

LEGAL UPDATE

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CASE UPDATE

Singapore Court of Appeal Lays Down Single Test for Establishing Duty of Care in Negligence

Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency
[2007] SGCA 37

Executive Summary

The Singapore Court of Appeal has ruled that a single test should be applied to determine the existence of a duty of care in the tort of negligence, regardless of the nature of the damage sustained by the claimant (ie. pure economic loss or physical damage). This test is based on a two-stage approach comprising of, first, proximity and, second, policy considerations.

Background

The appellant, Spandek Engineering (S) Pte Ltd (the “**Appellant**”), had been appointed to redevelop a medical facility at Nee Soon Army Camp (the “**Project**”) pursuant to a tender exercise conducted by the Government of Singapore. The Government of Singapore and the Appellant entered into a contract (the “**Contract**”) in respect of the Project. The Defence Science & Technology Agency (the “**Respondent**”) was appointed the superintendent officer of the Project.

In the course of the Project, the Appellant claimed that it discovered numerous discrepancies that allegedly led to the under-certification of the progress payments made to the Appellant. The Appellant also ran into cashflow difficulties. The Contract was eventually novated to another contractor.

At the time of the novation, the Appellant had only completed about half of the Contract work. In the ordinary course of events, the Appellant would have been paid a full lump sum at the end of the Project and would have been entitled to submit for certification any claim for works previously uncertified. However, the Appellant lost this right when it novated the Contract to the new contractor. The Appellant accordingly claimed against the Respondent in tort to recover its alleged losses.

The High Court Action

The Appellant claimed that it suffered economic loss and sued the Respondent for negligence on the basis that the Respondent owed it a duty of care to apply professional skill and judgment in certifying, in a fair and unbiased manner, payment for work carried out by the Appellant to avoid causing it any loss due to undervaluation and under-certification of works.

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The trial judge dismissed the Appellant's claim, holding that the Respondent did not owe the Appellant a duty of care to avoid causing the latter to suffer pure economic loss through its negligent conduct.

The Appellant appealed against the trial judge's decision.

The Court of Appeal's Decision

The Court of Appeal dismissed the appeal. While the Court of Appeal agreed that no legal duty of care arose on the facts of the case, the basis on which it reached this decision differed from that of the trial judge.

We turn now to examine the principles laid down by the Court of Appeal in respect of establishing a duty of care in a claim for negligence.

A single test to establish a duty of care in all claims

A survey of the state of the law in England and Singapore confirmed that the courts in both jurisdictions applied different tests to different types of damages claimed (eg. pure economic loss vs. physical damage). In England, even within the rubric of physical damage, there is confusion as regards which of three possible tests is applicable to determine a duty of care.

The Court of Appeal concluded that Singapore courts should cease adopting different tests for damage arising from different situations. A single test should be applied to determine the existence of a duty of care for all claims of negligence regardless of the nature of the damage caused. In delivering the written judgment of the court, Chan Sek Keong CJ said:

"[I]n our view, a single test is preferable in order to determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of damages claimed, and this should include claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions. In cases of physical damage, there is usually no difficulty with regard to a control mechanism to prevent indeterminate liability. However, the adoption of a single test would serve to constrain liability even in those extremely rare cases where physical damage might possibly result in indeterminate liability. It may well be that there are policy considerations in restricting recovery for pure economic loss in certain situations, but this in itself does not make it necessary for a wholly different approach in the form of a separate test altogether ... Ultimately, a single test to determine the existence of a duty of care for all claims of negligence would do well to eliminate the perception that there are, at once, two or more tests which are equally applicable."

The applicable test in Singapore

The single test to be applied in Singapore is, in essence, a two-stage test comprising of first, proximity and second, policy considerations. The application of the test is to be preceded by the preliminary requirement of factual foreseeability.

Factual foreseeability refers to the threshold requirement of reasonable foreseeability from a factual perspective. Unless this element is fulfilled, the claim will not even get off the ground.

Proximity refers to the sufficient legal proximity that must exist between the claimant and defendant for a duty of care to arise. This concept includes physical, circumstantial and causal proximity and also

embraces the twin criteria of voluntary assumption of responsibility and reliance, where the facts support them, as essential factors in meeting the test of proximity.

Once the elements of factual foreseeability and proximity are fulfilled, a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not the duty of care should be negated.

Comment

Following this decision, there is now a divergence between Singapore and England in the test to be applied in determining the duty of care in negligence claims. This marks a development of the jurisprudence in Singapore with respect to the duty of care in negligence, and cases and commentaries from other Commonwealth countries must now be read and applied with greater care. There will also be some uncertainty in this area of the law in Singapore as this new test continues to be developed and applied. In light of the above, businesses and individuals should seek professional legal advice, rather than rely on existing legal precedents and authorities, when faced with negligence claims where the existence of a duty of care is an issue.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our website), or either of the following lawyers:

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