UNIVERSITY OF SOUTHAMPTON

FACULTY OF SOCIAL SCIENCES

School of Law

THE EXTENT TO WHICH A SHIPOWNER HAS TO TAKE MEASURES TO PROTECT A SEAFARER FROM THE RISK OF BEING INJURED OR KILLED BY THE CRIMINAL ACTS OF PIRATES IN THE CONTEXT OF HIS/HER EMPLOYMENT:
AN ENGLISH NEGLIGENCE LAW PERSPECTIVE

by

Zoumpoulia Amaxilati

Thesis for the degree of Doctor of Philosophy

March 2019

UNIVERSITY OF SOUTHAMPTON
ABSTRACT

Faculty of Social Sciences
School of Law

Thesis for the degree of Doctor of Philosophy

The Extent to which a Shipowner has to Take Measures to Protect a Seafarer from the Risk of Being Injured or Killed by the Criminal Acts of Pirates in the Context of his/her Employment: An English Negligence Law Perspective

Zoumpoulia Amaxilati

The present thesis examines the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case. The examination is centred on the question of the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, with a view to clarifying the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

The outcome of the research is that a shipowner should conduct a maritime piracy specific risk assessment to introduce and enforce a maritime piracy specific ship security plan for the voyage to be undertaken, should inform a seafarer about the outcome of such assessment, and should harden the vessel against the risks identified by such assessment. If the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks has been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks has occurred, then a shipowner should not deploy private armed guards on board his/her ship. Conversely, an obligation to re-route his/her ship from a dangerous area may rest on a shipowner, but only in some exceptional circumstances.

Notwithstanding the focus of the thesis on the specific facts of maritime piracy, its example may offer an understanding of the future evolution of the application of the test of the hypothetical reasonable person in the employment context in general.

Table of Contents

Table of Cases

UK Cases

Table of Legislation

Statutes

Statutory Instruments

Explanatory notes

Codes

International Conventions

EU Legislative Materials

Table of ILO Documents

Table of IMO Documents

Table of Guidelines

Table of Collective Bargaining Agreements

Table of Standard Contracts

Table of War and Piracy Clauses

Author's Declaration

I, Zoumpoulia Amaxilati,

declare that the thesis entitled

"The Extent to which a Shipowner has to Take Measures to Protect a Seafarer from the Risk of Being Injured or Killed by the Criminal Acts of Pirates in the Context of his/her Employment: An English Negligence Law Perspective"

and the work presented in it is my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Part of this work has been published as: Zoumpoulia Amaxilati, 'To What Extent Does a Shipowner Have to Employ Private Armed Guards to Protect a Seafarer from the Risk of Being Injured or Killed by the Criminal Acts of Pirates in the Context of his/her Employment? An English Negligence Law Perspective' in Massimiliano Musi (ed), *Port, Maritime and Transport Law Between Legacies of the Past and Modernisation* (Bonomo Editore 2018).

Signature:

Date:

Acknowledgments

Firstly, I would like to express my sincere gratitude to my current supervisors Dr Melinee Kazarian and Professor Paul Todd for their insightful comments and encouragement, but also for the continuous support in all the time of writing of the present thesis. Besides my supervisors, I would like to thank my former supervisor Professor Hilton Staniland. Thanks to his support and encouragement, my PhD has not been only writing up a thesis for a three year period but also it has been a process where I obtained valuable skills and experiences to further my career.

Furthermore, I would like to thank my friend and colleague Dr Lijie Song, with whom I shared this journey of carrying out my doctoral research, and my friends Alexandra Chlorou, Marina Antoniadou, and Panagiotis Kalkanas, who are always by my side in everything that I do. Thank you for being so supportive and understanding.

Finally, I would like to thank my parents Pagona Zarpapi and Mauroudis Amaxilatis, my brother Dr Dimitrios Amaxilatis and my sister MD Efstratia Amaxilati for their love, support, help and encouragement in everything that I do. Last but not least, I would like to dedicate this work to my grand-parents Zoumpoulia and Dimitrios Amaxilatis. Thank you for everything you have done for me.

List of Abbreviations

BIMCO	Baltic and International Maritime Council
CMS	Contracted Maritime Security
CSEP	Coastal State Embarked Personnel
ECSA	European Community Shipowners' Associations
EU	European Union
HRA	High Risk Area
IBF	International Bargaining Forum
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
IGP & I Clubs	International Group of Protection and Indemnity Clubs
ILC	International Labour Conference
ILO	International Labour Organisation
IMB	International Maritime Bureau
IMEC	International Maritime Employer's Council
IMO	International Maritime Organisation
INTERMANAGER	International Association for the Ship Management Industry
INTERTANKO	International Association of Independent Tanker Owners
ITF	International Transport Workers' Federation
MCA	Maritime and Coastguard Agency
OCIMF	Oil Companies International Marine Forum
OEFF	One Earth Future Foundation
SAEs	State Afilliated Escorts
SEA	Seafarer's Employment Agreement
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
VPDs	Vessel Protection Detachments

Chapter One
Introduction

1.1. Aims and objectives

The specific purpose of the present thesis is to ascertain the extent to which a shipowner[1] has to take measures to protect a seafarer[2] from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, with a view to shedding light into the legal grounds upon which a seafarer, or the dependants of a seafarer,[3] may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy[4]

[1] The term 'shipowner' is broadly used in the present thesis to encompass the owner of the ship or another organisation or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner.
[2] The term 'seafarer' is broadly used in the present thesis to encompass any person who is employed or engaged or works in any capacity on board a ship.
[3] The term 'dependant' is defined in Section 1 (3) of the Fatal Accidents Act 1976, (c 30), as '(a) the wife or husband or former wife or husband of the deceased; (aa) the civil partner or former civil partner of the deceased; (b) any person who— (i) was living with the deceased in the same household immediately before the date of the death; and (ii) had been living with the deceased in the same household for at least two years before that date; and (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased; (c) any parent or other ascendant of the deceased; (d) any person who was treated by the deceased as his parent; (e) any child or other descendant of the deceased; (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage; (fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership; (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased'.
[4] The term 'maritime piracy' is broadly used in the present thesis to encompass piracy and armed robbery at sea. Piracy is defined in Article 101 of the United Nations Convention of the Law of the Sea, 1982, as follows: 'Piracy consists of any of the following acts: (a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'. Armed robbery is defined by the International Maritime Organisation (hereinafter IMO) in its Resolution A.1025 (26) (2009) Article 2 (2) 'Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships' as follows: 'Armed robbery against ships means any of the following acts: 1. Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; 2. Any act of inciting or of intentionally facilitating an act described above'.

attack in the context of his/her employment. To attempt to address the matter at hand involves the identification and analysis of a wide and diverse range of national laws. It is beyond the scope of the present thesis to examine all national laws. Instead, the scope of the present thesis will be limited to seafarers who work under English jurisdiction. As a result, English law will be analysed.

This thesis is, thus, a case of clarifying the English law pertaining to shipowner's liability, with particular reference to the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case, so as to be able to apply it to the specific facts of maritime piracy. Clarification of the matter of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment is of interest not only to shipowners and seafarers, but insurers are also grappling with the matter at hand.

1.2. Overview of the research background

Historically, maritime piracy has been one of the most severe threats encountered by the seafaring profession and the shipping industry in general. Through the course of its long history, maritime piracy has taken various forms, from plundering and privateering to hijacking large commercial vessels and kidnapping members of the crew, and has recognised, interchangeably, periods of great growth and of great recession.[5] Most notably, at the beginning of the 20th century, maritime piracy went through a period of great recession, which gave rise to ample discussion as to whether risks associated with entering piracy infested waters belonged to the past.[6]

[5] See, for example, A T Whately, 'Historical Sketch of the Law of Piracy' (1874) 3 The Law Magazine and Review 536; P W Birnie, 'Piracy: Past, Present and Future'(1987) 11 (3) Marine Policy 163. See also Alfred P Rubin, *The Law of Piracy* (2nd Edition, Naval War College Press 1998).
[6] Edwin D Dickinson, 'Is the Crime of Piracy Obsolete'(1924-1925) 38 Harvard Law Review 334.

However, the outbreak of Somali piracy, which first emerged at the end of the 20th century, escalated gradually, and reached its peak at the beginning of the 21st century with almost one actual or attempted maritime piracy attack every two days, came to reconfirm the enduring nature of maritime piracy as a threat to the seafaring profession and the shipping industry in general.[7] This is further confirmed by the fact that, in sequence to the elimination of maritime piracy off the coast of Somalia,[8] an increase was noticed to the rate of actual and attempted maritime piracy attacks off the coast of West Africa.[9] As a result, it is rather obvious that maritime piracy remains a contemporary problem, giving rise to a wide range of legal issues.[10]

It seems fair to say that, nowadays, the number of actual and attempted maritime piracy attacks has once again started to abate.[11] Unfortunately, however, the stage has

[7] For more details on the outbreak of Somali maritime piracy approximately ten years ago, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2008 Annual Report* (ICC-IMB 2009) 5 to 12; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2009 Annual Report* (ICC-IMB 2010) 5 to 12; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2010 Annual Report* (ICC-IMB 2011) 5 to 10; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2011 Annual Report* (ICC-IMB 2012) 5 to 10.

[8] It may be worth noting in this respect that there has been no successful maritime piracy attack off the coast of Somalia for more than three years between 2013 and 2016. For more details on the number of actual and attempted maritime piracy attacks off the coast of Somalia between 2013 and 2016, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC-IMB 2014) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC-IMB 2015) 5 to 10; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC-IMB 2016) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC-IMB 2017) 5 to 9.

[9] For more details on the number of actual and attempted maritime piracy attacks off the coast of West Africa between 2013 and 2016, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC-IMB 2014) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC-IMB 2015) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC-IMB 2016) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC-IMB 2017) 5 to 9.

[10] Namely, it gives rise to issues in relation to: (i) international law, (ii) jurisdiction, (iii) criminal prosecution, (iv) counter-piracy law, (vi) human rights, (vii) employment rights, (viii) charterparties, and (ix) marine insurance law.

[11] For more details on the number of actual and attempted maritime piracy attacks the past six years, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2012 Annual Report* (ICC-IMB 2013) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC-IMB 2014) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC-IMB 2015) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC-IMB 2016) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC-

not been reached yet where one could reasonably argue that risks associated with sailing through piracy infested waters have been eliminated.[12] There are tenable grounds for arguing so. First, the decrease to the rate of actual and attempted maritime piracy attacks off the coast of Somalia has been followed by an increase to the rate of actual and attempted maritime piracy attacks off the coast of West Africa.[13] Indeed, in 2012, the rate of actual and attempted maritime piracy attacks off the coast of West Africa was three times higher than the respective rate in 2005.[14]

Furthermore, Somali maritime piracy has recently been rekindled. In 2017, for example, after a three year low, seven actual and attempted maritime piracy attacks took place off the coast of Somalia.[15] Similarly, in the first six months of 2018, two actual and attempted maritime piracy attacks occurred off the coast of Somalia.[16] Clearly, these figures evidence that Somali pirates still have the capability and capacity to carry out maritime piracy attacks, especially if they come across ships that are not equipped with adequate precautionary measures against risks associated with sailing through piracy infested waters. It may be worth noting in this respect that the majority of the vessels attacked by pirates off the coast of Somalia in 2017 and 2018 had not adopted any precautionary measures to defend themselves against the risk of future maritime piracy attacks while transiting these waters.[17]

IMB 2017) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC-IMB 2018) 5 to 9.

[12] See, for example, Jon Huggins and other, 'Somali Piracy – Are we at the End Game?' (2015) 46 Case Western Reserve Journal of International Law 355.

[13] Note, here, that the last successful maritime piracy attack off the coast of Somalia took place in 2012.

[14] For more details on the number of actual and attempted maritime piracy attacks off the coast of West Africa in 2005 and 2012 respectively, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2005 Annual Report* (ICC-IMB 2006) 5 to 11; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2012 Annual Report* (ICC-IMB 2013) 5 to 9.

[15] For more details on the number of actual and attempted maritime piracy attacks off the coast of Somalia in 2017, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC-IMB 2018) 5 to 9.

[16] For more details on the number of actual and attempted maritime piracy attacks off the coast of Somalia in the first six months of 2018, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: Report for the Period of 1 January – 30 June 2018* (ICC-IMB 2018) 6 to 10.

[17] See, for example, Frank Gardner, 'Somalia Ship Hijack: Maritime Piracy Threatens to Return' (BBC, 16 March 2017) < https://www.bbc.co.uk/news/world-africa-39283911> accessed 2 February 2019.

Finally, the number of actual and attempted maritime piracy attacks in the wider region off the coast of South East Asia has remained significantly high in the past five years; with approximately one hundred and forty actual and attempted maritime piracy attacks in 2013; approximately one hundred and fifty actual and attempted maritime piracy attacks in 2014; approximately one hundred and seventy-eight actual and attempted attacks in 2015; approximately eighty-four actual and attempted maritime piracy attacks in 2016; approximately eighty actual and attempted maritime piracy attacks in 2017; and approximately forty-one actual and attempted maritime piracy attacks in the first six months of 2018.[18]

Most certainly, modern maritime piracy places seafarers at the centre of attention.[19] In most circumstances, pirates are not interested in gaining possession of the ship and/or the cargo, given that they do not have access to the infrastructures, which would allow them to sell the ship and/or the cargo for the purposes of extracting profit. Conversely, they are eager to kidnap or to take hostage seafarers for the purpose of extracting

[18] For more details on the number of actual and attempted maritime piracy attacks in the wider region off the coast of South East Asia, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC-IMB 2014) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC-IMB 2015) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC-IMB 2016) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC-IMB 2017) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC-IMB 2018) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: Report for the Period of 1 January – 30 June 2018* (ICC-IMB 2018) 6 to 10.

[19] For a detailed analysis of the operating methodology used by pirates, see Patrick Lennox and others, *Contemporary Piracy off the Horn of Africa* (Canadian Defence & Foreign Affairs Institute 2008); House of Commons, *Piracy off the Coast of Somalia: Tenth Report of Session 2010-12* (House of Commons, Foreign Affairs Committee 2011); Lauren Ploch and others, *Piracy off the Horn of Africa* (Report for Congress, Congressional Research Service 2011); Stig Jarle Hansen, *Piracy in the Greater Gulf of Aden: Myths, Misconceptions and Remedies* (Report 2009:29, Norwegian Institute for Urban and Regional Research 2012). See also Peter Chalk, 'Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses'(2010) XVI (II) Brown Journal of World Affairs 89; Nebojsa Nikolic and others, 'Are we Winning the War with the Pirates?' (2012) 63 (4) International Maritime Health 195, 195 to 199; Sandra L Hodgkinson, 'Current Trends in Global Piracy: Can Somalia's Successes Help Combat Piracy in the Gulf of Guinea and Elsewhere?'(2013) 46 (1) Case Western Reserve Journal of International Law 145, 147 to 149; Probal Kumar Ghosh, 'Strategies for Countering Somalian Piracy: Responding to the Evolving Threat' (2014) 70 (1) India Quarterly 15, 20 to 21; Ali Kamal-Deen, 'The Anatomy of Gulf of Guinea Piracy' (2015) 68(1) Naval War College Review 93. See finally Anamika Twyman-Ghoshal, 'Understanding Contemporary Maritime Piracy' (PhD Thesis, Northeastern University Boston 2012); Graham Caldwell, 'Seafarers and Modern Piracy' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014).

ransom payments from shipowners. To this end, they do not hesitate to employ unprecedented levels of violence during their attacks to put pressure on shipowners. Testimonies of released seafarers bring into light important information about the inhumane conditions seafarers had to face during their captivity. Experiencing systematic physical and psychological abuse that includes threats, assaults, systematic beating, deprivation of food, water and clothing, witnessing the assault of others, attempted murder, and even participating in simulated executions, to name but a few, is a common phenomenon for the victims of maritime piracy.[20]

Of course, the operating methodology just described was first adopted by pirates off the coast of Somalia. However, it was subsequently followed by pirates off the coast of West Africa. In the first six months of 2018, for example, approximately seventy-five seafarers have been kidnapped and taken hostage by pirates in Ghana and Nigeria, two of the most well-known piracy hot-spots off the coast of West Africa.[21] But, even when it comes to more traditional operating methodologies used by pirates, take, for example, the extortion of financial gain by stealing and selling cargo carried on board ships sailing through piracy infested waters, which is most commonly followed by pirates in the Gulf of Guinea, another well-known piracy hot-spot off the coast of West Africa, and in the wider area off the coast of South East Asia, the level of violence employed by pirates is considerable.[22] For that pirates have no financial interest in preserving the health and life of seafarers.

---

[20] See, for example, V Narayan, 'Sailor held by Somali pirates for over three years returns' (The Times of India City, 13 June 2014) <http://timesofindia.indiatimes.com/city/mumbai/Sailor-held-by-Somali-pirates-for-over-three-years-returns/articleshow/36451984.cms> accessed 2 February 2019; Monalisa Das, 'Living in captivity: Untold stories of Indians held hostage by Somali pirates' (The News Minute, 29 June 2016) <http://www.thenewsminute.com/article/living-captivity-untold-stories-indians-held-hostage-somali-pirates-45648> accessed 2 February 2019; Sofia Galani, 'The forgotten victims of Somali piracy' (University of Bristol Law School Blog, 7 November 2016) <http://legalresearch.blogs.bris.ac.uk/2016/11/the-forgotten-victims-of-somali-piracy/> accessed 2 February 2019.

[21] For more details on the number of seafarers kidnapped by pirates and taken hostage by pirates in the first six months of 2018, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: Report for the Period of 1 January – 30 June 2018* (ICC-IMB 2018) 11.

[22] For more details on the operating methodology followed by pirates off the coast of West Africa, see Sandra L Hodgkinson, 'Current Trends in Global Piracy: Can Somalia's Successes Help Combat Piracy in the Gulf of Guinea and Elsewhere?'(2013) 46 (1) Case Western Reserve Journal of International

It must follow then that, notwithstanding the recent decrease in the number of actual and attempted maritime piracy attacks, the threat of maritime piracy remains. Moreover, the potential risks to the health and life of seafarers working on board ships that are bound to cross piracy infested waters remain heightened. In fact, relevant studies indicate that, where the voyage to be undertaken is in piracy infested waters, the risks to the health and life of seafarers range from being slightly injured to being killed by the criminal acts of pirates in the context of their employment.[23] In 2017, for example, one hundred and eighty actual and attempted maritime piracy attacks occurred around the world.[24] Ninety-one seafarers were held hostage, seventy-five seafarers were kidnapped, ten seafarers were threatened, six seafarers were assaulted, six seafarers were injured, and three seafarers were killed as a result thereof.[25]

1.3. Research question and related queries

In light of the severe consequences that the risks of transiting piracy infested waters may have on the health and life of seafarers, I attempt in the present thesis to ascertain the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, with a view to shedding light into the legal grounds upon which a

---

Law 145, 147 to 149; Ali Kamal-Deen, 'The Anatomy of Gulf of Guinea Piracy' (2015) 68 (1) Naval War College Review 93, 100 to 101.

[23] See, for example, Marcus Oldenburg and others, 'Occupational Risks and Challenges of Seafaring' (2010) 52 Journal of Occupational Health 249; Douglas Stevenson, 'Piracy's Effect on Seafarers: A Way of Life' (2011) 2 (2) Maritime Law Bulletin 30; Sam Bateman, 'Sub-Standard Shipping and the Human Costs of Piracy' (2011) 3 (2) Australian Journal of Maritime and Ocean Affairs 57; Nebojsa Nikolic and others, 'Are we Winning the War with the Pirates?' (2012) 63 (4) International Maritime Health 195; Antonio Rosarion Ziello and others, 'Psychological Consequences in Victims of Maritime Piracy: the Italian Experience'(2014) 65 (1) International Maritime Health 28; Sanley Abila and others, 'Trauma, Post-trauma and Support in the Shipping Industry: The Experience of Filipino Seafarers after Pirate Attacks' (2014) 46 Marine Policy 132; Liz Booth, 'Effect of Piracy Long Term' (2015) 29 Maritime Risk International 69. See also Michael Stuart Garfinkle, 'The Psychological Impact of Piracy on Seafarers' (2012) The Seamen's Church Institute <http://chaplainsblog.seamenschurch.org/sites/default/files/sci-piracy-study-report-web_0.pdf> accessed 2 February 2019.

[24] For more details on the number of actual and attempted maritime piracy attacks in 2017, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC-IMB 2018) 12.

[25] For more details on the number of seafarers sustaining violence as a result of maritime piracy attacks in 2017, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC-IMB 2018) 12.

seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

Under English law, the subject matter of the present thesis, three potential causes of action may be available to a seafarer, or to the dependants of a seafarer, namely: a cause of action under the contract of employment; a cause of action under the tort for breach of statutory duty; and a cause of action under the tort of negligence. While, in principle, a potential claimant can choose which cause of action to pursue, in practice, he/she should pursue the cause of action that is more favourable to him/her. This spurs the question as to whether existing contractual or statutory provisions deal sufficiently with the matter of compensation for personal injury or loss of life caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment. If so, then a claim under the tort of negligence will not be necessary. For that such claim clearly places the heaviest burden on a seafarer, or on the dependants of a seafarer, to prove fault on the part of a shipowner. If, on the other hand, both existing contractual and statutory provisions fail to address sufficiently the matter at hand, then a claim under the tort of negligence will be the only option.

In an attempt to address the question described in the previous paragraph, I will analyse one by one all the potential causes of action, which may be available to a seafarer, or to the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. In this regard, I will focus on two directions. First, I will explore the interrelationship between contract, statute, and the common law in the field of the employment relationship between a shipowner and a seafarer. As a related issue, I will scrutinise the extent to which some typical examples of contractual, statutory, and common law employment rights in respect of health and safety at work will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

In particular, I will consider two main types of clauses, namely, health and social security protection benefits clauses and lump sum compensation clauses, which seafarers' employment agreements (hereinafter SEAs) for employed seafarers may have included. As will appear further on, such terms may well provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. However, attention needs to be paid to the wording used when drafting such terms, if it is intended for them to extend far enough to cover personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. In addition, it should be borne in mind that, unless a shipowner and a seafarer are proactive in drafting a contractual term, which specifically refers to maritime piracy, the application of a general contractual term may be problematic especially in the most complex of cases where a seafarer is injured or killed by the criminal acts of pirates while held hostage ashore. Finally, it should not be overlooked that the protection offered by such terms may be rather unsatisfying in the situation under discussion in the present thesis.

I will then carry out an examination of a selected number of statutory provisions. Most certainly, some of these statutory provisions may offer some assistance to a seafarer, or to the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment; but only in some exceptional circumstances falling within the scope of the aforesaid statutory provisions; and if, and to the extent that any breach of such statutory provisions will continue to give rise to a right of a civil claim for damages on and after the day the United Kingdom (hereinafter UK) withdraws from the European Union (hereinafter EU). In every case, the aforementioned statutory provisions may be used as evidence, although not conclusive, of the steps which a reasonable shipowner should take to discharge his/her

common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.[26]

I will finally examine one by one the four elements of the tort of negligence, with a view to ascertaining the extent to which the English law of negligence will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. This is because, in principle, for a seafarer, or for the dependants of a seafarer, to bring a successful compensation claim in negligence in the situation under discussion in the present thesis, they must prove on the civil standard of balance of probabilities that the shipowner owed the seafarer a common law duty of care; that the shipowner breached that common law duty of care; that the shipowner's breach caused the injury or death, which the seafarer suffered as a result thereof; and that the seafarer's injury or death was attributable because it was not too unreasonable as to be too remote in the circumstances.[27]

In this respect, I will identify a number of ambiguities and potential challenges in dealing with all the elements of a tort claim in the situation under discussion in the present thesis. In the aftermath of this examination, I will argue that, while the duty of care element, the causation element, and the remoteness element of the tort of negligence are less likely to be problematic in the present context, the same cannot be said in relation to the breach of duty of care element. Of course, the legal standard of care required of a shipowner will be that of the hypothetical reasonable shipowner.[28]

---

[26] See, for example, *Franklin v the Gramophone Co Ltd* [1948] 1 KB 542 (CA) 558 per Lord Justice Somervell; *Bux v Slough Metals Ltd* [1974] 1 All ER 262 (CA) 273 to 274 per Lord Justice Stephenson. For more details on the use of legislation as evidence in aid of a claim in negligence, see David Wilby, 'The General Principles of Negligence' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.107] to [2.113]; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 8, in particular [8 - 51] to [8 - 54].

[27] For the elements of the tort of negligence, see *Donoghue v Stevenson* [1932] AC 562 (HL) 579 per Lord Atkin; *Lochgelly Iron and Coal Company Ltd v McMullan* [1934] AC 1 (HL) 9 per Lord Atkin.

[28] See, for example, *Paris v Stepney Borough Council* [1951] AC 367 (HL) 382 per Lord Normand*; Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 558 per Lord Morton, 576 per Lord Tucker; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 (HL) 166 per Lord Keith; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 (QB) 1783 per Mr Justice Swanwick; *Tarrant v Ramage and others (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 190 per Mr

Although this may seem fairly straightforward, the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case could be rather confusing. Especially when it comes to cases, in which the alleged negligence consists of a shipowner's failure to take measures to protect a seafarer from the risk of being injured or killed by the deliberate wrongdoing of third parties in the context of his/her employment.

For the courts have systematically failed to articulate in a consistent and comprehensive manner the grounds upon which they have reached their decisions when dealing with that kind of cases.[29] The result is that, notwithstanding a sheer volume of cases has been developed in this area, the principles underlying the various instances where the breach of duty of care element has or has not been fulfilled remain rather confused and incoherent. Clearly, this emphasises the need to rethink the process of the application of the test of the hypothetical reasonable person in this context. In terms of rationalising this process, I will address three specific queries.

The first considers whether, and if so the extent to which, the element of cost should continue to be one of the factors which have to be weighed by the courts when determining the precautionary measures that should have been taken by a shipowner to meet the standard of care required of a shipowner in discharge of his/her common

---

Justice Clarke; *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [109] per Lord Reed and Lord Hodge.

[29] See, for example, *Houghton v Hackney Borough Council* (1961) 3 KIR 615 (QB); *Williams v Grimshaw* (1967) 3 KIR 610 (QB); *Peter Carlton v The Forrest Printing Ink Company Limited* [1980] IRLR 331 (CA); *Longworth v Coppas International* 1985 SC 42 (CS); *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB); *Moore v Kirklees Metropolitan Council* [1999] EWCA Civ J0430-29; *Rahman v Arearose Ltd* (QB, 18 February 1999); [2001] QB 351 (CA); *Cook v Bradford Community Health NHS* [2002] EWCA Civ 1616; *Waugh v London Borough of Newham* [2002] EWHC 802 (QB); *Humphrey v Tote Bookmakers* [2003] EWHC 217 (QB); *Harvey v Northumberland County Council* [2003] EWCA Civ 338; *Millward v Oxford County Council* [2004] EWHC 455 (QB); *Buck v Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576; *Lloyd v Ministry of Justice* [2007] EWHC 2475 (QB); *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB); *Vaile v London Borough of Havering* [2011] EWCA Civ 246; *McCarthy v Highland Council* [2011] CSIH 51; *Mitchell v United Co-Operative Ltd* [2012] EWCA Civ 348; *Nicholls v Ladbrokes Betting & Gaming Ltd* [2013] EWCA Civ 1963; *Smith v Ministry of Defence* [2013] UKSC 41.

law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case. The second revolves around the role of the concept of policy in this regard. In particular, it examines whether any consideration about policy should be just one of the many factors that have to be weighed by the courts in this context or whether the concept of policy should operate on a discrete level. As a related issue the meaning of the relevant policy considerations will also be considered. The third scrutinises whether, and if so the extent to which, any evidence of the practice commonly followed by those engaged in the particular activity should influence the precautionary measures that should have been taken by a shipowner to comply with the legal standard of care required of a shipowner to discharge the aforesaid common law duty of care owed to a seafarer in a particular case.

Following the rationalisation of the process of the application of the test of the hypothetical reasonable person in this area, a coherent legal basis will be identified upon which I will then address the question of the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. In order to lay down the ground for the discussion of the aforesaid question, I will have to draw a distinction between scenarios where the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is low or medium and scenarios where the probability of the risk at hand is real and of considerable high level. Because, in principle, in all cases, the level of precautionary measures which must be taken should be proportioned to the risk created.[30]

This implies that, if the probability of the risk at hand is low or medium, take, for example, instances where the voyage to be undertaken is in piracy infested waters in which only a low number of maritime piracy attacks have been reported and/or in piracy infested waters in which a low number of incidents of injury or death of seafarers as a result of maritime piracy attacks have occurred, then it will be enough for me to explore the extent to which a shipowner has to take soft precautionary

[30] *Read v Lyons* [1947] AC 156 (HL) 173 per Lord Macmillan.

measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. In particular, the extent to which a shipowner has to carry out a maritime piracy specific risk assessment, the extent to which a shipowner has to inform a seafarer about the outcome of the aforesaid assessment, and the extent to which a shipowner has to harden the vessel against the risks identified by a maritime piracy specific risk assessment will be discussed.

If, on the other hand, the probability of the risk at hand is real and of considerable high level, like, for example, when the voyage to be undertaken is in designated high risk areas, in areas, in which a significant number of maritime piracy attacks has been reported or in areas, in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks has occurred, then I will have to ascertain the extent to which a shipowner has to take hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. More specifically, the extent to which a shipowner has to deploy private armed guards on board a ship and the extent to which a shipowner has to re-route a ship from a dangerous route will be analysed.

It may be worth explaining here that the reasons of my decision to distinguish between soft and hard precautionary measures are twofold. On the one hand, there are practical reasons for drawing such a distinction. It allows me to deal with precautionary measures that will be necessary in all the circumstances where the probability of the risk at hand is real, no matter whether the level of risk at hand is low, medium or high and precautionary measures that will only be necessary when the probability of the risk at hand is real and of considerably high level separately. This makes the analysis in Chapters 4 and 5 more comprehensive, especially if one considers the wide range of precautionary measures available to shipowners in the fight against maritime piracy. On the other hand, drawing a distinction between soft and hard precautionary measures emphasises that the risk is on a spectrum and that greater precautionary measures must be taken as the level of risk increases. The decision to distinguish between soft and hard precautionary measures does not have

any further implications, since both precautionary measures will remain governed by the same analytical approach that will be used to evaluate them.

The questions outlined in the previous paragraphs will thus form the basic matrix for analysing the matter of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment. There will, however, be an emphasis on the English law of negligence, with particular reference to the process of application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. In the aftermath of this analysis, I will be able to say what a shipowner should or should not do to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment in a particular case. As a result, questions as to when a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment will be easier to address.

1.4. Originality

Up until now, the topic of the present thesis had only been touched by academic writers in a brief and superficial manner either on its own[31] or as a related issue when dealing with topics, such as the legal framework pertaining to the use of private armed guards on board ships as an extra layer of protection against risks associated with sailing through piracy infested waters,[32] the seafarers' right to wages while held

[31] See, for example, Alexander Lush, 'Troubled Waters' (2011) 155 (4) Solicitors' Journal 11; Megen Gold, 'And Justice for Ali? An Analysis of a Shipowner's Duty of Care in Piracy and Armed Robbery Attacks' (2016) 47 (4) Journal of Maritime Law and Commerce 501.
[32] See, for example, Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8.

hostage ashore by pirates,[33] the seafarers' right to redress from flag and coastal States for failing by omission to uphold the human rights of seafarers in the face of a maritime piracy attack,[34] and the violations of the human rights of seafarers, and especially those taken hostage by pirates,[35] to name but a few. Thus, the present thesis, being the first attempt to consider the topic at hand in a systematic and comprehensive manner, comes to fill a considerable gap in the relevant literature.

Aside from this general contribution, a number of specific novel contributions are brought about in this thesis. The first revolves around the examination of the extent to which a seafarer's employment agreement (hereinafter SEA) or the relevant regulatory framework provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Although the present thesis does not deal with contractual and regulatory aspects directly, the focus being on the English law of negligence, questions as to the extent to which a SEA or the relevant regulatory framework provide for compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment are raised to explain why the present thesis adopts an English negligence law perspective. An analysis of clauses inserted to a SEA and of existing statutory employment rights does not seem to have been done so far, not even in relation to claims for personal injury or loss of life, which a seafarer suffered in the context of his/her employment, in general. Therefore, the value of the present thesis goes beyond the maritime piracy context to fill a gap in the wider literature on maritime labour law.

Another specific original contribution to the wider literature on maritime labour law is brought about in the analysis of the issue of the third group of amendments to the Maritime Labour Convention, 2006, as amended. It may be worth noting in this

[33] See, for example, Graham Caldwell, 'Seafarers and Modern Piracy' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014).
[34] See, for example, Peter G Widd, 'The Seafarer, Piracy, and the Law: a Human Rights Approach' (PhD Thesis, University of Greenwich 2008).
[35] See, for example, Aysun Yucel, 'The Impact of Somali Piracy on Seafarers' Rights: a Cross-Disciplinary Assessment' (Master Thesis, Lund University 2012); Sofia Galani, 'Somali Piracy and the Human Rights of Seafarers' (2016) 34 (1) Netherlands Quarterly of Human Rights 71.

respect that such an analysis does not seem to have been done so far; especially in relation to a seafarer's, or the dependants' of a seafarer, right to obtain compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

Furthermore, for the first time, the present thesis draws attention to the uncertainty pertaining to the extent to which any breach of merchant shipping health and safety at work regulations will continue to give rise to a right of a civil claim for damages especially on and after the day the UK withdraws from the EU. To this end, two issues, which have never been intertwined before in such a way, are discussed. On the one hand, the effect of Section 69 of the Enterprises and Regulatory Reform Act 2013, (c 24), on merchant shipping health and safety at work regulations is considered. On the other hand, the potential impact of the withdrawal of the UK from the EU on merchant shipping health and safety at work regulations is analysed. Here, again, the value of this thesis goes beyond the maritime piracy context to fill a gap in the literature on the future of merchant shipping health and safety at work regulations.

In rationalising the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case, yet another specific original contribution to the wider literature on employer's liability is brought about in this thesis. Of course, the specific benefit of this task is to identify the legal framework upon which the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment is ascertained. Nevertheless, the example of the present thesis may offer an understanding of the future evolution of the process of the application of the test of the hypothetical reasonable person beyond the situation at hand in the present thesis.

By way of illustration, it may be instructive of the future development of the process of the application of this test not only when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment to all cases where the issue of liability and compensation for personal injury and loss of life, which a seafarer suffered in the context of his/her employment, arises for consideration, but also when determining the precautionary measures that should have been taken by a shore-based employer to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment to all cases where the issue of liability and compensation for personal injury and loss of life, which a shore-based employee suffered in the context of his/her employment, is under examination.

When it comes to the latter cases, the practical significance of the suggested process of the application of the test of the hypothetical reasonable person may be even greater. Because Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24), abolished the right to bring a civil claim for damages for any breach of health and safety at work regulations; especially when the aforementioned regulations provide for strict liability on the part of the employer. Thus, it is submitted that the suggested process of the application of the test of the hypothetical reasonable person provides an alternative venue to ensure that, notwithstanding the abolition of strict liability, employees will continue to enjoy the same level of protection in this area.

Finally, the originality and novelty of the present thesis is traced back to two features of the analysis provided in the present thesis. First, for the first time, the present thesis distinguishes between soft and hard precautionary measures. This distinction is crucial to the analysis provided in the present thesis because it helps to understand where the limits are to be set in relation to the precautionary measures, which a shipowner should take to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment in a particular case. Secondly, for the first time, the present thesis attempts to link what has already been

known in relation to the legal framework pertaining to specific precautionary measures, such as the conduct of a maritime piracy specific risk assessment, the use of private armed guards on board a ship, and the right to re-route a ship from a dangerous area, to name but a few, with the question of the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

1.5. Methodology

I have carried out the present thesis through the method of doctrinal analysis.[36] In particular, I have built the present thesis from a base of case law, principally from English and Scottish Courts. Note, here, that, in so far as the issue of employer's/shipowner's liability is concerned, English and Scottish law appears to be the same. In order to trace the relevant case law, I have used online sources. These included online platforms dedicated to legal research, such as WestLaw, iLaw, LexisNexis, and JustCite. Given the lack of cases, in which the alleged negligence consisted of a shipowner's failure to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, I have collected the relevant case law as follows.

At one extreme, I have reviewed and considered cases dealing with the issue of employer's/shipowner's liability for personal injury or loss of life, which a shore-based employee/seafarer suffered in the context of his/her employment. In this

[36] For more details on the method of doctrinal analysis, see Richard Posner, 'The Present Situation in Legal Scholarship' (1980) 90 Yale Law Journal 1113; Stephen Smith, 'In Defense of Traditional Legal Scholarship: A Comment' (1992) 63 University of Colorado Law Review 627; Emerson Tiller and other, 'What is Legal Doctrine?' (2006) 100 Northwestern University Law Review 517; Terry Hutchinson and other, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83; Salim Ibrahim Ali and others, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 (1) International Journal of Trend in Research and Development 493. See also Paul Chynoweth, 'Legal Research' in Andrew Knight and other (ed), *Advanced Research Methods in the Built Environment* (Wiley – Blackwell, 2008); Jan Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel and others (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017). See finally Michael McConville and other (eds) *Research Methods for Law* (2nd Edition Edinburgh University Press 2017); Dawn Watkins and other, *Research Methods in Law* (2nd Edition Routledge 2017); Terry Hutchinson, *Researching and Writing in Law* (4th Edition Thomson Reuters Australia 2018).

respect, I have placed particular emphasis on cases, in which the alleged negligence consisted of a shore-based employer's/shipowner's failure to take measures to protect a shore-based employee/seafarer from the risk of being injured or killed by the criminal acts of a third party. However, I have excluded from the analysis cases where the shore-based employer owes common law duties of care both to the shore-based employee and the third party, for example where the third party is a patient, a pupil, or a prisoner. This is because the latter cases involve questions of balance which are alien to the situation under discussion in the present thesis.

At the other extreme, I have scrutinised cases dealing with the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a defendant to meet the legal standard of care required of a defendant in discharge of his/her common law duty of care. In this regard, I have focused on cases, in which the claimant's claim relates to damage that involves non-economic values, such as personal injury and loss of life. Cases, in which the claimant's claim relates to damage that involves pure economic values, such as loss of property, have been discussed to a lesser extent for comparative purposes. Overall, reviewing and considering the relevant case law has permitted the existing doctrine on the scope and content of a shore-based employer's/shipowner's common law duty of care to safeguard the health and safety of a shore-based employee/seafarer in the context of his/her employment to be identified, analysed, clarified, and applied to the specific facts of maritime piracy.

I have then supplemented the case law described in the previous paragraphs with national legislation. Key provisions of Acts, Statutory Instruments, Codes, and Guidelines have been reviewed and considered where relevant to the analysis. It may be worth noting here that I have placed particular emphasis on legislation in relation to the employment relationship between a shipowner and a seafarer rather than on legislation pertaining to the employment relationship between a shore-based employer and a shore-based employee. This is because, in the field of the employment

relationship between a shipowner and a seafarer, general employment legislation does not often apply. Instead, specific merchant shipping legislation exists in this regard.

In a nutshell, the purpose of the analysis of the aforesaid legislative provisions has been twofold in the present thesis. On the one hand, it has shown the extent to which the legislative provisions at hand will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. On the other hand, it has permitted the impact of national legislation upon the scope and content of a shipowner's common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment to be drawn out. In order to trace the relevant national legislation, I have used online sources. The online sources included online platforms dedicated to legal research, such as WestLaw, and official websites, such as < http://www.legislation.gov.uk/ >.

In addition to national legislation, I have complemented the case law with international conventions, official documents drawn by the International Maritime Organisation (hereinafter IMO) and the International Labour Organisation (hereinafter ILO), and guidelines for shipowners, ship operators, masters, and seafarers for protection against risks associated with entering piracy infested waters drawn by the Baltic and International Maritime Council (hereinafter BIMCO), the International Chamber of Shipping (hereinafter ICS), the International Group of Protection and Indemnity Clubs (hereinafter IGP&I Clubs), the International Association of Independent Tanker Owners (hereinafter INTERTANKO), the International Association for the Ship Management Industry (hereinafter INTERMANAGER), and the Oil Companies International Marine Forum (hereinafter OCIMF).

The aforesaid international legal instruments and policy documents contain mandatory principles of international public law for all ships within their application and voluntary obligations that shipowners agreed they will respect with regard to maritime piracy respectively. These mandatory principles and voluntary obligations have no mandatory effect under private law. Thus, it is important to examine the

extent to which such mandatory principles and voluntary obligations can be interpreted as containing enforceable obligations in private law towards a shipowner. Indeed, reviewing and considering the relevant international legal instruments and policy documents has revealed how such mandatory principles and voluntary obligations fit in with the existing system of private law that allows a seafarer, or the dependants of a seafarer, to obtain compensation from a shipowner, if the seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. In order to trace the aforesaid international legal instruments and policy documents, I have used online sources including official websites, such as <http://www.imo.org>, < www.ilo.org>, and < www.bimco.org>, to name but a few.

Furthermore, I have enriched the relevant case law with terms included in SEAs. The aforementioned terms have been derived from the model format for SEAs for employed seafarers drafted by the Maritime and Coastguard Agency (hereinafter MCA) and the International Transport Workers' Federation (hereinafter ITF) – International Maritime Employer's Council (hereinafter IMEC) International Bargaining Forum (hereinafter IBF) International Collective Bargaining Agreement 2019 - 2022. More specifically, both terms providing for health and social security protection benefits and terms providing for lump sum payments in the event of personal injury or loss of life caused to a seafarer in the context of his/her employment have been reviewed and considered where relevant to the analysis.

Overall, reviewing and considering the aforementioned terms has fulfilled two purposes in the present thesis. It has shed light into the extent to which such terms will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Moreover, it has permitted the impact of contractual terms upon the scope and content of a shipowner's common law duty of care owed to a seafarer in the context of his/her employment to be drawn out. In order to trace the relevant terms, online sources have been used. The online sources included official websites, such as <www.gov.uk> and <http://www.itfseafarers.org>.

Finally, I have supplemented the aforesaid case law with literature. Books, journal articles, reports, and thesis have been reviewed and considered where relevant to the analysis. It may be worth noting here that examining the relevant literature on an issue by issue basis rather than on a separate chapter has been preferred in the present thesis. For that such an approach allows for a flexible and more focused analysis of the relevant literature. In order to trace the relevant literature, I have used both library based sources and online sources. The library based sources included hard copies of books and journals. The online sources included online platforms dedicated to legal research, such as WestLaw, iLaw, LexisNexis, and HeinOnline.

1.6. Structure

In line with the rationale described in section 1.3,[37] I will begin the process of clarifying the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, by considering in chapter 2 of the present thesis the interrelationship between contract, statute, and the common law and the extent to which contractual, statutory, and common law employment rights in this area will provide for compensation in the situation under discussion in the present thesis.

I will then continue by rethinking in chapter 3 of the present thesis the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment, with a view to identifying a coherent legal basis upon which I will then ascertain in chapters 4 and 5 of the present thesis the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

[37] See above at pages 7 to 14.

In chapter 4 of the present thesis, I will consider the question of the extent to which a shipowner has to take soft precautionary measures in this context. Finally, in chapter 5 of the present thesis, I will examine the extent to which a shipowner has to take hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment; as already seen in section 1.3, this question arises only where the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks has been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks has taken place.[38]

[38] See above at pages 12 to 13.

Chapter Two
Setting the Scene: Contract, Statute, and the Common Law

2.1. Introduction

In the present chapter I will carry out the first step in the process of clarifying the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. This task consists of exploring the interrelationship between contract, statute, and the common law in respect of health and safety at work in the field of the employment relationship between a shipowner and a seafarer. As a related issue it touches upon scrutinising the extent to which contractual, statutory, and common law employment rights in this area will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

Where a seafarer, or the dependants of a seafarer, seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, three causes of action may be available to them. Namely, these include a cause of action under the contract of employment; a cause of action under the tort for breach of statutory duty; and a cause of action under the tort of negligence. In passing, it may be worth noting here that, in the event of death of a seafarer as a result of a maritime piracy attack in the context of his/her employment, two potential actions are available.

The first is a ‘survival’ action under Section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934, (c 41), whereby the seafarer’s estate may bring an action on behalf of the seafarer for the seafarer’s own losses. In this regard, the seafarer’s estate must prove that a cause of action had arisen, which the seafarer could pursue, and that that cause of action was vested in the seafarer at the time of death. In the maritime

piracy context, a 'survival' action may be of great practical significance especially where the seafarer had suffered physical injury prior to his/her death, and where the seafarer's death occurred long after his/her physical injury. This covers circumstances where the seafarer does not die instantaneously in the maritime piracy attack which injured him/her; or where the seafarer suffers his/her injury while held hostage by pirates, but he/she does not die until some time after his/her injury.

The second is a 'wrongful death' action under Section 1 (1) of the Fatal Accidents Act 1976, (c 30), whereby the seafarer's dependants may sue, on their own behalf, for their loss of dependency. In this regard, the claimants must establish that the deceased seafarer would have had a claim against the shipowner but for his/her death, that the claimant falls within the categories of a dependant described in Section 1 (3) of the aforesaid Act,[39] that the claimant has suffered a loss of dependency,[40] and that the claim is not barred or excluded.[41] In the maritime piracy context, a 'wrongful death' action may be of great practical significance especially where the aforesaid dependency relationships arise. This covers, but is not limited to, circumstances where the deceased seafarer was married; or where the deceased seafarer had children.

In principle a seafarer, or the dependants of a seafarer, are free to pursue the cause of action that is most suitable for them. This implies that, where a contractual or

[39] Note, here, that the categories of a dependant are defined in Section 1 (3) of the Fatal Accidents Act 1976, (c 30), as follows: '(a) the wife or husband or former wife or husband of the deceased; (aa) the civil partner or former civil partner of the deceased; (b) any person who— (i) was living with the deceased in the same household immediately before the date of the death; and (ii) had been living with the deceased in the same household for at least two years before that date; and (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased; (c) any parent or other ascendant of the deceased; (d) any person who was treated by the deceased as his parent; (e) any child or other descendant of the deceased; (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage; (fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership; (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

[40] This implies that the claimant reasonably expected to receive a pecuniary benefit arising from his/her relationship with the deceased and that he/she would have received it, but for the seafarer's death.

