reluctance to engage in what he termed the “philosophical” question of whether pure economic loss could be recovered in tort,¹¹² the resolution of which would have required him to (potentially) depart expressly from English law. As a result of his reluctance to do so, Khoo J. decided the case on what can only be described as a pragmatic approach. Indeed, Khoo J.’s reasoning could not have been supported legally. His finding that there was sufficient proximity in *Management Corp. Strata Title Plan No. 1272* is difficult to reconcile with factually similar cases such as *Murphy* and *D & F Estates Ltd.*¹¹³ An implicit reliance on *Junior Books Ltd. v. Veitchi Co.*¹¹⁴ would also have been misplaced since that case had been largely confined

106. See *Mgmt. Corp. Strata Title Plan No. 1272*, [1995] 1 S.L.R. at 765. Khoo J. also drew support from the decision of the High Court of Australia wherein Mason J. held that the general proposition that pure economic loss is not recoverable is not an absolute or inflexible rule. See *id.* (citing *Sutherland Shire Council v. Heyman*, (1985) 157 C.L.R. 424 (Austl.)).

107. See *id.*

108. See *id.* at 764. Indeed, Khoo J. preferred “to take the pragmatic route by simply asking . . . whether the management corporation in this case should be allowed to recover the cost of putting right the alleged defects in the common property . . .” *Id.* However, with respect, Khoo J.’s disinclination to consider the “philosophical” problem of the recovery of pure economic loss was really avoidance of the true issue at hand. There is no distinction between “philosophy” and “pragmatism” when the two find expression in the same issue the judge was asked to decide.

109. See *id.* at 766.

110. See *id.*

111. See *supra* Part III.A.2.

112. See *Mgmt. Corp. Strata Title Plan No. 1272*, [1995] 1 S.L.R. at 764.

113. See Ong, *supra* note 100, at 262.

114. [1983] 1 A.C. 520 (H.L. 1982) (appeal taken from Scot.) (U.K.).

to its own unique facts¹¹⁵ which, in any event, did not bear much resemblance to those in *Management Corp. Strata Title Plan No. 1272*. In the final analysis, it seems that while Khoo J. might have been affected by unarticulated policy considerations¹¹⁶ to reach what even he considered to be a pragmatic result, the decision in *Management Corp. Strata Title Plan No. 1272* was unfortunately legally unprincipled for not expressly departing from English law in this regard. At this stage, therefore, the explicit effect of the land scarcity problem was still not apparent.

It took the Court of Appeal to articulate the unspoken departure from the English position by Khoo J. in the High Court. In the resulting appeal in *RSP Architects Planners & Engineers v. Ocean Front Pte Ltd.*,¹¹⁷ the Court of Appeal not only upheld Khoo J.'s decision, but also expressly departed from the English position with respect to the recovery of pure economic loss in cases of the present nature. L.P. Thean J.A., who delivered the judgment of the court, acknowledged that on the basis of English law at that time (which indeed remains largely unchanged in the present time), there was no duty of care owed by the developers to the management corporation.¹¹⁸ However, Thean J.A. referred to authorities from other jurisdictions to find support that the exclusionary rule has been and can

115. See *D & F Estates Ltd. v. Church Comm'rs*, [1989] 1 A.C. 177, 202 (H.L. 1988) (appeal taken from Eng.) (U.K.) (commenting that “[t]he consensus of judicial opinion, with which I concur, seems to be that the decision of the majority [in *Junior Books Ltd.*] is so far dependent on the unique, albeit non-contractual, relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict.”); see also *Simaan Gen. Contracting Co. v. Pilkington Glass Ltd.*, [1988] 1 Q.B. 758 (C.A.) (U.K.); *Muirhead v. Indus. Tank Specialties Ltd.*, [1986] 1 Q.B. 507 (C.A. 1985) (U.K.); *Tate & Lyle Indus. Ltd. v. Greater London Council*, [1983] 2 A.C. 509 (H.L. 1982) (appeal taken from Eng.) (U.K.).

116. See Ong, *supra* note 100, at 264–65. It is quite clear that there was a lacuna in Singapore law at that time for disputes of this nature. First, an action in contract is impractical since it would involve all the individual owners of the condominium units bringing an action against the developers for the defects in the common property. This is because the allegedly defective common property is owned by all the individual owners who have individual sale and purchase contracts with the developers. The management corporation is statutorily barred from taking out a representative claim on behalf of the individual owners in such a contractual dispute. Moreover, while in England a builder may be liable for such building defects, notwithstanding the non-recovery of pure economic loss in an action for negligence, under section 1 of the Defective Premises Act, 1972, c. 35 (Eng.), there is no such equivalent legislation in Singapore.

117. [1996] 1 S.L.R. 113 (Sing.); see also Debbie Ong Siew Ling, *Defects in Property Causing Pure Economic Loss: The Resurrection of Junior Books and Anns*, SING. J. LEGAL STUD. 257 (1996).

118. See *RSP Architects Planners & Eng'rs*, [1996] 1 S.L.R. at 132.

be departed from.¹¹⁹ In ultimately deciding to depart from the English position, Thean J.A. stated that the court was basically involved in a delicate balancing exercise in which consideration is given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society,¹²⁰ thereby hinting at the underlying policy reason influencing the court's decision. There was, however, to be no explicit reference to the land scarcity problem in this case, and the court was content to depart from the English position on the basis of the presence of other Commonwealth authorities. Instead, the Court of Appeal thought that "proximity" was the cornerstone of liability and articulated the applicable test to determine duty in such cases. The problems associated with this test will be discussed later, but there was found to be sufficient proximity in the present case because the management corporation was, *inter alia*, an entity conceived and created by the developers and the developers knew or ought to have known that if they were negligent in their construction of the common property, the resulting defects would have to be made good by the management corporation.¹²¹

The departure from the English position was significant taking into account the time when *RSP Architects Planners & Engineers* was decided. While by this time the AELA had clarified beyond doubt that English decisions were not binding on Singapore courts and that, even if so binding, the courts had the power to depart from them where local conditions called for such departure, the Singapore courts were still largely deferential to English decisions. As such, the departure from the English position in *Murphy* and *D & F Estates Ltd.*, with regard to the historical context, was important. It was unfortunate, however, that the Court of Appeal did not articulate the underlying policy reason beneath its decision to depart from the English position. Indeed, all that it had done was to cite the English position, followed by the positions taken by the other Commonwealth jurisdictions, before preferring the latter on the vague reasoning that consideration had to be given to all conflicting societal interests. Just what those interests were was not clearly spelled out, but it was clear that the Court of

119. *See id.* (citing *Sutherland Shire Council v. Heyman*, (1985) 157 C.L.R. 424 (Austl.) and *Bryan v. Maloney*, (1995) 128 A.L.R. 163 (Austl.)). In *Bryan*, the High Court of Australia held that as between the builder and the first owner, there was a relationship of proximity giving rise to a duty of care on the part of the builder to exercise reasonable care in the construction of the building to avoid causing the owner physical harm and economic loss resulting from defects in the property. There was also a similar relationship of proximity between the builder and the subsequent owner. All of these relationships were underpinned by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. *See id.* at 132–34 (citing 128 A.L.R. at 171–73). Thean J.A. also referred to New Zealand and Canadian cases. *See id.* at 135–136 (citing *Winnipeg v. Condo. Corp. No. 36*, [1995] 121 D.L.R. 193 (Can.), *Invercargill City Council v. Hamlin*, [1994] 3 N.Z.L.R. 513 (C.A.), and *Lester v. White*, [1992] 2 N.Z.L.R. 483 (H.C.)).

120. *See id.* at 139.

121. *See RSP Architects Planners & Eng'rs*, [1996] 1 S.L.R. at 141–42.

Appeal in *RSP Architects Planners & Engineers* was driven by fairly strong policy reasons to depart from the English position.

As it turned out, the true policy consideration taken by the Court of Appeal in *RSP Architects Planners & Engineers* was revealed only some years later in the decision of *RSP Architects Planners & Engineers v. Management Corp. Strata Title Plan No. 1075*.¹²² In that case, the management corporation of the condominium development sued the architects of the development for negligence in their design and/or supervision of the construction of the development. The claim was mainly for costs and expenses incurred in respect of rectification works to prevent further injury and damage. As was the case in *RSP Architects Planners & Engineers*, the architects here argued that they owed no duty of care to the management corporation with respect to the design or supervision because the damage was pure economic loss and there was no requisite proximity between them and the management corporation. At first,¹²³ the High Court held that the architects owed a duty of care to the management corporation. On appeal to the Court of Appeal, this decision was upheld. In restating the Singapore courts' departure from the English position in *Murphy* with respect to the tortious duty of care in relation to liability for pure economic loss, Thean J.A., delivering the grounds of decision of the court, observed thus:

The House of Lords in *Murphy* appeared to consider that there were no special factors distinguishing negligence in the construction of a building from negligence in the manufacture of a consumer good. In so doing, their Lordships accepted the analogies painted by Lord Brandon in *Junior Books Ltd.* between building construction and product manufacture. As Mason CJ, Deane and Gaudron JJ held in *Bryan v Maloney*, however, there are, in our opinion, two distinguishing factors. *Firstly, the investment in real property is likely to represent a significant, if not the most significant, investment in an individual's lifetime (as opposed to the purchase of a mere chattel).* The scale of the investment in money terms is far greater than what is involved in the acquisition of a chattel. Secondly, the permanence of the structure may give rise to a greater expectation than a chattel. *We think those arguments apply a fortiori in Singapore, where land is not only scarce but expensive.* We think that to treat houses and consumer goods alike would be to ignore simple realities, realities which, to our

122. See [1999] 2 S.L.R. 449 (Sing.); see also Debbie Ong Siew Ling, *The Test of Duty for Defects in Property Causing Pure Economic Loss*, SING. J. LEGAL STUD. 667 (1999).

