UiO : Faculty of Law
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Ship Recycling and Liability

The duty of care vis-à-vis shipyard workers

Candidate number: 1004

Submission deadline: 01.06.2022

Number of words: 15.232

Abstract

The area of liability is facing new difficulties with globalisation and trade expanding. This has also become evident in the maritime industry. An industry, which due to its international nature, inevitably is involved in various parts of the world with endless possibilities for incurring liability both in contract and tort. Especially, the area of ship recycling has within the last decade been exposed to the medias' eye and criticism. Even though the area is somewhat regulated, the cases drawn attention to in the media has shown how the regulatory framework has been unable to combat the issues involved. For this reason, the present thesis aim at assessing the extend to which the gaps in the legal regime of ship recycling are caught by other legal mechanisms, namely the English duty of care notion as applied by the courts.

The recycling of ships is regulated by various instruments at an international. The thesis concludes that the regulatory regime contains three main gaps. These are the difficulties of proving subjective elements, as is it required that intend to recycle a vessel is present before the Basel Convention and EU Waste Shipment Regulation is applied. Further, the same rules contain the gap that it is possible to argue that the decision was made outside the territory of a party to the rules. Lastly, for EU-flagged vessels the main gap is that a ship can be reflagged.

Under English Tort law a duty of care exists, when the relationship is one of proximity, it is foreseeable and fair, just and reasonable to impose such duty. In addition, there is a duty of care for someone, who creates a danger exploited by a third party. These two grounds were used for asserting that a former ship agent was liable vis-à-vis a shipyard worker who fell to his death demolishing the vessel of the agent in *Hamida v Begum*. The Courts held that the Claimant had a real prospect of succeeding with the second ground and thus dismissed to strike it out. The thesis concludes that the case is a landmark case in the area of liability for ship owners, ship operators, etc. for their acts and omissions in relation to end-of-life vessels. Even though the case faces extensive hurdles, it is nevertheless arguable that the criteria for a duty of care can be met, because of the knowledge of the seller of the vessel, and thus the foreseeable and proximate conditions. The last requirements paired with the floodgate argument may be an obstacle. However, the wider tendency to impose liability in similar areas of liability speaks in favour of stretching the duty of care to encompass the present.

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1 Introduction

1.1 Background and problem discussion

Shipping is a global business[1] and with globalisation having reached another level than ever before, new legal questions arise in the area of liability. The media has drawn more and more attention to business conduct and the consequences of outsourcing or selling off business and property as a way to avoid liability.[2] This includes the area of ship recycling.[3] An example hereof is found in the recent Norwegian appeal, which upheld the conviction of a Norwegian shipowner. He received a six months prison sentence over the attempted illegal export of the vessel "Harrier" from Norway to Pakistan for recycling.[4]

The fact that the ship recycling industry has been said to be not only the most dangerous job in the world[5] it also causes severe environmental problems.[6] This has led to various international legal instruments.[7] However, the practice of unsafe and non-environmentally safe recycling still continues. Partly, because of the gaps in the regulatory regimes, which makes it easy to circumvent the legislation by arguing a decision to recycle was made somewhere outside the scope of the regulation or reflagging the vessel prior to recycling. And partly also due to the international nature of the maritime industry that makes it hard to codify

[1] Falkanger, Brautaset, and Bull, *Scandinavian Maritime Law - The Norwegian Perspective*, 26.

[2] This includes the many cases on parent companies' liability for its subsidiaries, such as in the infamour Rana Plaza building collapse, see *Das v. George Weston Limited* [2017] ONSC 4129.

[3] The same issues are also seen in the earlier stages, namely the ship building. See for instance the Danish case where North Norean were exploited in a Polish Shipyard, where the work environment was considered unsafe, the workers were not paid and one worker ended up dying, cf. Krigslund, 'North Korean Laborers May Have Worked on Maersk Vessels'; 'Dansk krigsskib bygget med hjælp fra nordkoreanske tvangsarbejdere'; The Mediation and Complaints-Handling Institution for Responsible Business Conduct, 'Specific Instance on the Danish NCP's Own Instigation: The Due Diligence Process of the Danish Ministry of Defence in Regard to the Contracting and Building of the Inspection Vessel Lauge Koch'; Lillevang, 'Nordkoreanske tvangsarbejdere havde kontrakt på at bygge dansk inspektionsskib'.

[4] 19-183171MED-SUHO Notably, this case is one regarding the "old" rules on transport of waste, as the specific recycling rules for ships had not entered into force at the time of the incident. The case has been appealed and upheld at appeal, see Ismail and Klevstrand, 'Opprettholder Dom På Seks Måneders Fengsel for Skipsreder Georg Eide' The judgement has however not yet been released.

[5] 'The Toxic Tide'; The same has been said by The Global Trade Union IndustriAll, cf. Ship recycling: reducing human and environmental impacts, 'Science for Environment Policy (2016)', 3.

[6] Falkanger, Brautaset, and Bull, above no 1, 136; Ship recycling: reducing human and environmental impacts, above no 5.

[7] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Regulation (EC) No 1013/2006 on shipments of waste; OECD, Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, OECD/LEGAL/0266; Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships; UNEP, Decision VII/26. Environmentally sound management of ship dismantling; Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance.

and enforce one set of rules for the entire world. Whilst the immediate tortfeaser may be sued under national law and potentially found liable hereunder, their funds may be limited.[8] In addition, the developing countries may often have weaker legal systems with limited law enforcement.[9]

Interestingly, a somewhat recent case[10] may path the way of closing those very same regulatory gaps. The case involved a widow of a deceased shipyard worker who sued the operating agent *Maran* for owing the deceased an English law duty of care by selling the vessel, knowing it would probably end up at a scrapyard with poor working conditions and lacking environmental standards. The High Court and Appellate Court held that the operating agent could owe a duty of care to the deceased worker in Bangladesh even though the general rule under English law is that there must be a relationship of proximity and that a party is not liable for harm done to another party by a third party. This was held to be the case even where there are multiple third parties involved in the transaction in the case when the former operator created the danger. This poses an interesting question of how far the duty of care extends for agents, shipowners and other parties on the selling part of the transaction. The case is however not the final judgement, but a mere allowance of letting the case proceed to trial. This will albeit not lessen the importance of the judgements by the High Court and Appellate Court as the reasoning of the Courts have revealed the somewhat willingness to allow a duty of care to exist even though it would be *"an unusual extension of an existing principle"*[11]. This leads to the following research question.

1.1.1 Research question

To what extend are the liability gaps in the legal regime of ship recycling caught by the English duty of care notion as applied by the courts?

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[8] The fact that the Deceaseds employer in Hamida v Maran was not known, speaks in favour of the assumption that it will be hard for the injured party to recover from the immediate tortfeasor, see *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraph 11.

[9] Millington, 'Responsibility in the Supply Chain', 363; Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains*, 80; Ulfbeck, Andhov, and Mitkidis, *Law and Responsible Supply Chain Management*, 9; Mitkidis, 'Enforcement of Sustainability Clauses', 68; Van Dam, 'Tort Law and Human Rights', 226, 228; Ulfbeck, 'Virksomhedens Privatretlige Erstatningsansvar for Overholdelse Af Menneskerettigheder i Udlandet', sec. 5.2.

[10] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB); *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326.

[11] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 37.

1.2 Purpose and delimitation

The purpose of this thesis is to briefly examine the rules governing ship recycling and hereby uncovering some of the gaps in the legislature. This is to illustrate the difficulty of regulating this sector and thus identifying where courts may play a large role in ensuring the fulfilment of these regulations, and their underlying formal, even though their deemed inapplicable in certain cases. Thus, the aim becomes to map the law through precedent to identify and assess when and if legal liability may be imposed on ship owners or agents hereof regardless of the gaps in the legislation concerned.

It is important to state that the thesis intends no blame on the parties involved in these cases, but merely to objectively identify the law created via the courts and thus let it be for the courts to the decide what is right and wrong when it comes to ship recycling. There will never be a one-sided story, and while the companies may exploit the cheap labour in third world countries they are also generating work for the very same people and fostering the reuse of old steel.[12] That said, the choice of using yards with poor labour and environmental standards are not to be condoned. Hopefully, the courts willingness to impose liability more often in the area of corporate liability for damage done to people and the environment by the exploitation of the companies' position in similar cares will lead to a better and more safe ship recycling industry.

Given the limited space, the present thesis will not include an examination of vicarious liability and whether the ship owner could possibly be vicariously liable for the acts and omissions by an operating agent.

Further excluded are the rules on product liability, and thus no examination of whether a ship owner could be liable based on the rules of product liability.

Whether the expansion of liability via case law is the appropriate way to deal with a potentially incomplete legal body is not within the scope of the present thesis, which merely tries to set out the legal sphere of liability drawn by expansion.