[41] For the factors that may preclude a dependant from bringing a 'wrongful death' action under Section 1 (1) of the Fatal Accidents Acts 1976, (c 30), see *Dick v Falkirk Burh* 1976 SC (HL) 1. See also English Law Commission, *Claims for Wrongful Death* (Law Com No 263, 1999) [2.3] to [2.5].

statutory provision deals sufficiently with the matter of compensation for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, then a claim under the tort of negligence will not be preferred. This is because a claim under the tort of negligence imposes the heaviest burden on the claimant to prove fault on the part of the defendant.

Indeed, Lord Drummond Young in *Cairns v Northern Lighthouse Board* explained that there are no advantages in bringing a claim under the tort of negligence when the health and safety at work legislation applies.[42] His Lordship explained that most accidents at work are now likely to fall within the scope of legislation designed to ensure health and safety at work.[43] Nearly all of the aforesaid legislation provides for strict liability, subject usually to the defence of lack of reasonable practicability.[44] For this reason, it is considerably easier to establish liability under such legislation than at common law.[45] Thus, it is rather evident that, from a claimant's perspective, it is preferable to bring a claim under health and safety at work legislation than under the tort of negligence. By parity of reasons, the same may be said in relation to a claim under the contract of employment and a claim under the tort of negligence.

However, as will appear further on, despite the increased codification and the development of comprehensive contractual terms in respect of health and safety at work in the field of the employment relationship between a shipowner and a seafarer, the matter of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment will almost always not be sufficiently addressed by contractual and statutory provisions.[46] The common law thus will continue to have an important role to play in this regard, rendering it necessary to go through the next step in the process of shedding light into the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to

[42] [2013] CSOH 22, [43].
[43] *Cairns v Northern Lighthouse Board* [2013] CSOH 22, [43].
[44] ibid.
[45] ibid.
[46] See Chapter 2, Sections 2.2 and 2.3, Sub-sections 2.2.1 to 2.2.2 and 2.3.1 to 2.3.4 at pages 29 to 75.

claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

In other words, if existing contractual and statutory employment rights in respect of health and safety at work in the field of the employment relationship between a shipowner and a seafarer are found to eschew dealing with the question at hand, then attention will need to turn to the English law of negligence for deciding on the matter of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment. In particular, emphasis will need to be paid to the process of the application of the test of the hypothetical reasonable person, with a view to identifying a coherent legal basis upon which I will then ascertain the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. That will form the subject matter of the following chapters.

Before moving on to explore the role of contract in respect of health and safety at work in the field of the employment relationship between a shipowner and a seafarer, it may be worth noting one point. For the purposes of the present chapter, I will place particular emphasis on the employment relationship between a shipowner and a seafarer rather than on the employment relationship between a shore-based employer and a shore-based employee. This is because, in the case of the employment relationship between a shipowner and a seafarer, general employment legislation does not often apply and alternative merchant shipping legislation exists.[47] However, I

[47] See, for example, Employment Rights Act 1996, (c 18), Section 199 (1) stating that '(1) Sections 1 to 7, Part II and Sections 86 to 91 do not apply to a person employed as a seaman in a ship registered in the United Kingdom under a crew agreement the provisions and form of which are of a kind approved by the Secretary of State [or an agreement specified in regulations under section 32 (a) of the Merchant Shipping Act 1995]. (2) [Sections 8 to 10, Part III, Sections 44, 45, 47, 47C, 47E, 47F, 50 to 57B and 61 to 63, Parts 6A, 7, 8 and 8A, Sections 92 and 93] and [...] [Part X] do not apply to employment as master, or as a member of the crew, of a fishing vessel where the employee is remunerated only by a share in the profits or gross earnings of the vessel. [...] (4) [Sections 8 to 10 and 50 to 54] do not apply to employment as a merchant seaman. […]'. For more details on merchant shipping legislation, see

recognise that some of the matters under discussion in the present chapter may also be relevant to the employment relationship in general.

2.2. Contract

It is beyond any doubt that the contract of employment constitutes the basis of the relationship between a shipowner and a seafarer. Indeed, a seafarer working on board a United Kingdom (hereinafter UK) registered ship shall have an agreement in writing with another person in respect of his/her work on board that ship.[48] Where a seafarer

---

Erika Szyszczak, 'Employment Protection and Social Security' in Roy Lewis (ed), *Labour Law in Britain* (Basil Blackwell 1986) Chapter 13, at page 362; Paul Newdick, 'United Kingdom' in Deidre Fitzpatrick and other (eds), *Seafarers' Rights* (Oxford University Press 2005) Chapter 16; Desislava Dimitrova, *Seafarers' Rights in the Globalised Maritime Industry* (Kluwer Law International 2010) Part III; Grahame Aldous, 'Shipping and Workers on Ships' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 14; Aengus Fogarty, *Merchant Shipping Legislation* (3rd Edition, Informa 2017) Chapters 2 and 3; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 10, in particular [10 - 168].

[48] Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014 (SI 2014/1613), as amended, Regulation 9 (1). See also Marine Guidance Note 477 (M), Section 4.1. In passing it may be worth noting here that the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, implement into English law the provisions of the Maritime Labour Convention, 2006, as amended, which was adopted at the 94th (Maritime) Session of the International Labour Conference (hereinafter ILC) in February 2006 and came into force in August 2013. For more details on the adoption of the Maritime Labour Convention, 2006, as amended, see ILC, 'Provisional Record Part I – Report of the Committee of the Whole' (International Labour Office 2006); ILC, 'Provisional Record Part II – Proposed Consolidated Maritime Labour Convention' (International Labour Office 2006); ILC, 'Provisional Record – Text of the Maritime Labour Convention submitted by the Drafting Committee' (International Labour Office 2006). See also ILC, 'Report of the Chairperson of the Governing Body to the 94th (Maritime) Session of the International Labour Conference' (International Labour Office 2006); ILC, 'Provisional Record – First Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Second Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Third Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Fourth Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Fifth Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Sixth Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Seventh Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Eighth Sitting' (International Labour Office 2006); ILC, 'Provisional Record – Ninth Sitting' (International Labour Office 2006). See finally ILC, 'Report I (1A): Adoption of an Instrument to Consolidate Maritime Labour Standards' (International Labour Office 2005); ILC, 'Report I (1B): Proposed Consolidated Maritime Labour Convention' (International Labour Office 2005); ILC, 'Report II: Report of the Director - General on Developments in the Maritime Sector' (International Labour Office 2005). For an overview of the Maritime Labour Convention, 2006, as amended, see Patrick Bolle, 'The ILO's New Convention on Maritime Labour: An Innovative Instrument' (2006) 145 International Labour Review 135; John Isaac Black Jr, 'Reflections on the Negotiation of the Maritime Labour Convention 2006 at the International Labour Organisation' (2006) 31 Tulane Maritime Law Journal 35; Paul Bauer, 'The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights or an Impediment to True Reforms?' (2007-2008) 8 Chicago Journal of International Law 643; Moira

is directly employed by a shipowner, the seafarer's employment agreement (hereinafter SEA) should be between the seafarer and the shipowner and must be signed by both the seafarer and the shipowner or an authorised signatory of the shipowner.[49] Where, on the other hand, a seafarer is not directly employed by a shipowner, but is employed by a third party, such as a manning agency, the employer must be a party to the SEA.[50] The shipowner, or the authorised signatory of the shipowner, must also sign the SEA to guarantee to the seafarer the performance of the employer's obligations under the agreement, if the employer fails to meet his/her obligations.[51] Both the seafarer and the shipowner must have copies of the SEA signed by all the relevant parties and one copy of the SEA must be carried on board whenever the ship goes at sea and displayed for the seafarer to refer to upon request.[52]

However, the identification of the terms and conditions of a SEA is a complicated issue. It clearly demonstrates the complexity of the interrelationship between contract, statute, and the common law in the field of the employment relationship between a shipowner and a seafarer. In identifying the terms and conditions of a SEA to every specific case, a line of questions should be asked. What are the express and implied terms and conditions included in the employment agreement issued to the seafarer? Is there a term incorporating the terms and conditions of a collective bargaining

---

McConnell, 'The Maritime Labour Convention 2006 – Reflection on Challenges for Flag State Implementation' (2011) 10 World Maritime University Journal of Maritime Affairs 127; Iliana Christodoulou Varotsi, 'Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organisation: Limitations and Perspectives' (2012) 43 (4) Journal of Maritime Law and Commerce 467; Oana Adascalitei, 'The Maritime Labour Convention 2006 – A Long Awaited Change in the Maritime Sector' (2014) 149 Procedia – Social and Behavioural Sciences 8; Jon Whitlow and other, 'The Maritime Labour Convention, 2006: A Model for Other Industries?' (2015) 7 (1-2) International Journal of Labour Research 117; Julia Constantino Chagas Lessa, 'The Maritime Labour Convention: An Overview' (2016) 22 Journal of International Maritime Law 379. See also Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014); Filippo Lorenzon, 'Safety and Compliance' in Yvonne Baatz (ed), *Maritime Law* (4th Edition, Informa 2017) Chapter 9, in particular [6].

[49] Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, Regulation 9 (2). See also Marine Guidance Note 477 (M), Section 4.2.

[50] ibid Regulation 9 (2) (a). See also Marine Guidance Note 477 (M), Section 4.3.

[51] ibid Regulation 9 (2) (b). See also Marine Guidance Note 477 (M), Section 4.3.

[52] ibid Regulation 12 (1) and (3). See also Marine Guidance Note 477 (M), Sections 4.4, 7.1, and 7.2.

agreement agreed between the shipowner and the seafarer's union? If so, which is the applicable collective bargaining agreement? In addition, it should be asked what are the terms and conditions included in the applicable collective bargaining agreement? Finally, it should be asked what are the statutory and common law employment rights applicable to the employment relationship between the shipowner and the seafarer? Is there any conflict between the contractual employment rights and the statutory and common law employment rights? If so, how is this conflict to be resolved?[53]

For present purposes, there are two aspects of a SEA that are important. First, Regulation 10 (1) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, states that a SEA must include a minimum set of information required by the law. In particular, a SEA must provide details of the seafarer and the shipowner; of the place where the agreement is entered into; of the date on which the agreement is entered into; of the capacity in which the seafarer is to work; of the duration of the

[53] In relation to the complexity of the interrelationship between contract, statute, and the common law in the field of the employment relationship between a shipowner and a seafarer, see Paul Newdick, 'United Kingdom' in Deidre Fitzpatrick and other (eds), *Seafarers' Rights* (Oxford University Press 2005) Chapter 16, in particular [16.26] to [16.27]; Moira L McConnell, 'A Delicate Balance: The Seafarers' Employment Agreement, the System of the Maritime Labour convention, 2006, and the Role of the Flag States' in Patrick Chaumette (ed), *Seafarers: An International Labour Market in Perspective* (Editorial Gomylex 2006) Chapter 5, in particular [4]; Chen Gang and other, 'Labour Rights of Merchant Seafarers Held Hostage by Pirates' in Stefano Zunarelli and other (eds), *Current Issues in Maritime and Transport Law* (Bologna: Bonormo Editore 2016) Section 5, in particular [5.1.]. For more details on the complexity of the interrelationship between contract, statute, and the common law in the field of the employment relationship in general, see Brian Napier, 'The Contract of Employment' in Roy Lewis (ed), *Labour Law in Britain* (Basil Blackwell 1986) Chapter 12; Mark Freedland, *The Personal Employment Contract* (Oxford University Press 2006) Chapter 3; ACL Davies, 'The Relationship between the Contract of Employment and Statute' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 4; Alan Bogg and other, 'The Contract of Employment and Collective Labour' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 5; Douglas Brodie, 'The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 6; ACL Davies, 'Terms Inserted into the Contract of Employment by Legislation' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 20; Astrid Sanders, 'The Content of Contracts of Employment – Terms Incorporated from Collective Agreements or from Other Sources' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 21; Hugh Collins, 'Implied Terms in the Contract of Employment' in Mark Freedland and others (eds), *The Contract of Employment* (1st Edition, Oxford 2016) Chapter 23.

employment; and of the health and social protection benefits to be provided to the seafarer by the shipowner.[54] In addition, a SEA must provide details of the seafarer's entitlement to repatriation; of the maximum sum which the shipowner will pay to the seafarer in respect of compensation for any loss of property arising from the loss or foundering of the ship; of the collective bargaining agreement which is incorporated into the agreement or is otherwise relevant to it.[55] Finally, a SEA must include provisions about the wages; the hours of work; the paid leave; the pension benefits to be provided to the seafarer; and the grievance and disciplinary provisions.[56]

Secondly, the doctrine of freedom of contract prescribes that a SEA may consist of more than the minimum set of information required by the law. Or, putting the matter another way, a SEA may also contain terms and conditions that are freely negotiated between a shipowner and a seafarer. It is common, for example, for a SEA to include a clause providing for lump sum payments to a seafarer in the event of personal injury or loss of life, which the seafarer suffered in the context of his/her employment.[57] It is even common for a SEA to include a clause providing for the highest amount of compensation paid to a seafarer for personal injury or loss of life, which the seafarer suffered in the context of his/her employment.[58]

Where a seafarer works on board a ship that is bound to transit war zones or piracy infested waters, it is common for a SEA to include a clause providing for the seafarer's right to be promptly informed about an assignment in such area; to be given

[54] Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014 (SI 2014/1613), as amended, Regulation 10 (1) (a), read in conjunction with Schedule 1, Part 1, paragraphs 1 to 9. See also Marine Guidance Note 477 (M), Section 5.1, read in conjunction with Annex 1, Part 1, paragraphs 1 to 9.
[55] ibid Regulation 10 (1) (a), read in conjunction with Schedule 1, Part 1, paragraphs 10 to 14. See also Marine Guidance Note 477 (M), Section 5.1, read in conjunction with Annex 1, Part 1, paragraphs 10 to 13.
[56] ibid Regulation 10 (1) (a), read in conjunction with Schedule 1, Part 2, Paragraphs 1 to 6. See also Marine Guidance Note 477 (M), Section 5.1, read in conjunction with Annex 1, Part 3, paragraphs 1 to 6.
[57] See, for example, the ITF - IMEC IBF International Collective Bargaining Agreement 2019-2022, Articles 22, 23, 25 and 26.
[58] ibid Articles 25 and 26.

a choice as to whether to proceed to such area; to be paid a bonus for the duration of the ship's stay in such area; and to be provided with the right to accept or decline an assignment in such area without risking losing his/her employment or suffering any other detrimental effects.[59] Where a seafarer is exposed to the risk of becoming captive as a result of an act of maritime piracy or hijacking, it is common for a SEA to include a clause providing for the seafarer's right to be continually entitled to wages and other contractual benefits until the seafarer's release and thereafter until the seafarer's repatriation to his/her home or place of engagement.[60]

Provision of the minimum set of information required by the law and the additional information agreed between a shipowner and a seafarer may be achieved by one of the following ways. It may be achieved by including the relevant terms and conditions in the agreement issued to a seafarer.[61] Or, it may be achieved by including a cross reference in a SEA to another document, such as a collective bargaining agreement, provided that a copy of such document is attached to the SEA.[62] In every case, a SEA must not contain terms and conditions that are contrary to English law.[63] In other words, the terms and conditions of a SEA may be freely negotiated between a shipowner and a seafarer subject to regulation by statute and the common law.

In the field of the employment relationship between a shipowner and a seafarer, one area where the doctrine of freedom of contract is significantly circumvented is that of health and safety at work. A crucial aspect of a regime providing protection for health and safety at work is how compensation can be obtained when personal injury or loss

[59] See, for example, the ITF - IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 17.
[60] ibid.
[61] See, for example, the suggested Model Format for seafarers' employment agreements (hereinafter SEAs) for employed seafarers drawn by the Maritime and Coastguard Agency (hereinafter MCA) and set out at Annex 2 of the Marine Guidance Note 477 (M).
[62] See, for example, the suggested Model Format for SEAs for employed seafarers drawn by the International Transport Worker's Federation (hereinafter ITF) and set out at <http://www.itfseafarers.org/itf_agreements.cfm> accessed 23 January 2019.
[63] Marine Guidance Note 477 (M), Section 5.4 and Annex 2, Notes 12 and 15.

of life occurs.[64] As set out above, it is common in this respect for a SEA to include a contractual term providing for lump sum payments in the event of personal injury or loss of life, which a seafarer suffered in the context of his/her employment.[65] While, at first sight, there is no objection to the inclusion of such contractual term to the agreement issued to a seafarer, there may be objections; if, and to the extent that, such contractual term goes on to state that payment of such sums will be in full and final settlement of all claims a seafarer may have against a shipowner.

Such contractual term is not consistent with English law, since it contravenes with Section 2 (1) of the Unfair Contract Terms Act 1977, (c 50). Indeed, Section 2 (1) of this Act stipulates that a person cannot by reference to any contractual term exclude or restrict his/her liability for personal injury or loss of life resulting from negligence. In the same line, the Guidelines on Shipowners' Responsibilities in respect of Contractual Claims for Personal Injury to or Death of Seafarers adopted by the Assembly of the International Maritime Organisation (hereinafter IMO) in Resolution A 931(22), which urge a shipowner, in discharging his/her responsibility to provide for safe and decent working conditions, to make proper contractual arrangements for the payment of compensation for personal injury or loss of life caused to a seafarer in the context of his/her employment, recognise that full and prompt contractual compensation should be paid without prejudice to any other legal rights that a seafarer, or the dependants of a seafarer, may have under national law.

If, on the other hand, a SEA includes a contractual term providing for a 'no fault' scheme for compensation to be obtained when injury or death occurs, the inclusion of such contractual term will be permitted. Such provision is consistent with English

[64] Paul Newdick, 'United Kingdom' in Deidre Fitzpatrick and other (eds), *Seafarers' Rights* (Oxford University Press 2005) Chapter 16, in particular [16.68]. See also IMO, 'Guidelines on Shipowners' Responsibilities in respect of Contractual Claims for Personal Injury to or Death of Seafarers' (29 November 2001) Resolution A 931 (22). In particular, Guideline 4.1 provides that 'Shipowners, in discharging their responsibilities to provide for safe and decent working conditions, should have effective arrangements for the payment of compensation for death or personal injury. [...]'.
[65] See Chapter 2, Section 2.2 at page 32.

law, since it expands the protection offered to a seafarer by the common law. As will be discussed in section 2.4, under the common law, for compensation to be obtained for personal injury or loss of life, which a seafarer suffered in the context of his/her employment, a seafarer, or the dependants of a seafarer, have to prove negligence on the part of a shipowner or another person for whom a shipowner is vicariously liable.[66] Negligence can arise when the measures taken by a shipowner or another person for whom the shipowner is vicariously liable to protect a seafarer from the risk of being injured or killed in the context of his/her employment fell below the legal standard of care;[67] namely, that of the hypothetical reasonable shipowner.[68]

Having perused the role of contract in the field of the employment relationship between a shipowner and a seafarer, with particular reference to the limits set to the doctrine of freedom of contract by statute and the common law, I will now examine the extent to which some typical examples of terms and conditions, which are often included in an employment agreement issued to a seafarer, provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. In particular, contractual terms providing for health and social security protection benefits and for lump sum payments in the event of personal injury or loss of life which a seafarer suffered in the context of his/her employment will form the main basis for discussion in the following sub-sections.

These contractual terms have been derived from the model format for SEAs for employed seafarers drafted by the Maritime and Coastguard Agency (hereinafter MCA)[69] and the International Transport Workers' Federation (hereinafter ITF) – International Maritime Employer's Council (hereinafter IMEC) International

[66] See below at pages 75 to 76.
[67] The principal authority for the so-called test of the hypothetical reasonable person would appear to be *Blyth v Birmingham Waterworks Co* 156 ER 1047; (1856) 11 Exch 781 (CA).
[68] See, for example, *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 558 per Lord Morton, 576 per Lord Tucker; *Tarrant v Ramage and others (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 190 per Mr Justice Clarke.
[69] This is set out at Annex 2 of the Marine Guidance Note 477 (M).

Bargaining Forum (hereinafter IBF) International Collective Bargaining Agreement 2019-2022. Of course, the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 sets outs the standard terms and conditions applicable only to seafarers working on board any ship owned or operated by a shipowner in membership with the Joint Negotiating Group in respect of which there is in existence an IBF Special Agreement.[70] Nevertheless, its provisions may be instructive.

2.2.1. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will a contractual term stipulating for health and social security protection benefits provide for compensation?

As seen in section 2.2, under Regulation 10 (1) (a) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, read in conjunction with Schedule 1 Part 1 paragraph 9 of the same Regulations, a SEA must include details of the health and social protection benefits to be provided to a seafarer by a shipowner.[71] A good example of a health and social security protection benefits clause may be traced back to the suggested Model Format for SEAs for employed seafarers drawn by the MCA and set out at Annex 2 of the Marine Guidance Note 477 (M) stating that:

> If you become sick or injured while on a voyage, you will be paid your normal basic wages until you have been repatriated in accordance with the repatriation provisions set out below. After you have been repatriated you will be paid your normal basic wages excluding bonuses up to a maximum of [...] weeks […] less the amount of any Statutory Sick Pay or Social Security Sickness Benefit to which you may be entitled.
>
> If you require medical care while you are on-board this will be provided free of charge, [...]. Where practicable and appropriate, you will be given

[70] ITF - IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 1.
[71] See above at pages 31 to 32.

> leave to visit a qualified medical doctor or dentists in ports of call for the purpose of obtaining treatment.
>
> In the event of sickness or incapacity, you will be provided with medical care, [...] until your recovery or until your sickness or incapacity has been declared of a permanent character, subject to a maximum period of [...] weeks [...]. [...].
>
> In the event of your death occurring on board or ashore during a voyage, the shipowner will meet the cost of burial expenses, or cremation [...].[72]

No doubt, the provision of proper medical care will be impracticable, especially when a seafarer is injured by the criminal acts of pirates while held hostage on board a ship or ashore. Nevertheless, a seafarer, or the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, may benefit from a claim under a health and social security protection benefits clause.

The avowed purpose of a contractual term providing for health and social security protection benefits is to ensure that a seafarer, or the dependants of a seafarer, is protected from the financial consequences of sickness, injury or death occurring in the

[72] See also Article 22 of the ITF - IMEC IBF International Collective Bargaining Agreement 2019-2022 stating that '22.1. A seafarer shall be entitled to immediate medical attention when required [...]. 22.2. A Seafarer who is hospitalised abroad owing to sickness or injury shall be entitled to medical attention [...] at the company's expense for as long as such attention is required or until the seafarer is repatriated [...], whichever is the earlier. 22.3. A seafarer repatriated unfit as a result of sickness or injury, shall be entitled to medical attention [...] at the company's expense: a. in the case of sickness, for up to 130 days after repatriation, [...]; b. in the case of injury, for so long as medical attention is required or until a medical determination is made [...] concerning permanent disability; c. in those cases where, following repatriation, seafarers have to meet their own medical care costs, [...] they may submit claims for reimbursement within 6 months, [...]. [...]' and Article 23 of the ITF - IMEC IBF International Collective Bargaining Agreement 2019-2022 stating that '23.1. When a seafarer is landed at any port because of sickness or injury a pro rata payment of their basic wages [...] shall continue until they have been repatriated [...]. 23.2. Thereafter the seafarer shall be entitled to sick pay at the rate equivalent to their basic wage while they remain sick up to a maximum of 130 days after repatriation. [...]. 23.3. However, in the event of incapacity due to an accident the basic wages shall be paid until the injured seafarer has been cured or until a medical determination is made in accordance with clause 25.2 concerning permanent disability. [...]'.

context of his/her employment.[73] What this effectively means is that a health and social protection benefits clause is only relevant with regard to the payment of wages and the provision of medical care after an incident causing sickness, injury or death occurs and until the seafarer's recovery where this is possible.

As pointed out by Caldwell, the purpose of such clause seems to fit well with the various instances where a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.[74] Most certainly, the consequences of a maritime piracy attack, whether personal injury or loss of life, take place in the context of the employment of a seafarer working on board a ship that is bound to transit piracy infested waters; even in the most complex of cases where a seafarer is held hostage on board a ship or ashore by pirates.[75] It must follow then that, in principle, there is no objection to recognising that a health and social security protection benefits clause will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

What is likely to raise more issues in the context of maritime piracy, however, is the duration and the extent of a shipowner's obligation to bear the financial consequences for a seafarer, who works on board his/her ship, in respect of sickness, injury or death caused to the seafarer in the context of his/her employment. In this regard, Regulations 43 (2) (a) and 50 (1) (a) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, state that the obligation in question covers sickness and/or injury occurring between the date on which a SEA commences and the date on which a seafarer is deemed duly repatriated, or after that period but is caused by circumstances or events arising during that period.

[73] Maritime Labour Convention, 2006, as amended, Regulation 4.2 (1).
[74] Graham Caldwell, 'Seafarers and Modern Piracy' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014) Chapter 7, in particular [7.29].
[75] ibid Chapter 7, in particular [7.30].

Furthermore, Regulations 43 (2) (b) and 50 (1) (b) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, exclude from the obligation in question sickness and/or injury occurring during a period of leave, other than shore leave. Finally, Regulation 52 (1) of Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, stipulates that the obligation in question covers death occurring on board a ship on which the seafarer works or on shore leave in a country other than the seafarer's country of residence.

As one can reasonably understand, the combined reading of the above mentioned Regulations sets out the minimum duration and extent of a shipowner's obligation to bear the financial consequences for a seafarer, who works on board his/her ship, in respect of sickness, injury or death, which the seafarer suffers in the context of his/her employment. Put in simple terms, they provide that, unless a shipowner and a seafarer agree otherwise, a shipowner's obligation under a health and social security protection benefits clause will cover a period between the commencement of a SEA and the completion of the repatriation of the seafarer. Furthermore, they provide that the shipowner's obligation at hand will cover sickness, injury or death of a seafarer occurring within that period, but only when the sickness, injury or death of a seafarer takes place on board the ship on which the seafarer works or on shore leave.

In view of this minimum duration and extent of the shipowner's obligation at hand, three problematic factual scenarios are likely to arise in the situation under discussion in the present thesis. These problematic factual scenarios arguably diminish the benefit inferred to a seafarer, or to the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, by a health and social security protection benefits clause.

The first problematic factual scenario involves a seafarer injured by the criminal acts of pirates while held hostage ashore. The most obvious argument would seem to hinge around the fact that a seafarer held hostage ashore by pirates no longer renders service in connection to the ship. This implies that any injury, which a seafarer suffers by the criminal acts of pirates while held hostage ashore, does not occur in the context of his/her employment. The result is that any such injury will not fall within the minimum extent of a shipowner's obligation under a health and social security protection benefits clause. Note, however, that Caldwell maintains in this respect that a seafarer held hostage ashore by pirates continues to render service in connection to the ship as his/her life is used as leverage for the release of the ship.[76]

Another argument would seem to suggest that, in the factual scenario under examination, the exclusion set out in Regulations 43 (2) (b) and 50 (1) (b) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, should be triggered. This exclusion provides that a shipowner's obligation under a contractual term providing for health and social security protection benefits does not extend to injury occurring during a period of leave. However, a period of capture ashore by pirates can hardly be considered as a period of leave for the purposes of this exclusion.

Further to the factual scenario described in the previous paragraphs, a more problematic factual scenario arises where a seafarer is killed by the criminal acts of pirates while held hostage ashore. As seen earlier in this sub-section, a shipowner's obligation to bear the financial consequences for a seafarer, who works on board his/her ship, in respect of death, which the seafarer suffers in the context of his/her employment, covers death occurring on board a ship on which the seafarer works or on shore leave in a country other than the seafarer's country of residence.[77]

---

[76] Graham Caldwell, 'Seafarers and Modern Piracy' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014) Chapter 7, in particular [7.40].

[77] See above at pages 38 to 39.

What this effectively means is that, for the dependants of a seafarer to benefit from a health and social security protection benefits clause where a seafarer is killed by the criminal acts of pirates while held hostage ashore, they will have to establish that a period of capture ashore by pirates qualifies as shore leave. However, this can hardly be argued, since the term 'shore leave' has a very specific meaning in maritime practice. Indeed, this term refers to a period during which a seafarer is allowed to go ashore while the ship on board which he/she is working is anchored in port.[78]

Remember, however, that, so far, the analysis revolved around the minimum duration and extent of a shipowner's obligation to bear the financial consequences for a seafarer, who works on board his/her ship, in respect of sickness, injury or death, which the seafarer suffers in the context of his/her employment. Where a shipowner and a seafarer are proactive in ensuring that a health and social security protection benefits clause will provide for compensation, even in the most complex of factual scenarios where a seafarer is injured or killed by criminal acts of pirates while held hostage ashore, it is open to them to include to a SEA a health and social security protection benefits clause providing accordingly. This could be achieved in two ways.

At one extreme, a shipowner and a seafarer could agree to include in the SEA a broadly drafted health and social security protection benefits clause. Take, for example, the health and social security protection benefits clause included to the suggested Model Format for SEAs for employed seafarers drawn by the MCA cited earlier in the present sub-section.[79] I maintain that the wording used by such clause is broad enough to cover sickness, injury or death, which a seafarer suffers by the criminal acts of pirates while held hostage ashore. This is because of the use of broad

[78] See, for example, the Convention on Facilitation of International Maritime Traffic 1965, as amended, Annex, Section 1 where the term 'shore leave' is defined as 'permission for a crew member to be ashore during the ship's stay in port within such geographical or time limits, if any, as may be decided by the public authorities'.
[79] See above at pages 36 to 37.

words, such as ‘if you become sick or injured while on a voyage, [...]’ and ‘in the event of your death occurring on board or ashore during a voyage, [...]’.[80]

At the other extreme, a shipowner and a seafarer could agree to include to a SEA a health and social security protection benefits clause specifically laying out that sickness, injury or death, which a seafarer suffers by the criminal acts of pirates while held hostage ashore, is covered. I have not been able to trace a health and social security protection benefits clause drafted by using such wording. However, Article 17 of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 uses a similar wording to stipulate that, where a seafarer may be held hostage on board a commercial ship or ashore by pirates, the seafarer’s employment status and entitlements under a SEA shall continue until the seafarer is released and thereafter until the seafarer is duly repatriated to his/her home or place of engagement.[81]

Reverting now to the factual scenarios I mentioned earlier, the third problem emerges where a seafarer is injured or killed by the criminal acts of pirates while held hostage on board a ship or ashore for a prolonged period. In such cases, it is likely that the SEA will expire or will be suspended or will be terminated while the seafarer remains in captivity. This spurs the question as to whether a seafarer, or the dependants of a seafarer, could still benefit from a contractual health and social security protection benefits clause to obtain compensation from a shipowner for personal injury or loss of life, which the seafarer suffered by the criminal acts of pirates after the expiry, the suspension or the termination of the SEA.

[80] Model Format for Seafarer’s Employment Agreements for Employed Seafarers drawn by the Maritime and Coastguard Agency and set out at Annex 2 of the Marine Guidance Note 477 (M).
[81] Indeed, Article 17 of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 states that ’17.5. In case a Seafarer may become captive or otherwise prevented from sailing as a result of an act of piracy or hijacking, irrespective whether such act takes place within or outside IBF designated areas referred to in this Article, the Seafarer’s employment status and entitlements under this Agreement shall continue until the Seafarer’s release and thereafter until the Seafarer is safely repatriated to his/her home or place of engagement or until all Company’s contractual liabilities end. These continued entitlements shall, in particular, include the payment of full wages and other contractual benefits. The Company shall also make every effort to provide captured Seafarers, with extra protection, food, welfare, medical and other assistance as necessary’.

So far, this complex situation has been addressed through the means of commercial initiative. Indeed, contractual terms have been developed stipulating that, for the whole time that a seafarer remains held hostage on board a ship or ashore by pirates and until his/her release and thereafter his/her safe repatriation to his/her home or place of engagement, a seafarer remains entitled to his/her wages and other contractual benefits under the SEA.[82] Clearly, this offers another avenue for a seafarer, or the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. Because it extends the duration and extent of a contractual health and social security protection benefits clause.

However, on 5 June 2018, the International Labour Conference (hereinafter ILC) at its 107th Session approved the third group of amendments to the Maritime Labour Convention, 2006, as amended. The third group of amendments was agreed by the Special Tripartite Committee on 27 April 2018 at its third meeting at the International Labour Organisation (hereinafter ILO) headquarters in Geneva.[83] The agreed amendments are the result of the work undertaken by the ILO, in view of the Resolution adopted by the ILC at its 94th (Maritime) Session concerning the effects of maritime piracy on the shipping industry, and they concern Regulations 2.1, 2.2, and 2.5 of the aforementioned Convention which deal with the SEA, the seafarer's right to be paid wages, and the seafarer's right to be repatriated, respectively.[84]

More specifically, the agreed amendment to Regulation 2.1 stipulates that a new paragraph should be inserted to Standard A 2.1 ensuring that a SEA shall continue to

[82] See, for example, the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 17.5.
[83] For more details about the third meeting of the Special Tripartite Committee, see ILSD, 'Third Meeting of the Special Tripartite Committee of the Maritime Labour Convention, 2006, as amended' (International Labour Office 2018); ILC, 'Provisional Record – Eighth Item on the Agenda: Maritime Matters' (International Labour Office 2018).
[84] For more details on the third group of amendments to the Maritime Labour Convention, 2006, as amended, see ILC, 'Amendments of 2018 to the Code of the Maritime Labour Convention, 2006, as Amended (MLC, 2006), Approved by the Conference at its One Hundred and Seventh Session, Geneva, 5 June 2018' (International Labour Office 2018).

have effect while a seafarer is held hostage on board a ship or ashore by pirates.[85] Furthermore, the agreed amendment to Regulation 2.2 inserts a new paragraph to Standard A 2.2 stating that, where a seafarer is held hostage on board a ship or ashore by pirates, wages and other contractual benefits under the SEA, relevant collective bargaining agreement or applicable national laws, shall continue to be paid during the whole period of captivity and until the seafarer is released and duly repatriated or, where the seafarer dies while in captivity, until the date of death as determined in accordance with applicable national laws or regulations.[86] Finally, the agreed amendment to Regulation 2.5 replaces paragraph 8, with a view to ensuring that a seafarer's right to be repatriated shall not lapse where a seafarer is held hostage on board a ship or ashore by pirates.[87]

Most certainly, if the third group of amendments to the Maritime Labour Convention, 2006, as amended, enters into force, it will shed light on the complexities hinging around the third problematic factual scenario described above.[88] For that it will finally be clear that, where a seafarer is held hostage on board a ship or ashore by pirates for a prolonged period, the seafarer's right to be paid wages and other contractual benefits, including any health and social security protection benefits, under the SEA, relevant collective bargaining agreement or applicable national laws, will remain operative during the whole period of captivity and until the seafarer is released and duly repatriated or, where the seafarer dies while in captivity, until the date of death as determined in accordance with applicable national laws or regulations. However, it should be noted that, if the third group of amendments to the Maritime Labour Convention, 2006, as amended, enters into force, this will not happen before 2021.

[85] For more details on the third group of amendments to the Maritime Labour Convention, 2006, as amended, see ILC, 'Amendments of 2018 to the Code of the Maritime Labour Convention, 2006, as Amended (MLC, 2006), Approved by the Conference at its One Hundred and Seventh Session, Geneva, 5 June 2018' (International Labour Office 2018).
[86] ibid.
[87] ibid.
[88] See above at page 42.

According to the process to be followed for the amendment of the Maritime Labour Convention, 2006, as amended,[89] the agreed amendments have now been notified to all Member States whose ratification of the Maritime Labour Convention, 2006, as amended, was registered before the date of the 107th Session of the ILC.[90] The Member States will have two years from that notification to express a formal disagreement to the agreed amendments.[91] Unless more than 40 per cent of ratifying Members States, representing not less than 40 per cent of world gross tonnage, have formally expressed their disagreement with the amendments, the third group of amendments will enter into force six months after the end of the two years.[92]

Therefore, the need for shipowners and seafarers to continue to be proactive in including adequately drafted health and social security protection benefits clauses to employment agreements issued to seafarers is emphasised; especially, when the interested parties intend for a health and social security protection benefits clause to provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates while held hostage on board a ship or ashore for a prolonged period.

As a final remark, three more points need to be highlighted. First, a shipowner's obligation to bear the financial consequences for a seafarer, who works on board his/her ship, in respect of sickness, injury or death, which a seafarer suffered in the context of his/her employment, provides for the payment of medical expenses, wages, compensation in case of incapacity of a seafarer, and the cost of burial/cremation expenses.[93] In this regard, Regulations 43 (6) and 50 (4) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, provide that a shipowner's obligation may be extended until the sick or injured seafarer recovers or until the sick or injured

[89] Maritime Labour Convention, 2006, as amended, Article XIV.
[90] ILC, 'Provisional Record – Eighth Item on the Agenda: Maritime Matters' (International Labour Office 2018) 2, in particular [7].
[91] ibid.
[92] ibid.
[93] Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, Regulations 43 (3) and (4), 50 (3), and 52 (1).

seafarer is declared unfit to continue working at sea. In the context of maritime piracy, this provision offers a seafarer substantial protection from the financial consequences arising out of his/her injury.

Remember, however, that Regulations 43 (6) (a) and 50 (5) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, state that a shipowner may limit his/her obligation to meet the payment of medical expenses, wages, and compensation in case of incapacity of a seafarer, subject to a minimum period of sixteen weeks. This can be rather unsatisfying in some exceptional circumstances where the seafarer's recovery is likely to last longer than sixteen weeks. Of course, it is open to a shipowner and a seafarer to agree to include to a SEA a health and social security protection benefits clause providing for the payment of medical expenses, wages, and compensation in case of incapacity of a seafarer beyond the period of sixteen weeks. However, such an agreement will turn upon the balance struck between the negotiating power of a shipowner and a seafarer.

Secondly, a seafarer, or the dependants of a seafarer, who is injured or killed by the criminal acts of pirates in the context of his/her employment, may benefit from a statutory sick pay scheme and other statutory social security benefits.[94] In Regulations 43 (5) (a), 50 (7), and 52 (2) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, it is explained that a shipowner is not liable to bear the financial consequences for a seafarer working on board his/her ship in respect of sickness, injury or death of a seafarer occurring in the context of his/her employment to the extent that such financial consequences are met by a public authority. However, it is

[94] See, for example, Social Security Contributions and Benefits Act 1992, (c 4), in particular Part V and Part XI. See also Statutory Sick Pay (Mariners, Airmen and Persons Abroad) Regulations 1982, (SI 1982/1349). For more details on statutory sick pay schemes and other statutory social security benefits, see Paul Newdick, 'United Kingdom' in Deidre Fitzpatrick and other (eds), *Seafarers' Rights* (Oxford University Press 2005) Chapter 16, in particular [16.50] to [16.51]; Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press 2016) Part II, Chapter on Employer's Liability, at page 218.

open to the interested parties to include to the SEA a health and social security protection benefits clause providing otherwise.[95]

Thirdly, a claim under a health and social security protection benefits clause does not preclude a claim in negligence in respect of personal injury or loss of life caused to a seafarer in the context of his/her employment. Indeed, Regulation 4.2 (2) of the Maritime Labour Convention, 2006, as amended, which is implemented into English law through the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, explicitly states that 'this Regulation does not affect any other legal remedies that a seafarer may seek'.[96] Therefore, when a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, the right to contractual health and social protection benefits runs alongside the right to damages for negligence, and a seafarer, or the dependants of a seafarer, can exercise both.[97]

2.2.2. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will a contractual term providing for lump sum payments in the event of personal injury or loss of life caused to a seafarer in the context of his/her employment provide for compensation?

As pointed out in section 2.2, it is common for a SEA to include a contractual term providing for lump sum payments in the event of personal injury or loss of life, which

[95] See, for example, Regulation 50 (12) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, stating that 'a collective bargaining agreement may exclude or limit the operation of paragraphs (4) to (9) if it complies with paragraph (13)'.
[96] Maritime Labour Convention, 2006, as amended, Regulation 4.2 (2).
[97] It may be worth noting here that the same applies in respect of statutory social security benefits and the right to damages for negligence. See, for example, Brian Napier, 'The Contract of Employment' in Roy Lewis (ed), *Labour Law in Britain* (Basil Blackwell 1986) Chapter 12, at page 341; Philip James and other, 'Health and Safety at Work' in Roy Lewis (ed), *Labour Law in Britain* (Basil Blackwell 1986) Chapter 16, at pages 463 to 465; Richard Lewis, 'Employer's Liability and Worker's Compensation: England and Wales' in Ken Oliphant and other, *Employer's Liability and Worker's Compensation* (De Gruyter 2012) Chapter 4, in particular [1]; Daniel Bennett, 'The Development of Employer's Liability Law' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 1, in particular [1.38]; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 11, in particular [11 - 01].

a seafarer suffered in the context of his/her employment.[98] In answering then the question as to whether such term provides for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, the wording of such term may be crucial. Take, for example, the relevant clauses included in the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022. Article 26 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 provides for lump sum payments in the event of death, which a seafarer suffered in the context of his/her employment by stating that:

> 26.1. If a Seafarer dies through any cause whilst in the employment of the Company including death from natural causes and death occurring whilst travelling to and from the vessel, or as a result of marine or other similar peril, but excluding death due to wilful acts, the Company shall pay the sums specified [...] to a nominated beneficiary and to each dependant child [...].[99]

It seems to me that Article 26 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 extends far enough to provide for compensation, if a seafarer is killed by the criminal acts of pirates in the context of his/her employment. This is because it explicitly states that 'if a Seafarer dies through any cause [...] the Company shall pay the sums specified [...]'. [100]

The obvious criticism to be levelled here would seem to suggest that such an interpretation is contrary to the intended purposes of this clause, given that Article 26 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 goes on to list a number of examples after the use of general words. Indeed, it states that 'if a Seafarer dies through any cause, [...], including death from natural causes or death occurring whilst travelling to or from the vessel, or as a result of marine or other

[98] See above at page 32.
[99] ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 26 (1).
[100] ibid.

similar perils, the Company shall pay [...]'.[101] However, it is accepted that, as a general rule, where specific examples follow general words, the meaning of the latter should not be restricted by the insertion of such examples.[102] Had that not being so, death caused by the criminal acts of pirates would still be covered, since maritime piracy falls within the scope of the words 'marine or other similar peril'.[103]

Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 provides for lump sum payments in the event of injury caused to a seafarer as a result of an accident whilst in the employment of the shipowner by stating that:

> 25.1. A Seafarer who suffers permanent disability as a result of an accident whilst in the employment of the Company regardless of fault, including accidents occurring while travelling to or from the Ship, and whose ability to work as a Seafarer is reduced as a result thereof, but excluding permanent disability due to wilful acts, shall in addition to sick pay, be entitled to compensation according to the provisions of this Agreement. [...].[104]

As one can reasonably understand, Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 sets out two prerequisites that should be fulfilled cumulatively before compensation can be obtained when permanent disability occurs. While the first stipulates that the seafarer's injury should be the result of an accident, the second provides that the seafarer's injury should cause permanent disability and should reduce his/her ability to continue working at sea. It

[101] ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 26 (1).
[102] The principal authority for this rule would appear to be *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175 (HL). For more details on the construction of contractual terms, see Hugh Beale (ed), *Chitty on Contracts* (33rd Edition, Sweet & Maxwell 2018) Volume 1, Part 4, Chapter 13, in particular [13 - 103].
[103] See, for example, how the words 'marine perils' are defined for the purposes of marine insurance. Section 3 (2) of the Marine Insurance Act 1906, (c 41), states that 'Maritime perils means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy'.
[104] ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, Article 25 (1).

must follow then that the answer to the question at hand, namely, whether Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 extends far enough to provide for compensation, if a seafarer is injured by the criminal acts of pirates in the context of his/her employment, will turn upon two issues, namely: that of the meaning of the word 'accident'; and that of the type of injury sustained by a seafarer as a result of a maritime piracy attack.

In so far as the meaning of the word 'accident' is concerned, the most obvious argument would seem to suggest that Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 does not extend far enough to provide for compensation when a seafarer suffers injury as a result of a maritime piracy attack. This is because a maritime piracy attack can hardly fall within the meaning of the word 'accident'. The strength of this premise would clearly be determined by the degree of importance to be attached to the judgment delivered by Mr Justice Gross in *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha),* where his Justice was of the opinion that a maritime piracy attack cannot properly be described as an 'accident'.[105]

Of crucial significance in this respect is the context with which *The Saldanha*[106] was concerned. Indeed, Mr Justice Gross expressed the opinion described above when deciding as to whether the detention of a ship by pirates entitled the charterers to put the vessel 'off-hire' for the purposes of a clause incorporated into a time charterparty.[107] In judicial practice, the courts have traditionally adopted a very literal

[105] [2010] EWHC 1340 (Comm) (QB) at [12].
[106] *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) (QB).
[107] For the context with which *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) (QB) is concerned, see John Weale, 'Piracy and Off-Hire: Extraneous Causes Revisited' (2010) 4 (Nov) Lloyd's Maritime and Commercial Law Quarterly 574; Andrew Wrights and other, 'Two Important Charterparty Cases: *The Saldanha* and *The Kos*' (2010) 8 (2) Shipping and Transport International 26; Konstantinos S Georgiou, 'Piracy and Off-Hire: Charterparty (Time) - NYPE Clause 15' (2010) 10 (6) Lloyd's Shipping and Trade Law 4; Stephen Girvin, 'English and Scottish Shipping Law' (2011) Lloyd's Maritime and Commercial Law Yearbook 79; Graham Caldwell, 'Piracy and the Zero Incentive Approach' (2012) 12 (3) Lloyd's Shipping and Trade Law 2; See also Paul Todd, *Charterparties and Piracy Today* (Create Space Independent Publishing Platform 2014) Chapter 2, in particular [2.3]. See finally Aref Fakhry, 'Frustration of Contracts of Affreightment

approach when interpreting 'off-hire' clauses.[108] It is beyond any doubt that this literal approach comes in direct opposition to the more protective approach that has been followed by the courts towards seafarers' rights.[109]

Against this backdrop, I maintain that, in the present context, the degree of importance to be attached to the judgment delivered by Mr Justice Gross in *The Saldanha*[110] should be limited. This implies that, for the purposes of Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, the word 'accident' should be interpreted broadly rather than literally, in order to allow for a maritime piracy attack to fall within its scope.