123. See *Mgmt. Corp. Strata Title Plan No. 1075 v. RSP Architects Planners & Eng'rs*, [1998] S.G.H.C. 302 (Sing.).

mind, are instrumental in dictating the expectations and degree of reliance placed upon the persons developing, building or designing the structure which stands upon it.¹²⁴

Accordingly, this passage formed the key policy consideration which the Court of Appeal always had, even when it decided *RSP Architects Planners & Engineers*. The land scarcity problem in Singapore was specifically highlighted in *Management Corp. Strata Title Plan No. 1075* as being the reason why there was no good reason to follow the exclusionary rule in respect of pure economic loss articulated in *Murphy*, at least with respect to building defects. Indeed, the Court of Appeal's reference to the significant investment in real property is not only true in the abstract, it is factually accurate in Singapore. As discussed earlier,¹²⁵ the cost of public housing is significant compared with the average household income of its residents. The significance is likely to be even greater considering private housing, which was the subject matter in *RSP Architects Planners & Engineers* and *Management Corp. Strata Title Plan No. 1075*. The Court of Appeal recognized this when it said that these arguments would apply *a fortiori* in Singapore, owing to the scarcity of land. Here we see the central policy consideration affecting the court's decision to depart from English law even when English law was of highly persuasive value in the context of when the cases were decided.

However, in distinguishing between houses and consumer goods, the Court of Appeal was evidently aware of the dangers of indeterminate liability should recovery of pure economic loss be allowed without restraint. Indeed, as has been pointed out, if the Court of Appeal's reasoning in *Management Corp. Strata Title Plan No. 1075* was that pure economic loss is recoverable where the individual's investment is significant, then what about a chattel which costs substantively as much as a building?¹²⁶ While the land scarcity problem undeniably led to the decision to depart from the English position, the peculiar nature of that problem also prompted the Court of Appeal to try and artificially constrain what was really a pragmatic solution to the confines of legal coherency. In doing so, what ensued was the promulgation of inexplicable distinctions which were to plague Singapore tort law for the next decade. The test to determine the existence of a duty of care in negligence was mired in uncertainty, confusion and conceptual difficulty, arguably because of the Court of Appeal's desire in *RSP Architects Planners & Engineers* and *Management Corp. Strata Title Plan No. 1075* to pursue what was arguably a "pragmatic" solution.¹²⁷

124. *Mgmt. Corp. Strata Title Plan No. 1075*, [1999] 2 S.L.R. at 470, ¶ 43 (emphasis added).

125. See *supra* Part II.B.1.

126. See Ong, *supra* note 122, at 672.

127. The departure from the English position in both *RSP Architects Planners & Eng'rs*, [1996] 1 S.L.R. 113 and *Mgmt. Corp. Strata Title Plan No. 1075*, [1999] 2 S.L.R.

(b) The Test to Determine Duty of Care

The first difficulty was the proper *nature* of the test to be applied to determine a duty of care for negligence in respect of pure economic loss. As was alluded to earlier, the Court of Appeal had determined the cornerstone of liability to be “proximity.”¹²⁸ In *RSP Architects Planners & Engineers*, Thean J.A. applied the two-stage test in *Anns v. Merton London Borough Council*¹²⁹ and relied on *Junior Books Ltd.* to find that the developer owed a duty of care in negligence for economic loss caused to the claimant with whom the developer had no contractual relationship. In so doing, the Court of Appeal not only departed from the English position in respect of the exclusionary rule for pure economic losses, but also, in one fell swoop, resurrected *Anns* and *Junior Books Ltd.*, two cases consigned to judicial neglect in England. The approach which the Court of Appeal took was that it first considered whether there was (on the facts of the case) sufficient proximity between the parties, which would give rise to a duty of care:

But the approach of the court has been to examine a particular circumstance to determine whether there exists that degree of *proximity* between the plaintiff and the defendant as would give rise to a duty of care by the latter to the former with respect to the damage sustained by the former. *Such proximity is the “determinant” of the duty of care and also the scope of such duty.*¹³⁰

The Court of Appeal then proceeded “to consider whether there is any policy consideration in negating such [a] duty of care.”¹³¹ Thus, this was substantively similar to the “two-stage” test used in *Anns*, *RSP Architects Planners & Engineers* and then *Management Corp. Strata Title Plan No. 1075*, where the Court of Appeal revisited its holdings in *RSP Architects Planners & Engineers*. The Court of Appeal was invited in *Management Corp. Strata Title Plan No. 1075* to overturn their earlier decision in *RSP Architects Planners & Engineers* but it did not do so. Instead, in holding that pure economic loss was still recoverable, it (somewhat curiously) expressly rejected the “two-stage test” in *Anns*. Thean J.A. observed thus:

449 has been assiduously followed by later Singapore cases. *See, e.g.*, *Goodwill Bldg. Res. Pte Ltd. v. Yue Cheong Kuan t/a Ben Design Architects*, [2006] S.G.D.C. 240 (Sing.); *In Builders Pte Ltd. v. Lee Chiew Leong*, [2006] S.G.D.C. 235 (Sing.); *Hong Huat Dev. Co. Pte v. Hiap Hong & Co. Pte*, [2000] S.G.H.C. 131 (Sing.) (where it was said that “position in Singapore is different” from the position in England with respect to recovery of pure economic loss in negligence).

128. *See supra* Part IV.A.1.(a).

129. *See* [1978] A.C. 728 (H.L.) (appeal taken from Eng.) (U.K.).

130. *RSP Architects Planners & Eng’rs*, [1996] 1 S.L.R. at 139 (emphasis added).

131. *Id.* at 142.

It seems to us that what is objectionable in that passage [containing Lord Wilberforce's test in the *Anns* case] is firstly his Lordship's sweeping proposition of a single general rule or principle which can be applied in every situation to determine whether a duty of care arises and secondly the fact that the test propounded by his Lordship in the first stage was based on foreseeability of damage alone.¹³²

And a little later, Thean J.A. stated that:

It is abundantly clear that in *Ocean Front* this court did *not* follow the broad proposition laid down by Lord Wilberforce in *Anns*. True, the court reached its conclusion by a *two-stage process*. *In principle, there is no objection to such approach*. It depends on what is involved and considered in each stage. The court certainly did not apply the first test in *Anns*. The court's finding that there was sufficient degree of proximity giving rise to a duty on the part of the developers to avoid the loss sustained by the management corporation was not premised on foreseeability of damage alone, but on the consideration of other relevant facts. Nor did the court accept Lord Wilberforce's proposition that in any given situation, a single general rule or principle can be applied to determine whether a duty of care arises.

It does not follow from the mere fact that the court in the course of their determination examined the facts by the *two-stage process* that the court in effect followed *Anns*.¹³³

132. *Mgmt. Corp. Strata Title Plan No. 1075*, [1999] 2 S.L.R. at 456–57.

133. *Id.* at 465, ¶¶ 29–30 (emphasis added). As to what this “two-stage process” entailed, Thean J.A. continued:

Stripped of the verbiage, the crux of such approach [the “two-stage process” referred to in the preceding paragraph] is no more than this: the court first examines and considers the facts and factors to determine whether there is *sufficient degree of proximity* in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former. . . . *Next*, having found such degree of proximity, the court next considers whether there is *any material factor or policy which precludes such duty from arising*.

Id. at 466, ¶ 31 (emphasis added).

It can be seen that the Court of Appeal in *Management Corp. Strata Title Plan No. 1075* was keen to show that it was not following a discredited authority in *Anns*. Instead of the two-stage *Anns* test, it characterized the applicable test as a “two-stage process.” However, as observed in a case comment on this case, the Court of Appeal was perhaps “overly concerned” with explaining that *RSP Architects Planners & Engineers* did not apply the test in *Anns*.¹³⁴ Indeed, as observed by Andrew Phang J. in the more recent case of *Sunny Metal & Engineering Pte Ltd. v. Ng Khim Ming Eric*,¹³⁵ the new “two-stage process” is, “in substance and effect, the same as the ‘two-stage test’ laid down by Lord Wilberforce in *Anns*.” It may well be that the two-stage test in *Anns* has been reproduced substantially in the three-stage test in *Caparo Industries Plc. v. Dickman*¹³⁶ since its references to such terms as “foreseeability,” “proximity” and “policy considerations” mirror the three stages in *Caparo Industries Plc.*, and it cannot be easily denied that the “two-stage process” utilized by the Court of Appeal in *RSP Architects Planners & Engineers* and later in *Management Corp. Strata Title Plan No. 1075* is in fact the same as the *Anns* test.¹³⁷ This interpretation of the “two-stage process” in *Eastern Lagoon* is apparently supported by the Court of Appeal’s subsequent decision in *Man B & W Diesel S E Asia Pte Ltd. v. PT Bumi International Tankers*,¹³⁸ where it pointed out that:

[*RSP Architects Planners & Engineers*] preferred the approach taken by the House of Lords in *Anns* rather than in [*Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.) (appeal taken from Eng.) (U.K.)] and also by the courts in Australia and Canada. It basically adopted the two-step test advanced by Lord Wilberforce in *Anns*.¹³⁹

This seemingly suggests that the “two-stage process” in *RSP Architects Planners & Engineers* is the same as the two-stage test in *Anns*. However, this is at odds with dicta in *Management Corp. Strata Title Plan No. 1075* which expressly stated that the “two-stage process” used in *RSP Architects Planners & Engineers* had nothing to do with the two-stage test in *Anns*. Just when it appears that the Court of Appeal had taken the position that the “two-stage process” in *RSP Architects Planners & Engineers* was simply a restatement of the two-stage test in *Anns*, it went on to hold that:

134. See Ong, *supra* note 122, at 669.

135. [2007] 1 S.L.R. 853, 886–87 (Sing.).

136. See [1990] 2 A.C. 605 (H.L.) (U.K.).

137. Here we can see the reluctance of Singapore’s highest court to follow an authority which has been overruled by the House of Lords. The deference to English law is clear.

138. See [2004] 2 S.L.R. 300 (Sing.).

139. *Id.* at 311 (emphasis added).