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[12] Ship recycling: reducing human and environmental impacts, above no 5, 3.

1.3 Methodology

The present thesis uses the doctrinal legal method, where legal arguments are taken into consideration and weighed against each other.[13] This includes weighing all relevant legal sources, such as the law, international regulation, case law, legal considerations of justice and soft law. Even though no formal hierarchy exists between these legal sources, formalised sources attaches a higher degree of legal value.[14] Thus, the regulations and case law are given priority over soft law instruments such as maritime companies' own ship recycling policies.

The thesis will primarily be centred around tort law liability, especially English Tort Law. The reason being that the claim from any shipyard workers will be non-contractual to any other party than that of their immediate employer, i.e. the shipyard.

The reason for especially focusing on English law is first of all that the leading case at the moment (and to be finally decided later) is based upon an English law duty of care. Even where the case is not to be decided under English law, but Bangladeshi law, it is suggested that the duty of care is not materially different between the laws of those two systems.[15] Another example of English law's prevalence was also found in *Okpabi v Shell*[16], which held that the English decision *Chandler v Cape*[17] was applicable to the case, which was decided according to Nigerian law. Both of which were about the parent companies' liability for a subsidiaries conduct in relation to personal injury and environmental damage respectively.

However, even where international private law points to the law of the land where the harmful event occurred, English law and precedent will still be of relevance. This is because many of the developing countries in which the harmful events are often taking place have developed their legal system on the same grounds as those of their former colonials.[18] Thus, English law plays a significant role in many maritime disputes in regards to ship recycling, which is often conducted in former English colonies, but also shipping general, where English law seems one of the primary and preferred choice of law. Some scholars even argue that tort law is universal in nature, and thus that the choice of law question is less dominating.[19] Secondly,

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[13] Blume, *Retssystemet og juridisk metode*, 106.
[14] Ibid., 120.
[15] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 123.
[16] *Okpabi and others v. Royal Dutch Shell Plc and another*.
[17] *Chandler v Cape Plc* [2012] EWCA Civ 525.
[18] Van Dam, above no. 9, 237.
[19] Ulfbeck, above no 9, sec. 5.2.

the international nature of shipping[20] makes it natural to include international law such as English law.[21]

1.4 Outline

This thesis starts by introducing the rules and regulations in the area of ship recycling. This includes mapping the rules as well as identifying any gaps in the regulatory regime.

Next, the thesis proceeds with identifying where the regulatory gaps might be "caught", which will include the examination of English law of negligence. Especially the duty of care is here relevant to include and map the scope of. This will be done by both examining case law on liability for acts and omissions.

On the basis of the preceding examinations, the thesis will analyse the main case for the research topic, namely *Begum v Maran*. This will include laying out all the arguments used by the Courts in reaching their conclusion to assess whether the case may establish a duty of care for the former shipowner towards the workers at the shipyard.

Lastly, a conclusion will be draw up in the last section.

[20] Falkanger, Brautaset, and Bull, above no 1, 27.
[21] Ibid., 28.

2 Ship Recycling: Regulatory framework and gaps

To identify the main gaps in the legal regime of ship recycling a short overview of the practice and the rules governing is provided in the following paragraphs.

2.1 What is ship recycling?

Ships that have outdone their lifespan must be dismantled, after which its parts are treated as waste. This process is also known as *ship breaking* or *ship recycling* and the ships in this life stage are often referred to as *end-of-life ships*. Ship recycling can occur through various ways. One is through dry docking and another by sailing the vessel onto the shore. The latter process is also known under the term *beaching*. Beaching has attracted a lot of criticism, as it is not regarded safe for neither the people conducting the work nor the environment suffering from various oils and other components and substances leaking into the soil, groundwater and ocean. More than 70 % of the ships that annually need to be demolished are done so in India, Pakistan and Bangladesh, where only the beaching method is used.[22] The World Labour Organisation has categorised the employment of ship dismantlers as the most dangerous in the world.[23] With that said, ship recycling is an important part of the circular economy as it allows for the reuse of steel and various other components, which reduces the need to use mining as a way of gaining new steel.[24] Thus, the ship recycling also positively contributes by reducing the non-environmentally practice of mining. However, one may argue that the recycling needs to be safe and environmentally friendly in order to properly reduce the negative effects of mining, as it would otherwise just equalise the absence of mining.

As with many other things, profit is also a known decisive factor for ship owners to choose beaching over recycling at safe shipyards. It is estimated that the difference in profit by choosing the beaching method is US$ 3-7 million per recycled vessel.[25]

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[22] 'The Problem - NGO Shipbreaking Platform'.
[23] 'The Toxic Tide'; The same has been said by The Global Trade Union IndustriAll, cf. Ship recycling: reducing human and environmental impacts, above no 5, 3.
[24] Ship recycling: reducing human and environmental impacts, above no 5, 3.
[25] 'Shipbreaking Judgment'.

As a result of the ship recycling industries' impact on human health and the environment, various legal instruments have been initiated to encounter the environmental, health and safety issues correlated with beaching (and ship breaking in general).

2.2 Regulatory framework of Ship Recycling

The following paragraphs present a short overview of the rules on ship recycling. It introduces the main legal frameworks. It lies outside the scope to commence an in-depth analysis of each and every regulation presented. The main focus is to establish a basis of knowledge of the ship recycling regulation to identify and understand the gaps in the regulation to conduct the subsequent analysis of how case law has evolved upon these gaps to determine whether case law is in the midst of creating a new legal standard for liability for those responsible for end-of-life ships.

2.2.1 Basel Convention and EU Waste Shipment Regulation

Initially, the recycling of ships was not regulated under separate legislation, but included under the rules on transboundary movement of waste. These rules have their outset in the 1989 Basel Convention[26] entering into force May 5th, 1992. It applies to all transboundary movement of hazardous waste between exporting and importing states. The Basel Convention is implemented in the EU by way of the European Waste Shipment Regulation[27].

The question is if the end-of-life ships are included in the scope of the convention. At the Seventh Conference of the Parties to Basel Convention, the Parties recognised that ships are known to contain hazardous materials and such materials may become hazardous waste as listed in the annexes to the convention. Likewise, the decision taken at the Seventh Conference also recognised that a ship may become waste as defined in article 2 of the Basel Convention.[28] Thus, end-of-life ships can be rendered as hazardous waste under the Basel Convention.

An end-of-life ship on its way to a recycling facility will fall within the category of waste *"which are disposed of **or intended** to be disposed of"*[29] (author's own highlight), given that

[26] The Basel Conventions compatibility with UNCLOS lies outside the scope of this thesis.
[27] Regulation (EC) No 1013/2006 on shipments of waste.
[28] UNEP, Decision VII/26. Environmentally sound management of ship dismantling.
[29] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 2(1).

the ships are sold for demolition because they have out-served their purpose and no longer can be of use (as they were originally intended for) to the shipowner. This formulation of when waste falls within the scope forms a possibility to circumvent the legislation, because the ship owners will be able to argue that the intention was not present at the given time or not disclosing any intention which may have been present regardless. Intent, as a subjective mental factor, can be very hard to establish solid evidence for conviction. However, case law has seen instances where intent was present. The first case was the *Seatrade* case, where the shipping operator and certain other executive were held criminally liable for intending to export ships in breach of the Waste Shipment Regulation.[30] Intend was found based on email correspondence before the ships were en route to the shipyards. More recently, a Norwegian shipowner was sentenced six months imprisonment on the grounds of contribution to attempt to scrap the vessel in contravention of the Basel Convention.[31] Here intend was found based on two insurance certificates, which were contradictory as to the last destination of the vessel.

According to the Basel Convention, import and export of hazardous waste to or from non-Parties are illegal.[32] Furthermore, with the entering into force of the Basel Ban Amendment on December 5th, 2019, export from OECD[33], EC and Lichtenstein countries to other than those mentioned is not allowed.[34]

Essential of the Basel Convention is that all transboundary movement between parties as well as through non-parties are subject to the prior informed consent procedure.[35] An issue to be identified here is that if the end-of-life ship commences its journey for recycling in a non-party state, the Basel Convention (or EU Regulation) will not apply.

The rules on prior informed consent entail that the exporter must inform the country of import and/or transit of the intended import/transit and the importer/transit-country must give its consent to the requested import/transit. In case of ship recycling, it is the ship owner who as the generator or exporter of the (hazardous) waste (end-of-life ship) who has the responsibility

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[30] Prosecutor v X (Seatrade); 'Ship Recycling', The case is however up for retrial, as the Defendant successfully appealed the case due to impartiality reasons, see.
[31] 19-183171MED-SUHO.
[32] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 4(5).
[33] Out of the main recycling countries (India, Bangladesh, Pakistan, China, China and Turkey) only Turkey is a member of OECD.
[34] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 4A.
[35] Ibid, articles 6, 7.

to notify the exporting and importing state. The export state is the state from which the vessel departs to the recycling facility, or which it is planned to depart from.