Another argument would seem to suggest that the use of different wording between Article 25 (1) and 26 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 was intentional, so that the scope of application of the former would be narrower than that of the latter. While this may be so, the answer to the question at hand, namely, whether Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 provides for compensation, if a seafarer is injured by the criminal acts of pirates in the context of his/her employment, continues to turn upon the meaning of the word 'accident'.

I argued earlier in this sub-section that, for the purposes of Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022, the word 'accident' should be interpreted broadly.[111] This implies that, notwithstanding the different wording, Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 extends far enough to provide for compensation, if

---

in the Event of Capture of Merchant Ships by Pirates in Waters off Somalia' (PhD Thesis, University of Southampton 2013) Chapter 2, in particular [2.1.4] at pages 69 to 71.

[108] Paul Todd, *Charterparties and Piracy Today* (Create Space Independent Publishing Platform 2014) Chapter 2, in particular [2.1].

[109] For more details on the protective approach adopted by the courts when interpreting seafarers' rights, see Paul Newdick, 'United Kingdom' in Deidre Fitzpatrick and other (ed), *Seafarers' Rights* (Oxford University Press 2005) Chapter 16, in particular [16.03].

[110] *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) (QB).

[111] See above at page 50 to 51.

a seafarer suffers injury as a result of a maritime piracy attack in the context of his/her employment. If an intention to the contrary existed, clearer words would be required.

Turning to the type of injury sustained by a seafarer as a result of a maritime piracy attack, it should be remembered that the scope of application of Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 is limited in two ways. Put in simple terms, it covers injury, as a result of which a seafarer suffers permanent disability, and whose ability to continue working at sea is reduced as a result thereof. In effect, therefore, a seafarer, who is injured by the criminal acts of pirates in the context of his/her employment, but does not suffer permanent disability, and whose ability to continue working at sea is not reduced as a result thereof, will not be able to benefit from a civil claim for damages under Article 25 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022.

Overall, the analysis of Articles 25 (1) and 26 (1) of the ITF – IMEC IBF International Collective Bargaining Agreement 2019-2022 emphasises the need for shipowners and seafarers to pay attention to the wording used when drafting contractual terms providing for lump sum payments in respect of injury or death, which a seafarer suffered in the context of his/her employment; especially if they intend for such contractual terms to provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

To sum up, it must be clear from the analysis provided in section 2.2 that the terms and conditions of a SEA should be the first point of reference in the process of scrutinising the legal basis upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. Nevertheless, the terms and conditions of a SEA are not by themselves enough to provide a complete picture in this regard, because health and safety at work is one of the areas where significant constraints are placed to the doctrine of freedom of contract by statute and the common law. Therefore, the role of

statute in this area in the field of the employment relationship between a shipowner and a seafarer will be discussed in the following section.

2.3. Statute

The stage has now been reached where the regulatory framework has come to offer a very similar level of protection to seafarers as the protection given to shore-based employees in terms of health and safety at work. Indeed, a volume of merchant shipping health and safety at work regulations has been enacted by the Secretary of State for Transport under Sections 85 and 86 of the Merchant Shipping Act 1995, (c 21).[112] Take, for example, the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, the Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205), and the Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006, (SI 2006/2183). Many of the merchant shipping regulations in this area emanate from IMO and ILO Conventions,[113] and European Union Directives (hereinafter EU Directives).[114]

Before moving on to examine in the following sub-sections the extent to which some existing statutory employment rights in terms of health and safety at work will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, it seems necessary to say a few words about the general principles applicable when determining whether the breach of a statutory duty gives rise to a right of a civil claim for damages. In doing so, I will go through a line of previously decided cases which have long been treated by the courts as leading authorities to cite in this regard. As a related issue I will consider the effect

[112] For more details on merchant shipping health and safety at work regulations, see Aengus Fogarty, *Merchant Shipping Legislation* (3rd Edition, Informa 2017) Chapter 3.
[113] See, for example, the Merchant Shipping (International Safety Management (ISM) Code) Regulations 2014, (SI 2014/1512); the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended.
[114] See, for example, the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended.

of a recent legislative initiative which has set limits to the right of an employee, or of the dependants of an employee, suffering personal injury or loss of life as a result of a breach of a health and safety at work regulation to bring a civil claim for damages against an employer, with particular reference to merchant shipping health and safety at work regulations. Finally, I will draw attention to the potential impact of the withdrawal of the UK from the EU on merchant shipping health and safety at work regulations, as most of these Regulations emanate from EU Directives.

Over a century ago, the Court of Appeal in the landmark judgment of *Groves v Lord Wimborne* held for the first time that an injured employee, or the dependants of an injured employee, could bring a civil claim for damages for breach of statutory duty against his/her employer, in that case in respect of the Factory and Workshop Act 1878, (c 16).[115] What is particularly interesting in this respect, however, is the fact that the Court of Appeal came to the conclusion just described, even though the Factory and Worksop Act 1878, (c 16), provided for criminal penalties as a remedy for its breach. As will appear further on in this section, the fact that a breach of a statutory duty gives rise to criminal liability has commonly been treated as an indication, although not conclusive, that civil liability does not exist.[116]

More recently, Lord Simonds in the House of Lords in *Cutler v Wandsworth Stadium Ltd* explained that, where a statute is silent as to whether any breach of its provisions gives rise to a right of civil action, a consideration of the whole statute and the circumstances, in which it was enacted, is required.[117] In this respect, Lord Simonds maintained that there are indications pointing out towards the one or the other answer.[118] A good example of such indications may be traced back to the provision of a specific remedy for a breach of a statutory duty.[119] As a general rule, the provision

[115] [1898] 2 QB 402 (CA) 406 per Lord Justice Smith, 413 per Lord Justice Rigby, and 415 per Lord Justice Vaughan Williams. See also *Phillips v Britannia Hygienic Laundry* [1923] 2 KB 823, 841 per Lord Justice Atkin; *Lonrho v Shell* [1982] AC 173 (HL) 185 per Lord Diplock.
[116] See below at pages 54 to 56.
[117] [1949] AC 398 (HL) 407.
[118] *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL) 407.
[119] ibid.

of such a specific remedy prescribes that a right of civil action does not accrue under the statute.[120] Yet this general rule is not without exceptions.[121]

Lord Diplock in *Lonrho Ltd v Shell* attempted to clarify the exceptions referred to by Lord Simonds.[122] Indeed, his Lordship identified two exceptions. While the first revolves around the fact that, upon the true construction of the statute, it is clear that the statutory duty was imposed for the protection of a particular class of individuals, the second arises where the statutory duty creates a public right and a member of the public suffers damage different from the damage suffered by the rest of the public.[123] For present purposes, the former exception is of greater practical significance.

Much more recently, Lord Browne - Wilkinson in the House of Lords in *X (Minors) v Bedfordshire County Council* conveniently summarised the principles applicable when determining whether the breach of a statutory duty gives rise to a right of a civil claim for damages in the following words:

> The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of statutory duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was

[120] *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL) 407.
[121] ibid.
[122] [1982] AC 173 (HL) 185.
[123] *Lonrho Ltd v Shell* [1982] AC 173 (HL) 185 per Lord Diplock.

> intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action. [...] However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.[124]

While the principles just described are well-established, the application of those principles in every particular case is not entirely straightforward, and conflicting decisions are likely to arise. By way of illustration, in *Todd v Adams (The Maragetha Maria),* the Court of Appeal held that any breach of the statutory duties emerging from the Fishing Vessel (Safety Provisions) Rules 1975, (SI 1975/330), promulgated under Section 121 of the Merchant Shipping Act 1995, (c 21), gives rise to criminal liability, but not to civil liability.[125] In reaching the conclusion just described, the Court of Appeal placed emphasis on the specific features of these Rules.

More specifically, before deciding as to whether any breach of the Fishing Vessel (Safety Provisions) Rules 1975, (SI 1975/330), gives rise to a civil claim for damages, the Court of Appeal in *The Maragetha Maria*[126] took into account the following indications: first, the provision of criminal penalties in Section 121 (5) of the Merchant Shipping Act 1995, (c 21); secondly, the obligation in Section 121 (1) of the Merchant Shipping Act 1995, (c 21), was not a duty which the legislature had imposed on any particular person; thirdly, the fact that Section 121 (2) of the Merchant Shipping Act 1995, (c 21), gave the Secretary of State the power to exempt ships from the ambit of any rules; fourthly, the certification provisions in Sections 122 to 125 of the Merchant Shipping Act 1995, (c 21); and, fifthly, the fact that the legislature must have envisaged, when enacting Section 121 (1) of the Merchant

[124] [1995] 2 AC 633 (HL) 730.
[125] [2002] EWCA Civ 509 (CA) [22].
[126] *Todd v Adams (The Maragetha Maria)* [2002] EWCA Civ 509 (CA).

Shipping Act 1995, (c 21), that the Secretary of State would promulgate rules of a fairly detailed and comprehensive nature.[127]

In *George Ziemniak v ETPM Deep Sea Ltd*,[128] on the other hand, the Court of Appeal first distinguished the decision in *The Maragetha Maria*[129] on the ground that it was concerned with the protection of employees on board fishing vessels. The Court of Appeal then held that any breach of the Merchant Shipping (Life Saving Appliances) Regulations 1980, (SI 1980/538), made pursuant to powers conferred by Section 21 of the Merchant Shipping Act 1979, (c 39), now Section 85 of the Merchant Shipping Act 1995, (c 21), gives rise to a right of a civil claim for damages.[130] The thrust of this judgment revolved around the premise that there was no valid reason for distinguishing seafarers from shore-based employees in respect of health and safety at work considerations.[131] Of crucial significance in this respect was the fact that the approach followed by the courts for a considerable period of time had been that breaches of health and safety at work regulations enacted for the protection of shore-based employees would generally give rise to civil liability.[132]

Two points may be commented in this regard. First, the correctness of the distinction between seafarers and employees on board fishing vessels is debatable. To illustrate this, I will use as an example the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended. These Regulations apply to seafarers and to employees on board fishing vessels,[133] and it has been found by the courts that they give rise to a right to bring a civil claim for damages for any breach of their provisions.[134] If the premise of the Court of Appeal in *George*

[127] *Todd v Adams (The Maragetha Maria)* [2002] EWCA Civ 509 (CA) [23] to [30].
[128] [2003] EWCA Civ 636 (CA).
[129] [2002] EWCA Civ 509 (CA).
[130] *George Ziemniak v ETPM Deep Sea Ltd* [2003] EWCA Civ 636 (CA) [54].
[131] ibid [41].
[132] ibid.
[133] Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, Regulation 3 (2).
[134] See, for example, *Cairns v Northern Lighthouse Board* [2013] CSOH 22; *Wilson v North Star Shipping (Aberdeen) Ltd* [2014] CSOH 156.

Ziemniak v ETPM Deep Sea Ltd[135] is accepted, namely, that cases concerned with the protection of employees on board fishing vessels should be distinguished from cases concerned with the protection of seafarers, then the following paradox will be created. These Regulations will be applied in one way in relation to employees on board fishing vessels and in another way in relation to seafarers. Clearly, such a result will give rise to further uncertainty rather than clarifying the issue of deciding as to whether any breach of merchant shipping regulations gives rise to civil liability.

Secondly, I recognise that the conceptual framework followed by the Court of Appeal in *George Ziemniak v ETPM Deep Sea Ltd*[136] seemed reasonable at the time; given that the harmonisation of the protection offered to seafarers with the protection offered to shore-based employees has been sought after. Nevertheless, I maintain serious doubts as to whether such a reasoning will continue to have much force nowadays. This is because, pursuant to a recent legislative initiative under Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24), general employment legislation in respect of health and safety at work no longer provides for civil liability.

Ever since 2013, the law on civil liability for breach of most health and safety at work regulations reverted to the position it was prior to the decision in *Groves v Lord Wimborne*.[137] Indeed, Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24), abolished the right to bring a civil claim for damages for breach of health and safety at work regulations emanating from the Health and Safety at Work Act 1974, (c 30).[138] This implies that the only cause of action available to an employee, or to the

[135] [2003] EWCA Civ 636 (CA).
[136] ibid.
[137] [1898] 2 QB 402 (CA).
[138] Hansard, HC Vol 551, col 192 (16 October 2012). For more details on Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24), see Richard West, '*Willock v Corus UK Ltd*: Personal Injury – Liability – Health and Safety at Work' (2013) 4 Journal of Personal Injury Law 186; Nigel Tomkins, 'Civil Health and Safety Law after the Enterprise and Regulatory Reform Act 2013' (2013) 4 Journal of Personal Injury Law 203; Patrick Limb QC and other, 'Section 69 of the Enterprise and Regulatory Reform Act 2013 – Plus Ca Change?' (2014) 1 Journal of Personal Injury Law 1; Andrew Roy, 'Without a Safety Net: Litigating Employers' Liability Claims after the Enterprise Act' (2015) 1 Journal of Personal Injury Law 15. See also Daniel Bennett, 'The Development of Employer's Liability Law' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 1, in particular [1.101]; David Wilby, 'The General Principles of Negligence' in Daniel

dependants of an employee, to obtain compensation from an employer for personal injury or loss of life, which the employee suffered in the context of his/her employment, will now be to establish negligence on the part of the employer.[139] Any breaches of health and safety at work regulations on the part of an employer will remain relevant, but only as evidence in aid of a negligence claim.[140]

However, any breach of merchant shipping health and safety at work regulations is not subject to the exclusion of civil liability under Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24).[141] As seen in this section, merchant shipping health and safety at work regulations do not promulgate under the Health and Safety at Work Act 1974, (c 30), but under the Merchant Shipping Act 1995, (c 21).[142] Hence, the general principles applicable when deciding as to whether the breach of a statutory duty gives rise to a civil claim for damages remain relevant. This implies that, unlike a shore-based employee, or the dependants of a shore-based employee, a seafarer, or the dependants of a seafarer, may still benefit from a civil claim for damages for breach of merchant shipping health and safety at work regulations.

Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.01]; David Rivers, 'The Health and Safety at Work Act 1974' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 8, in particular [8.06]; Daniel Bennett, 'Equipment at Work' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 24, in particular [24.01] and [24.122] to [14.127]; Jenny Steele, 'Employer's Liability' in Michael A Jones (ed), *Clerk & Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017) Chapter 13, in particular [13 - 41] to [13 - 47]; Christopher Walton and others (eds), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 12, in particular [12 - 02] and [12 - 66] to [12 - 75]; Christian Witting, *Street On Torts* (15th Edition, Oxford University Press 2018) Chapter 19, in particular [1].

[139] Hansard, HC Vol 551, col 192 (16 October 2012).

[140] See, for example, Nigel Tomkins, 'Civil Health and Safety Law after the Enterprise and Regulatory Reform Act 2013' (2013) 4 Journal of Personal Injury Law 203; Andrew Roy, 'Without a Safety Net: Litigating Employers' Liability Claims after the Enterprise Act' (2015) 1 Journal of Personal Injury Law 15. See also Daniel Bennett, 'Equipment at Work' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 24, in particular [24.122] to [24.127]; Jenny Steele, 'Employer's Liability' in Michael A Jones (ed), *Clerk & Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017) Chapter 13, in particular [13 - 02]; Christopher Walton and others (ed)s, *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 12, in particular [12 – 73].

[141] Graham Aldous, 'Shipping and Workers on Ships' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 14, in particular [14.01] and [14.07].

[142] See above at page 53.

Indeed, Lord Bannatyne in *Wilson v North Star Shipping (Aberdeen) Ltd* held that the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, conferred a civil right of action on the claimant.[143] In this case, the claim arose out of the injury of a seafarer sustained during the course of his employment when he was crushed between two vessels. With regard to these Regulations, Lord Bannatyne adopted an approach similar to the analysis of Lord Drummond Young in *Cairns v Northern Lighthouse Board*.[144] Note, however, that the judgment in *Cairns v Northern Lighthouse Board*[145] and in *Wilson v North Star Shipping (Aberdeen) Ltd*[146] were concerned with accidents which occurred before 1 October 2013. Hence, the cases were concerned with facts which occured before the enactment of Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24).

Furthermore, both the judgment in *Cairns v Northern Lighthouse Board*[147] and in *Wilson v North Star Shipping (Aberdeen) Ltd*[148] came from courts in Scotland. Of course, Scottish law and English law are the same when it comes to shipowner's liability for personal injury or loss of life caused to a seafarer in the context of his/her employment. Nevertheless, in Scotland, considerable concerns have been raised as to the reforms introduced by Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24).[149] Therefore, both of these cases should be treated cautiously when it comes to the extent to which any breach of merchant shipping health and safety at work legislation gives rise to a civil claim for damages, and it is yet to be seen how this issue will be resolved, if a case comes before English courts.

One final remark has to be made, and that revolves around the potential impact of the withdrawal of the UK from the EU on merchant shipping health and safety at work

[143] [2014] CSOH 156, [77].
[144] [2013] CSOH 22, [27] to [40].
[145] ibid.
[146] [2014] CSOH 156.
[147] [2013] CSOH 22.
[148] [2014] CSOH 156.
[149] See, for example, Douglas Brodie, 'Damages Claims (EU Directive on Safety and Health at Work) (Scotland) Bill' (2015) (125) Employment Law Bulletin 4.

regulations.[150] Addressing this issue is necessary because the vast majority of merchant shipping health and safety at work regulations emanate from EU Directives, the most typical paradigm being the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended.[151] In Section 2, the European Union (Withdrawal) Act 2018, (c 16), (hereinafter EU (Withdrawal) Act 2018, (c 16)), which will repeal the European Communities Act 1972, (c 68), on exit day, explicitly states that all domestic legislation promulgated under EU law, including all domestic statutory instruments emanating from EU Directives, will continue to have effect in domestic law on and after exit day. This will allow any UK government conducting the withdrawal of the UK from the EU to avoid significant gaps and uncertainty to regulatory framework and to decide over time as to whether to maintain, replace or repeal any piece of legislation.

In the field of health and safety at work, Amendment 4 of the Lords Amendments to the EU (Withdrawal) Bill proposed to set out limits to the power of a Minister of the Crown to amend, repeal, or revoke retained EU law in this area.[152] The Amendment suggested that any changes to health and safety entitlements, rights and protection may be effected through primary legislation, or through subordinate legislation made under an enhanced scrutiny procedure, to be established by the Secretary of State.[153] Furthermore, it proposed that a Minister of the Crown seeking to make such changes must provide a declaration that the regulation does no more than make technical changes to retained EU law in this area, leaving thereby any substantial changes to health and safety entitlements, rights and protection to primary legislation.[154]

[150] For an analysis of the effect of the withdrawal of the UK from the EU on shipping and port law in general, see Vincent Power, 'The Impact of Brexit on Shipping and Ports Law' (2018) 3 Journal of International Maritime Law 181.
[151] See Section 2.3 at page 53.
[152] Lords Amendments to the EU (Withdrawal) Bill HC Bill (2017-19) Amendment 4.
[153] ibid. See also Explanatory Notes to the Lords Amendments to the EU (Withdrawal) Bill, Amendment 4*, in particular [23] to [24].
[154] ibid. See also Explanatory Notes to the Lords Amendments to the EU (Withdrawal) Bill, Amendment 4*, in particular [25] to [26].

However, the Commons did not approve Amendment 4 of the Lords Amendments to the EU (Withdrawal) Bill because they felt that the EU (Withdrawal) Bill already contained sufficient protection for the area of EU law concerned.[155] This means that, after the exit day, there will be no enhanced protection for health and safety entitlements, rights, and protection emanating from EU legislation. The general provisions as to the retention of existing EU law as set out in Sections 2, 3, and 4 of the EU (Withdrawal) Act 2018, (c 16), will apply. More specifically, Section 2 of the EU (Withdrawal) Act 2018, (c 16), will be relevant, as most health and safety at work regulations, including any merchant shipping health and safety at work regulations, were made under Section 2 (2) of the European Communities Act 1972, (c 68). Furthermore, the general provisions as to the status and modification of retained EU law set out in Sections 7 and 8 of the EU (Withdrawal) Act 2018, (c 16), will apply.

Having said that, it is clear that, once the European Communities Act 1972, (c 68), is repealed on exit day, any merchant shipping health and safety at work regulations, as they have effect in domestic law immediately before exit day, will continue to have effect on and after exit day. However, it is yet to be seen whether any UK government conducting the withdrawal of the UK from the EU will decide to make any substantive changes to such merchant shipping health and safety at work regulations. Of course, in principle, the future of the aforementioned regulations will depend on the terms of the UK departure from the EU and the extent, if any, to which the UK will remain obliged to respect rules pertinent to the single market. Subject to that, one could envisage three possibilities as to the future of these regulations.

The first possibility would seem to suggest that any UK government conducting the withdrawal of the UK from the EU may decide to repeal any merchant shipping health and safety at work regulations so that only the protection offered to seafarers in terms of health and safety at work by the common law would be available. However, this scenario seems highly unlikely to effectuate, given that a repeal of any merchant

[155] Commons Amendments in Lieu, Amendments to Amendments and Reasons HL Bill (2017-19) [4] to [4A].

shipping health and safety at work regulations would clearly contravene the UK's international obligations in this area, particularly under the Maritime Labour Convention, 2006, as amended, the International Convention for the Safety of Life at Sea, 1974, as amended, and the International Convention on Standards of Training, Certification, and Watch-keeping for Seafarers, 1978, as amended.

Another possibility would seem to suggest that any UK government overviewing the departure of the UK from the EU may decide to retain any merchant shipping health and safety at work regulations as they are on and after exit day. This implies that any merchant shipping health and safety at work regulations would continue to be interpreted so as to give rise to a right to bring a civil claim for damages for any breach of their provisions. Hence, the paradox of distinguishing seafarers from shore-based employees in respect of health and safety at work will remain.

Finally, the third possibility would seem to suggest that any UK government conducting the withdrawal of the UK from the EU may decide to replace any merchant shipping health and safety at work regulations with new statutory instruments, with a view to harmonising the protection offered to seafarers with the protection offered to shore-based employees in terms of health and safety at work. What this effectively means is that these new statutory instruments may make any necessary substantive changes to the aforesaid regulations so that their provisions would no longer have to be interpreted as to give rise to a right to bring a civil claim for damages for any breach of the provisions of merchant shipping health and safety at work regulations. This emanates from a string of underlying policy reasons turning away from any distinctions between seafarers and shore-based employees in respect of health and safety at work considerations.[156]

[156] See, for example, *George Ziemniak v ETPM Deep Sea Ltd* [2003] EWCA Civ 636 (CA) [41] where the Court of Appeal held that there was no valid reason for distinguishing seafarers from shore-based employees in respect of health and safety at work considerations. Of course, this comment was made, with a view to enhancing the protection offered to seafarers. Because at the time a right to bring a civil claim for damages for breach of health and safety at work regulations was available to shore-based employees, but not to seafarers. Nonetheless, there is no good reason why the same reasoning cannot

Of course, I recognise that, even if any UK government conducting the withdrawal of the UK from the EU decides to make such substantive changes, the amendments in question shall continue to comply with the UK's international obligations in the field of health and safety at work for seafarers, particularly under the Maritime Labour Convention, 2006, as amended, the International Convention for the Safety of Life at Sea, 1974, as amended, and the International Convention on Standards of Training, Certification, and Watch-keeping for Seafarers, 1978, as amended. However, none of these international legal instruments provide for a civil claim for damages as a remedy for breach of their provisions.[157] Thus, there is in principle no objection to any amendments abolishing the right to bring a civil claim for damages for breach of merchant shipping health and safety at work regulations.[158]

Against this backdrop, I will therefore continue by exploring the extent to which some existing statutory employment rights in respect of health and safety at work will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Inherent in this task is a practical limitation which is imposed by the sheer volume of merchant shipping health and safety at work regulations. To address this practical limitation, I divide existing merchant shipping health and safety at work regulations into two categories. The first category includes merchant shipping health and safety at work regulations that have a very specific scope of application, and they are highly unlikely to have an impact on

---

be applied in the opposite situation where a right to bring a civil claim for damages for breach of health and safety at work regulations is available to seafarers, but not to shore-based employees.

[157] Perhaps the only exception is Regulation 2.6 of the Maritime Labour Convention, 2006, as amended, stating that 'seafarers are entitled to adequate compensation in the case of injury, loss, or unemployment arising from the ship's loss or foundering'.

[158] Note, here, that even the Council Directive 89/391/EC (hereinafter the Framework Directive), the provisions of which are implemented into English law by merchant shipping health and safety regulations, such as the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, does not impose a requirement to provide for compensation for damage suffered as a result of any breach of its provisions. This was one of the arguments raised by the UK in *Commission of the European Communities v United Kingdom* (C-127/05) [2007] All ER (EC) 986 where the European Commission challenged Section 2 (1) of the Health and Safety at Work Act 1974, (c 30), on the basis that it results in a situation where the Framework Directive has not been adequately implemented. Although this argument was not specifically addressed in the judgment, the court found for the UK.

the unique circumstances of maritime piracy as a result thereof.[159] The second category includes merchant shipping health and safety at work regulations that have a broad scope of application by virtue of which they may be relevant to the unique circumstances of maritime piracy.[160] It is thus only logical that I will focus on the latter category in the following sub-sections.

In passing it may be worth explaining here that, when I use the term 'merchant shipping health and safety at work regulations', I refer to all the regulations from which a seafarer, or the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss or life, which the seafarer suffered in the context of his/her employment, may draw some benefit. As explained earlier, an integral part of a regime providing protection for health and safety at work is how compensation can be obtained when personal injury or loss of life occurs.[161] For that not only will I consider any relevant strictly defined merchant shipping health and safety at work regulations, such as the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, but I will also consider any relevant general merchant shipping regulations, such as the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended.

[159] See, for example, the Merchant Shipping and Fishing Vessels (Manual Handling Operations) Regulations 1998, (SI 1998/2857); the Merchant Shipping and Fishing Vessels (Provision and Use of Work Equipment) Regulations 2006, (SI 2006/2183); the Merchant Shipping and Fishing Vessels (Lifting Operations and Lifting Equipment) Regulations 2006, (SI 2006/2184); the Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Work at Height) Regulations 2010, (SI 2010/332).
[160] See, for example, the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended; the Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205); the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended.
[161] See Chapter 2, Section 2.2 at page 33.

2.3.1. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, provide for compensation?

The Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, stipulate the general statutory duties cast upon a shipowner in respect of health and safety at work. These Regulations represent yet another example of merchant shipping health and safety at work legislation emanating from EU Directives, since they were enacted to implement into English law the Council Directive 89/391/EC on the introduction of measures to encourage improvements in health and safety at work (hereinafter the Framework Directive).

In terms of exploring the extent to which these Regulations will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, Regulations 5, 7, and 12 of these Regulations may be of greater interest. Before moving on to analyse these Regulations one by one, it may be worth noting here that, for the purposes of this sub-section, I assume that any breach of these Regulations gives rise to a civil claim for damages.

Starting with Regulation 5 (1) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, this Regulation provides that a shipowner shall ensure the health and safety of seafarers so far as is reasonably practicable, having regard to a line of principles, which among other things include the avoidance of risks. As a result, the following question arises as to whether the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment falls within the scope of this Regulation.

At one extreme, it is true that the precise wording used by Regulation 5 (1) is considerably broad. Regulation 5 (2) draws attention to the generality of the duty imposed on shipowners under Regulation 5 (1). At the other extreme, it is also true that, when Regulation 5 (1) was enacted, maritime piracy was not one of the intended

purposes. A careful reading of the preamble of the Framework Directive indicates that its enactment was motivated by an increased rate of accidents at work and occupational diseases. Remember, here, that the provisions of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, should be interpreted in accordance with the Framework Directive; given that they were enacted to implement this Directive into English law.

As discussed in sub-section 2.2.2, maritime piracy can hardly be described as an 'accident'.[162] However, I argued earlier that, in so far as the protection of seafarers' rights is concerned, the word 'accident' should be interpreted broadly rather than literally.[163] This implies that the question posed above, namely, as to whether the risk of a seafarer being injured or killed by the criminal acts of pirates falls within the scope of Regulation 5 (1), can be answered in the affirmative.

But even if I am wrong, and the word 'accident' shall obtain a more restrictive meaning, my premise, namely, that the risk of a seafarer being injured or killed by the criminal acts of pirates falls within the scope of Regulation 5 (1), is further supported by the fact that, according to the Code of Safe Working Practices for Merchant Seafarers 2015 Edition – Amendment 3 (October 2018), which should be read in conjunction with the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, risks from violence in the workplace fall within the scope of occupational health and safety at work risks.

Turning now to Regulation 7 (1) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, it stipulates that a duty rests on a shipowner to conduct an assessment of the risks of the health and safety of seafarers arising in the normal course of their activities or duties,

[162] See above at pages 48 to 51.
[163] See Chapter 2, Section 2.2, Sub-Section 2.2.2 at pages 48 to 51.

for the purpose of identifying among other things the measures to be taken to comply with the shipowner's duties under the Regulations.[164]

Most certainly, the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment constitutes a risk arising in the normal course of his/her activities or duties; especially, when the voyage to be undertaken is in and/or around piracy infested waters. In such cases, a shipowner will have to carry out a proper and sufficient assessment of the risks of health and safety of seafarers arising out of entering piracy infested waters, with a view to identifying the measures to be taken to safeguard the health and safety of seafarers against such risks. In effect, therefore, where a shipowner fails to conduct such a proper and sufficient risk assessment, Regulation 7 (1) will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

Closing with Regulation 12 (2) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, this Regulation provides that a duty is cast upon a shipowner to provide a seafarer with adequate and appropriate health and safety at work training and instruction before being assigned to shipboard duties and on his/her being exposed to new or increased risks.

Once again, Regulation 12 (2) adopts a broad wording. This, taken in conjunction with my earlier premises that the word 'accident' should be interpreted broadly rather than literally[165] and that maritime piracy should fall within the scope of application of these Regulations as a result thereof[166], arguably suggests that a shipowner will have to provide a seafarer with adequate and appropriate health and safety at work training and instruction including maritime piracy specific training and instruction; especially where the voyage to be undertaken is in and/or around piracy infested waters.

---

[164] For more details on how to conduct a suitable and sufficient risk assessment for the purposes of Regulation 7 (1) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, see the Code of Safe Working Practices for Merchant Seafarers 2015 Edition – Amendment 3 (October 2018), ANNEX 1.2.
[165] See Chapter 2, Section 2.2, Sub-Section 2.2.2 at pages 48 to 51.
[166] See Chapter 2, Section 2.3, Sub-Section 2.3.2 at page 67.

Consequently, where a shipowner fails to provide a seafarer with such training and instruction, Regulation 12 (2) will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.

2.3.2. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will the Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205), provide for compensation?

The Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205), give effect to Council Directive 89/656/EEC on the minimum health and safety requirements for the use by employees of personal protective equipment in the workplace. The overriding duty is contained in Regulation 5 of the aforementioned Regulations and stipulates that personal protective equipment shall be provided when risks cannot be eliminated or reduced by any other means. I maintain in this respect that the Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205), will be of no practical significance, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. There are tenable grounds for arguing so.

First, the risk of future maritime piracy attacks can hardly be described as a risk that cannot be avoided or reduced by any other means. Indeed, there is a plethora of precautionary measures, which a shipowner can take to protect the ship and her crew from risks associated with sailing through piracy infested waters.[167] Secondly,

[167] In this regard, the general guidelines for protection against the risk of future maritime piracy attacks issued by the Baltic and International Maritime Council (hereinafter BIMCO), the International Chamber of Shipping (hereinafter ICS), the International Group of Protection and Indemnity Clubs (hereinafter IGP&I Clubs), the International Association of Independent Tanker Owners (hereinafter INTERTANKO), the International Association for the Ship Management Industry (hereinafter INTERMANAGER), and the Oil Companies International Marine Forum (hereinafter OCIMF), and endorsed by twenty nine different international shipping associations may be instructive. For more details on the precautionary measures available to shipowners in the fight against maritime piracy, see ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5,

Regulation 2 (2) provides that, for the purposes of the Merchant Shipping and Fishing Vessels (Personal Protective Equipment) Regulations 1999, (SI 1999/2205), self-defence or deterrent equipment does not constitute personal protective equipment. This, taken in conjunction with the fact that any equipment provided by a shipowner to thwart maritime piracy attacks is likely to be self-defence or deterrent equipment,[168] clearly suggests that the specific facts of maritime piracy do not fall within the scope of application of these Regulations.

2.3.3. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613) provide for compensation?

As seen in section 2.2, the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, were enacted to implement the provisions of the Maritime Labour Convention, 2006, as amended, which was adopted at the 94th (Maritime) Session of the International Labour Conference (hereinafter ILC) in February 2006 and came into force in August 2013.[169] More specifically, Part 10 of the aforementioned Regulations implements into English law Regulations 2.6 and 4.2 of the Maritime Labour Conference, 2006, as amended, which are concerned with shipowner's liability.

Of crucial significance in this respect is Regulation 48 (3) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended. According to Regulation 48 (3), if the loss or foundering of a ship causes the seafarer to suffer injury or death, the shipowner must pay compensation to the seafarer. Most certainly, Regulation 48 (3) offers great

---

Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018).

[168] Take, for example, the use of razor wire barriers to deter pirates from boarding a vessel.

[169] See above at pages 29 to 30.

assistance to a seafarer, or the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of the loss or foundering of a ship in the context of his/her employment.

However, in the context of maritime piracy, Regulation 48 (3) has limited practical significance. Because its scope is limited to some strictly defined circumstances. Namely, Regulation 48 (3) applies only where a seafarer suffers injury or death as a result of the loss or foundering of a ship. In so far as foundering is concerned, the applicability of Regulation 48 (3) to the specific facts of maritime piracy may be summarised as follows. If there is foundering of a ship as a result of a maritime piracy attack, and if a seafarer suffers personal injury or loss of life as a result thereof, Regulation 48 will provide for compensation. If, on the other hand, there is no foundering of a ship, Regulation 48 (3) will not be triggered.

It is yet to be seen in this regard if capture of a ship by pirates constitutes loss of a ship for the purposes of Regulation 48 (3). It seems to me that the most reasonable possibility would seem to suggest that it does not.[170] As early as in 1906, Mr Justice Ridley in *Sivewright v Allen* emphasised that the term 'loss of a ship' does not mean 'mere capture of a ship by an enemy or a seizure by pirates', unless there is also 'physical destruction of the ship'.[171] Similarly, the House of Lords in *Horlock v Beal* was of the opinion that the term 'loss of a ship' is confined to 'physical loss'.[172]

It may be worth highlighting here that the cases just cited were concerned with explaining the meaning of the term 'loss of a ship' for the purposes of Section 158 of

[170] In academic circles, a similar view has been expressed when discussing the issue as to whether a seafarer held hostage by pirates should be entitled to his/her wages. See, for example, Hilton Staniland, 'Protecting the Wages of Seafarers Held Hostage by Pirates: The Need to Reform the Law' (2013) 3 (4) International Journal of Public Law and Policy 345, in particular [7]. See also Graham Caldwell, 'Seafarers and Modern Piracy' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014) Chapter 7, in particular [7.22] to [7.28]; Chen Gang and Desai Shan, 'Labour Rights of Merchant Seafarers Held Hostage by Pirates' in Stefano Zunarelli and Massimiliano Musi (ed), *Current Issues in Maritime and Transport Law* (Bologna: Bonormo Editore 2016) Section 2, in particular [2.3]; Aengus Fogarty, *Merchant Shipping Legislation* (3rd Edition, Informa 2017) Chapter 2, in particular [2.49] to [2.51].
[171] [1906] 2 KB 81.
[172] [1916] AC 486 (HL) 490 and 524.

the Merchant Shipping Act 1894, (c 60), now Section 38 of the Merchant Shipping Act 1995, (c 21). Nevertheless, I argue that they are equally applicable in relation to the meaning of the term 'loss of a ship' for the purposes of Regulation 48 (3) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended. This is because both Section 38 of the Merchant Shipping Act 1995, (c 21), and Regulation 48 (3) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, implement into English law Regulation 2.6 of the Maritime Labour Convention, 2006, as amended.[173] It is thus only logical that the term 'loss of a ship' will obtain the same meaning under both provisions.

Having said that, I submit that, both for the purposes of Section 38 of the Merchant Shipping Act 1995, (c 21), and of Regulation 48 (3) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, mere capture of a ship by pirates will not be enough to constitute loss of a ship. Something more than that will be required. Take, for example, a situation where a ship is captured and destroyed by pirates. In such case, if a seafarer is injured or killed as a result thereof, Regulation 48 (3) of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, will provide for compensation. If, on the other hand, a ship is captured by pirates, but there is no physical destruction of the ship, Regulation 48 (3) will not provide for compensation.

Furthermore, Regulation 49 of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, may be of considerable practical assistance to a seafarer, or to the dependants of a

[173] MCA, *Merchant Shipping (Maritime Labour Convention) (Shipowner Liability) Regulations ("the proposed regulations")* (25 February 2014) Impact Assessment No DFT00028, Section 4 stating that '[…] In particular, the proposed Regulations would bring UK legislation into line with Regulation 2.6, Standard A 2.6, Regulation 4.2 and Standard A 4.2. The main changes that would result from the proposed Regulations are summarised below: a) statutory shipowners' liability for loss or injury suffered by the seafarer as a result from the loss or foundering of the ship. The Maritime Labour Convention 2006, as amended, also provides for continuation of Seafarers' wages, but this is already covered by Section 38 (1) of the Merchant Shipping Act (MSA) 1995; […]'.

seafarer, who seek compensation from a shipowner for injury or death caused to the seafarer as a result of a maritime piracy attack in the context of his/her employment. Indeed, Regulation 49 implements into English law Standard A 4.2 of the Maritime Labour Convention, 2006, as amended, which casts upon a shipowner an obligation to provide financial security to assure compensation in the event of death or long-term disability of a seafarer due to an occupational injury, illness or hazard.[174]

The provisions of Regulation 49 do not provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Conversely, they ensure that, if a seafarer, or the dependants of a seafarer, succeeds in a civil claim for damages against a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, the damages awarded will be recovered. It should be remembered in this respect that, if the insurance policy is under English law, the Third Parties (Rights Against Insurers) Act 2010, (c 10), confers a further benefit, since it provides that a seafarer, or the dependants of a seafarer, will be able to claim against the insurer without first establishing the liability of the shipowner in separate proceedings.[175]

Finally, Regulations 43, 50, and 51 of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations, (SI 2014/1613), as amended, may provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Given that these Regulations relate to the content of health and social security protection benefits clauses, which must be included in a SEA under Regulation 10 (1) (a) of the Merchant

[174] It may be worth noting here that, in so far as English law is concerned, the Employer's Liability (Compulsory Insurance) Act 1969, (c 57), may also be relevant. However, the aforesaid Act applies only to employees working in the UK; thereby, leaving seafarers out of its scope unless they work in the UK. In effect, therefore, the Employer's Liability (Compulsory Insurance) Act 1969, (c 57), will be of limited practical significance, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. For more details on the application of the Employer's Liability (Compulsory Insurance) Act 1969, (c 57), to seafarers, see David Rivers, 'Employers Liability Insurance' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 13; Johanna Hjalmarsson, 'Crewing Insurance under the Maritime Labour Convention 2006' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014) Chapter 5, in particular [5.12] to [5.16].

[175] Third Parties (Rights Against Insurers) Act 2010, (c 10), Section 1 (3).

Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc) Regulations 2014, (SI 2014/1613), as amended, read in conjunction with Schedule 1 Part 1 paragraph 9 of these Regulations, I considered these Regulations earlier in the present chapter when I explored the extent to which a health and social security protection benefits clause provides for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.[176]

2.3.4. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will the Employer's Liability (Defective Equipment) Act 1969, (c 37), provide for compensation?

As seen earlier in this chapter, general employment legislation does not often apply to seafarers.[177] However, the Employer's Liability (Defective Equipment) Act 1969, (c 37), is a good paradigm of general employment legislation that does apply to seafarers. This was made clear by the House of Lords in *Coltman v Bibby Tankers Ltd (The Derbyshire).*[178] In this case, the third engineer of the bulk carrier *Derbyshire* lost his life when the ship sank off the coast of Japan because of a defect in her design and construction attributable to the shipbuilders.[179] Lord Oliver, who delivered the leading judgment, accepted that the aforementioned Act applies to seafarers.[180] Moreover, his Lordship clarified once and for all that the ship herself falls within the meaning of the word 'equipment' for the purposes of this Act.[181]

Nonetheless, I maintain that the Employer's Liability (Defective Equipment) Act 1969, (c 37) will be of limited practical significance, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. This is because the ambit of Section 1 (1) of this Act is very narrow. Put in simple terms, its ambit is

[176] See Chapter 2, Section 2.2, Sub-Section 2.2.1 at pages 36 to 42.
[177] See Chapter 2, Section 2.1 at pages 28 to 29.
[178] [1988] AC 276 (HL).
[179] For more details on the context with which *Coltman v Bibby Tankers Ltd (The Derbyshire)* [1988] AC 276 (HL) was concerned, see K X Li and other, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 (3) Journal of Maritime Law and Commerce 381, 382 to 383.
[180] *Coltman v Bibby Tankers Ltd (The Derbyshire)* [1988] AC 276 (HL) 300 to 301.
[181] ibid.

limited to cases where the equipment, which is provided by a shipowner for the purposes of a shipowner's business, is defective and injures or kills a seafarer.[182] Note, however, that, if a seafarer is injured or killed by a defect in equipment provided by a shipowner to protect the ship herself and the crew from future maritime piracy attacks and the defect is attributable, either wholly or partly, to the fault of a third party, such as the manufacturer of the equipment, a seafarer, or the dependants of a seafarer, will be able to benefit from a civil claim for damages under Section 1 (1) of the Employers' Liability (Defective Equipment) Act 1969, (c 37).

Overall, the above review of merchant shipping health and safety at work regulations has demonstrated the inability of any particular provision to resolve all questions as to whether a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. It is thus clear that, in the presence of insufficient provisions in the relevant regulatory framework, resort to the common law is needed in order to shed light into the legal basis, upon which a seafarer, or the dependants of a seafarer, may be entitled to bring such claim. Therefore, I will continue by exploring the role of common law in this area in the field of the employment relationship between a shipowner and a seafarer.

2.4. Common law

In so far as health and safety at work is concerned, the common law has long recognised the same level of protection to seafarers as the protection given to shore-

[182] Indeed, Section 1 of the Employers' Liability (Defective Equipment) Act 1969, (c 37), stipulates that '(1) Where after the commencement of this Act – (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of injury'.

based employees.[183] Indeed, Lord Harman in the Court of Appeal in *Saul v Saint Andrews Steam Fishing Co (The St. Chad)* explicitly stated that a shipowner owes a seafarer the same duty of care as any shore-based employer.[184] What this effectively means is that a common law duty of care is cast upon a shipowner to safeguard the health and safety of a seafarer in the context of his/her employment.[185] Of course, I recognise that a similar duty of care rests on a shipowner under a SEA.

Section 42 of the Merchant Shipping Act 1995, (c 21), stipulates that a SEA shall include an implied by law term, in accordance with which a shipowner owes a seafarer a duty of care to exercise reasonable skill and care to ensure that his/her ship is seaworthy at the time when the voyage commences and to keep his/her ship in a seaworthy condition for the voyage during the voyage. Put in simple terms, the effect of the aforementioned Section is that a shipowner's duty of care to safeguard the health and safety of a seafarer in the context of his/her employment obtains both a common law and a contractual reiteration.[186] This spurs two questions.

The first question reflects on whether a seafarer, or the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered in the context of his/her employment, should bring a civil claim for damages under the tort of negligence or under the SEA. In judicial practice, the predominant view appears to be that there is really very little difference between the two, as the duty of care at hand emanates from both.[187] Academics are also in

[183] For that both sources dealing with the employment relationship between a shipowner and a seafarer and sources dealing with the employment relationship between a shore-based employer and a shore-based employee will be cited.
[184] [1965] 2 Lloyd's Rep 1 (CA) 7.
[185] The leading authority to cite in this respect is *Wilson & Clyde Coal Company Ltd v English* [1938] AC 57 (HL) 65 per Lord Thankerton, 75 per Lord Macmillan, 78 per Lord Wright, 87 per Lord Maughan. See also *Priestley v Fowler* 150 ER 1030.
[186] See, for example, K X Li and other, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 (3) Journal of Maritime Law and Commerce 381, 388; Pengfei Zhang and other, 'Safety First: Reconstructing the Concept of Seaworthiness under the Maritime Labour Convention 2006' (2016) 67 Marine Policy 54, 57 to 58.
[187] See, for example, *Lister v Romford Ice & Cold Storage Ltd* [1957] AC 555 (HL) 573 per Viscount Simonds; *Davie v New Merton Board Mills* [1959] AC 604 (HL) 619 per Viscount Simonds; *Matthews*

agreement on this point. *Munkman on Employer's Liability*, for example, recognises that both a common law and a contractual reiteration of an employer's duty of care to safeguard the health and safety of an employee in the context of his/her employment exists and highlights that the common law reiteration of the duty of care at hand overshadows the contractual reiteration of such duty of care.[188]

On the same line, *Charlesworth & Percy on Negligence* recognises that an employer's duty of care to safeguard the health and safety of an employee in the context of his/her employment arises both under the English law of negligence and under a contract of employment.[189] Similarly, *Chitty on Contracts* explains that, in general, an employer's duty to exercise reasonable skill and care to safeguard the health and safety of an employee in the context of his/her employment may be enforced either by an action under the tort of negligence or by an action for breach of an implied term in the contract of employment.[190] Nonetheless, the action is usually brought under the tort of negligence.[191] In fact, *Chitty on Contracts* highlights that, although there may be some differences between the relevant legal principles of tort and contract, the courts generally assume that the legal principles to be applied when an employee claims compensation from an employer for personal injury or loss of life suffered by the former in the context of his/her employment are the legal principles of tort.[192]

Furthermore, *Clerk & Lindsell on Torts* points out that the contractual reiteration of an employer's duty of care to safeguard the health and safety of an employee in the context of his/her employment reflects the common law reiteration of such duty of care, and that an employee may bring a claim for damages for personal injury or loss

---

v Kuwait Bechtel Corporation [1959] 2 QB 57 (CA) 64 per Lord Justice Sellers; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [43] and [119] per Lord Justice Underhill.

[188] Mr Justice Langstaff, 'The Employer's Duty of Care' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 4, in particular [4.43].