While we would not say that for every subsequent case to fall within the scope of the decision in [*RSP Architects Planners & Engineers*] the facts must be identical or the same, *extreme caution must be exercised in extending the Donoghue principle*, or the decision in [*RSP Architects Planners & Engineers*], to *new situations*, particularly to a scenario which is essentially contractual.¹⁴⁰

With respect, this added qualification is inconsistent with the earlier pronouncement (*in the same case*) that the approach in *RSP Architects Planners & Engineers* was “*basically ... the two-step test advanced by Lord Wilberforce in Anns*” (emphasis added). By using expressions such as “extreme caution” and “new situations,” it appears that the Court of Appeal in *Man B & W Diesel* had in mind a restrictive approach similar to that urged in *Caparo Industries Plc.*, and yet (apparently) analogized the approach in *RSP Architects Planners & Engineers* to the two-stage *Anns* test. Accordingly, in order to solve the land scarcity problem by the promulgation of a test to restrict liability for pure economic loss, the Court of Appeal has demonstrated some confusion in relation to the *exact* test it wanted to lay down. It seems that, quite apart from the pragmatic results reached in both *RSP Architects Planners & Engineers* and *Management Corp. Strata Title Plan No. 1075* to cater to the land scarcity problem, the Court of Appeal was none too concerned for conceptual clarity with respect to the applicable test. Instead, it was driven by the (still) prevalent desire to remain faithful to the English position, even when it had expressly departed from it. The Court of Appeal arguably did not want to be associated with *Anns*, a decision departed from by the House of Lords in *Murphy*, and yet it was itself not following *Murphy*. Here we can see the conflicting roles played by a desire to attend to the land scarcity problem by a finding of liability and a (contrary) desire to portray some adherence to English law even in the face of explicit departure. The approach taken was nothing short of confusing.

Indeed, this confusion was to continue in the next case of *United Project Consultants Pte Ltd. v. Leong Kwok Onn*.¹⁴¹ In that case, the Court of Appeal seemingly retreated *once again* (if it had indeed departed from its previous position in *Management Corp. Strata Title Plan No. 1075*) from the position taken in *Man B & W Diesel S E Asia Pte Ltd.* that the “two-stage process” used in *RSP Architects Planners & Engineers* was the two-stage test in *Anns*. After endorsing Thean J.A.’s statement of the “two-stage process” in *Management Corp. Strata Title Plan No. 1075*,¹⁴² the Court of Appeal went on to state that “[i]n essence, before liability may be imposed upon a defendant for pure economic loss, a court must be satisfied that all the circumstances of the case give rise to a

140. *Id.* at 313 (emphasis added).

141. *See* [2005] 4 S.L.R. 214 (Sing.).

142. *See id.* at 23–116.

relationship whereby the defendant owes a duty to the plaintiff to avoid the particular loss suffered by the plaintiff. In doing so, the court must likewise be satisfied that there are no policy reasons why such a duty ought not to be imposed.”¹⁴³ This seems to be a restatement of the *Anns* test. However, it then expressly went on to clarify that the “restatement of the principle in [*Management Corp. Strata Title Plan No. 1075*] should not be construed as reverting to the two-stage test in *Anns*”¹⁴⁴

In the final analysis, it appears that the “two-stage process” in *RSP Architects Planners & Engineers* is the applicable test to establish a duty of care in cases of pure economic loss. However, the exact nature of this test was mired in confusion: is it substantively the same (as it seems on its face) as the *Anns* test, or is it something else (as the courts seem to say)? Moreover, the confusion did not stop there, for there is a second difficult distinction which the courts have drawn: for cases not involving pure economic loss, it is the three-stage test in *Caparo Industries Plc.*, which has also been endorsed in the Singapore context.¹⁴⁵ Indeed, in *The Sunrise Crane*,¹⁴⁶ the Court of Appeal made the distinction between the use of the two-stage test in *Anns* for cases of pure economic loss, and the three-stage test in *Caparo Industries Plc.* for cases involving physical damage.¹⁴⁷ It appears that, with respect to cases of physical damage, the test to be applied is the three-stage test in *Caparo Industries Plc.*, but without an explicit *analogising or incremental* process. Thus, this is really the reverse of the situation in cases of pure economic loss. While the courts in Singapore have endeavored to apply the three-stage test in *Caparo Industries Plc.*, they have not *strictly* followed the incremental approach, turning the purported *Caparo Industries Plc.* test into what is essentially a three-stage version of the *Anns* test.

2. The Decisions Evaluated

To summarize, it was first unsatisfactory that two different tests apply to determine the imposition of a duty of care depending on the nature of the damages claimed in an action for negligence. Second, even within the confines of each particular type of damage, the purported application of the two-stage test in *Anns* or the three-stage test in *Caparo Industries Plc.* is laced with conceptual

143. *United Project Consultants Pte Ltd.*, [2005] 4 S.L.R. at 225–26.

144. *Id.* at 226 (emphasis added).

145. See, e.g., *The Sunrise Crane*, [2004] 4 S.L.R. 715 (Sing.); *TV Media Pte Ltd. v. De Cruz Andrea Heidi*, [2004] 3 S.L.R. 543 (Sing.); *D v. Kong Sim Guan*, [2003] 3 S.L.R. 146 (Sing.); *Mohd bin Sapri v. Soil-Build Pte Ltd.*, [1996] 2 S.L.R. 505 (Sing.); *Ikumene Sing. Pte Ltd. v. Leong Chee Leng*, [1993] 3 S.L.R. 24 (Sing.); *Pang Koi Fa v. Lim Djoe Phing*, [1993] 3 S.L.R. 317 (Sing.); *Standard Chartered Bank v. Coopers & Lybrand*, [1993] 3 S.L.R. 712 (Sing.).

146. [2004] 4 S.L.R. 715.

147. See *id.*

difficulties, for the courts are in effect *not* applying what they purport to be applying. What we have in the end, unfortunately, is a series of “hybrid or composite” tests which take in elements from both *Anns* and *Caparo Industries Plc*. This state of affairs was highly confusing and may have far-reaching consequences, for the determination of a duty of care is the essential first step in any action in the tort of negligence. But we can see that the confusion originated with the desire to resolve the land scarcity problem. The problem, of course, was the existence of a competing desire to adhere to English law. The result, as we have seen, is confusion both in the test applicable in given situations and the nature of the test itself in the context of recovery of pure economic loss. The reason for this consequence, it seems, can be traced back to the land scarcity problem.

B. High Building Density: Protection of Right of Support

Yet another example relating to the development of tort law in Singapore due to the land scarcity problem is the high building density. It was mentioned earlier that the building density in Singapore is high, owing to the scarcity of land.¹⁴⁸ Buildings being close to each other also mean that they inevitably depend on each other for support, except for independent structures. While English law has not recognized the protection of a right of support, the Singapore courts have in a series of decisions departed from this position.

1. The Singapore Courts’ Significant and Deliberate Departure from English Law

In another decision of the Court of Appeal in *Xpress Print Pte Ltd. v. Monocrafts Pte Ltd.*,¹⁴⁹ which concerned the right of support to land in the Singapore context, the facts were as follows. The appellant, Xpress Print Pte Ltd., and the first respondent, Monocrafts Pte Ltd., were owners of adjoining plots of land. There was a commercial building on Xpress Print’s land. In 1997, Monocrafts decided to construct a building of their own on their land. The second respondent, L & B Engineering (S) Pte Ltd., was employed as the main contractor for the project. L & B Engineering built a temporary retaining wall between the two plots of land to hold up soil on Xpress Print’s land. They then started to

148. *See supra* Part II.B.2.

149. [2000] 3 S.L.R. 545 (Sing.); *see also* Teo Keang Sood, *Land Law*, in ANNUAL REVIEW OF SINGAPORE CASES (2000); Prakash Pillai, *The Primacy of the Principle of Reciprocity in the Singapore Land Regime*, 13 SING. ACAD. L.J. 198 (2001); Elizabeth Wong, *Singapore Court of Appeal Takes Lead in Departing from Dalton v Angus*, SING. L. GAZETTE, May 2001.

excavate the soil on Monocraft's land so as to build a basement and lay the foundations for the building under construction. However, as a result of this excavation, soil subsidence occurred on Xpress Print's land and caused damage to its building thereon.¹⁵⁰ Xpress Print thereby commenced an action against Monocraft for negligence, wrongful interference of support and nuisance.

Before the High Court, the primary hurdle Xpress Print faced was the old common law principle embodied in *Dalton v. Angus*,¹⁵¹ which was followed in Singapore by the Court of Appeal of the Straits Settlements¹⁵² in *Lee Quee Siew v. Lim Hock Siew*.¹⁵³ By the principle in *Dalton*, although a landowner has a right to support for his land, this natural right of support extended only to the land in its natural state. Any right of support for buildings and other constructions on the land had to be acquired by easement. The House of Lords' decision in *Dalton* was premised on the distinction between "natural" rights, which the adjoining landowner enjoyed in respect of the land, and easement rights, which he did not automatically but could acquire in respect of the building on his adjoining land.¹⁵⁴ Unsurprisingly, since Xpress Print's case was premised on the right of support for its building on its plot of land, the combined authorities of *Dalton* and *Lee Quee Siew*, the latter of which was binding on the High Court, meant that it failed.

The decision of the High Court was overturned by the Court of Appeal. The Court of Appeal rejected the principle in *Dalton* that the right of support only extended to what was naturally on the land. On the contrary, it was held that a landowner who sought to develop his property owed his neighbor an absolute duty not to interfere with the right of support for his building, this right accruing from

150. See Pillai, *supra* note 149.

151. See (1881) 6 App. Cas. 740 (H.L.) (U.K.).

152. Whose decisions, given the historical nexus with the Singapore court system, remain binding on all but the highest court in Singapore. See Woon, *supra* note 84.

153. [1896] 3 S.S.L.R. 80.

154. See Wong, *supra* note 149. In Lord Selbourne's own words:

In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself [T]he doctrine laid down must, in my opinion, be understood of land without reference to buildings. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it.

Dalton, 6 App. Cas. at 791–92.

the moment the building was constructed.¹⁵⁵ As the violation of this right of support gave right to remedies under the tort law, Xpress Print succeeded in being awarded damages under the general tort measure, i.e., all foreseeable losses suffered by the injured party as a result of the wrongful act.¹⁵⁶ The reasoning of the Court of Appeal, as the underlying policy reasons for its decision, deserves further elaboration.