To sum up, two main gaps appear when considering the scope and enforceability of the Basel Regime. Firstly, the hardship of proving intent means that ship owner's easily can argue that they had no intention to recycle the ship or avoid disclosing any evidence hereof, just as the decision to recycle was taken someplace not included in the scope of the Basel Convention, and also hereby circumvent its application. Secondly, the end-of-life vessel may commence its last journey from a state not a party to the Basel Convention. This will exclude the vessel from being regulated by the Basel Convention. These gaps led to an increased pressure on the maritime industry to form more purposeful regulation, which led to the Hong Kong Convention.

2.2.2 Hong Kong Convention and EU Ship Recycling Regulation

As a result of the issues of circumventing the Basel regime and the continued unsafe and unhealthy ship recycling practices seen in the developing countries, the IMO was urged to draft a set of rules specifically designed for the recycling of ships. From this, the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships[36] emerged. The convention has however not yet entered into force and will therefore not be further elaborated.

Instead, the focus will be on the EU Ship Recycling Regulation[37], which implements the Hong Kong Convention on a EU-level[38], albeit with higher standards for the inventory of hazardous materials and ship recycling facilities. The Regulation distinguishes itself from the Basel regime by solely regulating the recycling of ships. *"The purpose of this Regulation is to prevent, reduce, minimise and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by ship recycling. The purpose of this Regulation is to enhance safety, the protection of human health and of the Union marine environment throughout a ship's life-cycle, in particular to ensure that*

[36] Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships.
[37] It is outside the scope of this thesis to asses the Ship Recycling Regulation's illegality in relation to circumventing the Basel Convention.
[38] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, article 1(3).

hazardous waste from such ship recycling is subject to environmentally sound management."[39].

The Recycling Regulation takes precedence over the Basel Regime for EU flagged vessels.[40] Given that the Regulation only applies to EU flagged vessels,[41] this poses yet another gap in the regulatory regime, whereby ship owners can circumvent the legislation, by so-called *reflagging* prior to recycling. It is also known as the term *flags of convenience*.[42] This means that the flag of the ship will be changed before recycling the ship and thereby exempting the ship from EU-regulation. Shipowners will then instead be caught by the Basel regime, and then fall back on where the decision to recycle was made, as this can make the export of the ship (as waste) illegal. However, as noted above, it will be difficult to establish intent to recycle the ship even though the flag is changed, because reflagging also occurs on other occasions than prior to recycling and is somewhat common in the maritime industry. One could argue that reflagging prior to recycling and then selling to a so-called *cash buyer* (as is usually the case) highly indicates an intention to recycle.

Exempt from the Ship Recycling Regulation are warships, ships under 500 gross tonnage, and ships flying a member state flag, but only operating in that same jurisdiction throughout its lifecycle.[43] The regulation further sets out the requirement that all new buildings shall have an inventory of hazardous materials.[44] Even ships flying the flag of a third country shall have such an inventory if they call at a member state port.[45]

Most importantly in regards to the purpose of the Recycling Regulation, it requires all end-of-life ships flying the flag of a member state must be recycled at a facility included in the European list.[46] This duty falls upon the ship owners. According to the definitions of the regulation, *"'ship owner' means the natural or legal person registered as the owner of the*

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[39] Ibid, article 1(1).
[40] That the Basel Convention does not allow for reservations, and that the EU Ship Recycling Regulation illegally creates an exemption to the Basel Convention is not addressed.
[41] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 2(1).
[42] NGO Shipbreaking Platform, 'Flags of Convenience'; Falkanger, Brautaset, and Bull, above no 1, 58.
[43] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 2(2)(a-b).
[44] Ibid, article 5(1).
[45] Ibid, article 12.
[46] Ibid, article 6(2)(a).

ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship" [47]. Thus, it can be concluded that both the legal owner as well as i.e. managers of vessels flying the flag of a member state are under the obligation to only recycle at a yard included in the European List. Thus, the ship owner as the legal owner will not able to circumvent the obligation to use European Listed facilities simply by outsourcing all operations to another entity or agency.

However, given the fact that ship owner's are not bound by any rules on when and how many times they can change the flag of the vessel, this obligation seems rather illusory.

2.3 Sub-conclusion

To summarise, three main gaps are identified in the regulatory regime of ship recycling. First, that burden of proving intent seems almost impossible, unless prima facie evidence is present. Secondly, the journey towards recycling can be made outside the territories of any parties to the Basel Convention, which will render the Convention inapplicable. Thirdly, the possibility of reflagging a vessel prior to recycling makes the EU Recycling Regulation's applicability almost illusory.

By the brief examination, it can therefore be concluded that the regulations aimed at preventing the adverse effects on human health and the environment resulting from the ship recycling industry are not properly encountered by the very same regulatory regime. Unfortunately, this leads to a consistent use of the recycling facilities with unsafe working practices, damaging the environment as profit most often outweighs these factors.

However, in recent case law, both in the area of ship recycling as well as in other areas facing the same kind of regulatory gaps due to the nature of the business' international character, courts are showing willingness to impose liability regardless of lacking statutory duties. These cases especially evolve around the duty of care, an English tort law principle in relation to the rules on negligence. Thus, this area of law will be examined in the following chapter to

[47] Ibid, article, 3(1)(14).

analyse whether the regulatory gaps are filled by the dynamic nature of the Common Law Courts.

3 Tort of negligence / Tort law liability

As seen so far, the regulatory gaps does not fulfill much of the aim initially sought with the Basel and Hong Kong Regimes. These gaps have however not withheld claimants from trying to establish grounds for liability for shipowners' recycling their vessels at facilities where human health and the environment aren't of high importance. A particular interesting case on the matter is *Begum v Maran*[48], where the wife of a former shipyard worker sued the former ship operating company for owing her late husband a duty of care. The legal grounds for the duty of care in the case was argued to be that the defendant owed such duty as the late shipyard worker was their neighbour or that defendant owed the duty, because they had created the danger exploited by a third party (being the shipyard). The case was not determined on its merit, but only a preliminary judgement, as the appellant had sought to strike out the case based on its fancifulness. This was however rejected by both the High Court and Appellate court. The cases therefore pose an interesting contribution to the liability potentially facing ship owners and agents when recycling their vessels, which they will not be able to circumvent by making a decision someplace special or reflagging their vessels.

Before commencing the analysis of the grounds on which the decisions were made, a basic exploration and assessment of English tort law, hereunder especially the development of the duty of care is laid out.

3.1 Tort law as a general liability rule

English tort law is one of the three main sources of liability in English law. The complete origin of the law of torts is out of scope of this thesis, but in short: there are many torts under English law and they have each developed certain requirements for certain factual situations.[49] Nowadays, a claimant can disclose certain facts for which there is legal remedy, i.e. a cause of action. Thus, a tort law liability is based upon a duty owed to someone and arises from the breach of this duty.

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[48] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB); Begum v Maran (UK) Ltd (Rev1) [2021] EWCA Civ 326.

[49] Van Dam, *European Tort Law*, 101; Jones M A et al., *Clerk & Lindsell on Torts.*, paras 8–01.

Even though as mentioned above there are many causes of action under English tort law, the tort of negligence eventually developed into a general liability rule.[50] This has led the courts to limit the scope of liability by imposing certain requirements of the tort of negligence.[51] These four requirements are firstly, the existence in law of a duty of care situation. Secondly, a breach of the duty of care by the defendant. Thirdly, a causal connection between the defendant's careless conduct and the damage, and fourthly that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

If it therefore necessary to further establish what a duty of care situation implies and when this arises in order to make the later assessment of whether such a duty might be present for shipowners or others selling their vessels for scrap.

3.2 Duty of care

Under English Tort law a great distinction is traditionally made between liability for acts on the one side and omissions on the other. The general rule for the later is that no liability arises. However, this is different for acts, which will be explored in the following when analysing the concept of the duty of care under English law.

3.2.1 Liability for acts

Liability based upon the duty of care will only arise, where the duty can be said to exist. This means that even when acting intentionally and causing damaging this will not lead to a liability if the person causing the damage does not owe a duty to be careful.[52] The duty is however a dynamic concept and thus developed over time constantly through the courts. Noticeably, not all notional duties do create an actual duty, and the wider the scope of an alleged duty the less likely it is to be regarded as a factual duty.[53] Thus, to assess the situations in which a notional duty arises case law has to be examined. From this it emerges that three requirements are laid down for a notional duty to exist, i.e. proximity, foreseeability, and fair, just and reasonable. The claimant must be in a class of persons

[50] Ibid, 103.
[51] Jones M A et al., above no 49., paras 8–03.
[52] Ibid., paras 8–05.
[53] Ibid., paras 8–06.

foreseeably struck by the damage to which the duty relates.[54] This will be explored further in the following sections.