[189] Christopher Walton and others (eds), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 11, in particular [11 - 09].

[190] Hugh Beale (ed), *Chitty of Contracts* (33rd Edition, Sweet & Maxwell 2018) Volume II, Chapter 40, in particular [40 - 106].

[191] ibid.

[192] ibid Chapter 40, in particular [40 – 107].

of life in both negligence and contract concurrently.[193] However, it may be worth noting in this respect that, notwithstanding the fact that the two causes of action run concurrently, an employee cannot recover damages in both negligence and contract.[194] Likewise, Freedland maintains that it is beyond any doubt that an employer under a contract of employment owes an employee implied contractual obligations, corresponding to obligations imposed under tort law, to safeguard his/her health and safety in the context of his/her employment.[195]

Finally, Burrows explains that, in principle, there is no objection for an employee to pursue a claim against an employer for breach of the common law duty of care to safeguard an employee's health and safety in the context of his/her employment in negligence or in contract, depending on which is more favourable to him/her.[196] Lush, writing about the employment relationship between a shipowner and a seafarer, with particular reference to the context of maritime piracy, takes the same view.[197] Lush recognises that liability under the contract of employment is an alternative cause of action available to a seafarer, or the dependants of a seafarer, considering a claim against a shipowner for compensation following an injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment.[198] Accordingly, when dealing with these cases one should identify all possible causes of action and pursue the most favourable one.[199]

The second question reflects on how far the legal standard of care required of a shipowner in discharge of his/her duty of care to safeguard the health and safety of a seafarer in the context of his/her employment, whether it is a duty in tort or an implied

[193] Jenny Steele, 'Employer's Liability' in Michael Jones (ed), *Clerk & Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017) Chapter 13, in particular [13 – 05].
[194] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd Edition, Oxford University Press 2004) Chapter 1, in particular [6].
[195] Mark Freedland, *The Personal Employment Contract* (Oxford University Press 2006) Chapter 3, in particular [3].
[196] Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd Edition, Oxford University Press 2004) Chapter 1, in particular [6].
[197] Alexander Lush, 'Troubled Waters' (2011) 155 (4) Solicitors Journal 11, 12
[198] ibid.
[199] ibid.

obligation of the SEA, extends. Or, putting the matter another way, this question considers whether the legal standard of care required of a shipowner to discharge such duty of care, whether it is a tortious duty of care or a contractual duty of care, can be limited or modified by agreement. In the field of health and safety at work, the answer to the question just posed seems to be fairly straightforward. Pursuant to Section 2 (1) of the Unfair Contract Terms Act 1977, (c 50), a contractual term purporting to limit or modify the required standard of care in the circumstances under examination will be rendered void and unenforceable by the courts as a result thereof.

As seen in section 2.2, Section 2 (1) of the Unfair Contract Terms Act 1977, (c 50), stipulates that a person cannot by reference to any contractual term exclude or restrict his/her liability for personal injury or loss of life resulting from negligence.[200] Note, here, that, for the purposes of the aforementioned Section, the term 'negligence' encompasses both the breach of any contractual obligation, express or implied, to take reasonable care or exercise reasonable skill in the performance of the contract and the breach of any common law duty of care to take reasonable care or exercise reasonable skill.[201] Therefore, notwithstanding the existence of any contractual term to the contrary in the SEA, the legal standard of care required of a shipowner to discharge his/her duty of care to safeguard the health and safety of a seafarer in the context of his/her employment, whether it is a duty in tort or an implied obligation of the SEA, will follow the general principles of the English law of negligence.

2.4.1. If a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, will the English law of negligence provide for compensation?

In order for a seafarer, or for the dependants of a seafarer, to bring a successful claim in negligence for compensation to be obtained from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, they must prove on the balance of probabilities that

[200] See above at pages 34 to 35.
[201] Unfair Contract Terms Act 1977, (c 50), Section 1 (1)

the four elements of the tort of negligence are fulfilled. Put in simple terms, they must show that there was a common law duty of care on the part of the shipowner; there was a breach of that duty of care by the shipowner; there was a causal link between the shipowner's breach of duty of care and the seafarer's injury or death; and the seafarer's injury or death was attributable to the breach because it was not too unreasonable as to be too remote in the circumstances.[202]

This orthodox perception of the four elements of the tort of negligence has of course been subjected to critical review.[203] Nevertheless, it remains the prevailing way in which courts decide cases dealing with negligence liability.[204] In this thesis, I will adopt this orthodoxy. Therefore, in ascertaining the extent to which the English law of negligence will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, I will examine one by one the four elements of the tort of negligence mentioned above.

Starting with the duty of care element, I argue that, in the situation under discussion in the present thesis, this will be fulfilled. There is in principle no objection to recognising that a common law duty of care is cast upon a shipowner to safeguard the health and safety of a seafarer in the context of his/her employment. As seen in section 2.4, this has long been recognised by the courts.[205] Furthermore, little can be argued against recognising that that duty of care extends far enough to cover the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of

[202] For the elements of the tort of negligence, see *Donoghue v Stevenson* [1932] AC 562 (HL) 579 per Lord Atkin; *Lochgelly Iron and Coal Company Ltd v McMullan* [1934] AC 1 (HL) 9 per Lord Atkin.
[203] See, for example, Percy Winfield, 'Duty in Tortious Negligence' (1934) 34 Columbia Law Review 41; W W Buckland, 'The Duty to Take Care' (1935) 51 Law Quarterly Review 637; Donal Nolan 'Deconstructing the Duty of Care' (2013) 129 (Oct) Law Quarterly Review 559; James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76 (3) Cambridge Law Journal 480. See also R Dale Gibson, 'A New Alphabet of Negligence' in Allen M Linden (ed), *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968).
[204] In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [20], for example, Lord Reed identified the issues arising from the judgment. In doing so, his Lordship followed the orthodox perception of the elements of the tort of negligence. In particular, Lord Reed stated '[…] (4) Did the police officers owe a duty of care to Mrs Robinson? […] (6) If there was a breach of a duty of care owed to Mrs Robinson, were her injuries caused by that breach?'.
[205] See above at pages 75 to 76.

his/her employment, especially where the voyage to be undertaken is in and/or around piracy infested waters. In passing, it may be worth noting here that piracy infested waters include, but may not be limited to, designated high risk areas, areas in which maritime piracy attacks have been reported and areas in which incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place.

Of course, the scope and content of that duty of care cannot be exhaustively described. Nevertheless, it has consistently been accepted by the courts that it extends far enough to cover the risk of a seafarer being injured or killed by the deliberate wrongdoing of third parties in the context of his/her employment, if the risk at hand is a reasonably foreseeable risk in the workplace.[206] Take, for example, the words of Mr Justice Diplock, as he then was, in *Houghton v Hackney Borough Council.*[207] In this case, a rent collector, the employee, claimed damages from the Hackney Borough Council, the employer, for injuries sustained when he was attacked by three robbers while rendering his service in a room which was not specially designed for rent collecting.[208] In his judgment, Mr Justice Diplock explained that 'it is an employer's duty to take reasonable care to see that his/her employees are not exposed to unnecessary risks, even if it be the risk of injury by criminals'.[209]

[206] See, for example, *Houghton v Hackney Borough Council* (1961) 3 KIR 615 (QB); *Williams v Grimshaw* (1967) 3 KIR 610 (QB); *Peter Carlton v The Forrest Printing Ink Company Limited* [1980] IRLR 331 (CA); *Longworth v Coppas International* 1985 SC 42 (CS); *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB); *Moore v Kirklees Metropolitan Council* [1999] EWCA Civ J0430-29; *Rahman v Arearose Ltd* (QB, 18 February 1999); [2001] QB 351 (CA); *Cook v Bradford Community Health NHS* [2002] EWCA Civ 1616; *Waugh v London Borough of Newham* [2002] EWHC 802 (QB); *Humphrey v Tote Bookmakers* [2003] EWHC 217 (QB); *Harvey v Northumberland County Council* [2003] EWCA Civ 338; *Millward v Oxford County Council* [2004] EWHC 455 (QB); *Buck v Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576; *Lloyd v Ministry of Justice* [2007] EWHC 2475 (QB); *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB); *Vaile v London Borough of Havering* [2011] EWCA Civ 246; *McCarthy v Highland Council* [2011] CSIH 51; *Mitchell v United Co-Operative Ltd* [2012] EWCA Civ 348; *Nicholls v Ladbrokes Betting & Gaming Ltd* [2013] EWCA Civ 1963; *Smith v Ministry of Defence* [2013] UKSC 41.
[207] (1961) 3 KIR 615 (QB).
[208] *Houghton v Hackney Borough Council* (1961) 3 KIR 615 (QB).
[209] ibid.

Mr Justice Diplock's premises has been approved by the Court of Appeal in *Peter Charlton v The Forrest Printing Ink Company Ltd*.[210] Here, Mr Charlton, the chief chemist in a firm specialising in making printing ink, who was responsible for collecting the money for the wages from the bank on a weekly basis, sustained injuries to his eyes and lost his vision when he was attacked by robbers while walking back to his car after he had collected the weekly wages. Mr Charlton claimed damages for his injuries from the firm on the ground that they failed to exercise reasonable skill and care to protect him from the risk of being injured by the criminal acts of robbers in the course of his employment. Although the claim failed at the Court of Appeal, Lord Denning, delivering the leading judgment with which the rest of the Court of Appeal concurred, stated that, regarding the duty of care element, the law is settled.[211] An employer owes an employee a duty to protect him/her from the deliberate wrongdoing of third parties in the course of his/her employment.[212]

Of greatest interest for the purpose of my analytical framework is the judgment of Mr Justice Clarke in *Tarrant v Ramage (The Salvital).*[213] This is because the claim in this case arose out of the injury of a radio officer rendering his service on board a tug which was ordinarily operating in a war zone during the Iran/Iraq war. No doubt, the factual matrix of this case is not identical to the situation under discussion in the present thesis. However, cases dealing with tortious liability for injury or death of seafarers caused by the wilful act of third parties in conflict zones are similar to cases dealing with tortious liability for injury or death of seafarers caused by the criminal acts of pirates. Thus, they should be mentioned explicitly in the analysis.

In particular, in *The Salvital*,[214] a radio officer was injured when the tug on board which he was working was struck by an exocet missile during the Iran/Iraq war. The radio officer claimed damages for his injuries from the tug owners. The claim against

[210] [1980] IRLR 331 (CA).
[211] *Peter Carlton v The Forrest Printing Ink Company Limited* [1980] IRLR 331 (CA).
[212] ibid.
[213] [1998] 1 Lloyd's Rep 185 (QB). See also *Longworth v Coppas International* 1985 SC 42 (CS); *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB).
[214] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB).

the owners of the tug was brought on the ground that they failed to fulfil their common law duty of care to take proper measures to protect him from the risk of being injured by the wilful acts of third parties in the context of his employment.

What is particularly interesting in this respect, however, is the way Mr Justice Clarke came to the conclusion that the tug owners were liable to compensate the radio officer. Mr Justice Clarke explained that the real question for decision in this case was not whether the owners of the tug owed a duty to the radio officer to exercise reasonable skill and care to protect him from the deliberate wrongdoing of third parties.[215] This was well-settled by authority.[216] Conversely, the questions at hand were whether the tug owners were in breach of their duty of care and, if they were negligent, whether the radio officer's injuries were caused by that breach.[217] As will appear further on, Mr Justice Clarke answered both questions in the affirmative.[218]

Indeed, the employment relationship has long been treated as one of the well-established exceptions to the rule of no liability for pure omissions giving rise to a common law duty of care on the part of a shipowner to take positive action to protect a seafarer from the risk of being injured or killed by the deliberate wrongdoing of third parties in the context of his/her employment.[219] In *Smith v Littlewoods Organisation Ltd*, for example, Lord Goff recognised that there are special

[215] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 190.
[216] ibid.
[217] ibid.
[218] See below at pages 86 to 98.
[219] For more details on the recognition of the employment relationship as one of the exceptional circumstances, in which third party liability in negligence accrues, see Robert O'Leary, 'Third Party Violence at Work' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 21. For more details on third party liability in negligence, see Basil Markesinis, 'Negligence, Nuisance and Affirmative Duties of Action' (1989) 105 (Jan) Law Quarterly Review 104; James G Logie, 'Affirmative Action in the Law of Tort: the Case of the Duty to Warn' (1989) 48 (1) Cambridge Law Journal 115; David Howarth, 'My Brother's Keeper? Liability for Acts of Third Parties' (1994) 14 Legal Studies 88; Janet O'Sullivan, 'Liability for Criminal Acts of Third Parties' (2009) 68 (2) Cambridge Law Journal 270; Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 (3) Cambridge Law Journal 651; Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 (Oct) Law Quarterly Review 559. See also Claire McIvor, *Third Party Liability in Tort* (1st Edition, Hart Publishing 2006); Michael A Jones, 'Negligence' in Michael A Jones (ed), *Clerk & Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017) Chapter 8, in particular [8 - 47] to [8 - 62]; Christopher Walton and others (eds), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 2, in particular [2 - 62] to [2 - 103].

circumstances in which a defendant may be held liable for injuries suffered by the claimant through the deliberate wrongdoing of third parties.[220] These special circumstances include cases where a duty of care may arise from a relationship between the parties, cases where a duty of care may arise from a relationship between the defendant and the third party, and cases where a duty of care may arise when the defendant negligently causes or permits a source of danger to be created, and it is reasonably foreseeable that third parties may interfere with it.[221]

The situation under discussion in the present thesis falls within the first of these special circumstances. Lord Nicholls in *Stovin v Wise* explained that the employer/employee relationship is a familiar instance where a common law obligation to take positive action arises.[222] Similarly, both Lord Hope and Lord Scott in *Mitchell v Glasgow City Council* recognised that, where a person is injured in the course of his/her employment, it can be taken for granted that the employer owes a duty of care to the person who is in his/her employment.[223] Lord Hope explained in this respect that the duty of care is created by the relationship, and the scope of the duty is determined by what in the context of that relationship is reasonably foreseeable.[224]

Finally, Lord Toulson in *Michael v Chief Constable of South Wales Police* reiterated the special circumstances in which liability may be imposed on a defendant for injury or damage to the claimant caused by the deliberate wrongdoing of third parties.[225] His Lordship identified two types of situations.[226] The first is where the defendant is in a position of control over the third party and should have foreseen the likelihood of the third party causing damage to the claimant if the defendant failed to exercise reasonable skill and care in the exercise of that control.[227] Clearly, this type of situations does not apply to the situation under discussion in the present thesis. For

[220] [1987] AC 241 (HL) 272.
[221] *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) 272 to 273.
[222] [1996] AC 923 (HL) 930.
[223] [2009] UKHL 11, [2009] 1 AC 874 (HL) [16] per Lord Hope, [40] per Lord Scott.
[224] *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874 (HL) [16].
[225] [2015] UKSC 2, [2015] AC 1732 (SC) [97] to [101].
[226] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 (SC) [99].
[227] ibid [99].

that the shipowner does not exercise control over the pirates. The second is where the defendant assumes a positive responsibility to safeguard the claimant.[228] According to Lord Toulson, the latter type of situations embraces the employer/employee relationship.[229] Thus, it is relevant to the present context. Remember, here, that a shipowner owes a seafarer the same duty of care as any shore-based employer.[230]

It must follow then that, at least where the voyage to be undertaken is in and/or around piracy infested waters, the shipowner's duty to exercise reasonable skill and care to safeguard the health and safety of a seafarer in the context of his/her employment extends far enough to cover the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment. In such cases, the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is a reasonably foreseeable risk in the workplace against which a shipowner has to take adequate precautionary measures. The mass of official advice as to the need for shipowners to consider measures to protect their ships and crew from future maritime piracy attacks is premised on that reality.[231]

Turning now to the breach of duty of care element, I submit that, in the situation under discussion in the present thesis, this may be fulfilled, but the circumstances in which that will be so remain rather obscure and incoherent. Broadly speaking, a shipowner will be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in circumstances in which the precautionary measures taken by the shipowner to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment fell below the legal standard of care required of the shipowner in the situation under discussion in the present thesis.

---

[228] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 (SC) [100].
[229] ibid.
[230] See Chapter 2, Section 2.4 at page 76.
[231] See, for example, UK Department of Transport, *Guidance to UK Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence against Merchant Shipping* (Crown Copyright 2011).

Logic, therefore, dictates that, in order to clarify the circumstances in which the breach of the duty of care element will be fulfilled, I will first have to shed light into the legal standard of care required of the shipowner in the situation under discussion in the present thesis. As a rule, the legal standard of care is that of the hypothetical reasonable shipowner. This has been set out by courts on various occasions.[232] In *The Salvital*, for example, Mr Justice Clarke explained in this regard that the question as to whether the tug owners were in breach of their duty to protect the radio officer from the wilful acts of third parties must be answered from the point of view of the reasonable owners of a tug like *Salvital* rendering her services in the Persian Gulf during the Iran/Iraq war, on the assumption that the tug owners had all such knowledge as they ought reasonably to have had at their disposal.[233]

Indeed, the so-called test of the hypothetical reasonable person has been the mechanism used by the courts when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case for more than two centuries.[234] The test itself has been left untouched by the controversies surrounding the other elements of the tort of negligence.[235] Yet its application has been the source of much confusion.[236] As will appear further on, this is more evident in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment.[237] Of course, I recognise that the majority of the cases to be discussed in the following paragraphs revolve around the employment relationship between a

[232] See, for example, *Paris v Stepney Borough Council* [1951] AC 367 (HL) 382 per Lord Normand*; Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 558 per Lord Morton, 576 per Lord Tucker; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 (HL) 166 per Lord Keith; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 (QB) 1783 per Mr Justice Swanwick; *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [109] per Lord Reed.
[233] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 190. See also *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [87] to [88] per Mr Justice Christopher Clarke.
[234] The principal authority for the so-called test of the hypothetical reasonable person would appear to be *Blyth v Birmingham Waterworks Co* 156 ER 1047; (1856) 11 Exch 781 (CA).
[235] Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 (3) Cambridge Law Journal 651, 651 to 652.
[236] ibid.
[237] See below at pages 87 to 92.

shore-based employer and a shore-based employee.[238] However, for present purposes, this is of limited practical significance, given that the same legal principles apply in the employment relationship between a shipowner and a seafarer.[239]

In general, I observe that, when deciding cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment, the courts have failed to articulate in a systematic and coherent way the actual grounds upon which their decisions were made. This may have something to do with policy considerations against third party liability in negligence. Lord Hoffmann in *Stovin v Wise* explained that these policy considerations revolve around political, moral, and economic reasons.[240]

However, as seen earlier, in cases of tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment, a duty of care exists on the part of the employer/shipowner due to the special relationship of the parties.[241] Thus, the only way for the courts to control liability and non-liability in this kind of cases is by interpreting the standard of reasonable care in a way that can easily be discharged by employers/shipowners.[242]

In *Houghton v Hackney Borough Council,* Mr Justice Diplock held that the precautions taken, although they did not prevent the rent collector from sustaining injury, did comply with the standard of reasonable care, which was required of the Hackney Borough Council in the circumstances.[243] In reaching this conclusion, Mr Justice Diplock placed particular emphasis on the practical difficulties of providing a room specially designed for rent collecting, rather than on the risk-creating activity of

[238] See below at pages 87 to 92.
[239] See Chapter 2, Section 2.4 at page 76.
[240] [1996] AC 923 (HL) 943.
[241] See above at pages 83 to 85.
[242] See Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 (3) Cambridge Law Journal 651, 655 to 666 where it was explained that a modified standard of care has previously been used in cases where the claimant seeks to hold the defendant liable for the consequences of the deliberate act of a third party.
[243] (1961) 3 KIR 615 (QB). For more details on the facts of the case, see above at page 81.

the Hackney Borough Council and the injury sustained by Mr Houghton.[244] Accordingly, the Hackney Borough Council was found non-liable.

Similarly, in *Peter Charlton v The Forrest Printing Ink Company Ltd*, Lord Denning found that the firm was not liable.[245] Indeed, his Lordship held that the firm exercised reasonable skill and care to protect Mr Charlton from the risk of being injured by the criminal acts of robbers in the context of his employment. [246] However, in this case, the crucial factor was not the practical difficulties of the alleged precautionary measures but the practice followed by various firms when collecting money for the wages from banks.[247] According to this practice, small companies dealing with comparatively small sums of money made their own arrangements for their own staff to collect the money from the bank.[248] Given that the firm in question was a small company, Lord Denning held that it should not have employed a security company to comply with the standard of reasonable care required in the circumstances.[249]

In *The Salvital*, on the other hand, Mr Justice Clarke held that the owners of the tug were in breach of their duty to take proper measures to protect the radio officer from the risk of being injured by the wilful acts of third parties in the context of his employment, even though they followed the practice commonly followed by other tugs rendering salvage services in the Persian Gulf during the Iran/Iraq war.[250] In fact, every time a warning was received that Iraqi aircrafts were in the air, the tugs moved clear of the casualty to protect themselves.[251] However, Mr Justice Clarke held that that was not enough to comply with the standard of reasonable care required of the owners of the tug in this case.[252] In finding so, Mr Justice Clarke focused on the risk-

[244] *Houghton v Hackney Borough Council* (1961) 3 KIR 615 (QB).
[245] [1980] IRLR 331 (CA). For more details on the facts of the case, see above at pages 81 to 82.
[246] *Peter Charlton v The Forrest Printing Ink Company Ltd* [1980] IRLR 331 (CA).
[247] ibid.
[248] ibid.
[249] ibid.
[250] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 193. For more details on the facts of the case, see above at pages 82 to 83.
[251] ibid 187 to 188.
[252] ibid 192.

creating activity of the tug owners.[253] More specifically, his Justice explained that the fact that the tug was operating in a war zone emphasised the need for taking further precautionary measures rather than the reverse.[254]

In *Graham Hopps v Mott MacDonald Ltd*, another case dealing with injury caused to an employee by the wilful act of third parties in a conflict zone, Mr Justice Christopher Clarke held that Mott MacDonald Ltd was not in breach of their duty to take reasonable care to protect Mr Hopps from the risk of being injured by the wilful act of third parties in the course of his employment.[255] In this case, Mr Hopps was injured when he was attacked while rendering his services in a construction site in Basrah after the invasion of Iraq.[256] Mr Hopps brought a claim for damages for his injuries against Mott MacDonald Ltd, which engaged him.[257]

The crux of his claim was that Mott MacDonald Ltd should have carried out a detailed and properly informed risk assessment about the suitability of the proposed transport arrangements and the provision of security, that they should have provided their employees with written instructions with regard to what precautionary measures should be taken in the circumstances, that they should have provided armoured vehicles for the transportation of their employees, and/or that they should have kept Mr Hopps in base until an armoured vehicle was available to transport him.[258]

Mr Justice Christopher Clarke held that Mott MacDonald Ltd were not in breach of their duty of care despite the fact that they had not carried out a proper risk assessment and had not provided their employees with written instructions describing what precautionary measures should be taken to minimise the risk of an attack and the consequent risk of an employee being injured or killed.[259] This is clearly opposite to what has been decided by Mr Justice Clarke in *The Salvital*, where his Justice

[253] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 192.
[254] ibid.
[255] [2009] EWHC 1881 (QB).
[256] *Graham Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB).
[257] ibid.
[258] ibid.
[259] ibid.

explained that the fact that the tug was operating in a conflict zone emphasised the need for carrying out a suitable and sufficient risk assessment and providing written instructions with regard to what precautions should be taken and to what tugs should do when receiving a warning of an attack.[260] Hence, the owners of the tug were found negligent for failing to provide the crew of the tug with such instructions.[261]

There are two potential reasons for the conflicting judgments of Mr Justice Clarke and Mr Justice Christopher Clarke in *The Salvital* and *Graham Hopps v Mott MacDonald Ltd* respectively. First, the level of risk may have been different between the two cases. While, in *The Salvital*, there was a warning for an upcoming attack,[262] in *Graham Hopps v Mott MacDonald Ltd*, there was no such warning.[263] This may be an indication that the level of risk was lower in the latter case. Secondly, in *Graham Hopps v Mott MacDonald Ltd*, Mr Justice Christopher Clarke put particular emphasis on the social utility of the risk-creating activity of the defendant.[264] Mr Justice Christopher Clarke explained that taking further precautionary measures would have had a serious effect in the progress of the reconstruction of the shattered infrastructure of Iraq.[265] As seen earlier, in *The Salvital*, Mr Justice Clarke did not consider at all the social value of rendering salvage services to casualties in the Persian Gulf during the Iran/Iraq war when determining the precautionary measures that should have been taken to comply with the standard of reasonable care in the circumstances.[266]

The last case to be discussed here is *Mitchell v United Co-Operative Ltd*.[267] In this case, Mrs Mitchell, a shop assistant, was injured when she was attacked by robbers while working at a convenience store. Mrs Mitchell claimed damages from her employers for the injuries she suffered as a result of this attack. The claim reached the Court of Appeal in an appeal from Mrs Mitchell. The issue that fell for decision in the

[260] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 192.
[261] ibid 193.
[262] ibid 189.
[263] *Graham Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB).
[264] ibid [131].
[265] ibid.
[266] See above at pages 88 to 89.
[267] *Mitchell v United Co-Operative Ltd* [2012] EWCA Civ 348.

appeal was whether the employers were in breach of their common law duty of reasonable care to keep their employees safe.[268] In particular, the Court of Appeal had to decide whether the employers ought to have installed security screens in the store and/or whether they should have hired a security guard.[269]

The Court of Appeal found that the employers had not failed to take reasonable care by failing to install security screens and provide a full-time security guard at the store.[270] Lord Justice Ward explained that, although a high risk of robbery existed, the alleged precautionary measures were not necessary to comply with the standard of reasonable care in the circumstances.[271] This is because the cost of taking the precautionary measures at hand exceeded their probable effectiveness.[272] On top of that, his Lordship explained that the fact that the store was running at a loss of about $60,000 per year indicated that further precautionary measures were not necessary.[273] Finally, his Lordship put particular emphasis on the evidence that the employers' approach to risk management was standard practice for retailer outlets of this kind.[274]

As the cases have developed, it seems clear that the courts have dealt with the question of breach of duty of care by reference to factors, such as the risk-creating activity of the defendant, the injury of the claimant, the cost of the precautionary measures, the practice commonly followed by those engaged in a particular risk-creating activity, and the social utility of the defendant's activity. However, it remains unclear how the courts have balanced these factors. Indeed, even though the courts have been referred to the same factors in almost all the cases described in the previous paragraphs, they have applied them inconsistently in different cases. Take, for example, the conflicting views of Mr Justice Clarke and Mr Justice Christopher

[268] *Mitchell v United Co-Operative Ltd* [2012] EWCA Civ 348 [11].
[269] ibid.
[270] ibid [21] to [24].
[271] ibid.
[272] ibid.
[273] ibid [23].
[274] ibid [131].

Clarke in *The Salvital*[275] and *Graham Hopps v Mott MacDonald Ltd*[276] respectively. The result is that, notwithstanding a volume of cases has been developed, the principles underlying the various instances where the breach of duty of care element has or has not been fulfilled remain rather confused and incoherent.

Hence, further research is required in this regard. This task will be undertaken in chapter 3, where I will revisit the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a defendant to meet the standard of care required by law to discharge his/her common law duty of care in a particular case. In particular, I will examine the role of the factors described in the previous paragraph, namely, the risk-creating activity of the defendant, the injury of the claimant, the cost of the precautionary measures, the practice commonly followed by those engaged in a particular risk-creating activity, and the social utility of the defendant's activity, when dealing with the breach of duty of care question.

The specific purpose of chapter 3 will be to identify a coherent legal basis, upon which I will then ascertain in the fourth and fifth chapters of the present thesis the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Ultimately, this will contribute to the overall purpose of the present thesis to shed light into the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for injury or death, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

Before moving on to consider the rest of the elements of the tort of negligence, it should be noted that some people would consider the question of whether a particular precautionary measure should be taken as a duty of care question rather than a breach

[275] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB).
[276] *Graham Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB).

of duty of care question. As Goudkamp explains, this mode of analysis is very common.[277] Most certainly, the practice of overspecifying the content of the duty of care element, in order to treat breach of duty of care cases as though they were duty of care cases has advantages. First, it allows for courts to deal with cases quickly through preliminary proceedings. Secondly, it promotes certainty and clarity. Unlike the breach of duty of care question, the duty of care question is a point of law. Thus, any judgment on the duty of care issue will be binding for lower courts.

However, the practice of asking whether there was a duty to take a particular precautionary measure tends to merge arguments of fault and duty.[278] This is illustrated by the fact that the conceptual framework of this approach revolves around the premises that no duty of care was owed by the defendant to take a particular precautionary measure because the reasonable person in the defendant's position would not have taken the precautionary measure at hand. Indeed, in *Darnley v Croydon Health Services NHS Trust*, the Court of Appeal framed the issue under consideration in similar words.[279] To Goudkamp, it seems clear that such a conceptual framework relates to the breach of duty of care element and not the duty of care element of the tort of negligence.[280] More recently, the Supreme Court was of the same opinion.[281] Therefore, it seems preferable to me to treat the question of whether a particular precautionary measure should be taken as a breach of duty of care question rather than a duty of care question.

So as to provide a rounded picture of the extent to which the English law of negligence will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment, I need to consider whether the causation and the remoteness elements of the tort of negligence can be

[277] James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76 (3) Cambridge Law Journal 480, 482.
[278] Janet O'Sullivan, 'Liability for Criminal Acts of Third Parties' (2009) 68 (2) 270, 272.
[279] [2017] EWCA Civ 151 [54] per Lord Justice Jackson, [87] per Lord Justice Sales.
[280] James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76 (3) Cambridge Law Journal 480, 482.
[281] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 [16].

fulfilled. In so far as the element of causation is concerned, I argue that, in the situation under discussion in the present thesis, this may be fulfilled. I recognise of course that this will depend on the specific facts of a particular case.

The classic 'but-for' test is relevant in this regard.[282] Or, putting the matter another way, a seafarer, or the dependants of a seafarer, will have to establish that, but for the shipowner's breach of duty of care, the seafarer would not have been injured or killed by the criminal acts of pirates in the context of his/her employment. In determining whether the element of causation is fulfilled, the courts do not look for absolute certainty.[283] The courts need to be satisfied that a more than fifty per cent chance exists that, but for the shipowner's breach of duty of care, the seafarer's injury or death would not have occurred.[284] In the context of maritime piracy, this can be achieved, especially since it is now known that a ship equipped with precautionary measures, such as razor wire barriers, water spray rails, foam monitors, alarms, and long range acoustic devices, to name but a few, is less likely to be the victim of a successful maritime piracy attack.[285] Therefore, a statistical analysis of reported actual and attempted maritime piracy attacks may assist the courts in this regard.

Before moving on to the element of remoteness, two potential challenges in dealing with the element of causation need to be considered. The first falls squarely within the scope of the causation element of the tort of negligence. It reflects on any arguments suggesting that the 'but-for' test cannot be applied, since the situation under

[282] The principal authority for the so-called 'but-for' test would appear to be *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.
[283] *Mallett v McMonagle* [1970] AC 166 (HL) 176 per Lord Diplock.
[284] ibid.
[285] See, for example, ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018).

discussion in the present thesis is a third party case where the seafarer's injury or death is caused by the criminal acts of pirates.

It is true that third party cases give rise to a separate legal issue as to how the causal link will be established. This has been discussed in a number of cases. In *Haynes v Harwood,* a police officer suffered injury when he tried to stop some bolting horses before they injured a woman and children who were in their path.[286] The most directly responsible causes of the injury were the actions of the boys who threw stones to the horses and the inherent nature of the animals.[287] The carter merely created a source of danger by leaving the horses unattended in a busy street.[288] Nevertheless, the court found that this was enough for the element of causation to be fulfilled.[289]

Similarly, in *Carmarthenshire County Council v Lewis*, a nursery was liable for failing to keep its premises secure, allowing a 3-year-old to escape onto the main road into the path of Mr Lewis's lorry.[290] Mr Lewis was fatally injured when he swerved his heavy vehicle to avoid David. The court held that causation was proven. Lord Keith explained that, by leaving a gate that was supposed to be locked unlocked, the nursery created an opportunity for harm to occur to Mr Lewis.[291]

Another case where the issue of how a causal link is to be established in third party cases was discussed is *Dorset Yacht Co Ltd v Home Office*.[292] In this case, the claim arose out of the physical damage of two yachts when a group of young boys from the Borstal youth detention centre to Brownsea Island in Poole Harbour boarded the yachts to escape.[293] Of course, the direct and immediate causes of the physical damage of the boats were the actions of the boys.[294] However, causation was proven.

---

[286] [1935] 1 KB 146 (CA).
[287] *Haynes v Harwood* [1935] 1 KB 146 (CA).
[288] ibid.
[289] ibid.
[290] [1955] AC 549 (HL).
[291] *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL) 571.
[292] [1970] AC 1004 (HL).
[293] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL).
[294] ibid.

This is because the lack of supervision on the part of the Borstal officers created the circumstances in which the boys were able to escape and cause the damage.[295]

Overall, it seems that, in third party cases, courts accepted that the element of causation of the tort of negligence was actually fulfilled on the basis of a weaker causal link of creating an opportunity for harm to occur. This is perhaps why the vast majority of cases in which the alleged negligence consisted of an employer's/shipowner's failure to take measures to protect an employee/seafarer from the risk of being injured or killed by the deliberate wrongdoing of third parties in the context of his/her employment have failed in the breach of duty of care element rather than in the causation element of the tort of negligence.[296]

Nonetheless, there are a few rare cases where courts concluded that an employer/shipowner had breached his/her common law duty of care in failing to take adequate measures to protect an employee/seafarer from the risk of being injured or killed by the deliberate wrongdoing of third parties in the course of his/her employment.[297] In such cases, courts have been ready to hold that a causal link existed between the employer's/shipowner's breach of duty of care and the employee's/seafarer's injury or death.[298]

As seen earlier,[299] in *The Salvital*, Mr Justice Clarke concluded that the owners of the tug had breached their common law duty of care in failing to provide the tug with written instructions with regard to what precautions should be taken and to what tugs should do when a warning of an attack is received.[300] In addition, his Justice held that the radio officer's injuries were caused by that breach.[301] In doing so, Mr Justice

[295] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL) 1053 per Lord Pearson.
[296] See, for example, *Houghton v Hackney Borough Council* (1961) 3 KIR 615 (QB); *Williams v Grimshaw* (1967) 3 KIR 610 (QB); *Peter Carlton v The Forrest Printing Ink Company Limited* [1980] IRLR 331 (CA).
[297] See, for example, *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB); *Rahman v Arearose Ltd* (QB, 18 February 1999); [2001] QB 351 (CA).
[298] ibid.
[299] See above at pages 88 to 92.
[300] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 191.
[301] ibid 193 to 194.

Clarke focused mainly on two questions. First, his Justice considered whether the master would have complied with the instructions, if the tug owners had given such instructions.[302] Secondly, Mr Justice examined whether the accident would have happened, if the master had complied with the instructions.[303]

As one can reasonably understand from the questions just described, Mr Justice Clarke's analytical framework did not centre upon finding a strict causal link between the tug owners' breach of duty of care and the radio officer's injury. Instead, Mr Justice Clarke tried to establish a weaker causal link on the basis that the tug owner's breach of duty of care created an opportunity for the accident to occur. On that basis, the claim of the radio officer against the owners of the tug succeeded.

The second lies on the line between the element of causation and the element of remoteness in the tort of negligence. Judicial opinion seems to be divided as to whether intervening acts are best dealt with as an issue of causation or as an issue of remoteness of damage.[304] Lord Justice Aikens in *Chubb Fire Ltd v Vicar of Spalding* explained in this regard that this is a distinction without importance.[305] To Lord Justice Aikens, it seems that new intervening acts is a doctrine used to determine whether a wrongdoing defendant 'will be responsible for certain consequences of that negligence and the damages that are claimed to flow from these consequences'.[306]

This challenge reflects on any arguments accepting that, in the situation under discussion in the present thesis, the 'but-for' test may be fulfilled. Nevertheless, the requisite causal link between the shipowner's breach of duty of care and the seafarer's injury or death may still fail because the criminal acts of pirates constitute a new intervening act, which breaks the chain of causation.

---

[302] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 193 to 194.
[303] ibid.
[304] Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press 2016) Chapter 8, Section 8.22 at page 457.
[305] [2010] EWCA Civ 981, [63].
[306] *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981, [63].

While a new intervening act can be due to a criminal act committed by third parties, differing outcomes are possible, depending on whether the act at hand is so unexpected as to be unforeseeable in the circumstances.[307] Clearly, this is a fact-sensitive enquiry, adding further to the uncertainty surrounding the elements of causation and remoteness in the tort of negligence.

However, this fact-sensitive enquiry may be less problematic in the maritime piracy context compared to other instances where the issue of third party liability in negligence arises for consideration. At least where the voyage to be undertaken is in and/or around piracy infested waters, it seems to me less likely that the intervention of pirates will constitute a new intervening act, which breaks the chain of causation between the shipowner's breach of duty of care and the seafarer's injury or death, given that such an intervention is certainly foreseeable.[308]

But even if it is accepted that foreseeable events can constitute new intervening acts, it still seems to me highly unlikely that the intervention of pirates will be a new intervening act, which breaks the chain of causation between the shipowner's breach of duty of care and the seafarer's injury or death in the situation under discussion in the present thesis. This is because holding that the intervention of pirates broke the chain of causation would permit the shipowner to evade liability, when the very duty cast upon the shipowner was to exercise reasonable skill and care to protect a seafarer from injury or death caused by the wilful act of third parties.[309]

Having said that, it is now time to consider the element of remoteness. This is a notoriously unpredictable area within the negligence action because it involves questions of fact, law and policy.[310] Nevertheless, I argue that the element of remoteness is more likely to be fulfilled in cases dealing with tortious liability for

[307] See, for example, *Stansbie v Troman* [1948] 2 KB 48; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL); *Chubb Fire Ltd v Vicar of Spalding* [2010] EWCA Civ 981.
[308] See Chapter 2, Section 2.4, Sub-Section 2.4.1 at page 85.
[309] ibid at pages 79 to 85.
[310] Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press 2016) Chapter 9, Section 9 at page 488.

injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment.

In short, the remoteness element of the tort of negligence explores whether the damage complained of, although factually caused by the defendant's breach of duty of care, was legally too remote as to be recoverable. This involves a two-stage enquiry. First, this enquiry examines whether the kind or type of damage was reasonably foreseeable by the defendant at the relevant time.[311] Secondly, it explores whether the damage falls within the scope of the duty of care owed by the defendant to the claimant to protect the claimant by the exercise of reasonable care.[312] If the kind or type of damage is reasonably foreseeable and falls within the scope of the duty of care which the defendant owes to the claimant, then the claimant's damage will be recoverable. Otherwise, the claimant's damage will be considered irrecoverable.

Starting with the first limb of this enquiry, the concept of reasonable foreseeability is of crucial significance. At this stage, the test of reasonable foreseeability focuses on the type or kind of the damage suffered by the claimant, but not the precise mechanism by which it arose.[313] In *Hadlow v Peterborough County Council*, a case dealing with tortious liability for injury caused to an employee by the wilful act of third parties in the context of her employment, it was found that the claimant's injury was not too remote as to be irrecoverable in the circumstances.[314]

Ms Hadlow was employed as a teacher at a secure unit for young women. She was due to teach a class of three women. The unit's policy was that no member of staff would be alone with a group of more than two. Ms Hadlow's teaching assistant would normally have been present. However, she was late. Ms Hadlow hurried to the door of

[311] See, for example, *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound 1)* [1961] AC 388 (PC); *Jolley v Sutton LBC* [2000] 1 WLR 1082 (HL).
[312] See, for example, *South Australia Asset Management Corporation v York Montague L*td [1997] AC 191 (HL).
[313] *Jolley v Sutton LBC* [2000] 1 WLR 1082 (HL) 1091 per Lord Hoffman.
[314] [2011] EWCA Civ 1329.

the classroom to attract the attention of a carer to stay behind. In doing so, Ms Hadlow tripped on a chair in her rush and badly injured herself.

Now, in this case, the foreseeable source of danger was a risk of attack on Ms Hadlow. Nonetheless, the Court of Appeal found that Ms Hadlow's damage was not too remote.[315] The accident did not happen in the most likely way, but the risk of injury was foreseeable.[316] The Court of Appeal explained that it was unnecessary to show foreseeability at the precise chain of events leading up to the accident.[317]

The application of this conceptual framework to the situation under discussion in the present thesis is rather straightforward. In this context, the foreseeable source of danger is a risk of a maritime piracy attack on seafarers, especially when the voyage to be undertaken is in and/or around piracy infested. If a seafarer is injured or killed by the criminal acts of pirates during a maritime piracy attack in the course of his/her employment, then the seafarer's injury or death will be reasonably foreseeable.

Turning now to the second limb of this enquiry, the scope of the duty of care which the defendant owes to the claimant needs to be considered. This recognises that even reasonably foreseeable damage has to fall within the scope of the defendant's duty of care towards the claimant to be recoverable. In this respect, there is an overlap between the duty of care element and the remoteness element of the tort of negligence.[318] However, there is no clear analytical approach as to whether it is an issue pertained to duty of care or remoteness of damage.[319]

In any case, the scope of duty of care enquiry is closely associated with policy reasoning. This was reiterated by Lord Hoffman in *South Australia Asset Management Corporation v York Montague L*td.[320] Against this backdrop, the

[315] *Hadlow v Peterborough County Council* [2011] EWCA Civ 1329.
[316] ibid.
[317] ibid.
[318] See above at pages 81 to 85.
[319] Rachael Mulheron, *Principles of Tort Law* (Cambridge University Press 2016) Chapter 9, Section 9.9 at page 505.
[320] *South Australia Asset Management Corporation v York Montague L*td [1997] AC 191 (HL) 213.

employee's/seafarer's injury or death caused by the wilful act of third parties in the course of his/her employment would fall within the scope of the employer's/shipowner's duty of care owed to the employee/seafarer, unless there is a reason of policy which requires that the negligence of the employer/shipowner should not cover such risk.

Clearly, this policy reasoning enhances the ambiguities surrounding the element of remoteness in the tort of negligence. This is because the outcome of a specific case would vastly depend on judicial opinion. Nevertheless, it seems to me that, in so far as cases related to maritime piracy attacks are concerned, there is no reason of policy which requires that the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment should fall outside the scope of a shipowner's duty of care owed to a seafarer.

2.5. Conclusion

In a world of increased globalisation in the field of the employment relationship between a shipowner and a seafarer, the development of both legislation and contractual terms in respect of health and safety at work has come about through a combination of International and European initiatives, followed by domestic action.

Most certainly, the Maritime Labour Convention, 2006, as amended, which entered into force on 20 August 2013 after a gestation period of more than 10 years is the most typical example of this combined effort to enhance the level of protection offered to seafarers in respect of health and safety at work. Indeed, the Maritime Labour Convention, 2006, as amended, has commonly been referred to as the 'super convention', a 'charter of rights', and the 'seafarers' bill of rights'.[321]

[321] See, for example, Moira McConnell, 'Making Labour History and the Maritime Labour Convention: Implications for International Law-Making and Responses to the Dynamics of Globalisation' in Aldo Chircop and others (eds), *The Future of Ocean Regime-Building* (Brill Online Books and Journals 2009); Desislava Dimitrova, *Seafarers' Rights in the Globalised Maritime Industry* (Kluwer Law International 2010) Part IV, in particular [2]. See also Hilton Staniland, 'Protecting the Wages of

However, none of these initiatives were taken with maritime piracy in mind. The only exception is the third group of amendments to the Maritime Labour Convention, 2006, which were confirmed by the International Labour Conference (hereinafter ILC) on 5 June 2018, but are not due to enter into force before 2021.

The result is that, notwithstanding the increased codification and the development of comprehensive contractual terms in respect of health and safety at work in the field of the employment relationship between a shipowner and a seafarer, there are no statutory or contractual provisions resolving adequately all the questions as to whether a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

It is thus clear that resort to the English law of negligence is necessary to dispose of the complex matter of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment.

Having argued that the breach of duty of care element of the tort of negligence is more likely to be problematic in the situation under discussion in the present thesis, I will continue by revisiting in chapter 3 the process of the application of the test of the hypothetical reasonable person when determining the breach of duty of care question in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful acts of third parties in the course of his/her employment. The overall purpose of this analysis will be to identify the coherent legal basis upon which I will then ascertain in chapters 4 and 5 the extent to which a shipowner will have to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

Seafarers Held Hostage by Pirates: The Need to Reform the Law' (2013) 3 (4) International Journal of Public Law and Policy 345, in particular [3]; Julia Constantino Chagas Lessa, 'The Maritime Labour Convention: An Overview' (2016) 22 Journal of International Maritime Law 379, 379 to 378.

Chapter Three
Rethinking the Test of the Hypothetical Reasonable Person

3.1. Introduction

In this chapter, I will attempt to rationalise the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in cases in which the alleged negligence consisted of a shipowner's failure to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. The issue at hand is directly relevant to the discussion raised in chapter 2 as to the extent to which the English law of negligence will provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment.[322]

It is recalled here that, in order for a seafarer, or for the dependants of a seafarer, to bring a successful claim in negligence for compensation to be obtained from a shipowner for personal injury or loss of life caused to the seafarer as a result of a maritime piracy attack in the context of his/her employment, the four elements of the tort of negligence must be established.[323] As stated in the relevant discussion in chapter 2, the breach of duty of care element is likely to be more problematic in this regard.[324] In principle, a shipowner will be found in breach of his/her common law duty of care, if, and to the extent that, the precautionary measures taken by him/her to protect a seafarer from the risk of being injured or killed in the context of his/her employment fell below the legal standard of care in the circumstances.[325]

[322] See Section 2.4, Sub-Section 2.4.1 at pages 79 to 101.
[323] ibid at page 79.
[324] ibid at pages 85 to 93.
[325] ibid.

Although the legal standard of care is that of the hypothetical reasonable shipowner, the process of the application of this test remains rather obscure and incoherent.[326] This is particularly obvious in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the course of his/her employment.[327] Indeed, in this kind of cases, courts have referred to factors, such as the risk-creating activity of the defendant, the injury of the claimant, the cost of the precautionary measures, the practice commonly followed by those engaged in a particular activity, and the social utility of the defendant's activity, when dealing with the question of breach of duty of care.[328] However, they have failed to apply those factors in a consistent way.[329] Hence, the need for this chapter is emphasised.