Having examined the English and foreign authorities on the matter,¹⁵⁷ Yong Pung How C.J., who delivered the judgment of the court, expressed the court's dissatisfaction with the principle in *Dalton*, thus:

[W]e are of the view that the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground, is a proposition inimical to a society which respects each citizen's property rights, and we cannot assent to it. No doubt the trial judge felt constrained by the authority of *Dalton v Angus* and *Lee Quee Siew's* case, but this court is entitled to depart from those cases, and therefore does not suffer from any such impediment. In the event, we are of the opinion that the current state of affairs cannot be allowed to persist. The question is therefore not whether the principle applied by the trial judge in the court below should be rejected, for it clearly must, but rather how far the duty of the landowner should extend.¹⁵⁸

Yong C.J. then considered that while the imposition of a general duty of care on landowners, as has been done in other jurisdictions, was supported by principle and has much to commend it, it would be anomalous to impose such a general duty under the Singapore land regime due to the different regimes which governed land ownership, depending on whether the land was registered or not.¹⁵⁹

155. See Pillai, *supra* note 149, at 200.

156. See *Xpress Print Pte Ltd. v. Monocrafts Pte Ltd.*, [2000] 3 S.L.R. 545, 563 (Sing.).

157. The foreign authorities at the time *Xpress Print Pte Ltd.* was decided showed some dissatisfaction towards the law as laid down in *Dalton*, 6 App. Cas. 740. See Pillai, *supra* note 149, at 205–07. Thus, this principle in *Dalton* has been described as “catastrophic” under modern urban conditions. See *Kebewar Pty Ltd. v. Harkin* (1985) N.S.W. LEXIS 5772 (Austl.); *M.C.A. Camillerie Bldg. & Constrs. Pty Ltd. v. H.R. Walters Pty Ltd.*, (1981) 2 B.P.R. 9277. Other foreign cases have also shown dissatisfaction. See *Fyvie v. Anand* (1994) N.S.W. LEXIS 13219 (Austl.); *Bognuda v. Upton & Shearer Ltd.*, [1972] N.Z.L.R. 741; *Wilton v. Hansen*, [1969] 4 D.L.R. 167 (Can.).

158. *Xpress Print Pte Ltd.*, [2000] 3 S.L.R. at 558, ¶ 37.

159. See *id.* at 559. If a general duty were imposed, this would mean that in relation to unregistered land, the duty to take reasonable care would be superseded by a strict duty of support upon the passage of 20 years. On the other hand, in relation to registered land, or

Thus, the Court of Appeal thought that the proper proposition in Singapore ought to be that the right of support of one's land could, as a matter of legal principle, extend to include support of a building on the land. It was said that the true legal justification for the right of support is the legal principle encapsulated in the Latin maxim *sic utere tuo ut alienum non laedas*, which translates in English to: use your own property in such a manner as not to injure that of another. Finally, the Court of Appeal reiterated that the importance of that principle is compounded in Singapore in view of the land use pattern, whereby all land available for commercial, industrial or residential purposes is used to a high intensity. The damage that might be caused if landowners were lackadaisical in their excavation works could be astronomical, not to mention the cost in human lives or injury to property.¹⁶⁰ This new right of support in respect of buildings would have exactly the same characteristics as the original right in relation to land in its natural state. For these reasons, therefore, the Court of Appeal in *Xpress Print Pte Ltd.* decided to depart from the old English position embodied in *Dalton*.

While the ruling in *Xpress Print Pte Ltd.* is not strictly a tort law decision, it has important implications in tort law. Specifically, the absolute duty now recognized in respect of support of buildings would mean that an action framed in private nuisance would more likely succeed now than before where no such right of support was recognized. The historical context of the decision is also important. *Xpress Print Pte Ltd.* was decided in 2000, about seven years after the passage of the AELA. While the Singapore courts were, by this time, much less deferential to English authority, the fact that the Court of Appeal in *Xpress Print Pte Ltd.* engaged in a painstaking analysis of the English position prior to even examining the approaches in Singapore and other jurisdictions showed that implicit deference was still paid. If this is correct, then its departure from *Dalton*, a longstanding decision of the House of Lords, must be regarded as significant. The Court of Appeal was evidently driven by what it regarded as very strong policy reasons emanating primarily from the land scarcity problem in Singapore.

Also, in contrast with the approach taken in relation to the recovery of pure economic loss,¹⁶¹ the Court of Appeal in *Xpress Print Pte Ltd.* undertook a fairly comprehensive examination of the other jurisdictions apart from England and settled on what can be satisfactorily described as a legally coherent proposition. Indeed, it has been said that the Court of Appeal's reasoning reflects the sociological shift in the common law away from the individualistic notion of a property right to a more communitarian approach rooted in social

buildings built less than 20 years before the land was registered, no easement of support would arise, and the duty to take reasonable care would continue in perpetuity.

160. *See id.* at 562.

161. *See supra* Part IV.A.2

responsibility.¹⁶² There is also a view that the Court of Appeal's decision supports the view that property "incorporates a concept not of right but of restraint, reflecting a state-regulated responsibility to contribute towards the optimal exploitation of all land resources for communal benefits."¹⁶³ If so, then the decision in *Xpress Print Pte Ltd.* was clearly driven by a deep-seated policy consideration to ensure that in land-scarce Singapore, one's right to land does not compromise another person's right to support. In fact, *Xpress Print Pte Ltd.* was subsequently interpreted by the High Court in *Afro-Asia Shipping Co Pte Ltd. v. Da Zhong Investment Pte Ltd.*¹⁶⁴ as imposing a duty in *negligence* and liability was accordingly found on that basis in the case.

2. The Decision in *Xpress Print Pte Ltd.* Evaluated

The decision in *Xpress Print* has been welcomed not only in Singapore,¹⁶⁵ but also in foreign textbooks.¹⁶⁶ In a leading textbook on land law, it was said that while most common law jurisdictions have indicated that the "restriction of the natural right of support is now over-ripe for reversal," the lead was taken in *Xpress Print Pte Ltd.* by way of an enlightened approach.¹⁶⁷ This may be one instance, as distinguished from the approach in relation to recovery for pure economic loss, in which the Singapore courts have not allowed a pragmatic resolution to the land scarcity problem to overshadow the need for legal coherence.

C. High Population Density: Protection of Privacy

Finally, we come to the last example of how land scarcity in Singapore has affected the development of tort law. As mentioned earlier,¹⁶⁸ the population density in Singapore is exceedingly high because of the high population and the way public housing has been organized into clusters of high-rise apartments. An aspect associated with high-density living is noise from the immediate surroundings.¹⁶⁹ A 2003 study of public housing residents revealed that the majority of the households (86.3%) found noise levels to be tolerable at least, but

162. Pillai, *supra* note 149, at 212.

163. KEVIN GRAY & SUSAN FRANCIS GRAY, *ELEMENTS OF LAW LAND* 117–18 (3d ed. 2001).

164. *Afro-Asia Shipping Co. Pte v. Da Zhong Inv. Pte Ltd.*, [2004] 2 S.L.R. 117 (Sing.).

165. See the literature cited in *supra* note 149.

166. GRAY & GRAY, *supra* note 163.

167. *Id.* at 14.

168. See *supra* Part II.B.3.

169. HOUSING & DEV. BD., *supra* note 26, at 76.

the remaining 13.7% thought the noise to be intolerable.¹⁷⁰ Interestingly, the main sources of noise pollution were from neighbors and traffic, in part showing the problem of high population density resulting from land scarcity.¹⁷¹ In a related vein, 12.2% of residents felt that there was insufficient privacy in public housing.¹⁷²

Tort law protects against excessive noise by way of actions in *property-related* torts such as nuisance. However, the protection of privacy cannot stop there, especially where there is no property interest which precludes an action in these torts. In this respect, while not captured in the study, it is also highly possible that other possible intrusions to one's privacy in a densely populated environment could arise independently of one's enjoyment of property. It is in this area that the Singapore courts have once again showed a surprising tendency to depart from English law in recognition of this aspect of the land scarcity problem.

1. The Singapore Courts' Significant and Deliberate Departure from English Law

In *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta*,¹⁷³ the defendant was the former employee of the second plaintiff company and had resigned from his employment. The first plaintiff was the Chief Executive Officer of the second plaintiff. The defendant desired to regain his employment, and when that was not forthcoming he engaged in a series of acts designed to harass both plaintiffs. For a year afterwards, the defendant persistently made telephone calls, sent facsimiles and flowers, and trespassed at the second plaintiff's premises on various occasions. The defendant also procured a third party to make calls to the first plaintiff's residence early in the morning, trespass against his house, and also send him a vicious greeting card which displayed a baby's rattle near the anniversary of the death of the first plaintiff's infant son. The defendant also sent various electronic mails and telephone text messages to the first plaintiff, as well as to various staff members of the second plaintiff. In granting the plaintiffs' application for damages and injunction after the second plaintiff failed to enter a defense, Lee Seiu Kin J.C. in the High Court had to overcome various legal hurdles and effectively come up with a new tort of intentional harassment, which had hitherto not been recognized elsewhere.

The problem essentially was that the plaintiffs had no recognizable tort under which to sue the defendant. First, they "could not sue under the traditional

170. *See id.*

171. *See id.*

172. *See id.* at 77.

173. [2001] 4 S.L.R. 454 (Sing.).

tort of trespass to the person in assault or battery.”¹⁷⁴ This is because “the defendant had not, by his harassment, come into any unwanted physical contact with the plaintiff, as required under battery, nor did he cause the plaintiff to reasonably apprehend any such contact, as required under assault.”¹⁷⁵ There was also no possible action under the rule in *Wilkinson v. Downton*.¹⁷⁶ *Wilkinson v. Downton* and its associated case, *Janvier v. Sweeney*,¹⁷⁷ established that false words or threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing psychiatric illnesses to the person to whom they are uttered are actionable. In both cases, the plaintiffs were awarded damages for psychiatric illnesses. However, in *Malcomson*, the plaintiffs did not suffer any bodily harm or recognizable psychiatric illness to sue under this tort. Finally, while some of the harassment took place in the first plaintiff’s home and the second plaintiff’s premises, much of the harassing acts took place outside these domains. Accordingly, the tort of private nuisance, which protected one’s right to the enjoyment of one’s own property, did not help for the most part in *Malcomson*. While it is true that in *Khorasandjian v. Bush*¹⁷⁸ the English Court of Appeal upheld an injunction against the defendant restraining him from “harassing, pestering or communicating” with the plaintiff, even though the plaintiff was a mere licensee in the property concerned, that case was partially overruled in *Hunter v. Canary Wharf*.¹⁷⁹ In this latter case, the House of Lords emphatically rejected the extension of the tort of private nuisance done by the English Court of Appeal in *Khorasandjian* and confirmed that a legal interest in property was required for an action in private nuisance.¹⁸⁰

Faced with these constraints, Lee J.C. in *Malcomson* had to go beyond the established torts to provide the plaintiffs with a remedy against the defendant’s harassment.¹⁸¹ While he could have simply followed the English position and held

174. Tan Keng Feng, *Harassment and Intentional Tort of Negligence*, SING. J. LEGAL STUD. 642, 642 (2002). See also Mark Lim et al., *After Malcomson v Mehta: Charting New Waters in the Law of Harassment in Singapore – Civil and Criminal Perspectives*, 14 SING. ACAD. L.J. 302 (2002).