3.2.1.1 The Neighbour principle: Donoghue v Stevenson

A general principle of the duty of care was first created in *Donoghue v Stevenson*[55], where Lord Atkin gave his famous speech on the duty under tort of negligence[56]:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. ***You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*** *Who, then, in law is my neighbour? The answer seems to be* ***persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*** *"*[57] (author's own highlight).

The case concerned a claimant having a bottle of ginger beer, who claimed to have suffered illness from the snail later found in the beer. The claimant had no contractual relationship with the retailer or the manufacturer and thus sued the manufacturer in tort. The manufacturer was here found to owe a duty of care to the consumer (claimant) to take reasonable care to ensure the safety of the product (the ginger beer).

The case laid the initial grounds for the so-called neighbour principle, according to which you owe your neighbour a duty of care for foreseeable danger. Thus, it set the initial two requirements for the now applicable duty of care.

The speech was however not followed in later case law and thus not binding as such.[58]

A change came in *Home Office v Dorset Yacht*[59] where the court applied the Atkin principle of a notional duty of care laid down in *Donoghue v Stevenson*. In *Home Office v Dorset Yacht*, borstal boys were held on an island, where they had some sense of freedom. However, they were still under the direct control of the prison officers who in their capacity as officers had a

[54] Ibid,. paras 8–08.
[55] *Donoghue v Stevenson* [1932] UKHL 100.
[56] Van Dam, above no 49, 103–4; Jones M A et al., above no 49, paras 8–12.
[57] *Donoghue v Stevenson* [1932] UKHL 100 paragraph 580.
[58] Jones M A et al., above no 4., paras 8–14.
[59] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

duty to supervise the prisoners. As a result hereof, the prison officers was found to owe a duty of care to owners of a yacht, which was used and damaged by the borstal boys, when they tried to escape the island. It was held *likely* that damage would occur because of the failure of the officers, which the officers ought to have foreseen.[60] Lord Reid further argued that Lord Atkin's speech in *Donoghue v Stevenson "ought to apply unless there is some justification of valid explanation for its exclusion."*.[61]

3.2.1.2 Three stage test: Caparo Plc v Dickmann

It wasn't until the *Caparo Plc v Dickmann*[62] case that a test for when a duty of care was owed was set in stone by Lord Bridge:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it ***fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other****."* [63] (author's own highlight). Thus, Lord Bridge added the third condition for the duty of care and defined the three criteria more specifically.

Accordingly, the *three-stage test* set out in *Caparo Plc v Dickmann* must be met before a duty of care can be invoked. This entails that firstly the relationship between the wrongdoer and the innocent party must be one of proximity or neighbourhood.[64] Secondly, the damage must be foreseeable, and thirdly it must be just, fair and reasonable to impose the duty of care.[65]

The requirement of **proximity** can come in different forms such as physical, circumstantial, causal or assumed closeness between the defendant and claimant.[66]

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[60] Ibid., paragraphs 1029, 1033.
[61] Ibid., paragraph 1027.
[62] *Caparo Industries Plc v Dickman* [1990] UKHL 2.
[63] Ibid., paragraphs 617–618; The passage cited above and principle laid down herein has later been cited in numerous cases, see for instance *Chandler v Cape Plc* [2012] EWCA Civ 525 paragraph 32.
[64] The neighbourhood criteria allows the circumvention of the privity of contract principle, according to which only parties to the contract can sue based on the contract and thus removes the possibilities for third parties to obtain legal rights from other parties contractual relationships, see Ulfbeck, 'Supply Chain Liability for Workers' Injuries – Lessons to Be Learned from Products Liability?', 280.
[65] *Caparo Industries Plc v Dickman* [1990] UKHL 2 paragraph 618.
[66] Jones M A et al., above no 4., paras 8–16.

The requirement of **foreseeability** focuses on the knowledge that the defendant ought to have. *"The greater the awareness of the potential for harm, the more likely it is that this criterion will be satisfied"*[67].

Lastly, the requirement of **fairness, justice and reasonableness** includes a wide variety of considerations, from the justice between the parties in the case to the broader justice of such duty from a judicial and societal perspective.[68] The test is thus a way to restrict a floodgate of liability cases to open and maintain some certainty for the law to remain effective.[69]

When considering the last requirement fairness, justice and reasonableness, one must look to the fact that the harmed person must be unharmed or indemnified by the person having harmed the other against the proportionality of imposing this burden on the wrongdoer. This includes looking at protection via insurance or contractually and the risk of exposure of the claimant and defendant.[70] The lack of protection of the consumer in *Donoghue v Stevenson* who didn't have a contractual remedy with the defendant was therefore a weighing argument in imposing the duty of care upon the defendant.

Only in exceptional cases will the courts allow a significant extension of the duty of care. Usually it is done in smaller steps, i.e. seeing whether allowing a duty to be found is merely an extension of a duty already recognised.[71]

In general the three-stage test has been established in cases concerned with economic loss or public services. However, the test has also been applied to personal injury.[72]

To summarise, the duty of care is a constantly developing concept. However, three requirements to establish such a duty of care for acts have been set out, namely proximity, foreseeability, and fair, just and reasonable. When assessing these requirements one must look to case law as well as broader judicial and societal principles.

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[67] Ibid., paras 8–16.
[68] Ibid., paras 8–17.
[69] Ibid., paras 8–19, 8–24; In relation to supply chain liability, the floodgate argument was the basis for rejecting the claim of the injured workers at the Rana Plaza factory in Bangladesh, see Das v. George Weston Limited 2017 ONSC 4129 paragraph 452; Ulfbeck, 'Supply Chain Liability for Workers' Injuries – Lessons to Be Learned from Products Liability?', 283; Policy considerations are arguably the main obstacles in supply chain liabiilty cases for imposing liability, see Ulfbeck and Ehlers, 'Direct and Vicarious Liability', 94–95, 97.
[70] Jones M A et al., above no 4., paras 8–18.
[71] Ibid., paras 8–22.
[72] Ibid., paras 8–24ff.

As *Begum v Maran* is based on a mixture in arguments of liability based on acts and omissions it is further relevant to lay the grounds for the duty of care requirements when it comes to omissions.

3.2.2 Liability for omissions

The following will shortly introduce and analyse the rules and principles developed through case law on the matter of liability for omissions under English tort law. This is done because *Begum v Maran* was argued to be an omission from the defendant to undertake and fulfil their duty of care in regards to damage caused by the intervention of third parties.

Under English tort law there is no liability for *pure omissions*.[73] However, if the defendant has also created a danger, he may come under a consequential duty to take precautions to prevent injuries from occurring.[74]

Especially, in novel situations, the duty of care will rarely extend to liability for omissions.[75]

3.2.2.1 Exceptions to the general rule of no liability for pure omissions

A duty to take action in the interest of another, and thus become liable if failing to do so will only be imposed in special cases. These special cases amount to three, of which the first is if there is a special relationship between the parties, which entitles one party to rely on affirmative action being taken by the other. Secondly, if there is a specific assumption of responsibility by one party to act affirmatively to benefit the other.[76] Thirdly, where one party must bear a specific responsibility for protecting the other from harm caused by third parties.[77]

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[73] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 247; *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2 paragraph 1060; Van Dam, above no 49, 109; Jones M A et al., above no 49, paras 8–46.

[74] Jones M A et al., above no 49, paras 8–46.

[75] Ibid., paras 8–28.

[76] This exception was the one, which was held to be the basis of a duty of care owed by the parent company towards its subsidiaries employees in *Chandler v Cape Plc* [2011] EWHC 951 (QB) paragraph 71; *Chandler v Cape Plc* [2012] EWCA Civ 525 paragraphs 63–64. The duty was reasoned with the omission from the parent company to properly advise its subsidiary on how to handle asbestos safely. The case was the landmark case setting forth four criteria for when a parent company will be liable for its subsidiary based on the duty of care assumption of responsibility. *Begum v Maran* falls without this ategory as the Defendant in the case was not a parent company. One could argue that the case would be applicable if the Claimant had sought damages against the registered owner or ship operator as the parent company based on a notion of control between the parties.

[77] Jones M A et al., above no 49, paras 8–50.

As relates to the third case, there is no general duty to prevent a third party from causing harm to another.[78] The reason being that it would be too difficult (and onerous) to predict whether a third party would cause damage as a result of a defendant's failure to act.

However, Lord Goff in *Smith v Littlewoods* identified four exceptions to the mail rule.[79] Thus, in the following four cases, liability for third parties' harm may be imposed on the defendant due to the defendant's failure to act.