In terms of rationalising the process of the application of the test of the hypothetical reasonable person in this context, I will address four specific questions revolving around the role of the factors mentioned in the precious factors. To what extent should the element of cost continue to be weighed by the courts when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to protect a seafarer from the risk of being injured or killed by the wilful act of third parties in the context of his/her employment in a particular case? What should the role of the concept of policy be in this regard? What should the meaning of the relevant policy considerations be? Should any evidence of the practice commonly followed by those engaged in a particular activity influence the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required in the circumstances?

As it will appear from the analysis of the aforesaid queries, the recommended process of the application of the test of the hypothetical reasonable person in this area revolves around four pillars. I first argue that the element of cost should be rejected as one of the relevant factors to be weighed by the courts in this regard. I then argue that

[326] See Chapter 2, Section 2.4, Sub-Section 2.4.1 at pages 85 to 93.
[327] ibid.
[328] ibid.
[329] ibid.

the concept of policy shall continue to have a role to play in the process of the application of the test of the hypothetical reasonable person in this area. For that it ensures that the much needed proportionality between the necessary precautionary measures and the probability of the damage occurring and the likely gravity of the damage, were it occur, will be achieved. However, the meaning of the relevant policy considerations should be strictly defined. I finally argue that the outcome of a proper and sufficient risk assessment rather than the practice commonly followed by those engaged in a particular activity should be relevant in the process of the application of the test of the hypothetical reasonable person in this area.

Of course the specific purpose of the rationalisation of the process of the application of the test of the hypothetical reasonable person in this context is to identify the coherent legal basis upon which I will then ascertain in chapters 4 and 5 of the present thesis the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Yet its value goes beyond the maritime piracy context.

In this chapter, I will address issues with regard to the process of the application of the test of the hypothetical person when dealing with the question of breach of duty of care, which are relevant to all cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the course of his/her employment. Furthermore, the issues to be discussed here are relevant to all cases where the issue of tortious liability for injury or death caused to an employee/seafarer in the context of his/her employment arises for consideration. Thus, the analysis of this chapter may offer an understanding of the future evolution of the process of the application of the test of the hypothetical reasonable person when dealing with the breach of duty of care question in the employment context in general.

Arguably, this is of great practical significance, given that the issue of employer's liability for personal injury or loss of life, which an employee suffered in the context

of his/her employment, has recently been reverted back to the English law of negligence by virtue of Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24).[330] Indeed, Section 69 of the aforementioned Act abolished the right to bring a civil claim for damages for any breach of health and safety at work regulations; especially when the aforesaid regulations provide for strict liability on the part of the employer. Therefore, I argue that the suggested process of the application of the test of the hypothetical person in this area provides an alternative venue to ensure that, notwithstanding the abolition of strict liability, employees will continue to enjoy the same level of protection in terms of health and safety at work.

3.2. The element of cost

The greatest mistake to make, and indeed the one that is most commonly made in the process of the application of the test of the hypothetical reasonable person when determining the breach of duty of care question in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the course of his/her employment, is to assume that the outcome of the required balancing exercise is determined solely on the basis of whether or not the cost of taking a precautionary measure exceeds the quantified value of the damage that will occur, if the precautionary measure is not taken and the risk materialises.

Rather comprehensively, such a conceptual framework may seem appealing in the simplest of cases, where the claimant's claim relates to damage that involves pure economic values, such as loss of property. This is because those pure economic values allow for the damage to be clearly and accurately quantified. A pure cost-benefit analysis could arrive at a just outcome for the parties as a result thereof.

Where, on the other hand, the relevant damage involves non-economic values, take, for example, the situation under discussion in the present thesis where the seafarer's claim relates to personal injury or loss of life, I argue that the conceptual framework just described fails to offer an appropriate answer. This is because those non-

[330] See Chapter 2, Section 2.3 at pages 59 to 61.

economic values prevent the damage from being clearly and accurately quantified.[331] And, therefore, a pure cost-benefit analysis could do no justice for the parties.

I contend that, in such cases, the question of breach of duty of care should be approached from a different angle. Rather than launching into the issue of whether or not the cost of taking a precautionary measure exceeds the quantified value of the damage suffered, the initial focus should instead be on the risk itself. Hence, a balancing exercise should still be required in the process of the application of the test of the hypothetical reasonable person in this context, but the element of cost should be rejected as one of the relevant factors to be weighed by the courts in this regard.

Instead, the risk itself should be the factor that has to be weighed by courts more heavily than any other factor in the course of this balancing exercise.[332] Put differently, the necessary balancing exercise can only meaningfully be carried out, if courts place proper attention to the risk itself, with particular reference to the consequences that are likely to occur if the risk materialises.

---

[331] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.84] where it is noted that 'the well-established principles and tariffs for the valuation of human suffering and economic loss are never used by the courts as the counterweight to the cost of the precautions which would have avoided the danger, the priority being the safety of the employee and the avoidance of injury',

[332] The factors that have to be weighed by the courts in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by an employer to meet the legal standard of care required of an employer in discharge of his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment in a particular case were conveniently described by Lord Reid in *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 574 where his Lordship explained that '[...] it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and other disadvantage of taking the precaution'. More recently, those factors were conveniently described by Mr Justice Christopher Clarke in *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88] where his Justice explained that 'in determining what is reasonable it is, firstly, necessary to consider the extent of the risks to thich the claimant and others were exposed. [...] that involves considering (a) the nature of the risk; (b) the likelihood of it eventuating; and (c) the likelihood of harm being sustained (and the extent of that harm) if it does. In deciding what steps had to be taken in order to deal with these risks it is relevant to take into consideration (i) the nature and purpose of the work that the claimant was employed to perform; (ii) the priority of the risks i.e. which were the principal and which the secondary risks; (iii) the effectiveness of various protective measures that could be taken and (iv) the consequences of taken them'.

In terms of determining the seriousness of the consequences of the risk, two approaches may be instructive: that of the worst-case scenario approach[333] and that of the average of the possible harms approach.[334] While, under the worst-case scenario approach, the most serious harm that is likely to occur, if the risk materialises, should be balanced off against the precautionary measure, under the average of the possible harms approach, the harm that is most likely to happen should be relevant.

My current contention is based upon a strict view of the way in which non-economic values like health and life ought to be protected. The most obvious manifestation of this way would seem to suggest that, if a serious risk to the health and life of a seafarer exists, taking precautionary measures of considerable expense may not be precluded from the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case. The principal authority for this manifestation would appear to be *Latimer v AEC Ltd.*[335]

In this case, an employee, Mr Latimer, working in a factory where the floors were oily and slippery due to an unusual heavy rainstorm, slipped and broke his ankle. Mr Latimer claimed damages from his employers, AEC Ltd, on the ground that they failed to exercise reasonable skill and care to safeguard his health and safety in the context of his employment.[336] The thrust of his claim was that AEC Ltd should have shut down the whole factory, or at least such part of the factory that was dangerous. Although the claim succeeded at first instance,[337] it was subsequently dismissed on appeal by both the Court of Appeal[338] and the House of Lords.[339]

---

[333] *Abouzaid v Mothercare (UK) Ltd* [2000] EWCA Civ 348, [33] per Lord Justice Pill.
[334] *Bolton v Stone* [1951] AC 850 (HL) 862 per Lord Normand.
[335] [1952] 2 QB 701 (CA) 707 per Lord Justice Singleton approved by the House of Lords in *Latimer v AEC Ltd* [1953] AC 643 (HL) 659 per Lord Tucker.
[336] Mr Latimer also claimed damages from AEC Ltd on the ground that they were in breach of the statutory duties imposed on them by sections 25 (1) and 26 of the Factories Act 1937, (c 67). This claim was dismissed at first instance and on appeal by both the Court of Appeal (*Latimer v AEC Ltd* [1952] 2 QB 701 (CA)) and the House of Lords (*Latimer v AEC Ltd* [1953] AC 643 (HL)).
[337] L*atimer v AEC Ltd* [1952] 1 All ER 443 (QB). In particular, Mr Justice Pilcher held that AEC Ltd, although they had done everything that they could reasonably be expected to do, short of shutting down the factory, they were negligent in permitting Mr Latimer to work in a part of the factory where the

More specifically, the House of Lords held that AEC Ltd had not been negligent for they had done all a reasonable employer could be expected to do for the safety of his/her employees, having regard to the degree of risk involved due to the slippery floor.[340] With regard to the allegation that AEC Ltd should have shut down the whole factory, or at least such part of the factory that was dangerous, a comment made by Lord Justice Singleton in the Court of Appeal was approved by the House of Lords.[341] In this comment, Lord Justice Singleton distinctively stated as follows:

> [...] if an employer's premise were rendered dangerous by fire and there was a risk of the roof falling, or a risk of a wall collapsing on the workmen, it might well be the duty of the employer to say "No man must work in this factory until steps have been taken to secure the portions which have been endangered by fire" and to make sure that the men did not run unnecessary risks. I think the position is different when all that has happened to the premise is that the floor is slippery.[342]

In the House of Lords, Lord Tucker explained that a drastic step, such as shutting down the factory, or at least such part of the factory that was dangerous, might be required on the part of a reasonably prudent employer if the risk to his/her employees is serious enough.[343] This implies that, had the risk ran by Mr Latimer been more serious than slipping and injuring his ankle, taking precautionary measures of considerable expense would have been necessary to meet the legal standard of care

---

floor was slippery. Having, thus, taken the risk that Mr Latimer might sustain injury, the employers were liable for the injury which the employee had in fact suffered.

[338] *Latimer v AEC Ltd* [1952] 2 QB 701 (CA). In dismissing the appeal, the Court of Appeal held that the AEC Ltd had not been negligent for they had done all that a reasonable employer could be expected to do, bearing in mind the degree of risk involved due to the slippery floor.

[339] *Latimer v AEC Ltd* [1953] AC 643 (HL).

[340] ibid 655 per Lord Porter, 656 per Lord Oaksey, 658 per Lord Reid, 659 per Lord Tucker, 662 per Lord Asquith.

[341] ibid 658 per Lord Tucker.

[342] *Latimer v AEC Ltd* [1952] 2 QB 701 (CA) 707.

[343] *Latimer v AEC Ltd* [1953] AC 643 (HL) 659.

required of an employer in discharge of his/her common law duty of care to safeguard the health and safety of his/her employee in the context of his/her employment.[344]

I also argue that an insistence on treating differently cases, in which the claimant's claim relates to damage that involves pure economic values, such as loss of property, and cases, in which the claimant's claim relates to damage that involves non-economic values, such as personal or loss of life, was tacitly recognised by the House of Lords and the Privy Council in *Bolton v Stone*[345] and in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)*[346] respectively.

I recognise here that the cases cited in the previous paragraph are not concerned with the wider issue of tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the course of his/her employment, a manifestation of which is the situation under discussion in this thesis. Nevertheless, it seems necessary to consider these cases to explore whether, and if so, the extent to which, my current argument can be reconciled with the leading authorities pertaining to the process of the application of the test of the hypothetical reasonable person when dealing with the question of breach of duty of care in a particular case.

In *Bolton v Stone,* the claim revolved around the injury of Miss Stone, the claimant, who was struck by a ball that had been hit by a player on a nearby cricket ground when she was standing in the road in front of her house.[347] Miss Stone sought to hold

[344] For other comments reflecting such strict view of the way in which non-economic values like health and life ought to be protected in cases, in which the alleged negligence consisted of an employer's failure to take measures to protect an employee from the risk of being injured or killed in the context of his/her employment, see *Marshall v Gotham* [1954] AC 360 (HL) 373 where Lord Reid explained that '[...]if a precaution is practicable it must be taken unless in the circumstances that would be unreasonable. And as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable'. See also *Longworth v Coppas International* 1985 SC 42 (CS) 46 where Lord Davidson commented that '[...] if an employer learns that his employee's place of work has become part of a war zone and that the employee's safety is imminently threatened by the activities of the combatants, I find nothing in the authorities cited by the defenders which would excuse the employer from the duty of assessing the risk and in appropriate circumstances of advising, exhorting, or even of enjoining his employees to quit the danger area'.
[345] [1951] AC 850 (HL).
[346] [1967] 1 AC 617 (PC).
[347] [1951] AC 850 (HL) 851 to 852.

the cricket club, the defendant, liable in negligence for the injury she suffered as a result of this incident on the basis that they had failed to exercise reasonable skill and care for her safety.[348] In particular, Miss Stone argued that the cricket club should have pitched the cricket pitch far from the said road, that they should have erected a fence of sufficient height to prevent balls being struck into the said road, or that they should have ensured that cricket balls would not be hit into the said road.[349] Although the claim was dismissed by Mr Justice Oliver,[350] the Court of Appeal reversed that decision and held that the cricket club was negligent.[351]

The cricket club appealed to the House of Lords. The House of Lords reversed the decision of the Court of Appeal. Although all the Law Lords agreed that, to concede negligence on the part of the cricket club, there had to be a foreseeable risk of a sufficiently high level, they found that, on the facts of the case, the risk of an innocent passer-by being hit by a ball and the consequent risk of an innocent passer-by sustaining injury as a result of this hit, although foreseeable, was not of a sufficiently high level to influence the mind of the hypothetical reasonable person.[352] Of crucial significance in this regard was the fact that there was evidence that over a period of thirty years balls had been struck over the fence only six times.[353] The House of Lords held that the cricket club was justified in taking no precautionary measures to eliminate the risk at hand as a result thereof.[354]

---

[348] Note, here, that Miss Stone also sought to hold the cricket club liable in nuisance for the injury she suffered as a result of this incident on the basis that they were in control of the ground and they invited visiting teams to play there. Mr Justice Oliver, the Court of Appeal and the House of Lords found that nuisance was not established, since it was admitted that in the circumstances of this case nuisance could not be established unless negligence was also proven.
[349] *Bolton v Stone* [1951] AC 850 (HL) 852.
[350] *Bolton v Stone* [1949] 1 All ER 237 (KB).
[351] *Bolton v Stone* [1950] 1 KB 201 (CA).
[352] *Bolton v Stone* [1951] AC 850 (HL) 859 to 860 per Lord Porter, 861 to 862 per Lord Normand, 863 per Lord Oaksey, 864 to 867 per Lord Reid, 869 per Lord Radcliffe.
[353] ibid 859 per Lord Porter, 862 per Lord Normand, 863 per Lord Oaksey, 864 per Lord Reid, 869 per Lord Radcliffe.
[354] ibid 860 per Lord Porter, 862 per Lord Normand, 863 per Lord Oaksey, 867 per Lord Reid, 869 per Lord Radcliffe.

The wider effect of the House of Lords judgment in *Bolton v Stone*[355] is that the quadrant of factors that have to be weighed by courts when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case were established. These factors include, namely: the probability of the damage occurring; the likely gravity of the damage, were it occur; the cost to implement the precautionary measures; and the social utility of the activity.[356]

Nevertheless, I argue that a more specific effect of the House of Lords judgment in *Bolton v Stone*[357] is that, when it comes to the aforementioned factors, it distinguishes between cases, in which the claimant's claim relates to damage that involves pure economic values, such as loss of property, and cases, in which the claimant's claim relates to damage that involves non-economic values, such as personal injury or loss of life. As will appear further on,[358] this more specific effect will be rather evident, if one compares the judgment delivered by Lord Reid in *Bolton v Stone*[359] with the judgment delivered by Lord Reid in *The Wagon Mound No 2*.[360]

In *Bolton v Stone,* Lord Reid described in some detail the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by the cricket club to meet the legal standard of care required of the cricket club in discharge of their common law duty of care to safeguard the health and safety of persons on the highway adjacent to the cricket ground.[361] In this respect, his Lordship explained as follows:

> […] the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from the taking steps to prevent the danger.

[355] [1951] AC 850 (HL).
[356] See also *Tomlinson v Congleton BC* [2004] 1 AC 46 (HL) 82 per Lord Hoffman.
[357] [1951] AC 850 (HL).
[358] See below at pages 112 to 115.
[359] [1951] AC 850 (HL).
[360] [1967] 1 AC 617 (PC).
[361] [1951] AC 850 (HL) 867 to 868.

> […] I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.[362]

Clearly, Lord Reid rejected the element of cost as one of the factors that have to be weighed by the courts when dealing with the breach of duty of care question in a particular case, at least when it comes to cases in which the claimant's claim relates to damage that involves non-economic values, such as injury or death. It may be worth noting here that *Bolton v Stone*[363] revolved around a personal injury claim.

However, in *The Wagon Mound No 2*, Lord Reid returned to discuss the issue of the process of the application of the test of the hypothetical reasonable person in this context.[364] Only this time, his Lordship did so in the context of a case where the claimant's claim related to damage that involved pure economic values, such as loss of property. In this case, the owners of *Corrimal* and *Aubrey D,* two vessels undergoing repairs at a wharf in Sydney Harbour, claimed damages from the demise charterers of the *Wagon Mound* because their vessels were destroyed by fire when the oil that had been spilled by the *Wagon Mound* was set alight.

The owners of *Corrimal* and *Aubrey D* sought to hold the demise charterers of the *Wagon Mound* liable in negligence for the damage sustained by their vessels as a result of this incident.[365] Mr Justice Walsh held that the demise charterers of the

---

[362] *Bolton v Stone* [1951] AC 850 (HL) 867.
[363] [1951] AC 850 (HL).
[364] [1967] 1 AC 617 (PC).
[365] The owners of the vessels also sought to hold the demise charterers of the *Wagon Mound* liable in nuisance for the damage sustained by their vessels as a result of this incident on the basis that they committed a 'wrongful' act in that they created a public nuisance by polluting the harbour waters with oil. Mr Justice Walsh held that nuisance was established because liability in nuisance did not depend on foreseeability. The demise charterers of the *Wagon Mound* appealed. The Privy Council (*Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 (PC))

Wagon Mound were not liable in negligence because damage by fire was not reasonably foreseeable in the circumstances.[366] The owners of *Corrimal* and *Aubrey D* appealed. Lord Reid, delivering the opinion of the Privy Council, allowed the appeal.[367] Having found that fire damage was a reasonably foreseeable risk of a considerably low level, his Lordship held that the demise charterers of the *Wagon Mound* were liable in negligence.[368] Of crucial significance in this respect was the fact that the available precautionary measures to avoid the risk at hand 'presented no difficulty, involved no disadvantage, and required no expense'.[369]

In terms of the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case, Lord Reid explained that:

> […] it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it.[370]

I maintain that the true meaning of the comment just cited is that the element of cost has an increased role to play when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case, but only in cases in which the claimant's claim relates to damage that involves pure economic values, such as loss of property. Unfortunately, however, Lord Reid went on to make the comment at hand after a marked reference to *Bolton v Stone*[371] and failed to point

---

allowed the appeal because creating a danger to persons or property in navigable waters fell in the class of nuisance in which foreseeability was required in determining liability.

[366] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)* [1963] 1 Lloyd's Rep 402 (SC (New South Wales)).

[367] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 (PC).

[368] ibid 641 to 644.

[369] ibid 644 per Lord Reid.

[370] ibid 642.

[371] [1951] AC 850 (HL).

out that his later comment was made in a different context than his earlier remark. Remember, here, that the claim in *Bolton v Stone*[372] involved a personal injury claim whereas the claim in *The Wagon Mound No 2*[373] involved a property claim.

As a result, Lord Reid's original comment in *Bolton v Stone*[374] and his own later remark in *The Wagon Mound No 2*[375] have been the subject matter of various interpretations. Dias, for example, maintains that Lord Reid's statement in *The Wagon Mound No 2* supersedes his own earlier remark in *Bolton v Stone*.[376] It is clear that the interpretation provided by Dias adopts the most obvious possibility. It fails, however, to consider the different circumstances between those cases.

Furthermore, it fails to take into account the fact that, when Lord Reid explained in *Bolton v Stone* that the element of cost should not be taken into account when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case, he was clearly referring to cases in which the claimant's claim relates to damage that involves non-economic values, such as personal injury and loss of life.[377] This is because in the immediately preceding passage his Lordship made a marked reference to the risk of damage to a person. Indeed, in the immediate preceding passage in *Bolton v Stone*, Lord Reid stated that:

> 'In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is

[372] [1951] AC 850 (HL).
[373] [1967] 1 AC 617 (PC).
[374] [1951] AC 850 (HL).
[375] [1967] 1 AC 617 (PC).
[376] R W M Dias, 'Trouble on Oiled Waters: Problems of *The Wagon Mound (No2)*' (1967) 25 (1) Cambridge Law Journal 62, 69.
[377] [1951] AC 850 (HL) 867.

> struck; but I do not think that it would be right to take into account the difficulty of remedial measures'.[378]

Finally, it fails to pay proper attention to similar comments made by Lord Reid in other cases concerned with personal injury claims. Take, for example, *Latimer v AEC Ltd.*[379] In this case, it was enough for Lord Reid to say that he agreed entirely with the speech delivered by Lord Tucker.[380] In fact, Lord Tucker was of the opinion that, where a serious risk to health and life existed, the element of the cost should not be relevant when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case; leaving, thereby, a window open for it to be relevant, but only when a gross disproportion between the risk at hand and the necessary precautionary measure exists.[381]

Likewise, in *Marshall v Gotham,* Lord Reid explained that, when a risk to health and life exists, it should not lightly be held that taking a practicable precautionary measure is unreasonable.[382] Here, again, Lord Reid implied that the priority should be the safety of the employee and the adoption of precautionary measures for the avoidance of injury. Finally, in *Morris v West Hartlepool Steam Navigation Co Ltd,* Lord Reid came to the conclusion that taking the alleged precautionary measures was necessary to comply with the legal standard of care; even though the risk at hand, although reasonably foreseeable, was of a considerably low level.[383] Because the consequences of the risk in question, were it to materialise, were almost certain to be serious.[384]

It must follow then that, had Lord Reid's remark in *Bolton v Stone*[385] been superseded, it would have been superseded by one of his later comments in *Latimer v*

[378] [1951] AC 850 (HL).
[379] [1953] AC 643 (HL).
[380] *Latimer v AEC Ltd* [1953] AC 643 (HL) 658.
[381] ibid 659.
[382] [1954] AC 360 (HL) 373.
[383] [1956] AC 552 (HL) 575. For the facts of this case, see Chapter 3, Section 3.4 at pages 139 to 140..
[384] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 575.
[385] [1951] AC 850 (HL) 867.

AEC Ltd,[386] in *Marshall v Gotham,*[387] or in *Morris v West Hartlepool Steam Navigation Co Ltd*.[388] However, it seems to me more plausible that Lord Reid's remark in *Bolton v Stone*[389] is not superseded at all.

Conversely, I argue that the comment under examination is qualified by Lord Reid's own later remarks in the cases discussed in the previous paragraphs. This is because in his later remarks Lord Reid did not reject his original premise that the element of cost should not be taken into account when determining the precautionary measures that should have been taken to discharge the legal standard of care in a particular case when it comes to cases involving personal injury claims. What his Lordship actually did was to recognise that there might be some exceptional circumstances where the element of the cost should be relevant; where, for example, a gross disproportion between the risk at hand and the cost of the precautionary measure in question exists.

Wright, on the other hand, gives a less obvious interpretation.[390] Wright's basic premise is that Lord Reid's statement in *Bolton v Stone* is supplemented with his own later remark in *The Wagon Mound No 2*.[391] More specifically, Wright maintains that, notwithstanding Lord Reid's comment in *The Wagon Mound No 2* has sometimes been misread as abandoning his own earlier remark in *Bolton v Stone*, the true meaning of this comment is that the element of cost should remain relevant in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case, but only when the probability of the damage occurring is real and of considerably low level.[392]

---

[386] [1953] AC 643 (HL) 658.
[387] [1954] AC 360 (HL) 373.
[388] [1956] AC 552 (HL) 575.
[389] [1951] AC 850 (HL) 867.
[390] Richard W Wright, 'The Standard of Care in Negligence Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1997) 249, 262.
[391] ibid.
[392] ibid.

What this effectively means is that, if a real risk of a sufficiently high level exists, then Lord Reid's statement in *Bolton v Stone*[393] will remain relevant, and the element of cost will have no role to play in determining the precautionary measures that should have been taken in a particular case. If, on the other hand, a real risk of a considerably low level exists, then Lord Reid's comment in *The Wagon Mound No 2*[394] will be relevant, and the element of cost will intervene to ensure that the precautionary measures that should have been taken are the most cost-efficient ones. Put in simple terms, Wright recognises that, depending on the specific facts of a case, different factors should be taken into account in the process of the application of the test of the hypothetical reasonable person in this regard.[395]

While the interpretation adopted by Wright is to be preferred, the most obvious criticism to be levelled in this respect is that it fails, once again, to pay proper attention to the different facts between *Bolton v Stone*[396] and *The Wagon Mound No 2*.[397] Indeed, Wright does not draw a distinction between cases in which the claimant's claim relates to non-economic values, such as personal injury and loss of life, and cases in which the claimant's claim relates to pure economic values, such as loss of property. And, arguably, this is the weakest point of his analysis.

Not so far apart, Wilby combines Lord Reid's remark in *Bolton v Stone* with his Lordship's later remark in *The Wagon Mound No 2*.[398] To Wilby, it seems that a combined reading of the comments at hand suggests that the element of cost should come into play in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case only when it comes to cases where the probability of the damage occurring is real and of a considerably

[393] [1951] AC 850 (HL) 867.
[394] [1967] 1 AC 617 (PC) 642.
[395] Richard W Wright, 'The Standard of Care in Negligence Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1997) 249, 260.
[396] [1951] AC 850 (HL).
[397] [1967] 1 AC 617 (PC).
[398] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.68] to [2.70].

low level.[399] In those cases, if the risk can easily be eliminated, it will be negligent not to take the necessary precautionary measures.[400] Rather interestingly, however, Wilby goes on to distinguish between cases involving personal injury claims and cases involving property claims.[401] Indeed, Wilby maintains that, if a real risk of a considerably low level exists, but the consequences of the risk, were it to occur, are very serious, like a risk to life, then the legal standard of care will justify great difficulty and expense to prevent the risk from materialising.[402]

If, as I argued in the previous paragraphs,[403] it is more plausible to treat the comments made by Lord Reid in *Bolton v Stone*[404] and *The Wagon Mound No 2*[405] as supplementary rather than as contradictory, then my argument that the element of cost should not be one of the factors to be weighed by courts when deciding the question of breach of duty of care in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the course of his/her employment, will be supported by authority.

I recognise that there are some limits to the analytical framework used to evaluate the role of cost in the process of the application of the test of the hypothetical reasonable person when deciding the breach of duty of care question in the situation under discussion in this thesis. First, one may argue that, dependent upon how one interprets the cases discussed in the previous paragraphs,[406] elements of cost may be factored into policy type analysis. Beever, for example, adopts such an interpretation.[407] Indeed, Beever considers that the fact that the cost of remedial measures was a

[399] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.68].
[400] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.68].
[401] ibid Chapter 2, in particular [2.69].
[402] ibid.
[403] See above at pages 110 to 119.
[404] [1951] AC 850 (HL) 867.
[405] [1967] 1 AC 617 (PC) 642.
[406] See above at pages 110 to 119.
[407] Alan Beever, 'Negligence and Utility' (2017) 17 (1) Oxford University Commonwealth Law Journal 85.

relevant consideration in the analysis provided by Lord Reid in *Bolton v Stone*[408] and *The Wagon Mound No 2*[409] involves an implicit reference to social utility.[410]

However, this interpretation fails to explain why courts insist on referring to the cost of remedial measures and the social utility of the risk-creating activity as distinct factors, if the former is considered to be an implicit reference to the latter. Remember, here, that the quadrant of factors to be weighed by courts when dealing with the breach of duty of care question has often been described as the probability of the damage occurring, the likely gravity of the damage, were it occur, the cost to implement the precautionary measures, and the social utility of the activity.[411] Thus, it seems to me preferable to treat those factors separately.

Secondly, one may reasonably question in this regard as to whether my argument should extend beyond the employment context to recommend a reform of the quadrant of factors to be taken into account by courts when determining the breach of duty of care question in all cases involving personal injury claims. This is a reasonable question given that *Bolton v Stone*[412] is not an employer's liability case. However, in answering this question further research will be necessary. For that different policy considerations apply in non-employment cases.

Rejecting the element of cost from the process of the application of the test of the hypothetical reasonable person when dealing with the breach of duty of care question will impose a higher amount of care on the part of defendants. This may be justified, and even required, in the employment context. Remember, here, that, as of October 2013, the right to bring a civil action for any breach of health and safety at work regulations, especially where these regulations provide for strict liability, has been abolished by virtue of Section 69 of the Enterprise and Regulatory Reform Act 2013,

[408] [1951] AC 850 (HL) 867.
[409] [1967] 1 AC 617 (PC) 642.
[410] Alan Beever, 'Negligence and Utility' (2017) 17 (1) Oxford University Commonwealth Law Journal 85, 86 to 88.
[411] See above at page 112.
[412] [1951] AC 850 (HL).

(c 24). Thus, my contention to remove the element of cost from the process of the application of the test of the hypothetical reasonable person in this context will provide an alternative venue to ensure that, notwithstanding the abolition of strict liability, employees will continue to enjoy the same level of protection in this area.

Nonetheless, it may be considered unfair to extend it far enough to cover all cases involving personal injury claims. As explained by Lord Reed and Lord Hodge writing together in *Kennedy v Cordia (Services) LLP (Scotland)*, an employee is not in the same position as any other member of the public.[413] This is because an employee is obliged to act in accordance with the instructions given to him/her by his/her employer.[414] Furthermore, an employer is in a better position to consider the risks to the health and safety of an employee while he/she is at work and the means by which those risks may be avoided.[415] In those circumstances, it seems more appropriate at this point to confine my current argument to the employment context.

As a final remark it seems fair to say that the purpose currently achieved under the element of cost is to keep the necessary precautionary measures proportionate to the probability of the damage occurring and the likely gravity of the damage, were it occur. However, this can sufficiently be addressed by the rest of the factors of the process of the application of the test of the hypothetical reasonable person in this context. As will appear further on, the concept of policy can achieve the same purpose.[416] Indeed, where the probability of the damage occurring and the likely gravity of the damage, were it occur, are not serious enough, the concept of policy will intervene to ensure that any gross disproportion is avoided in this regard. This further explains why the process of the application of the test of the hypothetical reasonable person in this context could dispense with the element of cost.

---

[413] [2016] UKSC 6, [107] to [108].
[414] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [107] to [108].
[415] ibid.
[416] See Chapter 3, Section 3.3 at pages 128 to 135.

Once again, I maintain that this is more evident in the employment context rather than in personal injury claims in general. For that it is more likely for policy considerations to arise in the former. In fact, one may go as far as to suggest that all employers exercise socially valuable activities because they contribute to the community welfare by creating more job opportunities.[417] Arguably, this provides yet another reason why, at this point, my argument to reject the element of cost from the process of the application of the test of the hypothetical reasonable person when dealing with the breach of duty of care question, should be limited to the employment context.

3.3. The role of policy

I can now turn to the task of considering the role of the concept of policy in the process of the application of the test of the hypothetical reasonable person when determining the breach of duty of care question in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment. An obvious starting place is to consider whether the concept of policy shall continue to be taken into account as one of the many factors to be weighed by courts in this regard or whether the concept of policy should operate on a discrete level to deny a particular precautionary measure even after it has been determined by courts that the precautionary measure at hand should have been taken to comply with the legal standard of care in the circumstances.

While the latter proposition has not received enough support by authority, the former can naturally be inferred from a line of previously decided cases.[418] In addition, it emerges from Section 1 of the Compensation Act 2006, (c 29), by virtue of which the

[417] With respect to the definition of 'desirable' activity, see Chapter 3, Section 3.3 at pages 130 to 131.
[418] See, for example, *Bolton v Stone* [1951] AC 850 (HL) 867 per Lord Reid; *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA) 336 per Lord Asquith; *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838 per Lord Denning; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 574 per Lord Reid; *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] AC 46 (HL) 82 per Lord Hoffman; *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88] per Mr Justice Christopher Clarke; *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476, [30] per Lord Justice Jackson, [49] per Lady Justice Smith, [59] per Lord Justice Ward; *Dwayne Humphrey v Aegis Defence Services Ltd and other* [2014] EWHC 989 (QB) [112] per Mr Justice Bidder; *Goldscheider v The Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB) [164] per Mr Justice Nicola Davies.

concept of policy was introduced by statute in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case.[419]

Take, for example, *Watt v Hertfordshire County Council*.[420] In terms of a claim revolving around the allegation that the fire authorities had negligently failed to exercise reasonable skill and care to protect a fireman from the risk of being injured in the context of his employment, Lord Denning explained that:

> It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. [...] It is always balancing the risk against the end.[421]

[419] Section 1 of the Compensation Act 2006, (c 29), states that 'A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might – (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or (b) discourage persons from undertaking functions in connection with a desirable activity'. See also the Social Action, Responsibility and Heroism Act 2015, (c 3), Sections 1 and 2.

[420] [1954] 1 WLR 835 (CA).

[421] *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838. See also *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA) 336 where Lord Asquith stated that 'in determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that'. In a different context, see *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] AC 46 (HL) 82. Here, the claim arose out of the injury of Mr Tomlinson when he dived into a lake located in a country park owned and occupied by the Congleton Borough Council. Mr Tomlinson sought to hold the Congleton Borough Council liable for breach of its duties under the Occupiers' Liability Acts 1957, (c 31), and 1984, (c 3). Lord Hoffmann observed, however, that 'the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other'. It is worth noting, that, in reaching his conclusion to reject the claim, Lord Hoffman put particular emphasis not only on the social value of the activity but also on the fact that people should accept responsibility for the risks they choose to run. With regard to the latter consideration, Lord Hoffman explained that ' a duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, […]'.

In *Morris v West Hartlepool Steam Navigation Co Ltd,* where the claim arose out of the injury of a seafarer when he fell into a hatch on the tween deck of a vessel, Lord Reid explained that:

> [...] it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.[422]

Most certainly, Lord Reid did not make any marked reference to the concept of policy. It seems to me, however, that the use of the words 'any other disadvantage of taking the precaution' is to the effect that a mixture of policy considerations is introduced as one of the competing factors that have to be weighed by the courts before determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case.

More recently, Mr Justice Christopher Clarke repeated the approach originally taken by Lord Reid in *Morris v West Hartlepool Steam Navigation Co Ltd*[423] in *Graham Hopps v Mott MacDonald Ltd.*[424] In this case, the claim revolved around the injury of Mr Graham Hopps when the vehicle by which he was transported to the site of his employment was struck by the exploding material from an Improvised Explosive Device.[425] Indeed, Mr Justice Christopher Clarke explained that:

> In determining what is reasonable it is, firstly, necessary to consider the extent of the risks to which the claimant and others were exposed. I accept [...] that that involves considering (a) the nature of the risk; (b) the

[422] [1956] AC 552 (HL) 574.
[423] ibid.
[424] [2009] EWHC 1881 (QB).
[425] *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [1] to [50]. See also Nigel Tomkins, '*Hopps v Mott MacDonald Ltd*: Personal Injury – Employers Liability – Health and Safety at Work' (2009) Journal of Personal Injury Law 185.

> likelihood of it eventuating; and (c) the likelihood of harm being sustained (and the extent of that harm) if it does. In deciding what steps had to be taken in order to deal with these risks it is relevant to take into consideration (i) the nature and purpose of the work that the claimant was employed to perform; (ii) the priority of the risks [...]; (iii) the effectiveness of various protective measures that could be taken and (iv) the consequences of taking them.[426]

Clearly, Mr Justice Christopher Clarke took the approach originally taken by Lord Reid in *Morris v West Hartlepool Steam Navigation Co Ltd*[427] one step further by setting out some explicit examples of policy considerations that have to be weighed by the courts when determining the precautionary measures that should have been taken by a defendant to comply with the legal standard of care in a particular case. Namely, the aforesaid examples include the nature and purpose of the work undertaken, the effectiveness of the various precautionary measures that could be taken and the consequences of taking the alleged precautionary measures.

As the aforesaid cases have developed, it seems rather clear that the common law has treated the concept of policy just as one of the many factors that have to be weighed by the courts in the process of the application of the test of the hypothetical reasonable person in this context. This spurs the question as to whether the introduction of Section 1 of the Compensation Act 2006, (c 29), has led towards the less obvious possibility described at the beginning of this section, namely, that the concept of policy should operate on a discrete level and that any consideration about policy should be used to deny a particular precautionary measure even after it has been determined by the courts that the precautionary measure should have been taken to comply with the legal standard of care in a particular case.[428]

---

[426] *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88].
[427] [1956] AC 552 (HL) 574.
[428] See above at page 122.

I maintain that the answer to the question just posed is 'no'. There are tenable grounds for arguing so. First, the Government's Explanatory Notes to the Compensation Act 2006, (c 29), explicitly state that Section 1 'reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts'.[429] Furthermore, the Government's Post-legislative Assessment of the Compensation Act 2016, (c 29), came to reaffirm the aforesaid statement.[430] Moreover, a number of cases decided after the introduction of Section 1 of the Compensation Act 2006, (c 29), recognised that the section at hand adds nothing to the common law principle.[431] Finally, academic circles point out that Section 1 of the Compensation Act 2006, (c 29), does nothing but to give statutory effect to the existing common law principle.[432]

Moving now to the meaning that the concept of policy should take in the process of the application of the test of the hypothetical reasonable person in this context, the

[429] Explanatory Notes to the Compensation Act 2006, (c 29), in particular [17].
[430] Ministry of Justice, *Memorandum to the Justice Select Committee Post-Legislative Assessment of the Compensation Act 2006* (Crown Copyright 2012) Preliminary Assessment of the Act, in particular [61] to [65], where it was highlighted that '[...] the provisions that were included in section 1 clarified and restated the existing law to confirm that the courts, in considering claims for negligence [...] may have regard to whether requiring particular steps to be taken by the defendant might prevent or impede desirable activities from taking place. [...] Section 1 [...] reflected and did not change the law, and on that basis we would not expect them to have led to any significant change in the way in which the courts have dealt with these cases'.
[431] See, for example, *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [92] per Mr Justice Christopher Clarke; *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476, [34] per Lord Justice Jackson; *Uren v Corporate Leisure (UK) Ltd* [2010] EWHC 46 (QB) [19] per Mr Justice Field reversed in part by *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; *Reynolds v Strutt & Parker LLP* [2011] EWHC 2263 (QB) [47] per Mr Justice Oliver-Jones; *Sutton v Syston Rugby Football Club Ltd* [2011] EWCA Civ 1182, [13] per Lord Justice Longmore; *Wilkin-Shaw v Fuller* [2012] EWHC 1777 (QB) [41] to [46] per Mr Justice Owen; *Dwayne Humphrey v Aegis Defence Services Ltd and other* [2014] EWHC 989 (QB) [112] per Mr Justice Bidder; *Goldscheider v The Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB) [164] per Mr Justice Nicola Davies.
[432] See, for example, Dominic de Saulles, 'Nought Plus Nought Plus Nought Equals Nought: Rhetoric and the Asbestos Wars' (2006) 4 Journal of Personal Injury Law 301; Rebecca Herbert, 'The Compensation Act 2006' (2006) 4 Journal of Personal Injury Law 337; Kevin Williams, 'Politics, the Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006' (2006) 4 Journal of Personal Injury Law 347; William Norris, 'The Duty of Care to Prevent Personal Injury' (2009) 2 Journal of Personal Injury Law 114; Nathan Tavares, 'Wilkin-Shaw v Fuller: Liability- Personal Injury – Death' (2012) 4 Journal of Personal Injury Law 193; Jonathan Wheeler, 'Wilkin-Shaw v Fuller: Personal Injury – Liability – Negligence' (2013) 3 Journal of Personal Injury Law 132; Philippa Tuckman, 'Trench-foot Gone but not Forgotten: Non-Freezing Cold Injuries in a Military Context' (2013) 3 Journal of Personal Injury Law 162; James Goudkamp and other, 'Tort Statutes and Tort Theories' (2015) 131 (Jan) Law Quarterly Review 133. See also Eloise Power, 'The Liability of Third Parties to an Injured Employee' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 7, in particular [7.39].

first point that has to be made is that, in general, there is no comprehensive definition about the concept of policy. McHugh, for example, explains that the concept of policy embraces all the factors, other than the purely doctrinal ones, which have to be taken into account by the courts when deciding cases.[433] Not so far apart, Morgan points out that the concept of policy includes social, economic, moral, constitutional or legal institutional issues.[434] Hartshorne, on the other hand, comments that the concept of policy 'refers to those broader non-legal factors or arguments which might outweigh the competing claim for the imposition of a duty of care'.[435]

It may be worth highlighting in this respect that the definitions described in the previous paragraph by McHugh, Morgan, and Hartshorne writing separately were given in the context of the duty of care inquiry. I submit, however, that they can equally be applicable to the breach of duty of care inquiry. In fact, Norris points out in this regard that there can be considerable overlap between policy considerations that illuminate issues as to the breach of duty of care inquiry and those that may explain why a common law duty of care is or is not owed at all.[436] In the context of the breach of duty of care inquiry, Goudkamp and Murphy, finally, explain that the concept of policy refers to community welfare considerations.[437]

That being said, I argue that it is not possible to list in an exhaustive way all the considerations that may fall within the scope of the concept of policy in the process of the application of the test of the hypothetical reasonable person when dealing with the breach of duty of care question. What is possible, however, is to identify those considerations that may have an important role to play in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third

[433] M H McHugh, 'Neighbourhood, Proximity and Reliance' in PD Finn (ed), *Essays on Torts* (Sydney: The Law Book Co Ltd, 1989).
[434] Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 (4) Professional Negligence 206, 211.
[435] John Hartshorne, 'Confusion, Contradiction and Chaos within the House of Lords post *Caparo v Dickman*' (2008) 16 (1) Tort Law Review 8, 15.
[436] William Norris, 'The Duty of Care to Prevent Personal Injury' (2009) 2 Journal of Personal Injury Law 114, 132.
[437] James Goudkamp and other, 'Tort Statutes and Tort Theories' (2015) 131(Jan) Law Quarterly Review 133, 144.

parties in the context of his/her employment, namely: that of fairness;[438] that of the preservation of a 'desirable' activity;[439] and, finally, that of the consequences of taking the alleged precautionary measures.[440]

As one can reasonably understand, the first factor just listed, namely that of fairness, is a concept well embedded in the English law of negligence. In fact, the concept of fairness forms part of the third limb of the so-called *Caparo* test, which is applicable when deciding as to whether a common law duty of care should be recognised in a novel case.[441] Wilby explains that, in the context of the duty of care inquiry, the concept of fairness reflects what the courts consider as to whether a common law duty of care should or should not be recognised in a particular case.[442]

In this respect, the courts have to take into account fairness from the perspective of the claimant's reasonable expectations as much as from the defendant's.[443] In doing so, wider considerations rather than analytical calculations of the economic consequences of their decisions are required. This is because the courts do not have the information on which to form anything more than a broad view of those

[438] See, for example, *Latimer v AEC Ltd* [1953] AC 643 (HL) 707 per Lord Justice Singleton; *Marshall v Gotham* [1954] AC 360 (HL) 373 per Lord Reid; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 574 per Lord Reid.
[439] See, for example, *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA) 336 per Lord Asquith; *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838 per Lord Denning; *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88] per Mr Justice Christopher Clarke; *Dwayne Humphrey v Aegis Defence Services Ltd* [2014] EWHC 989 (QB) [112] per Mr Justice Bidder. In a non-employment context, see also *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] AC 46 (HL) 82 per Lord Hoffman; *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476, [30] per Lord Justice Jackson, [49] per Lady Justice Smith, [59] per Lord Justice Ward; *Goldscheider v The Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB) [164] per Mr Justice Nicola Davies. See also the Compensation Act 2006, (c 29), Section 1. See finally the Social Action, Responsibility and Heroism Act 2015, (c 3), Sections 1 and 2.
[440] See, for example, *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 574 per Lord Reid; *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88] per Mr Justice Christopher Clarke.
[441] *Caparo Industries plc v Dickman and others* [1990] 2 AC 605 (HL) 618 per Lord Bridge.
[442] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.18].
[443] M A Jones, 'Negligence' in M A Jones (ed), *Clerk & Lindsell on Torts* (22ndt Edition, Sweet & Maxwell 2017) Chapter 8, in particular [8 - 185].

consequences.[444] And, even if they do have the relevant data, they lack the specialised knowledge on how to interpret these data in order to reach their decision as to whether a duty of care should or should not be recognised in a novel case.[445]

I argue in this respect that the concept of fairness should have a similar role in the context of the breach of duty of care inquiry. This is supported by authority. Indeed, Lord Justice Smith in *Everett v Comojo (UK) Ltd* explained that not only the imposition of a common law duty of care should be fair, just and reasonable, but also the standard of care or the scope of the common law duty of care must be fair, just and reasonable.[446] Put in simple terms, the concept of fairness should intervene to ensure that the right balance is kept between the interested parties in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case. To this end, the most requisite element of proportionality between the risk at hand and the necessary precautionary measures will be achieved.

In the situation under discussion in the present thesis, for example, two factual possibilities are likely to arise. The first possibility would seem to suggest that more equally effective precautionary measures are available against the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment. If so, then the concept of fairness would intervene to ensure that the measures of the lowest difficulty or cost will be necessary to comply with the legal standard of care in the circumstances. The second possibility revolves around factual situations where more equally effective precautionary measures are not available against the risk at hand. In those cases, the concept of fairness would ensure that a

---

[444] *Morgan Crubicle Co Plc v Hill Samuel Bank & Co Ltd* [1990] 3 All ER 330 (QB), [1990] BCC 686 (QB) 691 per Mr Justice Hoffman. It may be worth noting here that, although the judgment delivered by the Mr Justice Hoffman was reversed by the Court of Appeal, the comment at hand by Mr Justice Hoffman was approved by Lord Slade in *Morgan Crubicle Co Plc v Hill Samuel Bank & Co Ltd* [1991] Ch 295 (CA) 321.
[445] *Morgan Crubicle Co Plc v Hill Samuel Bank & Co Ltd* [1990] 3 All ER 330 (QB), [1990] BCC 686 (QB) 691 per Mr Justice Hoffman.
[446] [2012] 1 WLR 150 (CA) 159.

gross disproportion is avoided between the level of risk and the necessary precautionary measures. Both possibilities will further be considered below.[447]

The second factor of the preservation of a 'desirable' activity is a policy consideration that has most commonly been used by courts, and one that is likely to create the most problems in the future. I maintain that this will be particularly obvious in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment.