175. Keng, *supra* note 174.

176. See [1857] 2 Q.B. 57 (U.K.).

177. See [1919] 2 K.B. 316, 318–319 (U.K.).

178. [1993] Q.B. 727, 727 (U.K.).

179. See [1997] A.C. 655, 673–75 (H.L.) (appeal taken from Eng.) (U.K.).

180. See *id.* at 691–92. Lord Goff said of the English Court of Appeal’s ruling in *Khorasandjian*:

In truth, what the [English] Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in [the victim’s] home.

Id.

181. See Keng, *supra* note 174, at 643.

that the plaintiffs had no cause of action, Lee J.C. went further and considered whether the Singapore courts should, in fact, recognize a new tort of intentional harassment. Lee J.C.'s reasoning would be of some interest. After referring to the dictionary meanings of "harassment," he defined it to mean "a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person."¹⁸² Again, as an indication that Lee J.C. was more interested with the pragmatic resolution of the present case than entering into a wholly coherent discussion of the applicable law, he also said that this definition was one that "sufficiently encompasses the facts of the present case in order to proceed with a consideration of the law."¹⁸³

Lee J.C. considered that the English authorities did not hinder the development of a tort of intentional harassment.¹⁸⁴ He thought that the cases of *Wilkinson* and *Janvier* did not in any way so restrict the development of the law in the direction he was seeking to do. Commenting then on the case of *Hunter*, in which Lord Goff quite clearly stated that there was no tort of harassment in English law, Lee J.C. instead emphasized the approach of Lord Hoffmann in the same case, who noted that there was an absence of a tort of intentional harassment causing distress without actual bodily or psychiatric harm and that there was "no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence."¹⁸⁵ Taking these comments together with apparent support in England

182. *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta*, [2001] 4 S.L.R. 454, 464 (Sing.).

183. *See id.*; *see also* Lim et al., *supra* note 174, at 304.

184. Although, "there is no clear authority, at least in the British and Australian law of torts (nor for that matter in Canada and New Zealand), that an action on the case for damages is available for the intentional infliction of purely mental distress or, as it is sometimes described, mental distress *simpliciter*." Keng, *supra* note 174, at 644 n.7 (citing F.A. Trindade, *The Intentional Infliction of Purely Mental Distress*, 6 OXFORD J. LEGAL STUD. 219, 222 (1986)).

185. *Hunter*, [1997] A.C. at 707. Specifically, Lord Hoffmann stated:

The perceived gap in *Khorasandjian v. Bush* was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v. Downton* [1897] 2 Q.B. 57 and *Janvier v. Sweeney* [1919] 2 K.B. 316. The law of harassment has now been put on a statutory basis and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence. The policy considerations are quite different. I do not therefore say that

for a tort of intentional harassment in *Khorasandjian* and *Burris v. Azadani*,¹⁸⁶ Lee J.C. concluded that there was no English authority which stood in the way of the development of a tort of intentional harassment in Singapore.¹⁸⁷

Lee J.C.'s analysis of the English position could only take him so far. He still had to confront the question of whether there *should* be a tort of intentional harassment in Singapore. Although he was at pains to point out that there was nothing in England that prevented the development of the tort of intentional harassment, the corollary of that was equally true: there was nothing to *support* the development of the tort. As such, it fell on Lee J.C. to make an essentially policy-oriented reasoning on why the tort of intentional harassment should be recognized and created in Singapore, when the other jurisdictions in the Commonwealth had not done so. He pointed out that the last 200 years of improvements in technology have brought about three great changes in lifestyle, *viz.* urbanization, widespread availability of leisure time, and improved communication.¹⁸⁸ According to Lee J.C., these three changes have combined to create the problem in the present case which did not and could not exist before. He considered that life could be unbearable for the person who finds himself the object of attention of one who is determined to make use of these modern devices to harass and that the result can range from displeasure to distress to debilitation.¹⁸⁹ For all these reasons, therefore, Lee J.C. thought that the time had come to recognize a tort of intentional harassment in Singapore and granted the

Khorasandjian v. Bush was wrongly decided. But it must be seen as a case on intentional harassment, not nuisance.

Id. (citations omitted).

186. *See* (1995) 1 W.L.R. 1372, 1380–1381 (Eng.); *cf. Patel v. Patel* (1988) 2 F.L.R. 179, 180 (Austl.) (refusing to uphold a provision in an injunction that was based on the harassment of the plaintiff due to a family dispute).

187. It would appear that Lee J.C. attached significant importance to Lord Hoffmann's speech as reproduced at *supra* note 192. In *Malcomson Nicholas Hugh Bertram & Anor*, [2001] 4 S.L.R. at 469, ¶ 44, Lee J.C. stated that:

Also, counsel there did not appear to have cited the authorities that I have dealt with above, in particular, the statement by Lord Hoffmann in *Hunter v Canary Wharf*. . . in which he said that he saw no reason why 'a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence.' In the premises, I consider that there is no authority in the way of the development of the law in this area in Singapore.

However, strictly speaking, Lee J.C. need not have concerned himself with the law in England and need not have undertaken, in so assiduous a fashion, a consideration whether there was anything in England which stopped him from deciding the way he did. In essence, one can observe the strong implicit deference Lee J.C. once again had for English law.

188. *See Malcomson Nicholas Hugh Bertram & Anor*, [2001] 4 S.L.R. at 471.

189. *See id.*

relief asked for by the plaintiffs in *Malcomson*, but not before specifically highlighting the fact that Singapore was one of most densely populated countries in the world:

*In Singapore we live in one of the most densely populated countries in the world. And the policy of the government is to further increase the population. It will make for an intensely uncomfortable living environment if there is no recourse against a person who intentionally makes use of modern communication devices in a manner that causes offence, fear, distress and annoyance to another.*¹⁹⁰

The recognition of a tort not seen elsewhere in the Commonwealth is significant. A few points can be made. In the first place, the historical context of *Malcomson* must be kept in mind. It was decided in 2001, nearly a decade after the passage of the AELA.¹⁹¹ While the Singapore courts were less deferential to the English position by this time, they by no means had abandoned their strict adherence to the English position. In fact, this can be aptly seen in *Malcomson* itself. There was, strictly speaking, no need for Lee J.C. to have examined the English position relating to the tort of intentional harassment in such great detail if he had thought (as he surely must have) that the urbanized environment in Singapore called for the recognition of the tort. Implicitly, therefore, he must still have thought that the English position was strongly persuasive, and he went out of his way to justify his conclusion in accordance with the English position. However, despite the overt respect for the English position, Lee J.C. in effect departed from rather clear authority in *Hunter* that there was *no* tort of intentional harassment in English law. In doing so, he was probably prompted by not only the three changes to society which he saw, but particularly the state of urbanization in Singapore which has brought about a high population density. Indeed, similar to the problem with respect to the recovery of pure economic loss in the defective-buildings cases discussed above,¹⁹² the problem posed in *Malcomson* represented a lacuna in the law. Existing legislation dealing with harassment in Singapore, including sections 13A and 13B of the Miscellaneous Offences (Public Order and Nuisance) Act,¹⁹³ did not cover situations where there

190. *Id.* at 472–73, ¶ 55 (emphasis added).

191. *See supra* Part III.A.2.

192. *See supra* Part IV.A.

193. Miscellaneous Offences (Public Order and Nuisance) Act, 1997, c. 184 (Sing.). Sections 13A and 13B provide as follows:

Intentional harassment, alarm or distress

13A. —(1) Any person who in a public place or in a private place, with intent to cause harassment, alarm or distress to another person —
(a) uses threatening, abusive or insulting words or behaviour; or

was an *indirect* communication of harassment by way of a communicative device.¹⁹⁴ Combined with the high population density aspect of the land scarcity problem, which manifests itself by a not insignificant number of public housing residents feeling that the high density environment provides opportunities for nuisance,¹⁹⁵ this state of affairs might have led Lee J.C. to take a legally significant course of action by departing from English law effectively.

For all of Lee J.C.'s attempts to legally justify the recognition of a new tort of intentional harassment in Singapore, one must not lose sight of three significant factors which point to this decision as being more grounded in pragmatism than legal coherence. First, the application before Lee J.C. was an *ex parte* one, given that it was one of default judgment due to the defendant's failure to enter an appearance. As such, Lee J.C. would not have been apprised of

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that person or any other person harassment, alarm or distress, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000.

(2) It is a defence for the accused to prove —

(a) that he was inside a dwelling-house and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, by him would be heard or seen by a person outside that dwelling-house or any other dwelling-house; or

(b) that his conduct was reasonable.

Harassment, alarm or distress

13B. —(1) Any person who in a public place or in a private place —

(a) uses threatening, abusive or insulting words or behaviour; or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of any person likely to be caused harassment, alarm or distress thereby shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000.

(2) It is a defence for the accused to prove —

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress;

(b) that he was inside a dwelling-house and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that dwelling-house or any other dwelling-house; or

(c) that his conduct was reasonable.

In England, the problem of harassment is adequately dealt with by the Protection from Harassment Act, 1997, c. 40, § 1 (Eng.).