Firstly, where there is a special relationship between defendant and claimant based on an assumption of responsibility by the defendant.[80] Secondly, where there is a special relationship between defendant and claimant based on control by the defendant. Thirdly, where the defendant is responsible for a state of danger, which may be exploited by a third party.[81] Fourthly and lastly, where the defendant is responsible for property, which may be used by a third party to cause damage.[82]

In summary, there do exist a duty of care, which three requirements must be fulfilled, namely proximity, foreseeability and that it is fair, just and reasonable to impose the duty. In the area of omissions only certain situations will create a duty of care. For the present case especially the situation where a defendant creates a state of danger, which a third party exploits is relevant. Thus, the thesis will move to analysing the for the research topic relevant case and in this regard assess whether the requirements laid out in the present chapter can be said to have created a duty of care, and thus somewhat fill the regulatory gaps identified in chapter 0.

3.3 *Hamida Begum v Maran*

Hamida Begum v Maran[83] is a newly decided case by the English Courts which discusses some of the possible grounds for establishing a duty of care owed by a former ship agent vis-à-vis a shipyard worker.

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[78] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3; Jones M A et al., above no 49, paras 8–54.
[79] Lord Mackay and Lord Goff disagreed as to the reason and basis for the exeptions, but Clerk & Lindsell suggests that the four exceptions posed by Lord Goff are to be preferred, see Jones M A et al., above no 49, paras 8–54.
[80] The first exception was stated by Lord Goff to be able to both in and outside contract.
[81] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 273
[82] Ibid., paragraphs 271–277.
[83] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB); *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326.

The Claimants also included a claim for unjust enrichment available under English law. This claim was held unsustainable by the High Court[84] and will not be of further relevance to include in the analysis of the duty of care.

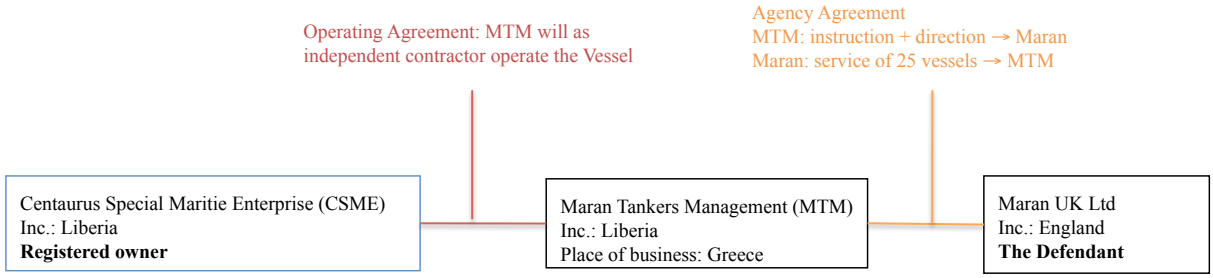
Another question for the courts was whether Bangladeshi law should apply, as this would entail a one-year limitation period, and thus that the claim would be statute barred. This issue is solely briefly included to have the full picture of the case, but is not part of the more in depth analysis as the present thesis aims at assessing the nature of the duty of care rather than the choice of law questions.

3.3.1 Facts of the case

Mohammad Khalil Mollah (hereinafter referred to as "the Deceased") worked on the demolition of the oil tanker MARAN CENTAURUS (hereinafter referred to as "the Vessel") in the Zuma Enterprise Shipyard (hereinafter referred to as "the Yard").[85] On 30th March 2018, he unfortunately fell to his death working on the Vessel. This led his wife, Hamida Begum (hereinafter referred to as "the Claimant"[86]), to claim damages for negligence against Maran UK Ltd (hereinafter referred to as "the Defendant"[87]) on 11th April 2019. The Defendant was the former ship agent of the Vessel, which the Deceased had been working on, when he fell to his death. Thus, the Defendant was not the owner of the Vessel, but had an agency agreement with MTM, who had an operating agreement with CSME. CSME was the registered owner of the Vessel (see Figure 1 below). Interestingly, the case therefore also involves the question of whether the ship agent would not be liable, as they were not the actual owner of the Vessel.

[84] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 73–74, 98. The decision that the claim of unjust enrichment would be unsustainable was not appealed.
[85] The Deceased's employer was not known, cf. *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 11.
[86] "the Respondent" when referring to the appealed case.
[87] "the Appellant" when referring to the appealed case.

Figure 1



A full overview of all known the parties involved is presented in Annex A under paragraph 6.

The Claimant claimed damages against the Defendant based on two "routes" creating an alleged duty of care owed by the Defendant vis-à-vis the Claimant. The first being that the Defendant owed a duty of care based on the basic duty of care notion established in *Donoghue v Stevenson*.[88] The second route being that the Defendant owed a duty of care towards the Claimant because the Defendant had created a state of danger, which a third party exploited.[89]

On February 28th, 2020, the Defendant filed an application notice to strike out the claim and alternatively for a summary judgement. Both are English law remedies, where the court is able to turn down the case. If the court renders that the claim discloses no reasonable grounds for bringing the claim the court can thus decide to strike it out. The summary judgement remedy will allow the court find in favour of the Defendant based on the limited facts presented if it renders that the claimant has no real prospect of succeeding on the claim, i.e. that the claim is bound to fail.[90] A *realistic claim* entails that the claim is not fanciful and one that carries some degree of conviction. This includes a test of whether the claim is bound to fail.[91]

Justice Jay in the High Court held that the Claimant had a real prospect of succeeding in relation to her claim in negligence and thus dismissed the application for summary judgement

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[88] The first route relates to the neighbourhood principle as laid down under paragraph 3.2.1.1 above.
[89] The second route is thus one related to liability for omissions as laid down on paragraph 3.2.2 above.
[90] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 5; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 20.
[91] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 22.

as well as to strike out the claim.[92] Even though, the judge held that Bangladeshi law would apply and thus that the claim would be statute barred, the Claimant had a prospect of arguing the application of Articles 7 and 26 of the Rome II convention, which would circumvent the one year limitation period under Bangladeshi law, which had not been complied with.

The Defendant appealed the decision by the High Court. On March 20th, 2021, the Appellate Court upheld the High Court's decision to dismiss the application for summary judgement as well as to strike out the claim.[93] The Appellate Court reiterated the conclusions made by the High Court and well established principles that in novel and fast developing areas of the law, a decision should not be made upon hypothetical (and possibly wrong) assumptions, but on actual findings of facts. The reluctance to strike out cases in these areas area argued also to be because of the European Human Court Rights' criticism of the procedure.[94]

Thus, the case is now awaiting trial, but it is indeed relevant and interesting to examine the grounds on which the courts decided to dismiss the motion to strike out the claim and/or give a summary judgement. Even though these grounds and findings may be disputed at trial, one can argue that the court may be somewhat inclined to at least take the considerations made by the High Court and Appellate Court into consideration, as they are more than simple findings in one ship recycling case. They are another indications of the tendency in the courts to allow liability for companies, where their acts and omissions contribute or engage in unsafe and non-environmentally safe practices. A tendency to impose liability on the ultimately stronger party, because of their ability to carry this liability and perhaps also their knowledge, which they no longer with technological development can't claim to be unaware about.[95] One may find support in the business literature for this position, i.e. that corporations' economic and political power *"increasingly makes them subject to expectations to assume social responsibility or legal liability"*[96].

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[92] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 98–99.
[93] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 72, 116.
[94] Van Dam, above no 49, 84.
[95] Even states are imposed liability in this regard. See for instance the Duth case, where the Dutch state was held accountable and imposed a duty to take action to reduce the green house gas emissions. ECLI:NL:GHDHA:2018:2610 C/09/456689 / HA ZA 13-1396 (English translation); This can be compared to the argument in supply chain liability cases, where the parent company is found to have superior knowledge and thus better suited to carry the liability, see Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?', 234.
[96] Buhmann and Wettstein, 'Business and Human Rights', 5.

With a summary judgement as the one in the present case, no mini trial is conducted and thus the courts are bound to make certain assumptions of the facts based on the parties' submissions. These assumptions will thus be examined in the following paragraph.

3.3.1.1 Factual assumptions

Given that the case was an interim decision, not all factual findings and discovery were made at trial. Thus, the Courts had to make factual assumptions, on which to base their conclusions. When deciding the case in this regard, the Courts had to do so on the basis of the Claimant's best case on the law.[97] This also meant that the Courts would not conduct a mini trial, but accepted the Claimant's arguments unless its factual assertions were demonstrably unsupportable. This included considering that further facts would appear at trial.[98]

The Appellate Court decided it was instructive to summarise the factual assumptions into eight assumptions instead of having them throughout the judgement as done by the High Court.[99] Thus, the following section will present the assumptions, as done by the Appellate Court with inclusion and reference to the remarks of the High Court.