There are tenable grounds for arguing so. First, the term 'desirable' activity emerging both from the common law[448] and the statutory[449] iteration of this policy consideration is considerably vague and ambiguous. This uncertainty is further compounded by the fact that a wide discretion is enjoyed by courts when deciding as to whether a particular activity qualifies as a 'desirable' activity in this context. Of crucial significance in this respect is the fact that Section 1 of the Compensation Act 2006, (c 29), fails to set out a definition of the term 'desirable' activity. It is, therefore, necessary to have recourse to the transcripts of the Parliamentary Debates associated with the Bill that became the Compensation Act 2006, (c 29).[450]

Indeed, introducing the Second Reading of the Bill for the Compensation Act 2006, (c 29), the then Parliamentary Under-Secretary of State for Constitutional Affairs explained that the term 'desirable' activity referred to the 'well-established concept of taking into account the wider social value of activities'.[451] In effect, therefore, when

---

[447] See Chapter 5, Sections 5.2 and 5.3, Sub-Sections 5.2.1 and 5.3.1 at pages 194 to 196 and 235 to 236 respectively.
[448] See, for example, *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA) 336 per Lord Asquith; *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838 per Lord Denning; *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [88] per Mr Justice Christopher Clarke; *Dwayne Humphrey v Aegis Defence Services Ltd* [2014] EWHC 989 (QB) [112] per Mr Justice Bidder. In a non-employment context, see *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] AC 46 (HL) 82 per Lord Hoffman; *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476, [30] per Lord Justice Jackson, [49] per Lady Justice Smith, [59] per Lord Justice Ward.
[449] Compensation Act 2006, (c 29), Section 1.
[450] In *Pepper v Hart* [1993] AC 593 (HL) 617 the House of Lords recognised that, where legislative wording is ambiguous, obscure or would lead to an absurdity, it is permissible to make reference to Parliamentary material in order to discover the true meaning of the wording in question.
[451] Hansard, HC Vol 447, col 421 (8 June 2006).

deciding as to whether a particular activity is a 'desirable' activity for the purposes of the policy consideration at hand, previously decided cases will be instructive.

In *Daborn v Bath Tramways Motor Co Ltd*, for example, the provision of ambulance services during the war was found to be a socially valuable activity.[452] Furthermore, in an attempt to offer some guidance as to the type of activities that qualify as socially valuable, Lord Asquith made a marked reference to the provision of railway services.[453] In *Watt v Hertfordshire County Council*, on the other hand, the provision of firefighting services was recognised as a socially valuable activity.[454]

More recently, in *Tomlinson v Congleton Borough Council*, the House of Lords recognised the social benefit of occupying a park in which a lake and sandy beaches are located.[455] Finally, in *Graham Hopps v Mott MacDonald Ltd*, Mr Justice Christopher Clarke recognised that the provision of services in order to reconstruct the shattered infrastructure of Iraq after war qualified as a socially valuable activity.[456] In the aftermath of those previously decided cases, one final remark has to be made. Broadly speaking, for the purposes of the policy consideration of the preservation of a 'desirable' activity, the term 'desirable' activity is intended to refer to activities that import great benefit to society in general and not to the particular defendant.[457]

This final remark leads us to the second source of confusion when it comes to the operation of the policy consideration of the preservation of a 'desirable' activity in a

---

[452] *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA).
[453] ibid.
[454] [1954] 1 WLR 835 (CA).
[455] [2003] UKHL 47; [2004] AC 46 (HL).
[456] [2009] EWHC 1881 (QB). See also *Dwayne Humphrey v Aegis Defence Services Ltd* [2014] EWHC 989 (QB).
[457] Note, here, that Section 2 of the Social Action, Responsibility and Heroism Act 2015, (c 3), provides that 'the court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members'. *Clerk & Lindsell on Torts* explains that the only defendants who would not fall within this provision are those engaged in positively anti-social activities and private individuals acting for their own purposes (M A Jones, 'Negligence' in M A Jones (ed), *Clerk & Lindsell on Tort* (22ndt Edition, Sweet & Maxwell 2017) Chapter 8, in particular [8 – 182]). Having said that, it is clear that Section 2 of the Social Action, Responsibility and Heroism Act 2015, (c 3), does not add anything to existing law. See also Rachael Mulheron, 'Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015' (2017) 80 Modern Law Review 88.

particular case. As seen earlier in the present section, Section 1 of the Compensation Act 2006, (c 29), provides that:

> A court […] may, in determining whether the defendant should have taken particular steps […], have regard to whether a requirement to take those steps might – (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or (b) discourage persons from undertaking functions in connection with a desirable activity.[458]

This spurs the question as to whether a mere decrease in commercial profit will be enough to trigger the policy consideration under examination. I argue that it will not. Most certainly, commercial profit is enjoyed by the particular defendant rather than by the society as a whole. It must follow then that it falls beyond the scope of application of Section 1 of the Compensation Act 2006, (c 29). Of course, it seems fair to say that, in practice, a decrease in commercial profit is one of the factors that might discourage a particular defendant from continuing the performance of his/her services. This is dictated by logic. Nevertheless, from a legal perspective, it is highly unlikely that, under the English law of negligence, pure economic profit will be enough to trigger the legal principle pertaining to the social value of the activity. In this respect, Williams expresses a concern as to how the pursuit of even purely private profit might not qualify to be a desirable activity in a capitalist society.[459]

It should be remembered, however, that the English law of negligence has long recognised the supremacy of non-economic values over purely economic values. This was implied by Lord Denning in *Watt v Hertfordshire County Council*.[460] The facts of the case could be summarised as follows. A firefighter was injured while travelling to an emergency in a vehicle with an unlashed jack. A claim was brought against the fire brigade, as employers, alleging negligence on their part in failing to fulfil their

[458] See above at page 126.
[459] Kevin Williams, 'Politics, the Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006' (2006) 4 Journal of Personal Injury Law 347, 352.
[460] [1954] 1 WLR 835 (CA) 838.

common law duty to exercise reasonable skill and care not to expose their employees to unnecessary risks. In particular, the firefighter claimed that the fire brigade: first, ought to have loaded the jack on to the lorry properly; secondly, ought to have supervised the loading of the jack on to the lorry; thirdly, should not have permitted the jack to be transported on to the lorry; and, finally, should not have permitted the claimant to ride on the back of the lorry on to which the jack had been loaded.[461]

The case reached the Court of Appeal in an appeal from the firefighter against the judgment of Mr Justice Barry holding that the fire brigade had not been negligent towards the claimant or towards their other employees. The Court of Appeal unanimously dismissed the appeal. More specifically, the Court of Appeal held that the fire brigade were under a common law duty to exercise reasonable skill and care to protect their firefighters from unnecessary risks. However, they were not negligent in requiring their firefighters to take risks that were normally encountered in this service.[462] The rationale of the judgment rested on the following admissions. First, it was accepted that a firefighter as an employee to the fire service always undertakes some risk.[463] Secondly, it was accepted that, in determining the precautionary measures that should have been taken to meet the legal standard of care in a particular case, it is essential not only to balance the risk against the remedial measures at hand but also to balance the risk against the end to be achieved by the activity concerned.[464]

In this case, it was found that the end to be achieved by firefighting services was to save health and life.[465] Hence, it justified taking considerable risks that could possibly endanger the health and life of the firefighters.[466] What is particularly interesting in this respect, however, is that Lord Denning drew a comparison between the human end to save health and life and the commercial end to make profit.[467] More

[461] *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 837.
[462] ibid 838.
[463] ibid 837.
[464] ibid 838.
[465] ibid.
[466] ibid.
[467] ibid.

specifically, his Lordship commented in this regard that, if the same accident had taken place in a commercial enterprise, there could be no doubt that the claimant's claim would have succeeded.[468] In other words, Lord Denning suggested that the commercial end to make profit would rarely, if ever, justify taking risks involving considerable threats to the health and life of individuals.

The comment made by Lord Denning in *Watt v Hertfordshire County Council*[469] allows for little, or no, space for pure economic ends to intervene and trigger the legal principle pertaining to the social value of the activity, whether it emerges from common law or from statute under Section 1 of the Compensation Act 2006, (c 29). Hence, to impose a lower standard of care by virtue of the legal principle in relation to the social value of the activity, especially in cases involving personal injury claims, something more than a mere decrease to commercial profit is required. By way of illustration, this may include an excessive increase of the operational costs, which arguably prohibits the continuance of the performance of services.

Closing with the third factor of the consequences of taking the alleged precautionary measures, it is sufficient to say here that, as I argued earlier in the present section in relation to the concept of fairness,[470] courts have to take into account the consequences of taking the alleged precautionary measures from the perspective of the claimant's reasonable expectations as much as from the defendant's. What this effectively means is that any consideration in this regard has to be twofold.[471]

In the situation under discussion in the present thesis, for example, courts have to take into account the consequences of taking the precautionary measures at hand both in terms of the effectiveness of the relevant precautionary measures in eliminating or

---

[468] *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838.
[469] ibid.
[470] See above at pages 129 to 130.
[471] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.94] where it was explained that 'apart from the costs to the employer in economic terms, issues may arise as to how practicable it is to use the protective measures, which may include risks to health and safety from the precautions themselves'.

reducing the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment and in terms of the risks that are likely to arise from the precautionary measures themselves.[472]

Before moving on to consider the role of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person when determining the breach of duty of care question in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment, it may be worth noting here that I will return to assess the aforesaid policy considerations in chapter 5 when ascertaining the extent to which a shipowner has to deploy private armed guards on board his/her ship or to re-route his/her ship from a dangerous area to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

3.4. The practice commonly followed by those engaged in a particular activity

I will finally clarify the role of any evidence of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should be taken to meet the legal standard of care in cases dealing with tortious liability for personal injury or loss of life caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment.

In passing it may be worth highlighting here that the issue just described is of considerable practical significance for the purposes of the present thesis. For that a general practice has now been developed by shipowners in order to protect their ships from risks associated with sailing through piracy infested waters.[473] It is thus only

[472] See Chapter 5, Sections 5.2 and 5.3, Sub-Sections 5.2.3 and 5.3.3 at pages 200 to 233 and 238 to 240 respectively.
[473] See, for example, ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Sections 6 and 8; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global*

logical that one may question the extent to which complying with the above mentioned general practice will be enough for a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

In terms of clarifying the role of any evidence of the practice commonly followed by those engaged in a particular activity in this context, I will consider a line of cases where the issue under examination was whether an employer/shipowner had breached his/her common law duty of care to safeguard the health and safety of an employee/seafarer in the context of his/her employment, with particular reference to the underlying matter of the value of any evidence of the practice commonly followed by employers/shipowners engaged in a particular activity when applying the test of the hypothetical reasonable person in this area. In the aftermath of this analysis, I argue that the stage has now been reached where the outcome of a proper and sufficient risk assessment rather than the practice commonly followed by those engaged in a particular activity should be relevant in this regard.

It is not surprising that, so far, the arguments most commonly used in cases, in which the alleged negligence consisted of an employer's/shipowner's failure to take measures to protect an employee from the risk of being injured or killed by the deliberate wrongdoing of third parties in the context of his/her employment, revolved around the practice commonly followed by those engaged in a particular activity. In *Peter Charlton v The Forrest Printing Ink Company Ltd*, for example, the employers, Forrest Printing Ink Company Ltd, argued that they did not fail in their common law duty of care to safeguard the health and safety of their employee, Mr Charlton,

---

Counter Piracy Guidance for Companies, Masters, and Seafarers (Witherby Publishing Group 2018) Section 7.16; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 8.

because they followed the practice commonly followed by various firms collecting wages from a bank.[474]

Furthermore, in *Tarrant v Ramage (The Salvital)*, the shipowners, the owners of the tug, argued that, by standing off the casualty when a warning that Iraqi aircrafts were in the air had been received, their tug followed the practice commonly followed by tugs rendering salvage service in the Persian Gulf during the Iran/Iraq war, and that they did not breach the common law duty of care owed to the seafarer, Mr Tarrant, as a result thereof.[475] Finally, in *Graham Hopps v Mott MacDonald Ltd*, the employee, Mr Graham Hopps, argued that the employers, Mott MacDonald Ltd, failed to safeguard his health and safety in the context of his employment because they had not provided an armoured vehicle for his transportation; given that other civilian employers ensured that their employees were transported in armoured vehicles.[476]

This may have something to do with the traditional position as to the value of any evidence of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person in this context. Arguably, this traditional position emerged from a comment made by Lord Dunedin in *Morton v William Dixon Ltd.*[477] As pointed out by Wilby in the latest edition of *Munkman on Employer's Liability*, in *Morton v William Dixon Ltd*,[478] Lord Dunedin tried to create a test for breach of duty of care suitable for cases where the alleged negligence consisted of an employer's failure to take measures to protect an employee from the risk of being injured or killed in the context of his/her employment.[479] Indeed, Lord Dunedin stated in this regard that:

---

[474] [1980] IRLR 331 (CA).
[475] [1998] 1 Lloyd's Rep 185 (QB) 191. For a description of the facts of the case see Chapter 4, Section 4.3.2 at pages 170 to 172.
[476] [2009] EWHC 1881 (QB) [103].
[477] 1909 SC 807 (CS) 809.
[478] ibid.
[479] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.99].

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.[480]

It is, thus, clear that the comment in question by Lord Dunedin influenced the judicial conduct of potential litigants in cases, in which the alleged negligence consisted of an employer's failure to take measures to protect an employee from the risk of being injured or killed by the deliberate acts of a third party.[481]

Nevertheless, it has early been recognised by courts that this traditional position does not represent the law.[482] In fact, in *Cavanagh v Ulster Weaving Co Ltd,* where the claim arose out of the injury of an employee, who was seriously injured in the course of his employment when he fell from a crawling ladder, which had no handrail, onto a glass roof whilst carrying a bucket of cement on the roof of the employers' factory, Lord Keith devoted his speech to the clarification of Lord Dunedin's comment cited above.[483] In particular, Lord Keith explained that:

> The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle. [...] Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle [...]

---

[480] *Morton v William Dixon Ltd* 1909 SC 807 (CS) 809.
[481] See, for example, *Peter Charlton v The Forrest Printing Ink Company Ltd* [1980] IRLR 331 (CA); *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB); *Graham Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB).
[482] See, for example, *Paris v Stepney Borough Council* [1951] AC 367 (HL) 382 per Lord Normand; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 571 per Lord Reid; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 (HL) 166 per Lord Keith; *Brown v Rolls Royce Ltd* [1960] 1 WLR 210 (HL) 214 per Lord Keith.
[483] [1960] AC 145 (HL) 166.

> Lord Dunedin was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.[484]

The so-called 'ruling' or 'fundamental' principle was conveniently described by the House of Lords in *Morris v West Hartlepool Steam Navigation Co Ltd*.[485] In this case, the claim arose out of the injury of a seafarer, who fell into a hatch on the tween deck of a vessel.[486] The seafarer claimed damages from his shipowners on the ground that they breached their common law duty of care to safeguard his health and safety in the context of his employment.[487] The thrust of the claim was that the shipowners should have erected guard-rails in hatches left open between decks in a ship whilst at sea.[488] The shipowners counter-argued that they were not negligent because there was evidence that there was a general practice in ships at sea not to erect guard-rails in similar circumstances.[489] Although the claim succeeded at first instance, it was dismissed on appeal by the Court of Appeal.[490]

The majority of the House of Lords, represented by Lord Reid, Lord Tucker, and Lord Cohen, held that the shipowners were in breach of their common law duty of care because they failed to erect a guard-rail in the hatch left open between the decks.[491] In reaching the conclusion just described, their Lordships explained that the relevant test when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment remains that of the hypothetical reasonable person.[492] Of crucial significance in this respect is the fact that both Lord Morton and Lord Porter, who delivered dissenting opinions, recognised

---

[484] *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 (HL) 166.
[485] [1956] AC 552 (HL).
[486] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 555 to 556 per Lord Morton, 562 to 567 per Lord Porter, 569 to 570 per Lord Reid, 575 to 576 per Lord Tucker, 578 per Lord Cohen.
[487] ibid.
[488] ibid.
[489] ibid.
[490] *Morris v West Hartlepool Steam Navigation Co Ltd* [1954] 2 Lloyd's Rep 507 (CA).
[491] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 575 per Lord Reid, 577 per Lord Tucker, 579 per Lord Cohen.
[492] ibid 574 per Lord Reid, 576 per Lord Tucker, 579 per Lord Cohen.

that the test to be applied was that of the hypothetical reasonable person.[493] Nevertheless, their Lordships reached a different conclusion in applying this test, in that they held that the shipowners were not negligent in the circumstances.[494]

In so far as the process of application of the test of the hypothetical reasonable person was concerned, all the Law Lords agreed that, when applying this test in a particular case, any evidence as to the practice commonly followed by those engaged in a particular activity does not constitute conclusive evidence as to whether the precautionary measures taken complied with the required standard of reasonable care.[495] In particular, Lord Reid explained that:

> I would agree that, if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. But an employer seeking to rely on a practice which is admittedly a bad one must at least prove that it has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects.[496]

Lord Tucker, on the other hand, was even more critical of any evidence that the practice commonly followed by those engaged in a particular activity by saying that:

> Evidence of general practice is often of great value and sometimes decisive, but [...] it may require close examination.[497]

Most certainly, those well-known comments by Lord Reid and Lord Tucker respectively were to the effect that they launched a less outdated position as to the

[493] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 558 per Lord Morton, 567 per Lord Porter.
[494] ibid 560 per Lord Morton, 568 per Lord Porter.
[495] ibid 560 per Lord Morton, 568 per Lord Porter, 574 per Lord Reid, 576 per Lord Tucker, 579 per Lord Cohen.
[496] ibid 574.
[497] ibid 576.

value of any evidence of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment.

This less outdated position was further developed by Mr Justice Swanwick in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd.*[498] Here, an employee, Mr Stokes, was working for fifteen years in a factory dealing with mineral oil.[499] Due to the nature of his work Mr Stokes died from scrotal cancer induced by his exposure to contact with mineral oil in the course of his work.[500] Mr Stokes's widow claimed damages from the former employers of her late husband, Guest, Keen and Nettlefold (Bolts and Nuts) Ltd.[501] The thrust of her claim was that Guest, Keen and Nettlefold (Bolts and Nuts) Ltd should have warned Mr Stokes about the risk of scrotal cancer and that they should have instituted six-monthly medical examinations of workers exposed to the risk of scrotal cancer.[502] Mr Justice Swanwick came to the conclusion that Guest, Keen and Nettlefold (Bolts and Nuts) Ltd were negligent because they did not take the alleged precautionary measures.[503] In doing so, Mr Justice Swanwick summarised the relevant principles in the following words:

> [...] the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but,

[498] [1968] 1 WLR 1776 (QB).
[499] *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 (QB) 1780 to 1781.
[500] ibid.
[501] ibid 1779.
[502] ibid 1785 and 1786.
[503] ibid 1795.

> where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; [...].[504]

The precise wording of the passage just cited, and in particular the use of the words 'entitled to follow it' with regard to any 'general practice which has been followed for a substantial period in similar circumstances without mishap', show that Mr Justice Swanwick went one step further to suggest that any evidence as to the practice commonly followed by those engaged in a particular activity should be *prima facie* evidence that the precautionary measures actually taken by an employer complied with the legal standard of care. However, if it can be established that, in the light of common sense or newer knowledge, the practice at hand is clearly bad, then the aforementioned *prima facie* evidence can, and should, be rebutted.

By way of illustration, the Court of Appeal in *Brown v John mills & Co (Llanidloes) L*td found that, notwithstanding the practice which had led to the employee's, Mr Brown's, accident was commonly followed by those engaged in polishing work in lathe, the employers, John Mills & Co (Llanidloes) Ltd, were not deprived of liability.[505] In this case, Mr Brown was injured while manually polishing work in lathe.[506] There was evidence that to polish work in lathe manually was common practice.[507] However, it was also known that that was a dangerous practice.[508] Mr Brown claimed damages from John Mills & Co (Llanidloes) Ltd on the ground that they failed to safeguard his health and safety in the context of his employment.[509] In particular, Mr Brown complained that he had not been given a polishing stick; that he was permitted to do this polishing in the way that he was doing it and that that was a

[504] *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 (QB) 1783. See also *Baker v Quantum Clothing Group Limited and others* [2011] UKSC 17, [9] where the Supreme Court approved the words of Mr Justice Swanwick.
[505] (1970) 8 KIR 702 (CA).
[506] *Brown v John mills & Co (Llanidloes) L*td (1970) 8 KIR 702 (CA).
[507] ibid.
[508] ibid.
[509] ibid.

dangerous way; and that John Mills & Co (Llanidloes) Ltd did not instruct him how to do the polishing safely and properly.[510]

Although the claim was dismissed at first instance, it succeeded in the Court of Appeal. Indeed, the Court of Appeal held that John Mills & Co (Llanidloes) Ltd was negligent because, in the face of a known danger, they failed in preventing or lessening the risks attendant on such practice.[511] Quite interestingly, Lord Justice Edmund Davies explained that the issue at hand on this appeal was whether an employer should be absolved of liability when his/her employee is injured in the context of his/her employment as a result of following a practice commonly followed by those engaged in the particular activity which unnecessarily exposes the employee to a foreseeable risk of injury.[512] When answering the question just posed, his Lordship made a marked reference to a passage in *Munkman on Employer's Liability*[513] which conveniently describes this less outdated position as to the value of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person in this context.[514] The relevant passage states that:

> [...] general and approved practice in industry is the primary guide in determining the standard of care; but it is not inflexible and may be departed from when there is a failure by that practice to take account of a danger that necessitates action by the employer for the employee's welfare or there may be differing standard where a large employer has greater

[510] *Brown v John mills & Co (Llanidloes) L*td (1970) 8 KIR 702 (CA).
[511] ibid.
[512] ibid.
[513] It may be worth noting in here that, although Lord Justice Edmund Davies referred to a previous edition of *Munkman on Employer's Liability*, the relevant passage appears in the most recent edition. See David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.106].
[514] *Brown v John mills & Co (Llanidloes) L*td (1970) 8 KIR 702 (CA).

> knowledge and insight and thus appreciates a risk an average employer may not appreciate.[515]

A recent judgment delivered by the Supreme Court in *Kennedy v Cordia (Services) LLP (Scotland)* gave yet another hard knock on the less outdated position described above.[516] It seems necessary to briefly recount the key facts of the case. Miss Kennedy was employed by Cordia (Services) LLP as a home carer.[517] Her duty was to visit individuals in their homes and to provide them with personal care.[518] On one occasion, Miss Kennedy was on her way to visit an elderly lady when she slipped and fell on an icy path, injuring her wrist.[519] Miss Kennedy claimed damages from Cordia (Services) LLP on the ground that they breached their common law duty of care to safeguard her health and safety in the context of her employment.[520] The thrust of her common law claim was that Cordia (Services) LLP should have provided her with appropriate anti-slip devices. Although the common law claim succeeded at first instance,[521] it was dismissed on appeal by the Inner House.[522]

Of crucial significance in this respect is the fact that the Inner House reversed the judgment delivered by the Outer House with regard to the common law claim because of two reasons. The first is that the Lord Ordinary failed to address the necessary basic questions identified by Lord Dunedin in *Morton v William Dixon Ltd*[523] in relation to the process of the application of the test of the hypothetical reasonable person in this context.[524] What this effectively means is that the Lord Ordinary should

---

[515] David Wilby, 'The General Principles of Negligence' in Daniel Bennet (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.106].
[516] [2016] UKSC 6.
[517] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [2] to [8].
[518] ibid.
[519] ibid.
[520] Note, here, that Miss Kennedy also claimed damages against Cordia (Services) LLP on the ground that they failed in their statutory duties under the Personal Protective Equipment at Work Regulations 1992, (SI 1992/2966) and the Management of Health and Safety at Work Regulations 1999, (SI 1999/3242).
[521] *Kennedy v Cordia (Services) LLP (Scotland)* [2013] CSOH 130.
[522] *Kennedy v Cordia (Services) LLP (Scotland)* [2014] CSIH 76; 2015 SC 154.
[523] 1909 SC 807 (CS) 809.
[524] *Kennedy v Cordia (Services) LLP (Scotland)* [2014] CSIH 76; 2015 SC 154, [5] per Lady Smith, [32] per Lord Brodie, [47] per Lord Clarke.

have considered whether the fact that Cordia (Services) LLP had not provided Miss Kennedy with appropriate anti-slip devices was a practice commonly followed by those engaged in the particular activity or a thing which was so obviously wanted that it would be folly in Cordia (Services) LLP to neglect it.

The second is that the Lord Ordinary failed to consider whether it would be fair, just, and reasonable to cast a common law duty of care upon Cordia (Services) LLP.[525] In fact, Lord Brodie, who delivered the leading judgment in the Outer House, commented that, had the Lord Ordinary considered that, he would have come to the conclusion that Cordia (Services) LLP did not owe Miss Kennedy a common law duty of care.[526] For that Miss Kennedy was a competent adult employee who should have decided by herself what to wear on her feet in the course of her employment.[527]

The Supreme Court clearly rejected the conclusions reached by the Outer House and went on to discuss the relevant issues. Starting with the latter issue, namely whether the Lord Ordinary should have considered whether it would be fair, just, and reasonable to recognise such duty of care on the part of Cordia (Services) LLP, the Supreme Court proceeded on the basis that *Kennedy v Cordia (Services) LLP (Scotland)* was a breach of duty of care case rather than a duty of care case.[528]

In other words, the issue for decision in *Kennedy v Cordia (Services) LLP (Scotland)* was not whether Cordia (Services) LLP owed Miss Kennedy a common law duty of care, but whether Cordia (Services) LLP was in breach of that duty. This makes sense since the present case falls squarely within a recognised category of duty of care. It

[525] *Kennedy v Cordia (Services) LLP (Scotland)* [2014] CSIH 76; 2015 SC 154, [5] per Lady Smith, [34] per Lord Brodie, [47] per Lord Clarke.
[526] ibid [34].
[527] *Kennedy v Cordia (Services) LLP (Scotland)* [2014] CSIH 76; 2015 SC 154, [34].
[528] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [114]. On the distinction between duty of care cases and breach of duty of care cases, see James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76 (3) Cambridge Law Journal 480.

has long been established that an employer owes an employee a common law duty of care to safeguard his/her health and safety in the context of his/her employment.[529]

The Supreme Court finally commented that, in that kind of cases, the threefold test for the recognition of a common law duty of care set out by Lord Bridge in *Caparo Industries plc v Dickman*[530] has no role to play.[531] One interesting point the Supreme Court did make in this respect is that the so-called *Caparo* test is concerned with the recognition of a common law duty of care only in novel circumstances.[532] In effect, therefore, it should not be applicable in established cases.[533]

For present purposes, it is the Supreme Court's analysis to the former issue that is of most interest. For it arguably establishes a modern position as to the value of any evidence of the practice commonly followed by those engaged in a particular activity in the process of the application of the test of the hypothetical reasonable person in this context. The Supreme Court explained that the precautionary measures that should have been taken to meet the legal standard of care required of an employer in discharge of his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment should no longer be confined to taking such precautionary measures as are commonly taken by those engaged in a particular activity.[534] The explanation for this proposition relates to the fact that the context in which the test of the hypothetical reasonable person has to be applied has changed since 1909, when *Morton v William Dixon Ltd*[535] was decided.[536]

---

[529] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [114]. See also *Wilson & Clyde Coal Company Ltd v English* [1938] AC 57 (HL).
[530] [1990] 2 AC 605 (HL) 617 to 618.
[531] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [114].
[532] ibid.
[533] Note, here, that this point has also been made by the Supreme Court in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 and more recently in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4. See also Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 (4) Professional Negligence 206; James Goudkamp, 'A Revolution in Duty of Care' (2015) 131 (Oct) Law Quarterly Review 519; Craig Purshouse, 'Arrested Development: Police Negligence and the *Caparo* 'Test' for Duty of Care' (2016) 23 Torts Law Journal 1.
[534] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [111].
[535] 1909 SC 807 (CS) 809.
[536] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [110].

Instead, the Supreme Court recognised the increasing value of carrying out a proper and sufficient risk assessment in the process of the application of the test of the hypothetical reasonable person in this area.[537] A comment by Lord Justice Smith in *Threlfall v Kingston-Upon-Hull City Council*, stating that in recent times it has become generally recognised that a reasonably prudent employer will carry out a proper and sufficient risk assessment in connection with his/her operations so that he/she can take suitable precautionary measures to avoid injury to its employees,[538] was cited by the Supreme Court as an illustration of this increasing value.[539]

What the Supreme Court effectively suggested is that the process of the application of the test of the hypothetical reasonable person in this area should be disentangled from any evidence as to the practice commonly followed by those engaged in a particular activity. In other words, any evidence as to the practice commonly followed by those engaged in a particular activity should no longer be considered as *prima facie* evidence that the precautionary measures taken by an employer complied with the legal standard of care. Conversely, the modern position launched by the Supreme Court substitutes any evidence as to the practice commonly followed by those engaged in a particular activity with evidence of the outcome of a proper and sufficient risk assessment. This can only mean that, according to this modern position, the precautionary measures that should have been taken by an employer to meet the legal standard of care in cases, in which the alleged negligence consisted of an employer's failure to take measures to protect an employee from the risk of being injured or killed in the context of his/her employment, should be determined by reference to the outcome of a proper and sufficient risk assessment.

Overall, I maintain that this modern position will turn out to be a positive development, for that it will lead to improved safety standards. A crucial consequence of this modern position is that there will be an incentive for employers to carry out a proper and sufficient risk assessment, since this will be evidence as to whether the

[537] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [110].
[538] [2010] EWCA Civ 1147, [35].
[539] *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [110].

precautionary measures taken by an employer were enough to discharge his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment in a particular case.

A further point to make is that, if this modern position is to be adopted, then particular emphasis will be placed on the facts of each particular case rather than on general considerations. Finally, it seems fair to mention that this modern position will lessen the burden imposed on an employee to prove that the practice commonly followed by those engaged in a particular activity is not appropriate. In turn, this implies that the courts will no longer have to conduct a thorough examination of the practice commonly followed by those engaged in a particular activity, since their primary concern will be to assess whether a proper and sufficient risk assessment has been carried out. This can only mean a quicker and more cost-efficient judicial process.

3.5. Conclusion

In the present chapter, I attempted to rationalise the process of the application of the test of the hypothetical reasonable person when determining the breach of duty of care question in cases dealing with tortious liability for injury or death caused to an employee/seafarer by the wilful act of third parties in the context of his/her employment. To this end, I addressed three specific queries. The first considered the role of the element of cost in the process of the application of the test of the hypothetical reasonable person in this area. The second explored the role of the concept of policy in this regard. The third examined the value of any evidence as to the practice commonly followed by those engaged in a particular activity when dealing with the breach of duty of care question in a particular case.

In particular, I argued that the element of cost should be rejected from the process of the application of the test of the hypothetical reasonable person in this area. Instead, the risk itself with particular reference to the consequences that are likely to occur if the risk materialises should be the factor that has to be weighed more heavily by courts when determining the precautionary measures that should have been taken by

an employer/shipowner to protect an employee/seafarer from the risk of being injured or killed by the wilful act of third parties in the context of his/her employment.

Of course, I recognised that the purpose currently achieved under the element of cost is to keep the right balance between the necessary precautionary measures and the probability of the damage occurring and the likely gravity of the damage, were it occur. Nevertheless, I argued that this can be achieved by the rest of the factors to be weighed by courts in this regard. Most certainly, the concept of policy is to that effect. For that I have argued that the concept of policy should remain relevant to the process of the application of the test of the hypothetical reasonable person in the area.

Finally, I argued that the stage has now be reached where any evidence as to the practice commonly followed by those engaged in a particular activity should be replaced by the outcome of a proper and sufficient risk assessment when determining the precautionary measures that should have been taken by an employer/shipowner to protect an employee/seafarer from the risk of being injured or killed by the wilful act of third parties in the context of his/her employment.

Having identified a coherent legal basis upon which I will then ascertain in chapters 4 and 5 of the present thesis the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates, I will now turn to sketch the content of the soft precautionary measures, which a shipowner should take to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Note, here, that the question of the extent to which a shipowner has to take soft precautionary measures in this regard arises only where the voyage to be undertaken is in piracy infested waters. For that the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is real and not a far-fetched possibility. Therefore, a shipowner should take measures to protect a seafarer from such risk in the context of his/her employment.

Of course, if the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is low or medium, then it would be enough to consider this question to deal with the matter at hand in the present thesis. If, on the other hand, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is considerably high, then it would also be necessary to address the question of the extent to which a shipowner has to take hard precautionary measures to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. This task will be undertaken in chapter 5 of the present thesis.

Chapter Four
Soft Precautionary Measures

4.1. Introduction

In chapter 3, I identified the principles upon which I will ascertain the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. In the present chapter, I will carry out the next step in the process of shedding light into the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. The task consists of attempting to sketch the content of the soft precautionary measures, which a shipowner should take to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

In doing so, I will adopt an incremental approach. In other words, I will examine previously decided cases to see how far the courts have gone when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in situations similar to the situation under discussion in the present thesis. Furthermore, I will pay attention to relevant legislation, codes of best practice, and guidelines for protection against risks associated with sailing through piracy infested waters. It should be remembered in this regard that, at common law, it has long been recognised by the courts that legislation, codes of best practice, and guidelines may be used as evidence, although not conclusive, of the steps which a reasonable shipowner should take to discharge

his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case.[540]

Studying previously decided cases and the provisions of relevant legislation, codes of best practice, and guidelines for protection against risks associated with entering piracy infested waters will therefore constitute the main subject matter of the present chapter. In the aftermath of this process, I argue that three broad obligations should be cast upon a shipowner to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. First, I argue in section 4.2 that a shipowner should be under an obligation to conduct a maritime piracy specific risk assessment. I then argue in section 4.3 that a shipowner should be under an obligation to inform a seafarer about the outcome of a maritime piracy specific risk assessment. Finally, I argue in section 4.4 that a shipowner should be under an obligation to harden the vessel against the risks identified by the maritime piracy specific risk assessment.

If, and to the extent that, a shipowner fails either to perform at all, or to adequately perform, any of these obligations, then he/she will fail to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. This implies that a seafarer, or the dependants of a seafarer, will have reasonable grounds to bring an action in negligence claiming compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. Remember, however, that, for the *prima facie* accrual of a cause of action in negligence, a seafarer, or the dependants of a seafarer,

[540] See, for example, *Franklin v The Gramophone Co Ltd* [1948] 1 KB 542 (CA) 558 per Lord Justice Somervell; *Bux v Slough Metals Ltd* [1974] 1 All ER 262 (CA) 273 to 274 per Lord Justice Stephenson. For more details on the use of legislation as evidence in aid of a claim in negligence, see David Wilby, 'The General Principles of Negligence' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 2, in particular [2.107] to [2.113]; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018) Chapter 8, in particular [8 - 51] to [8 - 54].

will also have to establish the other elements of the tort of negligence.[541] In short, a seafarer, or the dependants of a seafarer, will also have to prove that a causal link exists between the shipowner's breach of duty and the injury or the death caused to the seafarer as a result thereof and that the injury or the death caused to the seafarer as a result thereof was not a remote damage in the circumstances.

Ultimately, it may be worth highlighting here that, in principle, the question of the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment arises only where the voyage to be undertaken is in piracy infested waters. This is because, if a ship sails through piracy infested waters, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment will be real and not a far-fetched possibility. Therefore, a shipowner should exercise reasonable skill and care to protect a seafarer from such risk in the context of his/her employment.[542]

If the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is low or medium, then it will be enough to explore the extent to which a shipowner has to take soft precautionary measures to protect a seafarer from the risk at hand; given that the necessary precautionary measures should be commensurate to the level of risk.[543] By way of illustration, it may be observed here that, in general, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment will be low or medium, where the voyage to be undertaken is in piracy infested waters in which only a low number of maritime piracy attacks have been reported and/or in piracy infested waters in which a low number of incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place.

[541] See Chapter 2, Section 2.4, Sub-Section 2.4.1 at pages 79 to 80.
[542] ibid at pages 79 to 85.
[543] *Read v Lyons* [1947] AC 156 (HL) 173 per Lord Macmillan.

However, where the voyage to be undertaken is in designated high risk areas or in piracy infested waters in which a significant number of maritime piracy attacks have been reported or in piracy infested waters in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have occurred, then it will also be necessary to go through the last step in the process of examining the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment. Put differently, if the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is real and of considerably high level, then attention will also need to turn to the extent to which a shipowner has to take hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. That will form the subject matter of the following chapter 5.

Before moving on to the analysis it may be worth reminding here that the distinction between soft and hard precautionary measures does not have any substantive implications, since both precautionary measures will remain governed by the same analytical approach that will be used to evaluate them.[544] Conversely, the distinction of distinguishing between soft and hard precautionary measures is practical and serves to emphasise that the risk is on a spectrum and that greater precautionary measures must be taken as the level of risk increases.[545] Having said that, it may be worth setting out right from the outset that the obligations described in the present chapter are assessments to be made by a shipowner in all situations as they concern lower risk voyages. In practice, this means that prior to entering piracy infested waters a shipowner should always conduct a maritime piracy specific risk assessment, inform the seafarers about the outcome of such assessment, and harden the vessels against the risks identified by the maritime piracy specific risk assessment.

[544] See Chapter 1, Section 1.3 at pages 13 to 14.
[545] ibid.

4.2. An obligation to carry out a maritime piracy specific risk assessment

Starting with the first soft precautionary measure, I argue that, in the situation under discussion in the present thesis, a shipowner should be under an obligation to carry out a maritime piracy specific risk assessment, with a view to introducing and enforcing a maritime piracy specific ship security plan. Before moving on to articulate the grounds for arguing so, it may be worth explaining what I mean when I use the term 'maritime piracy specific ship security plan'. In doing so, the definitions of the terms 'ship security plan' and 'safety management system' as set out by the provisions of the International Code for the Security of Ships and of Port Facilities and the International Safety Management Code respectively will be instructive.

According to Section 2 (1) (4) of Part A of the International Code for the Security of Ships and of Port Facilities, a 'ship security plan' is 'a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo, cargo transport units, ship's stores or the ship from the risks of a security incident'. Similarly, Section 1 (1) (4) of Part A of the International Safety Management Code defines a 'safety management system' as 'a structured and documented system enabling company personnel to implement effectively the company safety and environmental policy'. By analogy, when I use the term 'maritime piracy specific ship security plan' I refer to a plan that is formulated to ensure the implementation of measures and procedures on board a ship designed to reduce and/or eliminate risks associated with entering piracy infested waters. This should be put in place to protect seafarers, cargo, and the ship herself from future maritime piracy attacks.

Turning now back to the grounds of my current argument, namely, that, in the situation under discussion in the present thesis, the first soft precautionary measure required of a shipowner should be that of the preparation of a maritime piracy specific risk assessment, one thing must be set out right from the outset. My current proposition follows naturally from my earlier premise that the stage has now been reached where the determination of the precautionary measures that should have been

taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case should be made by reference to the outcome of a proper and sufficient risk assessment rather than by reference to the practice generally followed by those engaged in a particular activity.[546] As seen in chapter 3, the circumstances in which an employer may be found negligent for failing to conduct a risk assessment have been quietly expanding in recent years, to the point that there can now be said that risk assessment is recognised by the courts as one of the steps, which a reasonable employer should take to discharge his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment in a particular case.[547]

Adding further support to my current argument is the fact that, in the maritime context in general, a risk assessment is now required by legislation and most codes of best practice. By way of illustration, in the field of health and safety at work, Regulation 7 (1) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, stipulates that a shipowner owes a seafarer a duty to conduct a suitable and sufficient assessment of the risks of the health and safety of a seafarer arising in the normal course of his/her activities or duties.[548] Furthermore, in terms of ensuring safety of life at sea, prevention of human injury and loss of life, and avoidance of damage to the environment, Section 1 (2) (2) of Part A of the International Safety Management Code explains that the company should assess all identified risks to its ships, seafarers and the environment and establish appropriate safeguards. Finally, in so far as security threats are concerned, Section 8 (1) of Part A of the International Code for the Security of Ships and of Port

[546] For more details on the role of a risk assessment when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case, see Chapter 3, Section 3.4 at pages 135 to 148.
[547] See Section 3.4 at pages 135 to 148.
[548] See also the Code of Safe Working Practices for Merchant Seafarers 2015 Edition – Amendment 3 (October 2018), Section 1.2.5, read in conjunction with ANNEX 1.2.

Facilities provides that ‘a ship security assessment is an essential and integral part of the process of developing and updating the ship security plan’.

Ultimately, in the context of maritime piracy in particular, Section 4.1 of the Guidance to United Kingdom Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence against Merchant Shipping drafted by the UK Department of Transport provides that a risk assessment should be carried out by the shipowner, prior to a ship entering piracy infested waters. The purpose of the assessment is to determine whether additional security personnel and/or measures are required. These additional security measures should supplement the mandatory security measures specified in the ship security plan for the given security level.

In addition, the need for a shipowner to conduct a maritime piracy specific risk assessment is emphasised by the general guidelines for protection against risks associated with sailing through piracy infested waters issued by the Baltic and International Maritime Council (hereinafter BIMCO), the International Chamber of Shipping (hereinafter ICS), the International Group of Protection and Indemnity Clubs (hereinafter IGP&I Clubs), the International Association of Independent Tanker Owners (hereinafter INTERTANKO), the International Association for the Ship Management Industry (hereinafter INTERMANAGER), and the Oil Companies International Marine Forum (hereinafter OCIMF), and endorsed by twenty nine different international shipping associations, which recognise the preparation of a maritime piracy specific risk assessment as an integral part of planning a voyage to be undertaken in piracy infested waters.[549]

[549] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 4; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 3; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 3.

4.2.1. Methodology for the preparation of a maritime piracy specific risk assessment

A detailed examination of the methodology to be applied when preparing a maritime piracy specific risk assessment falls beyond the scope of the present thesis. Nevertheless, I will draw attention to two points, which relate to the preparation of a maritime piracy specific risk assessment, and which are relevant to the context of the present thesis. More specifically, I will put particular emphasis on the scope and content and the duration of a shipowner's obligation to carry out a maritime piracy specific risk assessment. Arguably, these points are of great interest for the purposes of the present thesis due to their potential influence when establishing negligence on the part of a shipowner for failing either to conduct at all, or to properly and sufficiently conduct, a maritime piracy specific risk assessment.

Or, putting the matter another way, I maintain that these points will be instructive as to when a shipowner should be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment for failing either to conduct at all, or to properly and sufficiently conduct, a maritime piracy specific risk assessment. This, in turn, will shed light into the legal grounds upon which a *prima facie* cause of action in negligence will accrue to a seafarer, or to the dependants of a seafarer, who seek compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment; if, and to the extent that, all the other elements of the tort of negligence will also be satisfied.[550]

Before moving on to discuss these points, suffice to say here that it has often been observed that there are no fixed rules about how risk assessments should be undertaken.[551] However, as will appear further on in this sub-section, codes of best practice and guidelines have been developed to assist shipowners in this regard by prescribing how a proper and sufficient risk assessment, including a maritime piracy

[550] See Chapter 2, Section 2.4, Sub-Section 2.4.1 at pages 79 to 80.
[551] Code of Safe Working Practices for Merchant Seafarers 2015 Edition – Amendment 3 (October 2018), Section 1.2.5, read in conjunction with ANNEX 1.2.

specific risk assessment, should be carried out.[552] Furthermore, there is extensive literature dealing with the methodology for risk assessments, including maritime piracy specific risk assessments.[553] Therefore, it seems fair to say that a shipowner, who is interested in carrying out a maritime piracy specific risk assessment, will be able to derive guidance for its preparation from a variety of sources.

These sources include, but are not limited to, the aforesaid general guidelines for protection against risks associated with entering piracy infested waters.[554] In terms of prescribing how a maritime piracy specific risk assessment should be undertaken by a shipowner, these guidelines provide a shipowner with a comprehensive list of matters, which must be considered when preparing such a risk assessment.[555]

In addition to these general guidelines for protection against the risk of future maritime piracy attacks, a shipowner will be able to derive some guidance from the International Code for the Security of Ships and of Port Facilities and the International Safety Management Code. As seen in section 4.2, both require of a shipowner to conduct a risk assessment.[556] In this regard, they provide a shipowner with some instructions on the preparation of a risk assessment. Take, for example, Section 8.4 of Part A of the International Code for the Security of Ships and of Port

[552] See below at pages 159 to 160.
[553] See, for example, Zaili Yang and others, 'Maritime Safety Analysis in Retrospect' (2013) 40 (3) Maritime Policy and Management 261; Hans Liwang and others, 'Ship Security Challenges in High-Risk Areas: Manageable or Insurmountable?' (2015) 14 World Maritime University Journal of Maritime Affairs 201. See also Fidel Eduardo Reyes Melendez, 'A Selection and Comparison of Risk Assessment Methods and Models to be Used for the International Ship and Port Facility Security Code' (Master Thesis, World Maritime University 2004).
[554] See Chapter 4, Section 4.2 at page 157.
[555] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 4; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 3; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 3.
[556] See above at pages 155 to 156.

Facilities, which lists the minimum requirements for a ship security assessment.[557] It should be remembered in this respect that a ship security assessment and a safety assessment under the International Code for the Security of Ships and of Port Facilities and the International Safety Management Code respectively have to be tailored to the characteristics of the ship and the particular voyage to be undertaken.

Finally, a shipowner will be able to derive guidance from the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended. As already mentioned, under Regulation 7 (1), a shipowner owes a seafarer a duty to conduct a suitable and sufficient assessment of the risks of the health and safety of a seafarer arising in the normal course of his/her activities or duties.[558] In this regard, ANNEX 1.2 of the Code of Safe Working Practices for Merchant Seafarers 2015 Edition – Amendment 3 (October 2018), which should be read in conjunction with the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, (SI 1997/2962), as amended, provides detailed instructions on how such a suitable and sufficient risk assessment should be conducted.