194. See Lim et al., *supra* note 174, at 322–23. Quite apart from the literal wording of the statutory provisions, sections 13A and 13B were probably not effective since they did not provide the court with the power to grant interim relief, nor do they allow the victim to sue for civil damages.

195. See HOUSING & DEV. BD., *supra* note 26, at 76.

contrary arguments which might have been raised by the defendant, specifically those relating to the development of the tort of intentional harassment in England.¹⁹⁶ Secondly, no matter how one looks at it, the authorities in England cannot be satisfactorily said to show any resistance towards the development of a tort of intentional harassment. Indeed, if there had been occasion to do so, it would have been done in the long history of the English common law. Lee J.C. was perhaps too quick to attach importance to what was really an *obiter* comment by Lord Hoffmann in *Hunter*. Perhaps Lee J.C. ought not to have, with that slender strand of authority, taken the broad proposition that there was *nothing* in England that stood against the development of a tort of intentional harassment. It should also be noted that the English Court of Appeal in *Wong v. Parkside Health NHS Trust*,¹⁹⁷ a case decided shortly after *Malcomson*, held that there was no actionable tort of harassment at common law prior to the enactment of the Protection from Harassment Act in England.¹⁹⁸ Thirdly, Lee J.C. was content to give what he himself implicitly termed as an incomplete definition of the tort of intentional harassment in order to get on with the resolution of the case.¹⁹⁹ If Lee J.C. had really wanted to create a new tort which was sound in law and principle, surely he would have provided a complete definition rather than one which only catered to the facts at hand? Thus here we once again see how an aspect of the land scarcity problem drove a Singapore court to adopt a conceptually unsatisfactory but pragmatically necessary decision.

2. The Decision in *Malcomson* Evaluated

Indeed, although on the facts of *Malcomson* it was quite clear that a remedy was justifiably expected, the way it was ultimately done, *viz.* by way of the judicial creation of a new tort, may not have been the best. In what has been described as a pragmatic decision reached without full consideration of the legal implications, but for the practical problems caused by the high population density in Singapore created by land scarcity, *Malcomson* is not without its problems.

First, as mentioned earlier, the resolution of the problem of harassment by way of the creation of a new tort might not be the best solution. If the problem of harassment is as serious as Lee J.C. thought it to be, perhaps the best solution would have been to leave it to the legislature to deal comprehensively with the problem, rather than leave it to the long-drawn process of the common law. In England, the Protection from Harassment Act provides protection from acts of harassment generally. Where a civil remedy is sought, section 3(1) provides that

196. See also Lim et al., *supra* note 174, at 333.

197. [2001] EWCA (Civ.) 1721.

198. Protection from Harassment Act.

199. See *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta*, [2001] 4 S.L.R. 454, 464 (Sing.).

an act of harassment by a perpetrator who knows or ought to know that his actions or words amount to harassment may be the subject of a claim in civil proceedings. Section 3(2) goes on to provide that damages may be awarded for any anxiety caused by the harassment and any financial loss resulting from it. Section 7(2) provides the definition of harassment to include “alarming the person or causing the person distress.”²⁰⁰ A suitable piece of legislation could have been based on this Act. Indeed, a study has concluded that Singapore does have pieces of scattered legislation which, if combined in a coherent whole, may be adequate to deal with the problem of harassment.²⁰¹ One key piece of legislation, as already mentioned, is the Miscellaneous Offences (Public Order and Nuisance) Act. If suitable modifications are done to sections 13A and 13B of the Act, then the problem identified by Lee J.C. of these provisions being unsuitable to deal with acts of harassment, *viz.*, they do not deal with indirect communication of harassment, can be resolved quite quickly.²⁰² However, the result of *Malcomson* is, arguably, a developmental impediment to any legislative solution.

Secondly, even if the creation of a new tort is desired, Lee J.C. ought to have provided a more comprehensive definition of “harassment” rather than gloss over some of the more difficult conceptual problems. As has been pointed out, Lee J.C.’s definition of what constituted “harassment”²⁰³ is extremely broad and might cover a myriad of activities not normally considered harassment.²⁰⁴ Conceptually, should it be for the plaintiff to define what harassment includes, or should it be for the defendant to justify his acts which otherwise might come within such a broad definition?²⁰⁵ Lee J.C. likewise did not deal with the alternative meaning given to harassment in the earlier case of *Chua Keem Long v. Public Prosecutor*.²⁰⁶ In that case, the High Court had occasion to consider the meaning of “harassment” which appeared in section 33 of the Moneylenders Act.²⁰⁷ Yong C.J. took the definition of “harass” from the *New Shorter Oxford* dictionary, which defined the word to mean “trouble by repeated attacks. Now

200. *But see* NEIL ADDISON & TIMOTHY LAWSON-CRUTTENDEN, *HARASSMENT LAW AND PRACTICE* 34 (1998).

201. *See* Lim et al., *supra* note 174, at 320–32. The primary piece of legislation is the Miscellaneous Offences (Public Order and Nuisance) Act. Apart from this Act, there is other legislation that deals with acts of harassment. These can be divided into two broad categories. On the one hand, some provisions prohibit specific forms of conduct which may, in some instances, be akin to harassment (*e.g.*, causing public nuisance or annoyance, intimidation or sexual harassment). On the other hand, there are also provisions that prohibit harassment in specific situations (*e.g.*, family situations and moneylending).

202. *See id.* at 338–39.

203. *See Malcomson Nicholas Hugh Bertram & Anor*, [2001] 4 S.L.R. at 464; *see also* Lim et al., *supra* note 174, at 304.

204. *See* Lim et al., *supra* note 174, at 333.

205. *See id.*

206. *See* [1996] 1 S.L.R. 510, 521–22 (Sing.).

207. Moneylenders Act, 1985, c. 188, § 33 (Sing.).

freq, subject to constant molesting or persecution.” This is seemingly a much narrower definition than the definition put forward by Lee J.C. in *Malcomson*.²⁰⁸ However, he did not appear to have dealt with the problem, satisfied as he was to adopt a broad meaning so as to provide a resolution to the case at hand.

The problem with adopting a pragmatic approach in response to a problem created by land scarcity in Singapore has been the creation of a new tort which is mired in considerable conceptual uncertainty. Indeed, in the years following *Malcomson*, there has been no reported decision following the case, and the new tort of intentional harassment has, it seems, become a neglected tort. Whether because harassment was not really as big a problem as Lee J.C. foresaw, or because litigants are reluctant to sue under a tort that is so untested is largely a question for speculation, but there can be little doubt that, had the problem been legislatively resolved, the picture might not be as uncertain.²⁰⁹

D. Land Scarcity and Other Areas of Law in Singapore

To complete the discussion, it should be said that land scarcity in Singapore not only affects the development of tort law, but likewise affects the development of other areas of law. This is most aptly illustrated by the lack of any protection (constitutional or otherwise) over one’s right to own property. The Singapore government retains an almost unquestionable right to land acquisition. In the High Court decision of *Teng Fuh Holdings Pte Ltd. v. Collector of Land Revenue*²¹⁰ (affirmed by the Court of Appeal in *Teng Fuh Holdings Pte Ltd. v. Collector of Land Revenue*),²¹¹ it was observed (in the context of land acquisition) that it was not an “implausible proposition”²¹² that the government’s decision to acquire land is not questionable by any court, having regard to the nature and policy of the Land Acquisition Act²¹³ itself. It was further stated that, viewing the matter from the particular perspective of land acquisition in the Singapore context, it is imperative that a balance be found in the tension between ensuring that the purposes of the Land Acquisition Act and the ensuing public benefit are achieved on the one hand and ensuring that there is no abuse of power on the other. In this regard, it is important to note that the Land Acquisition Act was promulgated not

208. See Lim et al., *supra* note 174, at 334.

209. But of course the results from England are not encouraging. The U.K. Home Office has published a research study on the use and effectiveness of the Protection from Harassment Act; it showed that there is considerable uncertainty in the decision-making process where the Act is concerned. See JESSICA HARRIS, HOME OFFICE RESEARCH STUDY 203: AN EVALUATION OF THE USE AND EFFECTIVENESS OF THE PROTECTION FROM HARASSMENT ACT 1997 21, 63 (2000).

210. [2006] 3 S.L.R. 507 (Sing.).

211. See [2007] 2 S.L.R. 568, 569 (Sing.).

212. See *Teng Fuh Holdings Pte Ltd.*, [2006] 3 S.L.R. at 523.

213. Land Acquisition Act, 1985, c. 152 (Sing.).

only for the public benefit, but also because land is an extremely scarce and therefore valuable resource in the Singapore context. These are, in fact, inextricably related reasons. This being the case, it is clear why much more latitude and flexibility is given to governmental authorities.²¹⁴

Likewise, in *City Developments Ltd. v. Chief Assessor*, the tax authority applied a higher taxation rate to a vacant piece of land with the stated purpose of discouraging hoarding of land by a developer. In dismissing the developer's challenge to the tax authority's decision, the Court of Appeal opined that "it would have been impossible to argue that the policy (of discouraging land hoarding in Singapore) *per se* is either irrational or unknown to property developers" It was pointed out that "such a policy is premised on a very commonsensical notion (and which is in the public interest) of discouraging as well as preventing land hoarding in land-scarce Singapore."²¹⁵ It was in this context that the Court of Appeal said that "the unique context pertaining to the scarcity of land in Singapore has, in fact, been recognized judicially by the local courts in a diverse variety of areas of Singapore law."²¹⁶ This, of course, has been the central suggestion made in the present part of this paper, at least with respect to tort law in Singapore.

E. Some Common Threads

So far we have seen three examples in Singapore tort law where different aspects of the problem of land scarcity have, at least in part, led to the courts' adoption of decisions they otherwise might not have adopted. They might not have adopted these decisions because these were contrary to the prevailing English position of the day. As we have seen, while the Singapore courts were, strictly speaking, never bound to apply the English law whether on an explanation

214. *See Teng Fuh Holdings Pte Ltd.*, [2006] 3 S.L.R. at 524. The court went on to say:

As a corollary, it is not the task of the courts to sit as makers of policy. This would in fact be the very antithesis of what the courts ought to do. But latitude and flexibility stops where abuse of power begins. Such abuse of power is most commonly equated with the concept of bad faith. At this point, the courts must—and will—step in. But, in the nature of both the concept itself, such abuse of power will not be assumed (let alone be found) at the slightest drop of a hat. It is a serious allegation. There must be proof. In proceedings such as these, there must be sufficient evidence, produced in its appropriate context, that establishes that a "prima facie case of reasonable suspicion" of bad faith exists.