Firstly, it was evident that the vessel needed to be scrapped and that oil tankers of the size of the Vessel are hard to dispose of safely.[100]

Secondly, the Defendant had a choice as to whether it would sell the Vessel to a party ensuring a safe disposal or not.[101]

Thirdly, the Defendant had complete autonomy over the sale of the Vessel. Justice Jay found that the position of the Defendant was probably legally indistinguishable from that of MTM (the operating agent) as well as CSME (the registered owner). The Defendant agreed to view control at its highest, and thus assume that the Defendant had autonomy over the sale and therefore also accepted that *"the commercial realities went further than the four corners of*

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[97] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraph 36; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 36.
[98] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 22.
[99] Ibid., paragraph 21.
[100] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 30; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 27.
[101] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 30; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 28; Thus, by taking the supply chain liability considerations into consideration, one may argue that the outsourcing, which in those cases indicate a superior knowledge, that the chosen of shipyard with low environmental and safety standards that the seller 'outsources' and thus have a superior knowledge, see Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?'

the contract"[102]. In addition, Justice Jay found that there was *"a real prospect that an examination of the complete evidential picture at any trial would support the high watermark of the claimant's case on control"* [103].

Fourthly, the Defendant knew that the Vessel would be broken up in Bangladesh due to two main facts. The first being the high price and secondly the low amount of fuel left. The Defendant accepted that it *"was aware of the ultimate destination of the vessel"* [104]. Assessing the amount of fuel left is relevant in regards to assessing the Defendant's knowledge of where the Vessel would be broken up as the amount taken together with the position at the time of the sale (Singapore) and the size of the Vessel only left one other safe option possible, namely in China. However, due to the high price of the Vessel the costs of breaking the Vessel up would entail that China could not be viewed as possible anyway.[105] Thus, the inference that an amount of low fuel left and a high price would create the necessary grounds to establish knowledge of the end destination for recycling by the Defendant seems justified. In the absence of any evidence to the contrary Justice Jay agreed to the inference that the high price and low amount of fuel would mean that the Defendant knew that the Vessel was to be broken up in Bangladesh.[106] According to Lord Justice Males the price and fuel showed knowledge of and intend to send the Vessel to Bangladesh, which was equal to the same control as if the Vessel had been sold directly to the shipyard.[107]

Fifthly, the Defendant accepted (for the application only) that beaching is *"an inherently dangerous working practice"*[108].

Sixthly, since the Defendant chose to sell the Vessel to a buyer who would not meet safe demolishing practices, it exposed workers like the Deceased to *"a real risk of death of personal injury"*[109] [110].

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[102] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 19.
[103] Ibid., paragraph 19.
[104] Ibid., paragraph 14.
[105] As noted by Justice Jay, only 80,000 tonnnes out of the nearly 11 million tonnes broken up in 2018 where broken up in Chinese and Turkish yards, cf. *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 15.
[106] Ibid., paragraphs 14, 30.
[107] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 127.
[108] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 13, 30; That the practice used for ship recycling is of low human and environmental standard also appear from the EU Ship Recycling Regulation, according to which the purpose of the regulation was (and is) to redirect the practice from the substandard sites which is currently the practice, see Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 7 preamble.

Seventhly, in regard to the risk, Justice Jay held that it was only foreseeable that the Deceased would sustain a serious accident even though the exposure to the risk of personal injury was inevitable. However, he then went on to assume that the Deceased's accident was probable, and thus a foreseeable risk.[111] As stated under paragraph 3.2.2 with reference to *Smith v Littlewoods*[112], probability is enough to meet the foreseeability requirement.[113] As put in *Home Office v Dorset Yacht*[114], it would be *likely*[115] that the Deceased would be exposed to the fatal injury, which would be enough for foreseeability to be met. Lord Justice Males in the Appellate Court characterised the damage as *"entirely foreseeable"*[116] and that it was a *certainty*.[117]

Eighthly, the intervention by Hsjear (the cash buyer) did not alter the Vessel in any way.[118] Without too much reiteration, the same argument cannot said to be found in Lord Justice Males' argument under the fourth assumption.[119] Thus, one may not regard the selling to a cash buyer as a *novus actus* which would otherwise break the chain of causation.

3.3.2 Decision by the Courts

The following section will introduce and analyse the findings of the High Court and Appellate Court (hereinafter referred to as "the Courts") based on the assumptions set out above. It will do so by firstly looking at the first route claimed to have created a duty of care owed by the Defendant towards the Claimant, namely the one established in *Donoghue v Stevenson*[120]. Hereafter, the second route argued by the Claimant will be examined. Here, the Claimant argued that the Defendant owed a duty of care based on the principle that the defendant was responsible for a state of danger that was exploited by a third party.[121]

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[109] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 32.
[110] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 56.
[111] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 42–43; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 33.
[112] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3.
[113] Ibid.; Jones M A et al., Ibid., paras 8–55.
[114] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.
[115] Ibid., paragraphs 1029, 1033.
[116] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 122.
[117] Ibid., paragraph 124.
[118] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 37; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 34.
[119] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 127.
[120] *Donoghue v Stevenson* [1932] UKHL 100.
[121] This exception was stated to only be applied in very rare situations, cf. *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 273

3.3.2.1 Duty of care (Route 1)

When assessing whether the Defendant owed the Claimant a duty of care based on *Donoghue v Stevenson*[122] the Courts assessed whether the Defendant could reasonably foresee if their act or omission would be likely to injure the Claimant as their neighbour. As recalled from paragraph 3.2.1.1 this requires two elements, namely a special relationship between the Claimant and Defendant as well as that the likely damage was foreseeable.[123]

Justice Jay did not see the case as a classic *Donoghue v Stevenson*. The main reason being the intervention of the Yard or the Deceased's employer, which was in contrast to *Donoghue v Stevenson*, where no intervening act(s) by any third party in the chain of contractual relationships occurred.[124]

In the Appellate Court's review, they commented on the fact that the Respondent[125] put great weight on the requirement of foreseeability as if this would be able to create the duty of care alone.[126] However, the fulfillment of this requirement would not be enough, as especially for novel areas of the law, the full three-stage test[127] must be applied.[128] Even though the tendency towards imposing liability in these novel areas of law, where companies outsource their business or similar on the ground of the fairness criteria, the same criteria is the one being used for dismissing such liability. Especially, the floodgate argument is here being used to create some barrier from liability to be imposed.[129] One may consider whether this is truly fair. For with the ability to outsource or choose a cheaper contractor someplace else, where legal justice and law enforcement may not provide the same protection, one could argue comes a responsibility not to take advantage of this gap. A gap, which by some scholars is described as an imbalance in trade and human rights created because of the very same freedom of trade.[130] The floodgate argument can also be used in support of the proximity

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[122] *Donoghue v Stevenson* [1932] UKHL 100.
[123] Even though, the case was argued on the *Donoghue v Stevensen* principles, the third criteria of that it must be fair, just and reasonable will apply to any duty of care.
[124] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 37.
[125] As the Claimant in the High Court did not appeal the decision, they are the Respondent, where the Defendant is the Appellant in the Appellate Court's decision.
[126] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 40–41.
[127] *Caparo Industries Plc v Dickman* [1990] UKHL 2.
[128] Jones M A et al., above no 49., paragraph 8–25.
[129] The floodgate argument was the basis for rejecting the claim of the injured workers at the Rana Plaza factory incident in Bangladesh, see Das v. George Weston Limited 2017 ONSC 4129 paragraph 452.
[130] Van Dam, above no 9, 226.

criteria as a condition, as the absence of such relationship would indeed create an enormous amount claims of which at least some would also be unforeseeable.

In addition, the Appellate Court, with all fairness, posed the question of whether a shipbroker in London ought to regard a worker in a Bangladeshi shipyard as their neighbour for which an affirmative answer would entail the neighbour criteria to be met.[131] In answering this, one may look to the speech of Lord Atkin in *Donoughue v Stevenson*, where he said that *"The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*[132]

Thus, one may argue that even though there is quite some (physical) distance between a shipbroker in London and a worker in Bangladesh, the high price and low amount of fuel indicated that the Defendant would have known whereto the Vessel would be sent in the end. Knowing this destination, the Defendant would also know the risks associated herewith as the reputation of the shipyards in the third world countries are no secret. It is, and especially for a ship owner[133], known that vessel are dismantled in a non environmentally and human friendly way in these places, and thus the Defendant ought reasonable to have had in contemplation the ship yard workers when choosing to sell the Vessel at the given price and fuel level left. Arguably, it will be hard to establish that the Defendant knew nothing of the recycling destination and practice and thus the inference that the Yard workers would be neighbours of the Defendant.