4.2.2. A maritime piracy specific risk assessment should take account of the characteristics of the ship and the particular voyage to be undertaken

Reverting now to the points I mentioned earlier, I will first draw attention to the scope and content of a shipowner's obligation to conduct a maritime piracy specific risk assessment. It seems appropriate to highlight in this regard that, like a ship security assessment and a safety assessment under the International Code for the Security of Ships and of Port Facilities and the International Safety Management Code respectively, a maritime piracy specific risk assessment should take account of the characteristics of the ship and the particular voyage to be undertaken. This seems to be of considerable practical significance in the present context for various reasons.

[557] See also the International Code for the Security of Ships and of Port Facilities, Part B, Section 8.
[558] See Chapter 4, Section 4.2 at page 156.

First, a ship's vulnerability to risks associated with sailing through piracy infested waters depends vastly on her size, speed and freeboard.[559] Logic therefore dictates that, if a slow ship with a low freeboard is about to undertake a voyage in piracy infested waters, different considerations will apply when determining the precautionary measures to be adopted by a shipowner to reduce and/or eliminate the risk of future maritime piracy attacks.

In addition, the operating methodology followed by pirates varies greatly between different regions.[560] By way of illustration, the operating methodology followed by pirates off the coast of West Africa is characterised by an excessive use of violence towards seafarers. Unlike Somali pirates, who are preoccupied with taking seafarers hostage to use them as leverage to extort large sums of money as ransom,[561] West African pirates aim to extort financial gain by stealing and selling the cargo carried on board ships sailing through the area.[562] For that West African pirates are less inclined to preserving the life and health of seafarers. It must follow then that, for a maritime

[559] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 6; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 3; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 3.

[560] Hans Liwang and others, 'Ship Security Challenges in High-Risk Areas: Manageable or Insurmountable?' (2015) 14 World Maritime University Journal of Maritime Affairs 201, 204 to 207.

[561] For more details on the operating methodology of Somali pirates, see Patrick Lennox and others, *Contemporary Piracy off the Horn of Africa* (Canadian Defence & Foreign Affairs Institute 2008); Stig Jarle Hansen, *Piracy in the Greater Gulf of Aden: Myths, Misconceptions and Remedies* (Report 2009:29, Norwegian Institute for Urban and Regional Research 2012); House of Commons, *Piracy off the Coast of Somalia: Tenth Report of Session 2010-12* (House of Commons, Foreign Affairs Committee 2011); Lauren Ploch and others, *Piracy off the Horn of Africa* (Report for Congress, Congressional Research Service 2011). See also Peter Chalk, 'Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses'(2010) XVI (II) Brown Journal of World Affairs 89.

[562] For more details on the operating methodology followed by pirates off the coast of West Africa, see Sandra L Hodgkinson, 'Current Trends in Global Piracy: Can Somalia's Successes Help Combat Piracy in the Gulf of Guinea and Elsewhere?'(2013) 46 (1) Case Western Reserve Journal of International Law 145, 147 to 149; Ali Kamal-Deen, 'The Anatomy of Gulf of Guinea Piracy' (2015) 68 (1) Naval War College Review 93.

piracy specific risk assessment to be proper and sufficient, the operating methodology followed by pirates in the areas transited should be taken into account.

Finally, the ship's vulnerability is affected by external factors, such as the political, economic, and social conditions on land and at sea, which shape the risk of future maritime piracy attacks in the areas transited.[563] Take, for example, the different perspectives adopted by different States when it comes to the use of private armed guards on board ships to thwart maritime piracy attacks.[564] It is thus only logical that a proper and sufficient maritime piracy specific risk assessment should take account of these different perspectives before introducing and enforcing a maritime piracy specific ship security plan.

4.2.3. A maritime piracy specific risk assessment should be carried out at the time when the voyage commences and updated during the voyage

I will now draw attention to the duration of a shipowner's obligation to undertake a maritime piracy specific risk assessment. Suffice to say in this respect that the shipowner's obligation at hand should be a continuous one, in a sense that it should not be exhausted merely by the conduct of such an assessment at the time when the voyage commences. In reality, a shipowner should be under an obligation to carry out a maritime piracy specific risk assessment at the time when the voyage commences and to update the maritime piracy specific risk assessment during the voyage.

This tallies with the extent of a shipowner's common law duty of care to exercise reasonable skill and care to safeguard the health and safety of a seafarer in the context of his/her employment.[565] It has often been explained by the courts that the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of

[563] Hans Liwang and others, 'Ship Security Challenges in High-Risk Areas: Manageable or Insurmountable?' (2015) 14 World Maritime University Journal of Maritime Affairs 201, 209 to 215.
[564] On the different perspectives adopted by different States when it comes to the use of private armed guards on board ships, see Chapter 5, Section 5.2.3, Sub-Section 5.2.3.1 at pages 183 to 199.
[565] For the extent of a shipowner's common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment, see Chapter 2, Section 2.4 at pages 75 to 76.

care to safeguard the health and safety of a seafarer in the context of his/her employment should be determined by reference to the knowledge and information available to a shipowner at the time when the alleged breach occurred.[566] However, it has also been accepted by the courts that, from the moment that new knowledge and information becomes available to a shipowner about protective measures against a specific risk, then he/she should take appropriate steps to adopt such precautionary measures in order to reduce and/or eliminate the risk in question.[567]

It must follow then that, where new knowledge and information becomes available to a shipowner about precautionary measures against risks associated with sailing through piracy infested waters, not only he/she should take into account this new knowledge and information when preparing a maritime piracy specific risk assessment at the time when the voyage commences, but also he/she should take appropriate steps to update the existing maritime piracy specific risk assessment in this regard during the voyage. Otherwise, it is likely that a shipowner will fail to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment for failing to conduct a proper and sufficient maritime piracy specific risk assessment, with a view to introducing and enforcing a maritime piracy specific ship security plan.

As a final remark, it seems fair to say that it has been accepted by the courts that, in general, a failure either to conduct at all, or to adequately conduct, a risk assessment has only a potential significance in establishing negligence on the part of a shipowner; if, and to the extent that, had a proper and sufficient risk assessment been made, it would or should have led the shipowner to adopt a specific precautionary measure by

[566] See, for example, *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 (QB) 1783 per Mr Justice Swanick; *Thompson v Smiths Ship Repairers (North Shields) Ltd* [1984] QB 405 (QB) 415 to 416 per Mr Justice Mustill; *Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)* [2018] EWCA Civ 243, [29] to [4] per Lord Justice Jackson.

[567] In *Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)* [2018] EWCA Civ 243, [29] to [4], Lord Justice Jackson explained that 'the overall test of an employer's duty was that of the reasonable and prudent employer taking positive thought for the safety of his workers in the light of what he knew or ought to have known, and keeping reasonably abreast of developing knowledge'.

virtue of which the seafarer's injury would have been avoided.[568] Most certainly, this is justified by the fact that a failure either to conduct at all, or to adequately conduct, a risk assessment will rarely be the direct cause of injury or death suffered by a seafarer.[569] Nevertheless, I maintain that, in the situation under discussion in the present thesis, the value of a proper and sufficient maritime piracy specific risk assessment as the first soft precautionary measure which a shipowner should take to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment should not be underestimated.

4.3. An obligation to inform a seafarer about the outcome of a maritime piracy specific risk assessment

Turning now to the second soft precautionary measure, I propose that, in the situation under discussion in the present thesis, an obligation should be cast upon a shipowner to inform a seafarer about the outcome of a maritime piracy specific risk assessment. In particular, the shipowner's obligation at hand should consist of two limbs. First, a shipowner should warn a seafarer about the risks of rendering his/her service on board a particular ship that is bound to transit piracy infested waters during a particular voyage. Secondly, a shipowner should instruct a seafarer as to how such risks may be reduced or eliminated during the particular voyage. These two limbs of the shipowner's obligation at hand will be further considered below.

In maritime practice, the shipowner's obligation to inform a seafarer about the outcome of a maritime piracy specific risk assessment is of considerable significance. Because it allows a seafarer to knowingly decide as to whether he/she would like to remain on board a ship that is bound to enter piracy infested waters. Warren comments in this respect that every act on the part of a shipowner to pressurise or

[568] See, for example, *Allison v London Underground Limited* [2008] EWCA Civ 71, [58] per Lady Justice Smith; *Graham Hopps v Mott MacDonald Ltd and Ministry of Defence* [2009] EWHC 1881 (QB) [86] per Mr Justice Christopher Clarke; *Uren v Corporate Leisure (UK) Ltd and Ministry of Defence* [2011] EWCA Civ 66, [41] to [42] per Lady Justice Smith; *Dusek v Stormharbour Securities LLP* [2015] EWHC 37 (QB) [192], [207] to [208], and [215] to [216] per Mr Justice Hamblen.
[569] *Uren v Corporate Leisure (UK) Ltd and Ministry of Defence* [2011] EWCA Civ 66, [39] per Lady Justice Smith.

penalise a seafarer who refuses to transit piracy infested waters is morally unjust.[570] However, it seems fair to say that, in addition to its questionable morality, such conduct may also be unlawful, if, for example, it involves illegitimate threats.

From a legal perspective, perhaps the most obvious repercussion of the seafarer's informed consent to work in piracy infested waters revolves around the defence of voluntary assumption of risk.[571] Indeed, one may reasonably argue in this respect that the seafarer's informed consent triggers the defence of voluntary assumption of risk, by virtue of which any potential claim in negligence for compensation for personal injury or loss of life which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment should be barred. However, it should be remembered in this respect that, at common law, it has long been recognised by the courts that the defence of voluntary assumption of risk has a limited practical significance in the employment context.[572]

4.3.1. An obligation to warn a seafarer about the risks of entering piracy infested waters in the course of a particular voyage

There is in principle no objection to recognising that, in the situation under discussion in the present thesis, a shipowner should warn a seafarer about the risks of working on board a particular ship that is bound to transit piracy infested waters during a particular voyage. This is because the English law of negligence has long recognised that an obligation to warn an employee of the risks of the employment is one of the precautionary measures that should have been taken by an employer to meet the legal

[570] Richard C Warren, 'Piracy and Shipowners' Ethical Dilemmas' (2011) 6 (1) Society and Business Review 49, 54.
[571] The leading authority to cite here is *Smith v Baker* [1891] AC 325 (HL) 360 per Lord Herschell. See also *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 (HL) 671 per Lord Reid.
[572] *Merrington v Ironbridge Metalworks Ltd* [1952] 2 All ER 1101 (QB) 1103 per Mr Justice Hallet. For more details on the defence of voluntary assumption of risk in the employment context, see David Rivers, 'Contributory Negligence, Consenting to the Risk of Injury and Unpaid Volunteers' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 6, in particular [6.77] to [6.88].

standard of care to discharge his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment.[573]

However, questions are likely to arise as to the extent of the shipowner's obligation at hand. By way of illustration, one may reasonably question the extent to which a shipowner should be under an obligation to warn a seafarer about the risk of future maritime piracy attacks; given that this is an obvious risk associated with sailing through piracy infested waters. I argue in this regard that the extent of the shipowner's obligation at hand should reflect the outcome of the maritime piracy specific risk assessment. This follows naturally from my earlier premise that the stage has now been reached where the determination of the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case should be made by reference to the outcome of a proper and sufficient risk assessment.[574]

In effect, therefore, a shipowner should warn a seafarer about every risk identified by the maritime piracy specific risk assessment. In doing so, it should be immaterial whether a particular risk associated with sailing through piracy infested waters is obvious or how a particular risk is classified by the maritime piracy specific risk assessment. This is supported by authority.[575] In *General Cleaning Contractors Ltd v Christmas,* the House of Lords recognised for the first time that an employer's

---

[573] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 per Earl Jowitt, 189 per Lord Oaksey, 194 per Lord Reid, 199 per Lord Tucker; *McAllen v Dundee City Council* [2009] CSOH 9, [28] per Mr Justice Hodge; *Ammah v Kuehne + Nagal Logistic Ltd* [2009] EWCA Civ 11, [18] to [19] per Lord Justice Richards; *O'Neil v DHL Services Ltd* [2011] CSOH 183, [32] per Mr Justice Pentland; *Proctor v City Facilities Management Ltd* [2012] NIQB 99, [14] per Mr Justice Horner.
[574] On the role of a risk assessment when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case, see Chapter 3, Section 3.4 at pages 135 to 148.
[575] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 per Earl Jowitt, 189 per Lord Oaksey, 194 per Lord Reid, 199 per Lord Tucker; *McAllen v Dundee City Council* [2009] CSOH 9, [28] per Mr Justice Hodge; *Ammah v Kuehne + Nagal Logistic Ltd* [2009] EWCA Civ 11, [18] to [19] per Lord Justice Richards; *O'Neil v DHL Services Ltd* [2011] CSOH 183, [32] per Mr Justice Pentland; *Proctor v City Facilities Management Ltd* [2012] NIQB 99, [14] per Mr Justice Horner.

obligation to warn an employee of the risks of the employment extends far enough to cover obvious risks.[576] In this case, a window cleaner was standing on a sill cleaning the outside of a window of a London building when the window closed unexpectedly so as to deprive him of his hold. Consequently, the window-cleaner lost his balance, fell, and sustained serious injuries.[577]

The case reached the House of Lords on appeal from a judgment of the Court of Appeal affirming the judgment of Mr Justice Jones in the then King's Bench Division,[578] whereby it was held that the window-cleaner should recover from the window-cleaning company.[579] The House of Lords dismissed the appeal on the grounds that the window-cleaning company neither warned the window-cleaner of the obvious risk of the window closing unexpectedly nor provided the window-cleaner with any instructions as to how to prevent the window from closing.[580] Indeed, Lord Oaksey explained that, in leaving it to an employee to take precautionary measures against an obvious risk, which his/her work may involve, an employer fails to discharge his/her common law duty of care to safeguard the health and safety of an employee in the context of his/her employment.[581]

Reverting now to my current argument, namely, that, in the situation under discussion in the present thesis, a shipowner should warn a seafarer about every risk identified by the maritime piracy specific risk assessment, perhaps the only criticism to be levelled in this respect would seem to revolve around the misconception that the risks of rendering service on board a ship that is bound to transit piracy infested waters during

[576] [1953] AC 180 (HL) 189 per Earl Jowitt, 189 per Lord Oaksey, 194 per Lord Reid, 199 per Lord Tucker. See also *Ammah v Kuehne + Nagal Logistic Ltd* [2009] EWCA Civ 11, [18] to [19] per Lord Justice Richards.
[577] In relation to the facts of this case, see *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 184 to 185 per Earl Jowitt, 189 per Lord Oaksey, 191 per Lord Reid, 194 per Lord Tucker.
[578] *General Cleaning Contractors Ltd v Christmas* [1952] 1 KB 141 (CA).
[579] *General Cleaning Contractors Ltd v Christmas* [1951] WN 294 (KB).
[580] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 per Earl Jowitt, 189 per Lord Oaksey, 194 per Lord Reid, 199 per Lord Tucker. For a discussion of the aspect of the case dealing with an employer's obligation to provide an employee with instructions on how the risks of employment may be reduced or eliminated, see Chapter 4, Section 4.3, Sub-Section 4.3.2 at pages 169 to 170.
[581] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 190.

a voyage are inherent to the seafaring profession. It seems fair to say that, in general, a shipowner should not be under an obligation to warn a seafarer about normal seafaring risks. Take, for example, the judgment delivered by Mr Justice Salmon in *Kasapis v Laimos Brother Ltd*.[582] In this case, Mr Justice Salmon held that a shipowner had not been negligent because he/she failed to warn the ship's cook of the risk of injury while cutting through a carcass in rough weather conditions.[583] More specifically, his Justice explained that the risk in question was one of the inherent risks run by all cooks at sea in commercial ships.[584]

However, risks associated with transiting piracy infested waters can hardly be considered as inherent to the seafaring profession. In this regard, the meaning of the term 'inherent risks' may offer some assistance. The term 'inherent risks' refers to risks, which cannot be reduced and/or eliminated through the exercise of reasonable skill and care.[585] It seems clear then that the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is not inherent to the seafaring profession in general; especially, since the risk in question can be avoided by the exercise of reasonable skill and care. Note, however, the difference between a risk inherent to the seafaring profession in general and a risk inherent to sailing through piracy infested waters. Most certainly, the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is inherent to voyages to be undertaken in piracy infested waters.

In these circumstances, there are obvious risks to the vessel and the crew, which cannot all be avoided by the exercise of reasonable skill and care. So, for example, it is possible for a maritime piracy attack to occur, even though a shipowner has taken adequate measures to thwart future maritime piracy attacks. If a seafarer is injured or killed as a result thereof, there could be no question of a shipowner being liable for

[582] [1959] 2 Lloyd's Rep 378 (QB).
[583] *Kasapis v Laimos Brothers Ltd* [1959] 2 Lloyd's Rep 378 (QB) 381.
[584] ibid.
[585] This definition is derived from the words of Mr Justice Clarke in *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 190 to 191 where his Justice explained that 'working in a war zone involves risks which cannot all be guarded against by the exercise of reasonable care and skill'.

any breach of duty of care. In such case, the seafarer runs the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. This implies that the seafarer, or the dependants of the seafarer, will not be able to obtain compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. Clearly, this emphasises the need for a shipowner to warn a seafarer about the risks associated with sailing through piracy infested waters during a particular voyage.

4.3.2. An obligation to instruct a seafarer as to how risks associated with entering piracy infested waters may be reduced or eliminated in the course of a particular voyage

As with the shipowner's obligation to warn a seafarer about every risk identified by the maritime piracy specific risk assessment, little can be argued against recognising that, in the situation under discussion in the present thesis, a shipowner should instruct a seafarer as to how risks associated with working on board a ship that is bound to enter piracy infested waters may be reduced or eliminated during a particular voyage. The obligation of an employer to provide an employee with instructions as to what he/she should do to reduce or eliminate the risks of employment was first discussed by the House of Lords in *General Cleaning Contractors Ltd v Christmas*.[586] Though an employee may be experienced and able to take any necessary precautionary measures, it is for the employer to give such instructions as a hypothetical reasonable employer who has considered the risks of employment would give to his/her employee.[587] As both Lord Oaksey and Lord Reed explained in their speeches, this is because an employer is generally in a better position to assess the risks to which

[586] [1953] AC 180 (HL). See also *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB); *McAllen v Dundee City Council* [2009] CSOH 9; *Ammah v Kuehne + Nagal Logistic Ltd* [2009] EWCA Civ 11; *O'Neil v DHL Services Ltd* [2011] CSOH 183; *Proctor v City Facilities Management Ltd* [2012] NIQB 99.
[587] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 per Earl Jowitt, 189 to 190 per Lord Oaksey, 193 to 194 per Lord Reid, 199 per Lord Tucker.

his/her employee may be exposed in the course of his/her employment and to provide adequate information and instructions as to how such risks may best be avoided.[588]

Having followed the same conceptual framework, Mr Justice Clarke in *Tarrant v Ramage (The Salvital)* explained that a shipowner should provide a seafarer with written instructions describing what he/she knows of the risks to which his/her ship may be exposed and what should best be done to minimise such risks.[589] In this case, the claim arose out of the injury of a radio officer working on board a tug which was ordinarily operating in a war zone during the Iran/Iraq war. The tug owners were well known professional salvors, which were rendering salvage services to tankers and their cargo if they were struck by an Iraqi missile. On one occasion, the tug was rendering salvage services to a tanker which was severely damaged after she had been struck by an exocet missile. While the salvage operation was taking place, a warning was received that Iraqi aircrafts were in the air. As with previous alerts, the tug stood off the casualty. Once the tug was in a position where her master thought that she was as safe as she could reasonably be in the circumstances, she was struck by an exocet missile. As a result of this attack, the radio officer sustained injuries.[590]

The radio officer brought an action in negligence claiming compensation from the owners of the tug on the ground that they failed to safeguard his health and safety in the context of his employment. The crux of the claim was that the owners of the tug were negligent in that they failed to provide their tug and tugmaster with written instructions describing that, every time a warning was given, a tug should take shelter behind or in the radar shadow of a casualty.[591] Having accepted the submission made by the radio officer, Mr Justice Clarke held that the owners of the tug were in breach

[588] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 to 190 per Lord Oaksey and 193 to 194 per Lord Reed. See also *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 192 per Mr Justice Clarke.
[589] [1998] 1 Lloyd's Rep 185 (QB) 191 to 192.
[590] For more details on the facts of this case, see *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 186 to 190.
[591] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 191.

of the duty of care owed to the radio officer.[592] Furthermore, his Justice maintained that, if the owners had provided such instructions, the tugmaster would have complied with them.[593] Finally, Mr Justice Clarke came to the conclusion that, if the tugmaster had followed such instructions, the attack would probably have been avoided.[594] Accordingly, the radio officer was entitled to compensation.

Clearly, Mr Justice Clarke endorsed the generally accepted view that a shipowner owes a seafarer the same duty of care as any shore-based employer.[595] Of greater interest for the purposes of my current argument, however, is the fact that his Justice implied that there may be circumstances that emphasise the need for a shipowner to provide a seafarer with such instructions.[596] In *The Salvital* itself, Mr Justice Clarke maintained that the fact that the tug was operating in a war zone was to that effect.[597] This, taken in conjunction with the fact that there is a clear analogy between designated war zones and piracy infested waters, arguably suggests that the fact that a ship is bound to sail through piracy infested waters should also emphasise the need for a shipowner to give instructions to a seafarer. If this is so, then further support is added to my current argument that an obligation to provide a seafarer with instructions should fall within the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis.

Before moving on to consider the third soft precautionary measure, one final remark has to be made as to the content of the aforesaid instructions. As one can reasonably understand, this should reflect the facts of the particular case.[598] In other words, a

---

[592] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 193.
[593] ibid 194.
[594] ibid.
[595] *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) 569 per Lord Reid; *Saul v Saint Andrews Steam Fishing Co (The St. Chad)* [1965] 2 Lloyd's Rep 1 (CA) 7 per Lord Harman.
[596] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 192.
[597] ibid.
[598] *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 (HL) 189 per Earl Jowitt, 189 to 190 per Lord Oaksey, 193 to 194 per Lord Reid, 199 per Lord Tucker; *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 191 to 192; *McAllen v Dundee City Council* [2009] CSOH 9, [28] per Mr Justice Hodge; *Ammah v Kuehne + Nagal Logistic Ltd* [2009] EWCA Civ 11, [20] per Lord Justice

shipowner should provide a seafarer with instructions that reflect the outcome of the maritime piracy specific risk assessment. As in *The Salvital*, a shipowner should make reasonable enquiries as to the way in which pirates operate and, in the light of those enquiries, should give appropriate instructions and information to a seafarer.[599] The aforesaid instructions should always be updated in the light of experience and any new information which become available in relation to the relevant risks.[600]

Having said that, it seems to me that, in providing a seafarer merely with the general guidelines for protection against the risk of future maritime piracy attacks,[601] a shipowner should still be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. Because the aforesaid guidelines are general and not tailored to the facts of a particular case. The result is that, if a shipowner provides a seafarer with these guidelines, a seafarer, or the dependants of a seafarer, will still have reasonable grounds to bring an action in negligence claiming compensation from the shipowner for injury or death caused to the seafarer as a result of a maritime piracy attack in the context of his/her employment.

However, it should be remembered that, for a cause of action in negligence to *prima facie* accrue, all the elements of the tort of negligence should be fulfilled.[602] What this effectively means is that a seafarer, or the dependants of a seafarer, should also establish the following. On the one hand, they should show that, if the shipowner had provided a seafarer with instructions tailored to the outcome of the maritime piracy specific risk assessment, the seafarer would probably have complied with them. On the other hand, they should show that, if the seafarer had complied with such instructions, the attack would probably have been avoided. As a result, the seafarer would not have suffered personal injury or loss of life.

Richards; *O'Neil v DHL Services Ltd* [2011] CSOH 183, [32] per Mr Justice Pentland; *Proctor v City Facilities Management Ltd* [2012] NIQB 99, [14] per Mr Justice Horner.

[599] *Tarrant v Ramage (The Salvital)* [1998] 1 Lloyd's Rep 185 (QB) 191.

[600] ibid.

[601] See Chapter 4, Section 4.2 at pages 157 to 158.

[602] See Chapter 2, Sub-Section 2.4.1 at pages 79 to 80.

4.4. An obligation to harden the vessel against the risks identified by the maritime piracy specific risk assessment

Closing with the third soft precautionary measure, I argue that, in the situation under discussion in the present thesis, an obligation should rest on a shipowner to harden the vessel against risks identified by the maritime piracy specific risk assessment. In particular, a shipowner should adopt appropriate equipment to harden the vessel against risks associated with entering piracy infested waters. This equipment may include, but may not be limited to, razor wire barriers, water spray rails, alarms, long range acoustic devices, closed circuit television, safe muster points, and citadels.[603]

Moreover, a shipowner should adequately man the ship to put in place the maritime piracy specific security plan. As will appear further on, the importance of adequately manning the ship is emphasised by the fact that watch keeping and proper look-outs have been recognised as an integral component of a maritime piracy specific ship security plan.[604] Finally, a shipowner should properly train the crew in this regard. In reality, the majority of maritime piracy attacks are deterred by crew who have been properly trained before sailing through piracy infested waters.[605] I will thus continue by considering the specific obligations just described in the following sub-sections.

---

[603] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 8; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 8. See also Sam Bateman, 'Sub-Standard Shipping and the Human Costs of Piracy' (2011) 3 (2) Australian Journal of Maritime and Ocean Affairs 57, 58 to 60; Probal Kumar Gosh, 'Strategies for Countering Somalian Piracy: Responding to the Evolving Threat' (2014) 70 (1) India Quarterly 15, 28; Willow Bryant and others, 'Preventing Maritime Pirate Attacks: A Conjunctive Analysis of the Effectiveness of Ship Protection Measures Recommended by the International Maritime Organisation' (2014) 7 Journal of Transportation Security 69, 72 to 74 and 76 to 80.
[604] See Chapter 4, Section 4.4, Sub-Section 4.4.2 at page 176.
[605] See, for example, Willow Bryant and others, 'Preventing Maritime Pirate Attacks: A Conjunctive Analysis of the Effectiveness of Ship Protection Measures Recommended by the International Maritime Organisation' (2014) 7 Journal of Transportation Security 69, 79.

4.4.1. An obligation to adopt appropriate equipment to harden the vessel against risks identified by the maritime piracy specific risk assessment

In general, little can be argued against recognising that, in the situation under discussion in the present thesis, a shipowner should be under an obligation to adopt appropriate equipment to harden the vessel against risks associated with entering piracy infested waters. As seen right from the outset of the present thesis, a shipowner owes a seafarer the same common law duty of care as any shore-based employer.[606] This means that a shipowner is under a common law duty of care to exercise reasonable skill and care to safeguard the health and safety of a seafarer in the context of his/her employment.[607] In *Wilson & Clyde Coal Company Ltd v English,* Lord Wright explained that to fulfil such common law duty of care an employer has to provide an employee with a safe place of work, a safe system of work, and competent fellow employees.[608] Similar statements can be found in other cases.[609]

It should also be remembered that a similar duty of care rests on a shipowner under a seafarer's employment agreement (hereinafter SEA). I explained earlier that, in light of Section 42 (1) of the Merchant Shipping Act 1995, (c 21), the shipowner's duty of care to safeguard the health and safety of a seafarer in the context of his/her employment obtains both a common law and a contractual reiteration.[610] Indeed, Section 42 (1) of the Merchant Shipping Act 1995, (c 21), stipulates that a shipowner is under an implied by law duty to use all reasonable means to provide a ship that is seaworthy for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition for the voyage during the voyage. Like the shipowner's common law duty of care to safeguard the health and safety of a seafarer in the

[606] See Chapter 2, Section 2.4 at pages 75 to 76.
[607] This derives from the combined reading of *Saul v Saint Andrews Steam Fishing Co (The St. Chad)* [1965] 2 Lloyd's Rep 1 (CA) 7 per Lord Harman and *Wilson & Clyde Coal Company Ltd v English* [1938] AC 57 (HL).
[608] [1938] AC 57 (HL) 78.
[609] See, for example, *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348 (QB) 351 and 359 per Mr Justice Stearfeild; *Wilson v Tyneside Window Cleaning* [1958] 2 QB 110 (CA) 122 per Lord Justice Pearce; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 (HL) 910 per Lord Justice Hailsham; *Cook v Square D Ltd* [1992] ICR 262 (CA) 268 to 269 per Lord Justice Farquharson.
[610] See Chapter 2, Section 2.4 at page 76.

context of his/her employment, for the shipowner's implied by law duty to provide a seaworthy ship for the voyage to be discharged, a shipowner has to provide a seafarer with a safe place of work, a safe system of work, and competent fellow seafarers.[611]

The clear implication is that, if a shipowner fails to take appropriate precautionary measures to provide a seafarer with a safe place of work, a safe system of work, and/or competent fellow seafarers, then he/she may fall short of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Or, putting the matter another way, a shipowner may fail in his/her implied by law duty to provide a ship that is seaworthy for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition for the voyage during the voyage. In passing, it may be worth highlighting here that, pursuant to Section 2 (1) of the Unfair Contract Terms Act 1977, (c 50), and Section 42 (2) of the Merchant Shipping Act 1995, (c 21) respectively, neither the aforementioned common law duty of care nor the implied by law duty to provide a seaworthy ship for the voyage can be limited by the terms of the SEA.

It must follow then that, in the situation under discussion in the present thesis, a shipowner, who fails to put in place razor wire barriers, water spray rails, or foam monitors, to name but a few, will be in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Put in simple terms, the shipowner will fail to exercise reasonable skill and care to provide a seafarer with a safe place of work; especially since it is now known that a vessel without the above described equipment is more vulnerable to risks associated with entering piracy infested waters.[612] It goes without saying that, in determining the

[611] See, for example, K X Li and other, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 (3) Journal of Maritime Law and Commerce 381, 388; Pengfei Zhang and other, 'Safety First: Reconstructing the Concept of Seaworthiness under the Maritime Labour Convention 2006' (2016) 67 Marine Policy 54, 57 to 58.

[612] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 8; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter*

specific equipment that has to be adopted by a shipowner to harden the vessel against risks associated with sailing through piracy infested waters, the outcome of the maritime piracy specific risk assessment will be instructive. This is because the extent to which a shipowner has to adopt such equipment will vary depending on the circumstances of the particular case.

4.4.2. An obligation to adequately man a ship to put in place the maritime piracy specific security plan

In terms of recognising that, in the situation under discussion in the present thesis, a shipowner should adequately man a ship to put in place the maritime piracy specific ship security plan, little needs to be added. Manning a ship with sufficient personnel is fundamental for the provision of a safe place of work and a safe system of work. This is prescribed by legislation. Take, for example, Regulation 2.7 of the Maritime Labour Convention, 2006, as amended. This Regulation stipulates that each Member State shall require that all ships that fly its flag are properly manned for the safe, efficient and secure operation of the ship under all conditions, taking into account concerns about seafarer fatigue and the particular nature and conditions of the voyage.[613]

In the context of maritime piracy, the need for a shipowner to adequately man a ship is emphasised by the fact that watch keeping and proper look-outs are now an integral component of a maritime piracy specific ship security plan. Indeed, the general guidelines for protection against the risk of future maritime piracy attacks stipulate that additional look-outs should be provided and a shorter rotation of the watch period should be adopted, in order to maximise vigilance.[614] In addition, these general

---

Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (Version 5, Witherby Publishing Group 2018) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 8.

[613] Maritime Labour Convention, 2006, as amended, Regulation 2.7.

[614] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Section 8; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7.2; BIMCO, ICS,

guidelines stipulate that watch-keeping and proper look-outs are the most effective method of ship protection, since they allow for an early warning of a maritime piracy attack, and they allow for an early deployment of defensive measures.[615] Finally, Bryant, Townsley, and Leclerc observe in this respect that watch keeping and proper look-outs are the most important components to preventing maritime piracy attacks.[616]

It must follow then that, for a voyage that is known to include piracy infested waters, a ship, which is not properly manned to put in place precautionary measures, such as additional look-outs and a shorter rotation of the watch period, will be an unsafe place of work. That being so, in the situation under discussion in the present thesis, a shipowner, who fails to properly man his/her ship, will be in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Therefore, a seafarer, or the dependants of a seafarer, will have reasonable grounds to bring an action in negligence claiming compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment; provided that the rest of the elements of the tort of negligence will also be satisfied.

4.4.3. An obligation to provide a seafarer with training tailored to the outcome of a maritime piracy specific risk assessment

I argued earlier that, in the situation under discussion in the present thesis, a shipowner should harden his/her ship against the risks identified by a maritime piracy

---

IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 8.

[615] ibid.

[616] Willow Bryant and others, 'Preventing Maritime Pirate Attacks: A Conjunctive Analysis of the Effectiveness of Ship Protection Measures Recommended by the International Maritime Organisation' (2014) 7 Journal of Transportation Security 69, 79.

specific risk assessment.[617] In this respect, the third and last obligation that should rest on a shipowner is that of properly training a seafarer to effectively implement the maritime piracy specific ship security plan. In other words, a shipowner should provide a seafarer with training tailored to the outcome of a maritime piracy specific risk assessment. There are tenable grounds for arguing so.

First of all, this is prescribed by authority. As seen above, it has long been recognised by the courts that, in discharging the common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment, a shipowner has to provide a seafarer with a safe place of work, a safe system of work, and competent fellow seafarers.[618] Logic therefore dictates that, if, and to the extent that, a shipowner fails to properly train a seafarer, then he/she will fail to provide a seafarer with a safe place of work, a safe system of work, and competent fellow seafarers. Consequently, the shipowner will be in breach of his/her common law duty of care. In the context of maritime piracy, this is further supported by the fact that it is now known that, in reality, the majority of maritime piracy attacks are avoided when seafarers have been properly trained before sailing through piracy infested waters.[619]

Another factor that emphasises the need for a shipowner to properly train a seafarer, particularly where a ship enters piracy infested waters, is the use of multiple precautionary measures to successfully thwart maritime piracy attacks. Indeed, for a maritime piracy specific ship security plan to be effective, a combination of precautionary measures is often required.[620] As a result, a shipowner, who is interested in effectively implementing a maritime piracy specific ship security plan, with a view to providing the crew with a safe place of work, has to take appropriate steps to properly train the crew in this regard.

---

[617] See Chapter 4, Section 4.4 at page 173.
[618] See Chapter 4, Section 4.4, Sub-Section 4.4.1 at page 174.
[619] Willow Bryant and others, 'Preventing Maritime Pirate Attacks: A Conjunctive Analysis of the Effectiveness of Ship Protection Measures Recommended by the International Maritime Organisation' (2014) 7 Journal of Transportation Security 69, 79.
[620] ibid.

Although the training provided by a shipowner will vary depending on the circumstances of a particular case, its main purposes may be summarised in two propositions. At one extreme, it has to familiarise a seafarer with the equipment adopted to harden the vessel against the risks of entering piracy infested waters. At the other, it has to familiarise a seafarer with the instructions provided as to how such risks may be reduced or eliminated during the particular voyage. Thus, if a shipowner provides a seafarer with generic training that does not fulfil the aforesaid purposes, he/she may still be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

In terms of recognising that, in the situation under discussion in the present thesis, a shipowner should properly train a seafarer, with a view to effectively implementing the maritime piracy specific ship security plan, the Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, are also instructive. In fact, Regulations 27 (2) (a) and 51 (2) (b) emphasise the need for a shipowner to provide a seafarer with such training. This is because the Regulations at hand stipulate that, before being assigned to any shipboard duties on a seagoing ship, which is required to comply with the provisions of the International Code for the Security of Ships and of Port Facilities,[621] a seafarer must be familiarised with any security procedures relevant to his/her duties, including any security procedures that may relate to the risk of future maritime piracy attacks.[622]

Furthermore, Regulations 27 (2) (a) and 51 (2) (b) of the Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, provide that a seafarer must receive security-awareness

[621] It may be worth noting here that a commercial ship sailing through piracy infested waters will normally be required to comply with the provisions of the International Code for the Security of Ships and of Port Facilities. This is because, according to Regulation 1.2 of Chapter XI-2 of the International Convention on the Safety of Life at Sea, 1974, as amended, the International Code for the Security of Ships and of Port Facilities covers passenger ships, all types of cargo ships, including high-speed craft, of 500 gross tonnage and over, and offshore mobile drilling units.
[622] Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, Regulations 27 (2) (a) and 51 (2) (b).

training or instruction in accordance with the mandatory minimum requirements set out at Section A-VI/6, paragraphs 1 to 4 of the Seafarers' Training, Certification and Watchkeeping Code, as amended.[623] As will appear further on in this sub-section, following the latest update to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, these mandatory minimum requirements make a marked reference to maritime piracy.[624]

Of course, I recognise that, as with the vast majority of merchant shipping legislation, the Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, emanate from international and European legislation. They implement into English law the provisions of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, which was first adopted by the International Maritime Organisation (hereinafter IMO) in 1978 and was subsequently amended in 1991, 1994, 1995, 1997, 1998, 2004 (on two occasions), 2006 and 2010.

The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, was first incorporated into EU Law by Directive 94/58/EC of 22 November 1994 on the minimum level of training for seafarers. This was later adapted to subsequent amendments of the aforedaid Convention. Accordingly, Directive 94/58/EC of 22 November 1994 on the minimum level of training for seafarers was recast as Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008.

The latest update of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, was adopted by the Conference of the Parties to this Convention in June 2010 and entered into force in January 2012. This is most commonly known as the 2010 Manila Amendments. One of the most important points introduced to the Convention by the aforementioned

[623] Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, Regulations 27 (2) (a) and 51 (2) (b).
[624] See below at page 180.

amendments lies in the matter of training on security, including maritime piracy. Following the 2010 Manila Amendments, Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 was amended by Directive 2012/35/EU of the European Parliament and the Council of 21 November 2012, which urged all EU Member States to align their legislation with the new provisions.

However, I maintain that this can hardly diminish the influence of the Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015 (SI 2015/782), as amended, when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. For the reasons explained earlier, the Merchant Shipping (Standard of Training, Certification and Watchkeeping) Regulations 2015, (SI 2015/782), as amended, will continue to have effect in domestic law on and after the withdrawal of the UK from the EU.[625] In any case, the UK is a member of the IMO and a signatory to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended. What this effectively mean is that, despite the withdrawal of the UK from the EU, the aforesaid Regulations shall be retained as they are. Otherwise, the UK may fail to comply with its international obligations under the Convention.

Ultimately, I submit that a shipowner's obligation to provide a seafarer with training tailored to the outcome of a maritime piracy specific risk assessment should not be exhausted by the provision of such training at the commencement of a voyage. Conversely, a shipowner should also provide a seafarer with follow-up training during the voyage. This is prescribed by the nature of the shipowner's common law duty of care as a continuing duty. Indeed, a shipowner owes a seafarer a duty to exercise reasonable skill and care to safeguard his/her health and safety in the context of

[625] For a discussion of these reasons, see Chapter 2, Section 2.3 at pages 60 to 64.

his/her employment.[626] Moreover, the contractual reiteration of a shipowner's duty expressly states that such duty is not exhausted at the commencement of the voyage.[627] A shipowner has to exercise reasonable skill and care to keep the vessel in a seaworthy condition for the particular voyage during the voyage.[628] It must follow then that a shipowner, who properly trains a seafarer at the commencement of a voyage, but fails to provide a seafarer with follow-up training, may still be found in breach of his/her common law duty of care.

In the context of maritime piracy, recognising that the shipowner's obligation at hand extends far enough to cover an obligation to provide a seafarer with follow-up training during the voyage is also justified by the nature of the risks associated with sailing through piracy infested waters. As seen earlier in the present chapter, maritime piracy as a threat to the shipping industry in general, and to the life and health of seafarers in particular, is not static.[629] In so far as the threat of maritime piracy develops, the procedures followed by shipowners to reduce or eliminate such risk should develop accordingly. To this end, an obligation to provide a seafarer with follow-up training during the voyage is of considerable practical significance.

So as to provide a rounded picture of a shipowner's obligation to properly train a seafarer, with a view to effectively implementing the maritime piracy specific ship security plan, it may be worth noting that this follow-up training has to fulfil three main purposes. First, it has to investigate whether any equipment adopted by a shipowner to harden the vessel against the risks of sailing through piracy infested waters remains in a good operable condition. Furthermore, it has to keep the crew in a state of readiness at all times during the voyage. Finally, it has to test the effectiveness of the maritime piracy specific ship security plan.

---

[626] This derives from the combined reading of *Saul v Saint Andrews Steam Fishing Co (The St. Chad)* [1965] 2 Lloyd's Rep 1 (CA) 7 per Lord Harman and *Wilson & Clyde Coal Company Ltd v English* [1938] AC 57 (HL).
[627] Merchant Shipping Act 1995, (c 21), Section 42 (1).
[628] ibid.
[629] See Chapter 4, Section 4.2, Sub-section 4.2.2 at pages 161 to 162.

If this follow-up training identifies any deficiencies in the existing maritime piracy specific ship security plan, then the shipowner will have to make any necessary alterations to fix them. In addition to identifying and rectifying any deficiencies, this follow-up training should be used as a way to ensure that the existing maritime piracy specific ship security plan is adjusted to take account of experience and any new information which become available in relation to risks associated with transiting piracy infested waters. To achieve these purposes, this follow-up training may take various forms, such as short briefings and emergency drills, to name but a few.

4.5. Conclusion

In the present chapter, I have been concerned with sketching the content of the soft precautionary measures, which a shipowner should take to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. To this end, I have adopted an incremental approach. In particular, I have considered previously decided cases to derive guidance on how the question of ascertaining the extent to which a shipowner should take soft precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment should be decided. Furthermore, I have paid attention to relevant legislation, codes of best practice, and guidelines for protection against risks associated with sailing through piracy infested waters.

I have argued that three obligations should be cast upon a shipowner. First, a shipowner should conduct a maritime piracy specific risk assessment, with a view to introducing and enforcing a maritime piracy specific ship security plan for the particular voyage to be undertaken. In this respect, a shipowner should be under an obligation to carry out a maritime piracy specific risk assessment when the voyage commences and to update the maritime piracy specific risk assessment during the voyage. Secondly, a shipowner should inform a seafarer about the outcome of such maritime piracy specific risk assessment. In particular, a shipowner should warn a

seafarer about the risks of rendering his/her service on board a particular ship that is bound to transit piracy infested waters during a particular voyage and to instruct a seafarer as to how such risks may be reduced or eliminated during that voyage. Thirdly, a shipowner should harden the vessel against the risks identified by the maritime piracy specific risk assessment. More specifically, a shipowner should adopt appropriate equipment to harden the vessel against the aforesaid risks, should adequately man the ship to put in place the maritime piracy specific ship security plan, and should properly train a seafarer in this regard.

In the event that a shipowner fails either to perform at all, or to adequately perform, any of these obligations, then he/she will negligently fail in his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. A seafarer, or the dependants of a seafarer, will therefore have reasonable grounds to bring an action in negligence claiming compensation from the shipowner for personal injury or loss of life which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. However, it should be pointed out once again that, for the *prima facie* accrual of a cause of action in negligence, a seafarer, or the dependants of a seafarer, will have to establish all the elements of the tort of negligence.[630] This means that a seafarer, or the dependants of a seafarer, will also have to establish that, but for the shipowner's negligence, the attack would not have taken place, and the seafarer would not have suffered the injury or death, which he/she suffered as a result thereof.

To complete the discussion of the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment, I will now conduct in the following chapter the last step in the process of this examination. In brief, the task consists of considering the extent to which a shipowner has to take hard precautionary measures

[630] See Chapter 2, Section 2.4, Sub-Section 2.4.1 at pages 79 to 80.

to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Note, however, that this last step arises only where the voyage to be undertaken is in designated high risk areas or in areas in which a significant number of maritime piracy attacks has been reposted or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks has occurred. This is because, if the ship sails through the aforesaid areas, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is real and high.

Chapter Five
Hard Precautionary Measures

5.1. Introduction

In the present chapter I will conduct the last step in the process of shedding light into the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. It may be worth reminding in this respect that going through this last step is necessary only where the voyage to be undertaken is in designated high risk areas, in areas, in which a significant number of maritime piracy attacks have been reported or in areas, in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place. Most certainly, if a ship sails through the aforementioned areas, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment will be real and of considerable high level.

A shipowner should thus exercise reasonable skill and care to protect a seafarer from such risk in the context of his/her employment, and the exercise of such reasonable skill and care may extend far enough to cover an obligation to take hard precautionary measures in this regard. For that I pick up the matter where chapter 4 left it and attempt to ascertain the extent to which a shipowner has to take hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Remember here that the distinction between soft and hard precautionary measures is practical and serves to emphasise that the risk is on a spectrum and that greater precautionary measures must be taken as the level of risk increases.[631]

[631] See Chapter 1, Section 1.3 at pages 13 to 14.

In particular, in this chapter, the hard precautionary measure of deploying private armed guards on board a ship[632] and the hard precautionary measure of re-routing a ship from a dangerous route, being the most effective in eliminating and/or reducing the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment, and yet the most problematic in the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis, will be analysed.

Testing the aforesaid hard precautionary measures against three main policy considerations will constitute the main subject matter for the analysis provided in the present chapter. In particular, I will test them against the policy consideration of fairness, the policy consideration of the preservation of a socially valuable activity, and the policy consideration of the consequences of taking the alleged precautionary measure.[633] This is necessary because the three policy considerations at hand are likely to be fatal to any arguments suggesting that a shipowner should deploy private armed guards on board his/her ship or that a shipowner should re-route his/her ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

---

[632] It may be worth noting here that there are several types of contracted maritime security (hereinafter CMS) that are in use to protect ships from the risk of future maritime piracy attacks. These include private armed guards, i.e. embarked private security force personnel hired by the shipowner; floating armouries, i.e. vessels contracted to provide logistical support for private maritime security firms; vessel protection detachments (hereinafter VPDs), i.e. uniformed military personnel embarked on a vessel with explicit approval of the flag State; state affiliated escorts (hereinafter SAEs), i.e. escort by a State military asset; and coastal state embarked personnel (hereinafter CSEP), i.e. embarked armed personnel originating from the coastal State. For more details on the types of CMS, see Oceans Beyond Piracy, *Issue Paper: Defining Contracted Maritime Security* (Denver, CO: One Earth Future Foundation 2016); Oceans Beyond Piracy, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017); Oceans Beyond Piracy, *Issue Paper: Vessel Protection Detachments* (Denver, CO: One Earth Future Foundation 2017); Oceans Beyond Piracy, *Issue Paper: Coastal State Embarked Personnel* (Denver, CO: One Earth Future Foundation 2017); Oceans Beyond Piracy, *Issue Paper: State Affiliated Escorts* (Denver, CO: One Earth Future Foundation 2017).