Id.

215. *See City Devs. Ltd. v. Chief Assessor*, [2008] 4 S.L.R. 150–51, 157 (Sing.).

216. *Id.* at 157.

of reception or precedence,²¹⁷ they have, until quite recently, shown remarkable deference to the English position. Thus, these departures in tort law from English law must have been prompted by an exceedingly important policy consideration. That policy consideration has been postulated to be various aspects of the land scarcity problem in Singapore. Thus, we have seen that where the cost of housing is very high due to land scarcity, the courts have responded in tort law by allowing claims for pure economic loss in respect of negligence in the building defects cases. We have also seen that where the building density is very high due to the land scarcity problem, the courts have found a right to support to buildings on land, an extension of the position at English law. Finally, we have seen that where the population density is very high and the propensity for harassment is correspondingly (though not wholly, it must be said) high, the courts have likewise sought to find a solution by recognizing a tort not hitherto recognized elsewhere: the tort of intentional harassment.

However, with pragmatism came legal incoherency. Thus, we have seen that in two of the examples in which the courts have adopted fairly pragmatic solutions to the case at hand, they have done so without necessarily undertaking a legally coherent analysis and evaluation of the proposed solution and competing positions. The shadow of the land scarcity problem has been cast so heavily that the courts are more interested in finding direct solutions to the cases at hand, to such an extent that they declined, *inter alia*, to engage in “philosophical” discussions of the legal questions at hand²¹⁸ (when these were in fact, *legally speaking*, fairly important²¹⁹), or to provide any more definite meanings than necessary to resolve the case before them.²²⁰ The *consequence* of such an approach was that the pragmatic solutions reached were sometimes not wholly legally coherent. In the recovery of pure economic loss cases, the courts were not clear about what the applicable test was to ascertain a duty of care. Likewise, in the tort of intentional harassment, the courts were not too clear about the definition of “harassment,” and the approach taken by recognizing a common law tort might have impeded the more feasible solution of legislative resolution. But the paralyzing effect of the land scarcity problem, if somewhat detrimental to the legal solutions proffered, did *point* the courts to the areas of law in which there have been considerable difficulties even in other jurisdictions not so affected by the land scarcity problem as Singapore. In a series of decisions, and with a new mindset about the persuasive value of English law in recent times, there is some evidence that the Singapore courts have begun to rectify the problems caused, in part, by an unerring emphasis on the land scarcity problem. The evidence is singular, but far from being slender in weight, it deals with the vexed problem of recovery of pure economic loss in negligence. In that respect then, it may be that

217. *See supra* Part III.A.2.

218. *See supra* Part IV.A.1(a).

219. *See id.*

220. *See supra* Part IV.C.2.

the land scarcity problem has indirectly led to the development of a truly autochthonous Singapore legal system, albeit by a roundabout and protracted route.

V. REINING IN PRAGMATISM AND REDISCOVERING COHERENCY IN THE LAW

Indeed, barring the rather pragmatic approach taken with respect to the recovery of pure economic loss in the building cases discussed above, there are signs that the Singapore courts have recently begun to tidy up the conceptual untidiness caused (it has been suggested) by the courts' desire to deal with the land scarcity problem. This is aptly demonstrated by the applicable test to ascertain a duty of care in negligence. The problem is a complicated one, and deserves some elaboration to show how the Singapore courts have shown a renewed interest in the coherence of the law, instead of being burdened by the land scarcity problem.

In this respect, Lord Atkin, in *Donoghue v. Stevenson*,²²¹ laid down what became known as the "neighbor principle" with respect to a duty of care in the tort of negligence. The Biblical source of the "neighbor principle" brought with it a resonance of truth, and courts began to formulate a universal test based on that principle with which to impose a duty of care. Almost seventy years on, the courts of many jurisdictions have struggled to arrive at a test which is universal in application and capable of limiting liability in certain cases. There is, in negligence, a competing tension between the desirability of formulating a general principle and the need to limit liability. The difficulty in resolving this tension presently finds expression in a plethora of legal tests developed by the courts. The result is that the initial search for a universal test (and presumably one which is simple in its application) gives way to the complicated rationalization of these tests. Indeed, the present English position, embodied in the House of Lords decision in *Customs & Excise Commissioners v. Barclays Bank Plc.*,²²² is none too clear and would appear to endorse the three independent tests identified by the English Court of Appeal below. The uncertainty as to the applicable test is further complicated where the damage suffered involves psychiatric harm or pure economic loss. The Singapore courts are similarly not spared from these difficulties. Although they had hitherto adopted clear approaches vis-à-vis different types of damage (i.e., the two-stage test in *Anns* for cases of pure economic loss and the three-part test in *Caparo Industries Plc.*), the rationale for such a bifurcated approach is unclear.²²³ The Court of Appeal had occasion in

221. [1932] A.C. 562, 580 (H.L.) (appeal taken from Scot.) (U.K.).

222. See [2007] 1 A.C. 181, 184–86 (H.L.) (appeal taken from Eng.) (U.K.).

223. See *supra* Part IV.A.1(b).

*Spandek Engineering Pte Ltd. v. Defence Science & Technology Agency*²²⁴ to add its views to this fascinating area of tort law and to try and tidy up the coherent uncertainty resulting from the resolution of the land scarcity problem.

In *Spandek Engineering Pte Ltd.*, the appellant was a firm which had been awarded a contract to redevelop a medical facility (the Project). The respondent was the agency appointed to oversee the Project's completion. The appellant claimed that the respondent had breached its duty by negligently under-certifying the appellant's works. In dismissing the appellant's claim, the Court of Appeal held that a single test should determine the imposition of a duty of care in all claims of negligence, irrespective of the type of the damage involved. The Court of Appeal further stated that there was no justification for a general exclusionary rule against recovery of all economic losses; nor was there a need to adopt a different test for such cases. Indeed, it reasoned that there was nothing inherent in the nature of pure economic loss itself that necessitated a different approach. As such, to continue with a different approach would be doctrinally untidy and would not address the concerns of indeterminate liability which only sometimes resulted from such claims. Ultimately, the court thought that the adoption of a single test eliminated the perception that there were many tests which were equally applicable and brought certainty in the determination of a duty of care.

As to the applicable test, the Court of Appeal decided on a two-stage test comprising of proximity and policy considerations (which are together preceded by the threshold question of factual foreseeability). This is substantively similar to the two-stage test in *Anns*. This is of interest considering that the English courts have recently adopted the three-part test in *Caparo Industries Plc.* However, it seems that the two tests are the same in substance and effect. Having recourse to the "neighbor principle" and restricting duty of care to its most essential characteristics, the two-stage test in *Anns* would achieve the same result as the three-part test in *Caparo Industries Plc.* given that the factual conception of reasonable foreseeability is almost always satisfied. While acknowledging that the concept of "proximity" is not easily definable, the Court of Appeal suggested that the focus is on the closeness of the relationship between the parties which can be supported by the twin criteria of voluntary assumption of responsibility and reliance. This must not be taken to be an endorsement of a separate regime for cases of pure economic loss. Indeed, it is *still* the two-stage *Anns* test that applies, just that with respect to the first-stage, it may be that the twin concepts of

224. [2007] 4 S.L.R. 100 (Sing.). See also Kumaralingam Amirthalingam, *Refining the Duty of Care in Singapore*, 124 LAW Q. REV. 42, 42–45 (2008); A.L.R. Joseph, *Establishing a Duty of Care: Singapore's Single, Two-Stage Test*, 20 SING. ACAD. L.J. 251, 263–64 (2008); Goh Yihan, *Duty of Care in Psychiatric Harm in Singapore*, 124 LAW Q. REV. 539, 539 (2008). Indeed, *Spandek Engineering Pte Ltd.* has been applied in the area of duty of care for psychiatric harm. See Man Mohan Singh s/o Jothirambal Singh v. Zurich Ins. Pte Ltd., [2008] 3 S.L.R. 735, 737 (Sing.); Ngiam Kong Seng v. Lim Chiew Hock, [2008] 3 S.L.R. 674, 675 (Sing.).

voluntary assumption of responsibility and reliance serve as the best indicators of proximity *given the nature of how such losses are sustained*. On the other hand, for physical damage involving, for example, road accidents, these concepts of voluntary assumption of responsibility and reliance may not be appropriate to find proximity, although their use is not prohibited. The focus on proximity, while difficult, is inevitable given that basis of a duty of care lies in the relationship between the parties. While the inherent difficulties cannot be denied, it is important to articulate clear tests for proximity, as was done in *Spandeck Engineering Pte Ltd*. Finally, the Court of Appeal noted that policy considerations ought to play a limited role in the two-stage test. This is unsurprising given the court's desire to avoid any appearance that it has decided issues of law arbitrarily. Applying this test in *Spandeck Engineering Pte Ltd*., the Court of Appeal decided that the requirement of proximity was not satisfied since the respondent could not be regarded as having assumed responsibility towards the appellant as the appellant was free to claim the amounts under-certified by arbitration proceedings, as was stipulated in the contract.

Indeed, what is interesting about *Spandeck Engineering Pte Ltd*. is that the Court of Appeal, in rejecting the different tests to be applied to different types of damage, may have heralded a wholly different approach to pure economic loss in negligence, in Singapore at least. In an important paragraph, the Court of Appeal stated:

We respectfully agree that there is no justification for a *general* exclusionary rule against recovery of all economic losses and indeed, this is already the position the Singapore courts have taken, following *Ocean Front*. In this connection, we would also note that the Singapore cases which have allowed claims for pure economic losses have all been related to the economic value of the land Although the Singapore decisions on pure economic loss have been largely restricted to such situations, we are of the view that there is no reason not to extend liability for pure economic loss to other situations, provided that the issues of indeterminate liability and policy can be adequately dealt with.²²⁵

While the Court of Appeal ultimately acknowledged that there will be “*certain* situations” concerning pure economic loss which call for a more restrictive approach,²²⁶ its restatement of a *general* principle of *inclusionary* recovery, as opposed to an *exclusionary* one, is potentially significant. The ramifications of this statement have yet to be worked out in Singapore, and indeed while the cases applying *Spandeck Engineering Pte Ltd*. since have not had to deal

225. *Spandeck Engineering Pte Ltd*., [2007] 4 S.L.R. at 129 (emphasis added).