The Respondent argued that the requirement of proximity between the parties ought to be answered by way of two questions. The first being that if the Appellant had sold a dangerous product to the yard with full knowledge of the yard's dangerous practices, would the relationship between the Deceased and Appellant then be sufficiently approximate? The Respondent answered this affirmatively. The second question was then whether such duty

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[131] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 41.
[132] *Donoghue v Stevenson* [1932] UKHL 100 paragraph 580.
[133] It is argued by some scholars that this knowledge is known to all parties in the business, including the insurance companies, etc. and thus they ought also to take a responsibility to ensure the unsafe and non-environmentally safe practices of ship recycling be stopped, see Klevstrand, 'Jusprofessor Om «Harrier»-Saken'.

could be negated as a result of the intervention of a third party, which was answered negatively.[134] Thus, according to the Respondent, the requirement of proximity would be met.

However, one may argue that in *Donoghue v Stevenson* the product, a ginger beer with a rotten snail, was a dangerous product in itself, which the Vessel wasn't. Thus, when the Respondent argued that it was the dismantling, which was dangerous, the Appellate Court argued that this would take the case outside the scope of *Donoghue v Stevenson*, because it then did not concern an inherently dangerous product as such.[135] Against this argument, one may recall the Basel Convention, which includes end-of-life ships as hazardous waste under paragraph 2.2.1.[136] Thus, one may argue that since ships are considered hazardous waste under the legal regime, ships are also inherently dangerous and thus a dangerous product in itself, which could render *Donoghue v Stevenson* applicable to some extend.

Even though the case was held not to fit comfortably within the principles laid down in *Donoghue v Stevenson* the Appellate Court agreed with the High Court that it was not so fanciful that it should be struck out and the second route of arguments strengthened the Appellate Court's view in this regard.[137] The second route relating to a duty of care for omissions will therefore be analysed in the below paragraph.

3.3.2.2 Duty of care (Route 2)

The following section will introduce and assess the Courts' findings in regards to the Claimant's second route, namely that the Defendant owed a duty of care toward the Claimant because it had created a state of danger, which a third party exploited. This is therefore an argument that the Defendant is liable for its omission to act to avoid such harm, and thus one of the exceptions to the general rule that no liability is imposed for omissions. That is for in cases where one party must bear a specific responsibility for protecting the other from harm caused by third parties. This is however not a general rule and can only be said to happen in rare circumstances such as the four listed above in paragraph 3.2.2.

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[134] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 42.
[135] Ibid., paragraph 43.
[136] UNEP, Decision VII/26. Environmentally sound management of ship dismantling.
[137] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 49–50.

In assessing the applicability of the exceptions to the general rule that there is not any liability for omissions both the High Court and Appellate Court[138] had some difficulties. This was because the exceptions are only relevant to so-called pure omissions and *Begum v Maran* could rather be identified as a mix of acts and omissions. Justice Jay proceeded on the basis that the case ought to be viewed as a hybrid and made notice of the fact that the case distinguishes itself from other omission cases where liability has been assessed when damage has been caused by third parties. Namely, in *Begum v Maran* the immediate lack of proximity between the Defendant and the Yard/employer as there was no control over or responsibility for the potentially dangerous situation from the Defendant.[139] Thus, one may argue that the control exercised by the Defendant over the cash buyer, which went beyond the four corners of the contract[140], would be hard to argue to have created control over the Yard also. Even though the Defendant knew where the Vessel would be destined and that the practices here would be unsafe, the only control it would have, would be not to sell the Vessel at the given price or make sure that safe recycling practices in the sales contract would be followed by the cash buyer. Thus, this control would hardly be categorised as control over the Yard's working conditions, which was prima facie the reason for accident that led to the death of the Claimant's late husband. Given the rapid developments in the courts in this area of law, one could perhaps cautiously argue that the choice of not selling it to the given seller, a lower price, or similar, would also be some kind of control because this would entail that the Yard's with lowest safety measures would gain less and less work. Thus, this would maybe force them actually improve their sites and ultimately this could perhaps be some sort of indirect control. Only time can tell.

The Appellate Court seems to have found a more "elegant" route by way of highlighting that *pure omissions* may be regarded as a somewhat outdated term. Even though this was the case in *Smith v Littlewoods*[141] in which the principles of no liability for omission was set out, later authorities imply that liability arising from the intervention of third parties may be conferred differently nowadays. Here, the Appellate Court referred to Lord Reed's distinction in *Poole*, where Lord Reed made a distinction between *causing harm (making things worse)* and *to*

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[138] The Appellate Court further noticed that the analysis by Justice Jay in the High Court was somewhat hard to follow, partly also because the case does not easily fit within a recognised liability category, see *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 17.
[139] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 45.
[140] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 19.
[141] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3.

confer a benefit (not making things better).[142] It is in the latter situations that the courts are reluctant to impose a duty. Additionally, the Court highlighted a line of authorities to the general rule that there is no liability for harm caused by the intervention of third parties and emphasised that these authorities show the rapid speed with which the area of law develops as well as it being one of the most developing ones.[143]

Returning to the High Court's decision, Justice Jay had as above stated come to the conclusion that the case may be assessed as a hybrid of acts and omissions, and he proceeded to discuss the situations, in which a Defendant may be liable for omissions.[144] Justice Jay dismissed the first, i.e. that there was no assumption of responsibility between the parties. In this regard, he commented that this kind of liability relies on the *antecedent* relationship between the parties, which was not present between the Defendant and the Yard/employer.

The second exception that control can amount to a duty of care was also not found present. As opposed to *Home Office v Dorset Yacht*[145], Justice Jay held that the Defendant had no control over the Yard/employer because there was no physical connection between the defendant and Bangladesh, nor could the Yard be regarded as part of the shipping group, who owned and sold the Vessel (the Angelicoussis Group). The latter could also not be established by way of tacit understandings between the Defendant and the Yard/employer. Lastly, the Justice held that control could not be inferred from the fact that the Defendant knew that the vessel had to be disposed of safely.[146] For a discussion on control, reference is made to the second paragraph under paragraph 3.3.2.1.

However, the third exception was analysed more in depth by Justice Jay, as the question of whether the Defendant could be argued to have created a state of danger exploited by a third party was arguable. In this regard, the Justice dismissed the Defendant's argument that the Vessel itself was inherently unsafe, but rather it was the working conditions of the Yard, which were unsafe. Justice Jay did so by inference that if the Defendant would be liable if the Deceased had died from asbestos then you could not separate the safety of the vessel from that of the working conditions, and inter alia would liability for asbestos also mean that of the unsafe working conditions. In other words, the danger created by the asbestos would be equal

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[142] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 60.
[143] Ibid., paragraph 61.
[144] As recalled these exceptions are three, see paragraph 3.2.2.1.
[145] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.
[146] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 48.

to those of the dismantling of the ship. Thus, the ship could not be regarded as safe in one way and then unsafe if not dismantled safely.[147] The manager and operator of an oil tanker would therefore be regarded as having created the source of danger.[148] In addition, Justice Jay stated that it would be artificial to conclude that the danger was created by the Yard/employer solely. It was a danger inherent in the vessel once broken up. This conclusion also aligns with the previous argument that end-of-life vessels are considered hazardous waste according to the Basel Convention[149] as stated under paragraph 2.2.1., it ought also to be considered inherently dangerous.

In assessing the requirement of fairness, justice and reasonableness, Justice Jay even added that the balancing of the arguments in this regard possibly ought to be done in a way *"slightly stretching the boundaries of established norms"*.[150] Thus, this arguably represents the tendency seen in relation to the duty of care in general. Indeed, it would not be appropriate to assess this in a simple summary judgement. One may argue that the mentioning by the High Court in this paragraph as well as by the Appellate Court of all the factors regarding safety, health and environmental issues in relation to the practice of ship recycling, greater weight must be put to that which or who suffers from others' exploitation of their stronger position. Here, the Appellate Court made note of the evidence *"that, despite international concern registered in many ways over many years, the dangerous working practices in the Bangladesh shipbreaking yards inevitably cause shockingly high rates of death and serious injuries"*.[151] This is also what has been confirmed by various international organisations, such as the World Labour Organisation and the Global Trade Union IndustriAll amongst others. [152]

Lastly, the Justice referred to the fact that in novel areas of the law, which are developing, and where it is not possible to give a certain answer it is not appropriate to strike out the claim. Instead, the claim must be decided on its facts.[153] The same was also relied upon in *Vedanta*

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[147] Ibid., paragraph 57.
[148] Ibid., paragraph 60.
[149] UNEP, Decision VII/26. Environmentally sound management of ship dismantling.
[150] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 63.
[151] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 12.
[152] 'The Toxic Tide'; Ship recycling: reducing human and environmental impacts, above no 5, 3; 'SPECIAL REPORT'.
[153] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 64; The Appellate Court agreed with Justice Jay in making this conclusion and the authorities used, see *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 23, 71.