226. *Id.* at 130.

with this point,²²⁷ this could potentially shift the default position with respect to pure economic loss from non-recovery to recovery. This thereby mirrors what has been termed the more “liberal” regimes of recovery elsewhere in the world,²²⁸ in which there is no in-principle objection to recovery of pure economic loss, which depends on the establishment of the normal elements of fault liability.²²⁹ Thus, from an initially cautionary approach, it seems that the land scarcity problem might have indirectly driven the Singapore courts to a liberal approach (at least in one area of tort law) not found elsewhere in the Commonwealth.

In the end, whether the approach adopted in *Spandeck Engineering Pte Ltd.* is tenable remains to be seen, but it does represent a fresh approach to an old problem. Instead of opening new difficulties by way of new tests to new scenarios, *Spandeck Engineering Pte Ltd.* returns to the root of the “neighbor principle” and puts the focus squarely on the requirement of “proximity” to establish a duty of care in all cases. This brings 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 in the future. Furthermore, the difficult problem of psychiatric harm was not alluded to in *Spandeck Engineering Pte Ltd.* because it was not an issue for decision. Only if the approach in *Spandeck Engineering Pte Ltd.* can be applied with respect to psychiatric harm can it be said that the search for a universal test in respect of a duty of care has been finally established. In the end, the pronouncement of a *single* test (i.e., the *true* two-stage test in *Anns*) would assist in providing clarity for future claimants. As for the policy concerns about indeterminate liability stemming from claims for pure economic loss, as was suggested earlier, there is *no need* for a *different* analysis to apply based *only* on the *nature of the claim*. It is conceptually clearer to subsume these policy considerations into the appropriately named “policy” limb of the two-stage test in *Anns*, such that a duty of care would only be imposed where there is no risk of indeterminate liability. This analysis is superior to simply applying, *wholesale*, a different regime to cases of pure economic loss. The pronouncement that policy considerations ought now to play a limited role is ironic given how it was (as argued above) the policy issue of land scarcity that got the court in *Spandeck Engineering Pte Ltd.* here in the first place.

But more fundamentally, while *Spandeck Engineering Pte Ltd.* is a good *example* of how the Singapore courts have resolved outstanding problems of the past, is it an indication of a future approach in respect of the land scarcity problem? Have the Singapore courts reached an equilibrium resolution of the land scarcity problem?

227. See *Sonny Yap Boon Keng v. Pac. Prince Int'l Pte Ltd.*, [2008] S.G.H.C. 161, ¶ 151–53 (Sing.); *XD v. Hong Kah Town Council*, [2008] S.G.D.C. 96 (Sing.); *XU v. XV*, [2008] S.G.D.C. 220 (Sing.).

228. See PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW, *supra* note 8, at 43.

229. See *id.* at 44.

VI. LOOKING TO THE FUTURE: COMING TO TERMS WITH THE PROBLEM OF LAND SCARCITY?

With the Singapore government estimating the rate of population growth in Singapore to accelerate in the future,²³⁰ and with land reclamation not possibly keeping up with this rate of population increase,²³¹ the land scarcity problem is here to stay in Singapore. Along with that problem, it may be expected that the three attendant aspects of the problem will only be exacerbated. The decision in *Spandeck Engineering Pte Ltd.* may be a good indication as to how the Singapore courts might deal with the land scarcity problem in the future, if only with respect to the recovery of pure economic loss in negligence. The pertinent paragraphs in *Spandeck Engineering Pte Ltd.* hinting at the future role that policy considerations (including the land scarcity problem) would play in negligence (which is a large component of Singapore tort law) are reproduced below:

Assuming a positive answer to the preliminary question of factual foreseeability and the first stage of the legal proximity test, a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties.

We also recognise that the obvious objection to utilising policy as the overarching determinant of liability is its potential to result in arbitrary decisions. Although it is generally recognised that public policy is an unruly horse (*per* Burrough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303), it cannot be *completely* ignored. The danger is *not* with judges deciding cases based on policy considerations but rather with judges deciding cases based *solely* on them. We agree with Prof Tan ([29] *supra* at 228) that “[t]he truth lies somewhere in between pure principle-based decisions and policy-based

230. See Tan Weizhen, *Population Grows to 4.59 Million*, STRAITS TIMES (SING.), Aug. 1, 2008.

231. See Yong Koi Kwong, *Singapore Cannot Sustain 6.5 Million Comfortably*, STRAITS TIMES (SING.), Feb. 21, 2008 (“In spite of our relentless land reclamation for the last 40-odd years which grew our country to the present area of about 700 sq km and a projected area of 780 sq km, Singapore would be the most densely populated country with 12,800 persons per sq km of habitable area if the population is projected to grow to 5 million. If the population is planned for 6.5 million, the average number of persons per sq km is 16,640.”).

decisions” and that “[i]t is obviously impossible to decide cases *in vacuo*, exclusive of the interests and the context of the community for which the decisions are made.” In our view, it is inescapable that some measure of public policy must be considered but it must not be the sole determinant.²³²

Two points can be made. First, there is a new role that policy considerations can play. Rather than affect the imposition of a duty of care (and hence liability) *positively*, it can now only do so *negatively*. This considerably restricts the role which policy can play in negligence claims, at least at the duty stage. Thus, while land scarcity might well be a valid policy consideration *leading to* the finding of duty before *Spandeck Engineering Pte Ltd.*, this would not be possible after *Spandeck Engineering Pte Ltd.* Secondly, to prevent any argument of the courts being implicitly affected by policy considerations, the Court of Appeal in *Spandeck Engineering Pte Ltd.* has gone out of its way to say that policy considerations must now be *expressly* spelled out, if so utilized. While this would not stop judges from implicitly taking policy considerations into account, it does send out a strong signal that this should not be done unless absolutely necessary. In part, this may be because, as the Court of Appeal said in *Spandeck Engineering Pte Ltd.*, the courts must not be seen as arbitrarily deciding cases on the amorphous concept of “policy.” It is an open question whether this would find similar application in other areas of tort law in Singapore. *Spandeck Engineering Pte Ltd.* was of course a decision concerned with negligence broadly and duty of care specifically, but the ramifications of the decision might find expression in other areas. If so, we might expect to find land scarcity considerations to be of less weight (or no weight at all) in other areas of tort law. For the present moment, however, we can be quite certain that land scarcity considerations would only play a small, explicit role in the finding of a duty of care in negligence.

However, the evidence suggests that, apart from negligence situations, the land scarcity problem would continue to find relevance in other areas of tort law. Indeed, it bears repeating that even in recent times, the Singapore courts have repeatedly emphasized the importance of the land scarcity problem in Singapore jurisprudence.²³³ It is difficult to imagine the land scarcity problem not having continued relevance in other areas of tort law, apart from negligence, in a legal system wherein the judiciary draws an explicit link between land scarcity and the legal landscape. Perhaps the problem in negligence will also be resolved in time to come, whether expressly or not, despite the Court of Appeal’s direction that policy considerations be explicitly spelled out (only if they *negate* the *prima facie* finding of duty in the first place). Indeed, perhaps the more realistic

232. *Spandeck Eng’g Pte Ltd. v. Defence Sci. & Tech. Agency*, [2007] 4 S.L.R. 100, 134 (Sing.).

233. *See supra* Part IV.D.

outcome might be a heavier emphasis on legal coherence even in the face of the land scarcity problem. In other words, even where there is a land scarcity problem to be confronted within a decision, it would be unlikely that the decision reached would be wholly pragmatic and without regard to legal intricacies.

But practically speaking, *even if* we were to acknowledge that the direction to reduce reliance on policy considerations in *Spandeck Engineering Pte Ltd.* has universal application, this might not have as great an impact as one may have thought. Indeed, we must cast our minds back to the utility of the land scarcity policy consideration: this had the effect of making the Singapore courts depart from hitherto highly influential English decisions when they might have not done so otherwise. In other words, the land scarcity problem emboldened the Singapore courts to formulate uniquely local law where they might not have in the past. However, the historical context has since been updated, and with the rise of a movement towards the development of a Singapore jurisprudence which is unique and which draws as its reference not only English decisions but other international materials, it may well be that the *developmental* impact of the land scarcity problem will not go away. It will merely take a different form, in the name of fostering the development of an autochthonous Singapore legal system.²³⁴ The Singapore courts may well turn their attention to jurisdictions that have a similar land scarcity problem and take their cue from there, or indeed to formulate legal principles divorced from the English position and which takes into account the land scarcity problem, if only implicitly.

VII. CONCLUSION

Singapore tort law, like the history of its country of origin, has a checkered history. It is a story of the balancing of various competing factors. From a strong deference to English law to the later development of an autochthonous legal system, the Singapore courts have always had to deal with the problem of land scarcity. This paper has shown the unique legal decisions in three selected areas of tort law (each corresponding to the three aspects of the land scarcity problem explained above) that have resulted from the conditions in Singapore. In these three aspects, the Singapore courts have departed from highly influential English decisions, where they would not otherwise have done so. In doing so, they may have adopted approaches that are not entirely legally coherent, but have resolved the land scarcity problem in each instant case. In essence, this paper has shown that in tort law, the Singapore courts had hitherto adopted an approach that is both pragmatic and robust to achieve social and practical justice, with the legal refinements coming only at a later stage when the practicalities of the situation were resolved. What the future holds is unclear, but there is evidence involving pure economic loss in negligence that it is unlikely for the “pragmatism

234. *See supra* Part III.C.

first, legal coherence second” approach to assume center stage. Perhaps the time has come that the two are not regarded as mutually exclusive concepts in Singapore tort law, even if land scarcity is here to stay. What Singapore lacks in land, it might no longer lack in *either* legal coherence or judicial pragmatism.