Resources PLC & Another v Lungowe & Others[154], which evolved around the parent company's duty of care towards the mineworkers rather than the company responsible for the day-to-day activities.[155] Again, the reluctance may also due to the criticism of the procedure brought forward of the European Courts of Human Rights.[156]

Thus, the Claimant was held to have *"a real prospect of succeeding in relation to her claim in negligence"*[157] and the application for summary judgement and to strike out the claim was dismissed.

As to the standard of diligence of the Defendant, in relation also to commercial realities, the Justice held that fuel, as well as a the purchase price, would be factors to ensure safe recycling and that indeed a contractual structure could be built with liquidated damages to ensure the safe recycling. This was given further weight in the Appellate Courts decision, where it was stated that the Defendant *"could, and should, have insisted on the sale to a so-called 'green' yard"*[158]. This could have been done by the use of provisions in the sales agreement (MoA), where a tripartite agreement could have linked the inter-party payment to the delivery of the vessel to an approved yard. The contradictory part is here that a provision in the MoA (Clause 22) already stated that the buyer (Hsejar) had obligated itself to only sell to a ship breaking yard which would perform the demolition *"in accordance with good health and safety working practices"*.[159] Unfortunately, as the Court also highlighted, such practices are entirely ignored in the ship breaking industry where *"everyone turns a blind eye to what they know will actually happen"*[160]. Thus, one may argue that the Courts indicated how the Defendant could have met their duty of care owed vis-à-vis the Yard workers and thus perhaps that this is a slight indication towards a breach of the duty in case the duty would be found to exist. An interesting argument brought by the Defendant as support for not having breached the duty, was that because nearly all vessels ended up in South Asia, then the Defendant was not "deviating from standard practice". Here, Justice Jay, was very firm in his conclusion that *"if standard practice is inherently dangerous, it cannot be condoned as sound and rational even*

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[154] *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528 (13 October 2017).
[155] *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 paragraph 48.
[156] Van Dam, above no 49, 84.
[157] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 98.
[158] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 67.
[159] Ibid., paragraph 68.
[160] Ibid., paragraph 69.

though almost everybody does the same"[161]. This argument is thus another indication that fulfilling a duty of care, if established, for a ship owner, operator or the like, will not be met just because you follow the same practice as everyone else in the industry. Unless the practice can be condoned as safe for the human and environmental health, a satisfaction of a duty of care will require wider steps. Such steps may be to make sure that the sale of end-of-life vessels are not recycled at unsafe yards by way of accepting a lower price. Another step could be to engage with the yards more directly as to establish such safe practices for the long run. Some shipping companies[162] are very engaged in this, but so far it has not resulted in any of the yards meeting the standards required to be accepted to the European List of Recycling Facilities[163].

As is evident, the Courts discussed a number of facts relating to whether the Defendant could be held liable for its omission which led to a third party exploiting the danger created. To summarize the findings and analysis hereof it seems tone of the hurdles will be to establish that the Vessel was in inherently dangerous for the exception to apply. Ultimately, the three requirements for a duty of care must also be present and here the proximity seems to be the one most in question.

3.3.2.3 Choice of law

In this regard, the High Court briefly examined the question and in addition whether alternatives under articles 4[164], 7[165] and 26[166] under the Rome II Regulation[167] would mean that other laws than those of Bangladesh would apply. In brief, the High Court held that article 4 entailed that Bangladeshi law applied and thus the claim would be statute barred. However, he also found that pursuant to articles 7 and 26 of the Rome II the Claimant might be able to argue that English law could apply. However, the Appellate Court was not of the

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[161] Ibid., paragraph 15.
[162] One example hereof is Maersk, see A.P. Moeller Maersk, 'Leading Change in Ship Recycling Industry'.
[163] European Commission, 'Commission Implementing Decision (EU) 2020/95 of 22 January 2020 Amending Implementing Decision (EU) 2016/2323 Establishing the European List of Ship Recycling Facilities Pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council (Text with EEA Relevance)'.
[164] Accordingly, the main rule is the place of the tort/delict is applicable. The exception is found in paragraph 3, where another law can be applied, if this the tort/delict is found to be more closely connected hereto.
[165] This rules determines that for environmental damage the claim may be brought elsewhere than the starting point laid out in article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
[166] The article lays down the general public policy (ordre public) exception
[167] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

same opinion as regards article 7 under Rome II. In regards to article 26, the parties' on May 30th, 2019, exactly one year after the Deceased fell to his death, was evidence to the fact that the Respondent had had access to justice well before the expiration of the limitation date.[168] However, the High Court also held that wider policy arguments could be used in support of the public policy argument.[169] The Appellate Court did not find that the Respondent could meet the high hurdle of the public policy argument. Thus, only the argument of undue hardship would be left as to state that English law should apply. On the basis of various evidence presented only before the Appellate Court it held that the date of the Deceased's death had been wrongly identified to the Respondent's lawyers. This would perhaps entail undue hardship and could be decided by a preliminary hearing.

3.4 Sub-conclusion

Under English tort law, a remedy based on a duty of care exists. The duty requires a relationship of proximity, that the damage is reasonably foreseeable and that it is fair, just and reasonable to impose the duty. The general rule under English law is that no liability applies attached to omissions, except for certain situations, such as when there is a special relationship, control or a third party exploits the danger created.

The duty of care was used in *Hamida v Begum*. The case was only decided on factual assumptions as it the Defendant had filed a notice to strike out the claim. However, the Court held that the Claimants had a real prospect of succeeding with their claim and thus dismissed the notice. In doing so, the Courts held that the Claimants had a realistic claim as regards to establishing that the Defendant owed a duty of care based on the danger it had created by knowingly selling the Vessel at the given price with a low amount of fuel which was exploited by a third party. Thus, the Defendant ought reasonably to have foreseen this risk of damage and thus owed a duty of care vis-à-vis the Deceased.

[168] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 99.
[169] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraphs 85, 104.

4 Conclusion

When analysing the regulatory regime of ship recycling, one finds that both on an international level as well as on an EU level regulatory instruments have been implemented to ensure a safe recycling practice. The regulation is both aimed at the recycling of waste as well as specifically vis-à-vis end-of-life ships. The regulations however have three main gaps. For non EU-flagged vessels, one has to comply with the import and export rules laid down in the Basel Convention and EU Waste Shipment Regulation if one intends to dispose of the ship. Intent is however a subjective matter and thus hard to prove, which is one of the gaps in the regulatory framework. Another gap is that compliance is further based on the vessel being in the waters within the scope of the regulations. Thus, any decision to recycle an end-of-life ship can just be made outside the territories of parties to the regulations. Lastly, a gap for EU-flagged vessels is that the vessel can be reflagged prior to recycling which renders the EU Ship Recycling Regulation inapplicable. These gaps have led to the continued use of shipyards using unsafe and non-environmentally friendly practices where an increased profit may be a factor in the choice of yard.

However, under English Laws of Tort a duty of care exists, which has been used to argue that ship owners (and the ones identified herewith) are under a duty vis-à-vis shipyard workers. Generally, three requirements must be met for a duty of care to exist, namely proximity, foreseeability and it must be fair, just and reasonable to impose the duty. Additionally, some exceptions to the general rule that no liability attaches for omissions are three. Firstly, an exception exists where there is a special relationship. Secondly, a specific assumption of responsibility can lead to a duty. Lastly, where one party must protect the other from harm caused by third parties. Especially for the third exception, there will however be no general rule to take action to avoid harm from third parties that is except for in four circumstances. The first is when a special relationship creates an assumption of responsibility. The second is where there is a special relationship based on control. The third exception is when the defendant will be responsible for a state of danger exploited by a third part. Lastly, the fourth is when the defendant is responsible for property, which may be used by a third party to cause damage.

The duty of care was used in *Hamida v Begum* to argue that the former ship agent (the Defendant) was liable vis-à-vis a deceased shipyard worker, even though no direct relationship existed between the parties. Thus, it was argued that the Claimant was so closely and directly affected by the acts of the Defendant that the Defendant reasonably ought to have foreseen the damage inflicted upon the Claimant. The final decision in the case is yet to be decided as both the High Court and Appellate Court only decided the case on the notion to strike out the claim based on its fancifulness. However, the remarks made by the courts when deciding the case on its factual assumptions was that it was not so fanciful as to strike out the claim.

The Courts held that the case did not fit well within the principles laid down in *Donoghue v Stevenson*. However, the courts were more inclined to see that the Claimant had a real prospect of arguing that the Defendant owed a duty of care based on the harm it had created by selling the Vessel knowing it would end at a shipyard with poor working end environmental standards, which a third party (the Yard) exploited. Even though this would be a duty of care for an omission and the case was a mixture of acts and omissions, one may argue that in such cases the suggested approach of viewing omissions in a new way ought to be the way to decide cases forward. Thus, when dealing with a mixture of acts and omissions one may ask whether the act or omissions made the situation worse, and if answered affirmatively, this speaks in favour of imposing liability.

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6 Annexes

Annex A