[633] For more details on these policy considerations, see Chapter 3, Section 3.3 at pages 127 to 135.

In the aftermath of this analysis I will argue that a seafarer should rarely, if ever, be under an obligation to deploy private armed guards on board his/her ship. This implies that a shipowner, who fails to deploy private armed guards on board his/her ship, will not be found liable in negligence to compensate a seafarer, or the dependants of a seafarer, for personal injury or loss of life which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

Conversely, an obligation to re-route a ship from a dangerous area may be cast upon a shipowner, but only when this is possible because the ship's destination is not in and/or around piracy infested waters and when this does not incur additional operational costs, which can drive a shipowner out of business. Thus, a shipowner, who fails to re-route his/her ship from a dangerous route, may be found liable in negligence to compensate a seafarer, or the dependants of a seafarer, for injury or death which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, but only when the limited circumstances just described apply.

5.2. An obligation to deploy private armed guards on board a ship

At first sight, I observe that some valid reasons underpin any arguments suggesting that a shipowner should take the hard precautionary measure of carrying private armed guards on board his/her ship to thwart future maritime piracy attacks to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment; especially where the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks have been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place. The aforementioned reasons hinge around two sets of facts.

On the one hand, where the voyage to be undertaken is in the aforesaid areas, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is real and of considerable high level. Furthermore, the likely gravity of the harm of a seafarer, if the risk at hand

materialises, is of great seriousness. As seen in chapter 3, the two most prominent approaches to determine the magnitude of the risk are the worst-case scenario approach and the average of the possible harms approach.[634] In the maritime piracy context, while the largest possible harm of a seafarer will be loss of life, the average of the possible harms of a seafarer will be some serious physical injury. It is thus rather evident that, no matter which approach is followed, the gravity of the aforementioned types of harm of a seafarer is serious enough to justify the adoption of hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

On the other hand, most stakeholders have now come to recognise the use of private armed guards on board ships as one of the options available to shipowners in the fight against maritime piracy attacks. Note, here, that, as will appear further on, most of them take a neutral stance in this regard that neither encourages nor discourages the deployment of private armed guards on board ships as a self-protective measure against risks associated with sailing through piracy infested waters.[635] Nonetheless, this broad recognition, taken in conjunction with the fact that, in maritime practice, carrying private armed guards on board a ship tends to be the norm rather than the exception,[636] arguably suggests that deploying private armed guards on board ships to thwart maritime piracy attacks is a practice commonly followed by shipowners.

Indeed, the complex and intriguing legal issue of the use of private armed guards to defend ships from risks associated with entering piracy infested waters was brought into light by the outbreak of Somali maritime piracy more than ten years ago. In response to this emerging legal issue, most stakeholders adopted recommendations and guidelines. The International Maritime Organisation (hereinafter IMO), for

[634] See Section 3.2 at page 108.
[635] See below at pages 190 to 192.
[636] Clearly, this is because, to date, no ship carrying private armed guards on board has been the victim of a successful maritime piracy attack. For more details on the hard precautionary measure of deploying private armed guards to defend ships from the risk of future maritime piracy attacks, see Oceans Beyond Piracy, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017).

example, has issued a series of circulars providing recommendations for flag States, coastal and port States, and shipowners, ship operators and masters on the use of private armed guards on board ships in the high risk area.[637] In addition, the IMO has issued a circular stipulating interim guidance to private maritime security companies providing their services on board ships in the high risk area.[638] Nevertheless, the IMO has emphasised that it does not endorse or institutionalise their use to defend ships from maritime piracy attacks.[639]

On the same line, the Baltic and International Maritime Council (hereinafter BIMCO), the International Chamber of Shipping (hereinafter ICS), the International Group of Protection and Indemnity Clubs (hereinafter IGP&I Clubs), the International Association of Independent Tanker Owners (hereinafter INTERTANKO), the International Association for the Ship Management Industry (hereinafter INTERMANAGER), and the Oil Companies International Marine Forum (hereinafter OCIMF) have issued guidelines for shipowners, ship operators, masters, and seafarers for protection against risks associated with sailing through piracy infested waters.[640]

---

[637] IMO, 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1405/Rev. 2; IMO, 'Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1408/Rev. 1; IMO, 'Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (12 June 2015) MSC. 1/Circ. 1406/Rev. 3.

[638] IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1443.

[639] IMO, 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1405/Rev. 2, Annex, Section 1; IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1443, Annex, Section 1.5; IMO, 'Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (12 June 2015) MSC. 1/Circ. 1406/Rev. 3, Annex, Section 1.

[640] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018).

The aforementioned guidelines stipulate that, while the use of private armed guards to defend ships from the risk of future maritime piracy attacks is not recommended or endorsed, it remains a matter for individual shipowners to decide, but only after a thorough risk assessment, and where it is permitted by the ship's flag State and any coastal State.[641] Quite interestingly, twenty nine different international shipping associations including international counter-piracy actors, such as the European Union Naval Force (hereinafter EU NAVFOR), the Maritime Security Centre Horn of Africa (hereinafter MSCHOA), and the United Kingdom Maritime Trade Operations (hereinafter UKMTO) endorsed these guidelines.

Finally, many States have reviewed their policies and laws on the matter under examination. Take, for example, the United Kingdom (hereinafter UK). The UK Department of Transport has issued an interim guidance on the use of private armed guards to defend UK registered ships from the risk of future maritime piracy attacks. Put in simple terms, the UK has recognised that the use of private armed guards is an option available to shipowners to protect human life on board UK registered ships from risks associated with entering piracy infested waters, but only in exceptional circumstances, and where it is lawful to do so.[642] The exceptional circumstances for which this policy applies will be further discussed in sub-section 5.2.3.1.[643]

---

[641] ReCAAP ISC, ASF, FASA, IFC, INTERTANKO, OCIMF, RSIS and SSA, *Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia* (ReCAAP 2016) Sections 6 and 8; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7.16; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region* (Version 3, Witherby Publishing Group 2018) Section 8.

[642] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 1.4. See also UK Department of Transport, *Guidance to UK Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence against Merchant Shipping* (Crown Copyright 2011) Sections 2.5 to 2.9.

[643] See below at pages 203 to 219.

At a more specific level, however, I maintain that the sets of facts described in the previous paragraphs are not enough on their own to clarify the extent to which a shipowner has to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. For that carrying private armed guards on board a vessel, even if a shipowner deploys such guards on board his/her ship for self-defence purposes, spurs some serious questions with regard to policy considerations.

Is it fair to impose such a heavy burden on the part of a shipowner? Is shipping a socially valuable activity? If so, will a requirement to deploy private armed guards on board a ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment be enough to prevent shipping from being undertaken at all, to a particular extent or in a particular way, or to discourage a shipowner from undertaking functions in connection to shipping? What are the consequences of imposing such an obligation on a shipowner from a seafarer's and a shipowner's perspective, respectively? Are these consequences enough to preclude the hard precautionary measure of deploying private armed guards on board a ship from the standard of care required of a shipowner in the situation under discussion in the present thesis? It is thus necessary to address these questions before reaching any conclusions as to the matter at hand.

In passing it may be worth noting here that the present thesis appears to be the first attempt to meticulously address the question as to whether a shipowner who fails to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment should be found liable in negligence to compensate a seafarer, or the dependants of a seafarer, for any personal injury or loss of life caused to the seafarer as a result thereof; most legal research hitherto being concerned with the legal

framework pertaining to the use of private armed guards to defend ships from risks associated with sailing through piracy infested waters.[644]

5.2.1. Fairness

I suggested earlier in chapter 3 that the policy consideration of fairness has an important role to play when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case.[645] In short, this policy consideration ensures that the right balance is kept between the interests of the relevant parties. In the present sub-section, I argue that, from a legal perspective, it is fair to impose an obligation on a shipowner to deploy private armed guards on board

[644] See, for example, Carolin Liss, 'Losing Control? The Privatisation of Anti-Piracy Services in the Southeast Asia' (2009) 63 (3) Australian Journal of International Affairs 390; Christopher Spearin, 'Against the Current? Somali Pirates, Private Security, and American Responsibilisation' (2010) 31 (3) Contemporary Security Policy 553; Michael Mineau, 'Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy' (2010) 9 Journal of International Business and Law 63; Robert Jeffrey, 'An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defence against Pirates' (2010) 42 (4) Journal of Maritime Law and Commerce 507; Dana Parsons, 'Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight against Pirates' (2010-2011) 35 Tulane Maritime Law Journal 153; Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21; Graham Caldwell, 'Private Security and Armed Military Guards' (2012) 157 (5) The RUSI Journal 16; Graham Caldwell, 'Due Diligence and Privately Contracted Armed Security Personnel' (2012) 12 (5) Lloyd's Shipping and Trade Law 1; Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organisation' (2012) 1 (3) Cambridge Journal of International and Comparative Law 81; Brittany Pizor, 'Lending an "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545; Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665; Scott Fitzsimmons, 'Privatising the Struggle against Somali Piracy' (2013) 24 (1) Small War and Insurgencies 84; Hasebe Masamichi, 'The Use of Privately Contracted Armed Security Personnel (PCASP) to Defend against the Threat of Piracy: Differences between Japan and the UK' (2014) 4 Journal of Maritime Researches 43. See also James Brown, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy 2012); James Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in Douglas Guilfoyle (ed), *Modern Piracy* (Edward Elgar Publishing 2013); Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014); Ian Ralby, 'What Went Wrong When Regulating Private Maritime Security Companies' in Jorg Schildknecht and others (eds), *Operational Law in International Straits and Current Maritime Security Challenges* (Springer 2018).

[645] See Section 3.3 at pages 127 to 130.

his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

In this regard, I will consider two possibilities in fact. The first and most obvious possibility would seem to suggest that more equally-effective precautionary measures are available against a particular risk. In such cases, the policy consideration of fairness will rule out the precautionary measure of the highest cost from the legal standard of care required of a shipowner in a particular case. Rather comprehensively, this possibility is of limited practical significance in the present context. As seen in section 5.2, deploying private armed guards on board a ship has proven to be the most effective self-protective measure in the fight against maritime piracy.[646] This, taken in conjunction with the fact that the cost of deploying private armed guards on board a ship has considerably dropped over the past several years,[647] arguably curtail the applicability of this possibility in the situation under discussion in the present thesis.

The second and most significant possibility would seem to suggest that more equally-effective precautionary measures are not available against a particular risk. In such cases, the policy consideration of fairness will set limits to the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed in the context of his/her employment, with a view to avoiding a gross disproportion between the risk in question and the necessary precautionary measures. Once again, this possibility does not seem to create any problems in the present context. Where the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks have been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have occurred, the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment will be real and of considerably high level. For that an obligation to carry private armed guards on

[646] See above at page 190.
[647] For more details on the cost of deploying private armed guards to defend ships from the risk of future maritime piracy attacks, see Oceans Beyond Piracy, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017) 5.

board a ship should not be precluded from the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis.

5.2.2. The preservation of a 'desirable activity'

In testing the hard precautionary measure of deploying private armed guards on board a ship against the policy consideration of preserving a 'desirable activity', I will address the following questions. Is shipping a socially valuable activity capable of triggering the policy consideration at hand? If so, will a requirement to deploy private armed guards on board a ship to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis be enough to prevent shipping from being undertaken at all, to a particular extent, or in a particular way, or to discourage a shipowner from undertaking functions in connection with shipping?

Starting with the former question, I argue that the answer is 'yes'. As explained in chapter 3, the term 'desirable activity' is intended to refer to activities that import great benefit to society.[648] The *obiter* railway services example given by Lord Asquith in *Daborn v Bath Tramways Motor Co Ltd*[649] may be instructive. Indeed, in order to explain that the purpose to be served is a relevant factor to consider when determining the precautionary measures that should have been taken by a defendant to meet the legal standard of reasonable care in a particular case, Lord Asquith pointed out that, 'if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down'.[650]

Most certainly, an analogy can be drawn between shipping and the provision of railway services. Apart from the obvious commercial purposes, shipping, like the

[648] See Section 3.3 at pages 130 to 131.
[649] [1946] 2 All ER 333 (CA).
[650] *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA) 337.

railway services, is also concerned with community welfare purposes. This is evidenced by the central role of shipping in supporting and sustaining today's global society.[651] Shipping contributes substantially to the import and export of goods that are necessary to meet the needs of the modern world.[652] In fact, according to the United Nations Conference on Trade and Development (hereinafter UNCTAD), almost 80 per cent of global trade by volume and over 70 per cent by value are carried by sea and are handled by ports worldwide.[653] Therefore, it may be said that shipping falls within the scope of a socially valuable activity.

One potential challenge in treating shipping as a socially valuable activity revolves around the fact that the basis of my argument, namely Lord Asquith's remark in *Daborn v Bath Tramways Motor Co Ltd,* [654] is in *obiter*. With that in mind, one may reasonably counter argue that the scope of the term socially valuable activity should remain limited to sports activities,[655] emergency services,[656] and recreational activities.[657] However, it should be remembered that, although an *obiter* remark is not binding, it can still be persuasive in future litigation. Thus, it can be used in support of an argument to extend its scope to activities that do not fall within any of the already established examples listed in this paragraph.

In addition, I explained earlier that the term 'desirable' activity is intended to refer to activities that import great benefit to society in general and not to the particular defendant.[658] In the light of this definition, it seems that shipping is a borderline example, since it imports a benefit both to society as a whole and to the particular

---

[651] For more details on the role of shipping in supporting and sustaining today's global society, see IMO, 'Shipping Indispensable to the World' (World Maritime Day 2016) <http://www.imo.org/en/About/Events/WorldMaritimeDay/Documents/World%20Maritime%20Day%202016%20-%20Background%20paper%20(EN).pdf > accessed 30 January 2019.
[652] ibid.
[653] For more details on these figures, see UNCTAD, *Review of Maritime Transport 2018* (United Nations 2018) Chapter 1.
[654] [1946] 2 All ER 333 (CA).
[655] *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476.
[656] *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 (CA); *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA).
[657] *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] AC 46 (HL).
[658] See Chapter 3, Section 3.3 at page 131.

shipowner. Nevertheless, if my argument that a mere decrease in commercial profit should not be enough to trigger the policy consideration under examination is accepted,[659] then it will be possible to ensure that only the socially valuable aspects of shipping are taken into account when applying the policy consideration at hand.

Finally, in Section 2 of the Social Action, Responsibility and Heroism Act 2015, (c 3), it is explained that 'the court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members'. Clearly, Section 2 of the aforesaid Act reproduces the policy consideration at hand by using very broad words. Indeed, in *Clerk & Lindsell on Tort*, it is explained that the only defendants who would not fall within this provision are those engaged in positively anti-social activities and private individuals acting for their own benefit.[660] No doubt, the use of such broad words is not a positive development, for that it opens the door for the manipulation and the excessive extension of the policy consideration at hand.[661] However, it may be useful for extending the application of the policy consideration at hand to borderline activities, such as shipping. Especially, if one considers that the courts have previously applied the policy consideration at hand in activities importing benefit both to society and to a particular defendant. Take, for example, the case of sports scouting[662] and providing services for the reconstruction of the infrastructure of Iraq.[663]

Turning now to the latter question, the journey to an answer is less straightforward. For that the direct and indirect consequences of a requirement to deploy private armed guards on board a ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment need to be assessed. In terms of assessing the direct consequences, it seems fair to say that carrying private

[659] See Chapter 3, Section 3.3 at page 131.
[660] M A Jones, 'Negligence' in M A Jones (ed), *Clerk & Lindsell on Tort* (22nd Edition, Sweet & Maxwell 2017) Chapter 8, in particular [8 – 192].
[661] For a criticism of Section 2 of the Social Action, Responsibility and Heroism Act 2015, (c 3), see Rachael Mulheron, 'Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015' (2017) 80 Modern Law Review 88.
[662] *Scout Association v Mark Adam Barnes* [2010] EWCA Civ 1476.
[663] *Graham Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB).

armed guards on board a ship incurs additional operational costs. Remember, however, that, in chapter 3, I argued that the element of cost should be rejected as one of the factors which have to be weighed by the courts when applying the test of the hypothetical reasonable person to determine the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case.[664]

Of course, the element of policy can achieve the same purpose as the element of cost in the process of the application of the test of the hypothetical reasonable person in this context. Namely, this purpose is to keep the necessary precautionary measures proportionate to the probability of the damage occurring and the likely gravity of the damage, were it occur. However, it is highly unlikely that the aforementioned additional operational costs incurred by a shipowner will be considered enough to prevent shipping from being undertaken at all, to a particular extent, or in a particular way, or to discourage a shipowner from undertaking functions in connection with shipping. According to One Earth Future Foundation (hereinafter OEFF), the monthly average estimated costs of deploying private armed guards to defend a ship from the risk of future maritime piracy attacks amounts to 25,000 USD;[665] costs which can easily be covered if, for example, a ship proceeds on low speed when transiting piracy infested waters and saves on fuel.[666] In every case, even if these additional operational costs cannot be covered, they will only have a negative impact on the commercial profit enjoyed by a shipowner, which should not be enough on its own to trigger the policy consideration of the preservation of a 'desirable activity'.[667]

[664] See Section 3.2 at pages 106 to 122.
[665] For more details on the costs of the hard precautionary measure of deploying private armed guards to defend ships from the risk of future maritime piracy attacks, see Oceans Beyond Piracy, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017) 5.
[666] James Brown, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy 2012) 7.
[667] See Chapter 3, Section 3.3 at pages 131 to 134.

Overall, it seems that by virtue of the aforesaid direct consequences the policy consideration of preserving a 'desirable activity' will not preclude the hard precautionary measure of carrying private armed guards on board a ship from the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. In so far as the indirect consequences are concerned, there is an overlap in this regard between the policy consideration of preserving a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure. Thus, for convenience purposes, I will consider them in the following sub-section.

5.2.3. The consequences of taking the alleged precautionary measure

As seen in chapter 3, every consideration as to the consequences of taking the alleged precautionary measure when applying the test of the hypothetical reasonable person to determine the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case has to be twofold.[668] At one extreme, the consequences of deploying private armed guards on board a ship from the perspective of a seafarer's reasonable expectations have to be considered. In this regard, little needs to be said, given that it is now known that the use of private armed guards on board a ship is effective in eliminating and/or reducing risks associated with entering piracy infested waters. Indeed, to date, no ship carrying private armed guards on board has been the victim of a successful maritime piracy attack.[669]

At the other, the consequences of deploying private armed guards on board a ship from the perspective of a shipowner's reasonable expectations have to be taken into

[668] See Section 3.3 at pages 134 to 135.
[669] Oceans Beyond Piracy, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017) 5.

account. In this respect, the indirect consequences of carrying private armed guards on board a ship are relevant. Or, putting the matter another way, the ordinary risks emerging from the use of private armed guards to defend a ship from risks associated with entering piracy infested waters need to be assessed. It should be remembered in this respect that, in sub-section 5.2.2, I pointed out that, in so far as these indirect consequences are concerned, there is an overlap between the policy consideration of preserving a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure.[670] Thus, they are discussed together.

It must follow then that particular emphasis will be placed on the aforesaid indirect consequences. In particular, I argue that by virtue of these indirect consequences both the policy consideration of preserving a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure are likely to be fatal to any arguments supporting that a shipowner should deploy private armed guards on board a ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. The crux of my argument lies on the fact that the ordinary risks emerging from the use of private armed guards to thwart maritime piracy attacks are risks which can only be eliminated and/or reduced through the means of international cooperation. This implies that it would not be reasonable to impose an obligation on the part of a shipowner to deploy private armed guards on board his/her ship to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

By way of illustration, the aforementioned risks particularly in areas, such as the lawfulness of carrying private armed guards on board a ship,[671] the lawfulness of the

[670] See above at page 200.
[671] See, for example, Thomas Fedeli, 'The Rights and Liabilities of Private Actors: Pirates, Master, and Crew' (2010) One Earth Future Foundation Working Paper <https://www.yumpu.com/user/oneearthfuture.org> accessed 30 January 2019; Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organisation' (2012) 1 (3) Cambridge Journal of International and Comparative Law 81, 101 to 103; Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal

use of force at sea by private armed guards to thwart maritime piracy attacks,[672] and the command structure of private armed guards embarked on board a ship,[673] to name but a few, will be considered further below.

Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 61 to 66; Brittany Pizor, 'Lending and "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545, 554 to 558; Scott Fitzsimmons, 'Privatising the Struggle against Somali Piracy' (2013) 24 (1) Small War and Insurgencies 84, 95 to 96; Megen Gold, 'And Justice for Ali? An Analysis of a Shipowner's Duty of Care in Piracy and Armed Robbery Attacks' (2016) 47 (4) Journal of Maritime Law and Commerce 501, 515 to 518. See also Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni and other (eds), *War by Contract, Human Rights, Humanitarian Law and Private Contractors* (Oxford Scholarship Online 2011), Chapter 2, in particular [IX]; Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.1].

[672] See, for example, Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organisation' (2012) 1 (3) Cambridge Journal of International and Comparative Law 81, 101 to 103; Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 36 to 49; Brittany Pizor, 'Lending and "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545, 554 to 561; Hasebe Masamichi, 'The Use of Privately Contracted Armed Security Personnel (PCASP) to Defend against the Threat of Piracy: Differences between Japan and the UK' (2014) 4 Journal of Maritime Researches 43, 49 to 51. See also Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8, in particular Section III; James Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in Douglas Guilfoyle (ed), *Modern Piracy* (Edward Elgar Publishing 2013) Chapter 10, in particular [10.3.2]; Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.2] and [4.2] to [4.3]; Jasenko Marin and other, 'Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain' in Gemma Andreone (ed), *The Future of the Law of the Sea* (Springer 2017) Chapter 10.

[673] See, for example, Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 49 to 51; Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665, 695 to 697; Hasebe Masamichi, 'The Use of Privately Contracted Armed Security Personnel (PCASP) to Defend against the Threat of Piracy: Differences between Japan and the UK' (2014) 4 Journal of Maritime Researches 43, 47 to 48. See also Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8, in particular Section III; Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [2.2].

5.2.3.1. *The lawfulness of carrying private armed guards on board a ship*

On the topic of the lawfulness of carrying private armed guards on board to defend a ship from future maritime piracy attacks, the risk of a shipowner being found in breach of the laws and regulations of flag States, coastal States, and/or port States will be discussed. In maritime practice, this incurs additional risks of a shipowner being exposed to criminal charges, ranging from the imposition of fines for violations of laws and regulations on the use of weapons to ship and/or crew detention. The aforesaid risks, taken in conjunction with the fact that they cannot be eliminated and/or reduced through the means of commercial initiative, but only through the means of international cooperation, arguably suggest that it would not be reasonable to cast an obligation upon a shipowner to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

In general, a ship may be subject to many different laws and regulations during a voyage; the laws and regulations of flag States,[674] coastal States,[675] and port States[676] may all be relevant. This implies that, before deciding as to whether to deploy private armed guards on board a ship, a shipowner will have to carry out thorough research to ensure compliance with all the applicable laws and regulations.[677] More specifically, a shipowner will first have to ensure that the particular State whose flag his/her ship is entitled to fly recognises the use of private armed guards on board a ship as one of the options available to shipowners in the fight against maritime piracy. Most certainly, this is prescribed by the main rule of the international law of the sea stipulating that a ship has the nationality of the State whose flag she is entitled to fly.[678]

[674] United Nations Convention of the Law of the Sea, 1982, Article 94.
[675] ibid Article 17.
[676] ibid Article 27.
[677] Brittany Pizor, 'Lending and "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545, 564.
[678] United Nations Convention of the Law of the Sea, 1982, Article 91 (1).

Put in simple terms, this rule implies that a ship sailing under the flag of one State is subject to its exclusive jurisdiction on the high seas.[679] The exercise of such exclusive jurisdiction covers the enactment and enforcement of laws and regulations in administrative, technical and social matters, [680] which arguably extend far enough to cover the issue of deploying private armed guards on board to defend a ship from risks associated with entering piracy infested waters.[681] What is particularly significant in this respect, however, is that flag States' laws and regulations on the matter under examination vary significantly. They range from very permissive perspectives recommending the use of private armed guards on board ships as an extra layer of protection against the risk of future maritime piracy attacks to more prohibitive perspectives disallowing the use of private armed guards to defend ships from risks associated with sailing through piracy infested waters.[682]

As seen in section 5.2, the UK adopts a neutral stance that neither encourages nor discourages the use of private armed guards to defend UK registered ships from the risk of future maritime piracy attacks.[683] Indeed, the UK allows their use, but only in some strictly defined exceptional circumstances and where it is lawful to do so.[684] In particular, Sections 1.4 to 1.7 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances drafted by the UK Department of Transport provide as follows:

---

[679] United Nations Convention of the Law of the Sea, 1982, Article 92 (1).
[680] ibid Article 94.
[681] Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665, 675 to 679.
[682] For more details on the various perspectives adopted by flag States on the use of private armed guards to defend ships from the risk of future maritime piracy attacks, see ICS and ECSA, 'Comparison of Flag State Laws on Armed Guards and Arms on Board Vessels' (February 2017) <http://www.ics-shipping.org/docs/default-source/Piracy-Docs/comparison-of-flag-state-laws-on-armed-guards-and-arms-on-board-2017.pdf?sfvrsn=0> accessed 30 January 2019.
[683] See above at page 192.
[684] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Sections 1.4 to 1.7. See also UK Department of Transport, *Guidance to UK Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence against Merchant Shipping* (Crown Copyright 2011), Sections 2.5 to 2.9.

> 1.4. The government recognises that the engagement of armed guards is an option to protect human life on board UK registered ships from the threat of piracy, but only in exceptional circumstances and where it is lawful to do so. The exceptional circumstances for which this policy applies are defined below. [...].
>
> 1.6. The exceptional circumstances under which armed guards may be employed for use on board UK flagged ships are: when the ship is transiting the high seas throughout the High Risk Area [...]; AND the latest [Best Management Practices] BMP is being followed fully but, on its own, is not deemed by the shipping company and the ship's master as sufficient to protect against acts of piracy; AND the use of armed guards is assessed to reduce the risk to the lives and wellbeing of those on board the ship.
>
> 1.7. There may be limited circumstances in which it is appropriate for armed guards to be engaged on vessels which do not meet the criteria above (for example on large yachts in exceptional circumstances). These will be considered on a case-by-case basis [...].[685]

It is rather obvious that the UK position prescribes the following. Where a UK registered ship is navigating on the high seas throughout the designated high risk area, the use of private armed guards as an extra layer of protection against the risk of future maritime piracy attacks will be lawful if, and to the extent that, all the requirements set out by Section 1.6 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances are fulfilled. Where, on the other hand, a UK registered ship is navigating on the high seas throughout piracy infested waters, but outside the designated high risk area, their use will be unlawful.

---

[685] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Sections 1.4 to 1.7.

Section 1.6 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances explicitly states that the right to employ private armed guards for use on board UK registered ships is strictly confined to the designated high risk area, which is defined as an area bounded by 15ºN in the Red Sea and 22ºN in the Gulf of Oman, 5ºS and 65ºE.[686] The result is that, where a UK registered ship is navigating on the high seas throughout piracy infested waters, but outside the designated high risk area, and where a shipowner decides to use private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, then he/she will be in breach of UK laws and regulations, and he/she will be exposed to criminal charges as a result thereof.

Gold argues in this respect that, ever since the Guidelines for Owners, Operators, and Masters for Protection against Piracy and Armed Robbery in the Gulf of Guinea Region have been adopted, the exceptional circumstances, under which private armed guards may be deployed to defend UK registered ships from the risk of future maritime piracy attacks, extend far enough to encompass piracy infested waters outside the designated high risk area as this is defined in the then Best Management

[686] Note, here, that the definition of the designated high risk area has been taken from the update to Section 2 of the BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices for Protection against Somalia Based Piracy* (Version 4, Witherby Publishing Group 2011). Given that the BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) has now been released, it is yet to be seen whether Section 1.6 of the UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) will be updated. In any case, it should be pointed out that the BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) continues to define the designated high risk area in areas around the Red Sea, Gulf of Aden, Indian Ocean, and Arabian Sea. In effect, therefore, even if Section 1.6 of the UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) is updated to reflect the BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018), the definition of the designated high risk will remain confined to areas around the Red Sea, Gulf of Aden, Indian Ocean, and Arabian Sea.

Practices for Protection against Somalia Based Piracy.[687] In other words, Gold's basic premise is to the effect that the use of private armed guards to defend UK registered ships from the risk of future maritime piracy attacks should now be lawful in all the circumstances; even where a UK registered ship is navigating on the high seas throughout piracy infested waters, but outside the designated high risk area.

The most obvious criticism to be levelled here revolves around the fact that the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances was last updated in December 2015. By that time, maritime piracy off the coast of West Africa had already started to flourish.[688] This arguably suggests that, had there been an intention to extend the exceptional circumstances, under which private armed guards may be deployed to defend UK registered ships from the risk of future maritime piracy attacks, Section 1.6 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances would have been amended in such a way that would have covered piracy infested waters outside the designated high risk area.

Adding further support to this proposition is the fact that Section 6.8 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances provides as follows:

> 6.8. The exceptional circumstances set out in Section 1 stipulate that armed guards should only be used while transiting the HRA [High Risk

[687] Megen Gold, 'And Justice for Ali? An Analysis of a Shipowner's Duty of Care in Piracy and Armed Robbery Attacks' (2016) 47 (4) Journal of Maritime Law and Commerce 501, 517.
[688] For more details on the number of actual and attempted maritime piracy attacks off the coast of West Africa, see ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2011 Annual Report* (ICC IMB 2012) 5 to 10; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2012 Annual Report* (ICC IMB 2013) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC IMB 2014) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC IMB 2015) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC IMB 2016) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC IMB 2017) 5 to 9; ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC IMB 2018) 5 to 9.

> Area]. It is recognised though that the security team and their firearms must embark before entering the HRA, and disembark after leaving it. Whilst not in the HRA, firearms should be safely and securely stored on board the vessel. The embarkation and disembarkation of the firearms should take place at the soonest safe, convenient and lawful opportunity outside of the HRA and in accordance with the legal requirements of the State where this takes place.[689]

Clearly, the provision just cited evidences that, when drafting these guidelines, there was no intention to extend the exceptional circumstances, under which private armed guards may be deployed to defend UK registered ships from risks associated with sailing through piracy infested waters.

In the aftermath of this analysis, it is rather evident that, where a UK registered ship is navigating on the high seas throughout piracy infested waters, but outside the designated high risk area, the use of private armed guards as an extra layer of protection against the risk of future maritime piracy attacks remains unlawful. In such cases, a shipowner, who decides to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, may still be found in breach of UK laws and regulations and may still be exposed to criminal charges as a result thereof.

Another argument would seem to suggest that, where a UK registered ship is sailing on the high seas throughout piracy infested waters, but outside the designated high risk area, Section 1.7 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances may be invoked to ensure that carrying private armed guards on board a UK registered ship to thwart maritime piracy attacks will be lawful. It goes without saying that, where the necessary permission has been granted by the UK Department of

[689] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 6.8.

Transport prior to the commencement of a voyage, then the use of private armed guards to defend a UK registered ship from the risk of future maritime piracy attacks will be lawful. Where, on the other hand, the necessary permission has not been granted by the UK Department of Transport prior to the commencement of a voyage, then their use on board a UK registered ship will remain unlawful.

In every case, it should be remembered that both Sections 1.6 and 1.7 of the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances have been drafted narrowly to make sure that the exceptional circumstances under which private armed guards may be employed on board UK registered ships are not manipulated.

A shipowner will then have to ensure that the various coastal States whose territorial waters his/her ship is bound to transit during a voyage allow foreign ships to deploy private armed guards on board as an extra layer of protection against risks associated with transiting piracy infested waters. Unfortunately, however, when it comes to coastal States' laws and regulations, the ambiguities and challenges in the legal framework pertaining to the use of private armed guards to defend a ship from the risk of future maritime piracy attacks are even greater. Clearly, the uncertainty in the legal framework indicates that the ordinary risks emerging from the lawfulness of carrying private armed guards on board a ship cannot be resolved through the means of commercial initiative, but only through the means of international cooperation.

In principle, a coastal State has sovereignty over its territorial waters,[690] subject to the right to innocent passage through its territorial waters.[691] In so far as the right to innocent passage is concerned, the term 'passage' refers to navigation through territorial waters for the sole purpose of 'traversing those waters without entering internal waters or calling at a roadstead or port facility outside internal waters' or 'proceeding to or from internal waters or a call at such roadstead or port facility'.[692] A

[690] United Nations Convention of the Law of the Sea, 1982, Article 2.
[691] ibid Articles 17 to 26.
[692] ibid Article 18.

passage is deemed innocent if, and to the extent that, it is not 'prejudicial to the peace, good order or security of the coastal State'.[693] In Article 19 (2) of the United Nations Convention of the Law of the Sea, 1982, a list of activities that are considered prejudicial to the peace, good order or security of the coastal State is provided.[694]

For present purposes, Articles 19 (2) (b), 19 (2) (g), and 19 (2) (l) of the United Nations Convention of the Law of the Sea, 1982, are of greatest interest. Indeed, Article 19 (2) (b) of the aforesaid Convention stipulates that the passage of a foreign ship shall be considered non-innocent if in the territorial waters the ship engages in 'any exercise or practice with weapons'. Similarly, Article 19 (2) (g) of the United Nations Convention of the Law of the Sea, 1982, provides that, when it comes to the right to innocent passage, 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State is deemed non-innocent'. Finally, Article 19 (2) (l) of this Convention inserts a catch-all provision. It stipulates that the passage of a foreign ship is deemed non-innocent if in the territorial waters the ship engages in 'any other activity not having a direct bearing on passage'.[695]

Furthermore, Article 21 of the of the United Nations Convention of the Law of the Sea, 1982, grants a coastal State the right to adopt laws and regulations relating to the right to innocent passage. However, those laws and regulations must be in conformity with the provisions of the aforementioned Convention and other rules of international laws. In this regard, Article 21 (1) of this Convention provides a list of issues with which these laws and regulations may be concerned.[696] As will appear further on, for

[693] United Nations Convention of the Law of the Sea, 1982, Article 19 (1).
[694] As to whether or not this is an exhaustive list see Richard Barnes, 'Article 19' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (1st Edition C H Beck – Hart – NOMOS, 2017) Section III, in particular [3].
[695] United Nations Convention of the Law of the Sea, 1982, Article 19 (2) (l).
[696] Indeed, Article 21 (1) of the of the United Nations Convention of the Law of the Sea, 1982, provides that those laws and regulations may deal with all or any of the following issues '(a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention,

present purposes, Article 21 (1) (h) of the United Nations Convention of the Law of the Sea, 1982, is more relevant.[697] For that it provides that a coastal State has the right to adopt laws and regulations relating to the right to innocent passage, with a view to preventing infringements of its customs, fiscal, immigration or sanitary laws and regulations. Article 21 (2) of the United Nations Convention of the Law of the Sea, 1982, sets yet another limit to the right of coastal States to regulate the right to innocent passage by stating that any relevant laws and regulations 'shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'.

In view of Articles 19 (1), 19 (2) and 21 of the United Nations Convention of the Law of the Sea, 1982, many academic commentators have raised questions as to whether the deployment of private armed guards on board to defend a foreign ship from risks associated with sailing through piracy infested waters and/or the use of force by private armed guards to thwart maritime piracy attacks can be deemed a non-innocent activity under Article 19 (1) and (2) of the aforesaid Convention and as to whether a coastal State can draw authorisation from Article 21 of the aforementioned Convention to adopt laws and regulations relating to the use of private armed guards on board a foreign ship as an extra layer of protection against the risk of future maritime piracy attacks when exercising her right to innocent passage through the coastal State's territorial waters.[698]

---

reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State'.

[697] See below at pages 214 to 215.

[698] See, for example, Thomas Fedeli, 'The Rights and Liabilities of Private Actors: Pirates, Master, and Crew' (2010) One Earth Future Foundation Working Paper <https://www.yumpu.com/user/oneearthfuture.org> accessed 30 January 2019; Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 61 to 66; Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665, 679 to 687. See also Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni and other (eds), *War by Contract, Human Rights, Humanitarian Law and Private Contractors* (Oxford Scholarship Online 2011), Chapter 2, in particular [IX]; Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios

Some academic commentators suggest that the mere passage of a foreign ship carrying private armed guards on board is a violation of the right to innocent passage, and that a coastal State has the authority to regulate the use of private armed guards to thwart maritime piracy attacks when transiting its territorial waters.[699] Fedeli, for example, submits that the use of private armed guards to defend a foreign ship from the risk of future maritime piracy attacks may legitimately be considered prejudicial to the peace, good order or security of a coastal State.[700]

Likewise, Symmons maintains that, although the activities listed in Article 19 (2) of the United Nations Convention of the Law of the Sea, 1982, do not refer to the activities carried out by private armed guards on board a foreign ship when thwarting maritime piracy attacks, in a general sense, passage of a foreign ship equipped with private armed guards on board through the territorial waters of a coastal State is considered prejudicial to its peace, good order or security.[701] In this respect, Symmons recognises that none of the activities listed in Article 19 (2) of the Convention have any direct bearing on the use of private armed guards on board a ship for security. However, Symmons suggests that the listed examples do refer to certain types of military matters.[702] Thus, by extension, they can encompass the typical activities of on board armed security agents.[703] Furthermore, Symmons explains that the mere carriage of private armed guards on board a ship could be

---

Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.1].

[699] See, for example, Thomas Fedeli, 'The Rights and Liabilities of Private Actors: Pirates, Master, and Crew' (2010) One Earth Future Foundation Working Paper < https://www.yumpu.com/user/oneearthfuture.org> accessed 30 January 2019; Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 61 to 66.

[700] Thomas Fedeli, 'The Rights and Liabilities of Private Actors: Pirates, Master, and Crew' (2010) One Earth Future Foundation Working Paper < https://www.yumpu.com/user/oneearthfuture.org> accessed 30 January 2019.

[701] Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 62.

[702] ibid.

[703] ibid.

viewed by a coastal State as being an infringement of its customs laws in its territorial waters.[704]

Ronzitti holds an opposing view, arguing that, as long as weapons are safely stored and a foreign ship is not conducting 'any exercise or practice with weapons of any kind', an activity which is forbidden pursuant to Article 19 (2) (b) of the United Nations Convention of the Law of the Sea, 1982, the passage of a foreign ship carrying private armed guards on board should be deemed innocent.[705] In addition, Ronzitti argues that, while a coastal State has the right to adopt laws and regulations prohibiting a foreign ship equipped with private armed guards on board from entering its ports, it cannot adopt laws and regulations prohibiting a foreign ship carrying private armed guards on board from exercising the right to innocent passage, given that Article 21 of the United Nations Convention of the Law of the Sea, 1982, does not make any marked reference to the practice of carrying private armed guards on board to defend a foreign ship from future maritime piracy attacks.[706]

Similarly, Williams maintains that a foreign ship carrying private armed guards on board as an extra layer of protection against the risk of future maritime piracy attacks is entitled to exercise the right to innocent passage.[707] Whilst Williams highlights that the concerns raised with regard to the practice of using private armed guards on board to defend a foreign ship from risks associated with entering piracy infested waters when exercising the right to innocent passage promulgate from the risk of weapons being illegally traded, she goes on to state that this is a far-fetched possibility.[708] This

[704] Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 63.
[705] Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni and other (eds), *War by Contract, Human Rights, Humanitarian Law and Private Contractors* (Oxford Scholarship Online 2011), Chapter 2, in particular [IX].
[706] ibid.
[707] Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.1].
[708] ibid.

is because, for the United Nations Convention of the Law of the Sea, 1982, provisions on the right to innocent passage to be triggered, the passage has to be expeditious.[709]

Finally, Petrig maintains that, although a coastal State enjoys a wide discretion in determining which activities can be deemed prejudicial to its peace, good order or security under Article 19 (2) of the United Nations Convention of the Law of the Sea, 1982, and particularly under the catch-all provision in Article 19 (2) (l) of the Convention, the simple presence of private armed guards on board a foreign ship and/or the use of force by private armed guards to defend a foreign ship from risks associated with sailing through piracy infested waters, does not amount to a non-innocent activity.[710] This is because they do not represent a threat of force as in the case of warship whose mere presence does not amount to a 'threat or use of force' for the purposes of Article 19 (2) of the Convention.[711]

In so far as Article 21 of the United Nations Convention of the Law of the Sea, 1982, is concerned, Petrig submits that it does not provide a coastal State with a broad authority to adopt laws and regulations relating to the right to innocent passage, with a view to regulating the use of private armed guards to defend a foreign ship from future maritime piracy attacks.[712] In fact, a coastal State's authority to adopt laws and regulations relating to the right to innocent passage is limited in two ways.

Article 21 (1) of the United Nations Convention of the Law of the Sea, 1982, sets out a restrictive list of issues for which laws and regulations relating to the right to innocent passage may be adopted. In terms of deploying private armed guards on board a ship, Petrig explains that Article 21 (1) (h) of the Convention is more relevant, since it grants a coastal State the right to adopt laws and regulations to prevent any infringement of its customs, fiscal, immigration or sanitary laws and

[709] Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.1].
[710] Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665, 679 to 683.
[711] ibid 680 to 681.
[712] ibid 684 to 686.

regulations.[713] However, the authority which a coastal State enjoys to adopt laws and regulations in relation to arms carried on board ships under Article 21 (1) (h) of the Convention does not extend beyond customs matters.[714]

Article 21 (2) of the United Nations Convention of the Law of the Sea, 1982, provides that in terms of regulating the right to innocent passage a coastal State cannot adopt laws and regulations in relation to the 'design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards'. To Petrig, it seems that, as regards private armed guards on board a ship, it is the 'manning of ships' which is of greatest importance.[715] Nonetheless, Petrig argues that the use of private armed guards on board a foreign ship falls beyond the limit set by Article 21 (2) of the United Nations Convention of the Law of the Sea, 1982, on the coastal States' right to regulate the right to innocent passage.[716] For that, in principle, carrying private armed guards on board a ship is not an unchangeable manning standard which a ship cannot adjust during a voyage.[717]

Against this backdrop, Petrig observes that coastal States are not deprived of their right to adopt laws and regulations in relation to the use of private armed guards on board foreign ships exercising their right to innocent passage through the coastal States' territorial waters.[718] This is because the restrictions set out by Articles 21 (1) and (2) of the Convention do not extend far enough to cover the use of private armed guards on board a ship for security reasons.[719]

Most certainly, the differing opinions expressed by academic commentators emphasise the uncertainty that prevails in relation to the right of a ship with private armed guards on board to transit the territorial waters of a coastal State. Clearly, this

[713] Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 (3) International & Comparative Law Quarterly 665, 679 to 683.
[714] ibid 684 to 686.
[715] ibid.
[716] ibid.
[717] ibid.
[718] ibid.
[719] ibid.

implies that there is a need for international cooperation to ascertain the extent to which a foreign ship with private armed guards on board as an extra layer of protection against risks associated with sailing through piracy infested waters may be entitled to exercise her right of innocent passage through the territorial sea of a coastal State. Unfortunately, however, it is highly unlikely that such an initiative will occur. For that it requires of coastal States to limit their sovereign rights.

Although the majority of academic opinions described in the previous paragraphs agree that a foreign ship with private armed guards on board is entitled to exercise her right to innocent passage through the territorial waters of a coastal State, and that a coastal State cannot adopt laws and regulations in this regard, most coastal States have taken the opposite stance. In maritime practice, most coastal States now recognise that, when a ship passes through foreign territorial waters with private armed guards on board, the laws and regulations of that coastal State have to be respected.[720] To this end, many coastal States have now adopted laws and regulations, not only by virtue of which they can exercise both civil and criminal jurisdiction on board a foreign ship passing through their territorial waters with private armed guards on board,[721] but also by virtue of which they can take necessary steps to prevent such ship from passing through their territorial waters altogether.[722]

It must follow then from the aforementioned analysis that, where a ship exercises the right to innocent passage through foreign territorial waters, and where a shipowner decides to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of

[720] See, for example, UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015), Section 6.10 which stipulates that 'Section 3 of Part II of the United Nations Convention on the Law of the Sea, 1982, allows vessels the right to innocent passage through the territorial seas of a coastal state, where passage is not prejudicial to the peace, good order or security of that state. Activities which are classified in the United Nations Convention on the Law of the Sea, 1982, as prejudicial to the peace, good order or security of a State include any exercise or practice with weapons. Shipping companies should therefore consider the need to take legal advice on the legal requirements of a state whose territorial seas they are transiting even if firearms on board are securely stored and comply with any requirements put in place by that state'.
[721] United Nations Convention on the Law of the Sea, 1982, Articles 27 to 28.
[722] ibid Article 25.

his/her employment, then he/she may be found in breach of coastal States' laws and regulations, and he/she may be exposed to criminal charges as a result thereof.

A shipowner will finally have to ensure that the various port States whose internal waters and/or ports his/her ship is bound to enter during a voyage allow for a foreign ship with private armed guards on board to be admitted to internal waters and/or ports. Furthermore, a shipowner will have to identify port States' laws and regulations pertaining to the possession, embarkation and/or disembarkation of firearms, ammunition, and other security related equipment for use by private armed guards on board a foreign ship. In this regard, Article 25 (2) the United Nations Convention on the Law of the Sea, 1982, which provides port States with the right to take the necessary steps to prevent any breach of the conditions to which admission of a foreign ship to internal waters and/or ports is subject, is relevant. Unfortunately, however, the legal and administrative requirements to which a foreign ship with private armed guards on board may be admitted to internal waters or ports remain rather obscure and uncertain.

In view of this heightened uncertainty, the International Maritime Organisation (hereinafter IMO) issued circulars providing recommendations for coastal and port States on the use of private armed guards on board ships in the high risk area.[723] These recommendations encourage coastal and port States to establish policies and procedures on aspects related to the embarkation, disembarkation, and carriage of private armed guards and of firearms, ammunition, and other security related equipment for use by private armed guards on board foreign ships which do not hinder the continuation of maritime trade, do not interfere with the navigation of foreign ships, and ensure that all are consistent with the international law of the sea.[724]

[723] IMO, 'Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1408/Rev. 1.
[724] ibid Annex, Section 6.

Furthermore, the IMO has circulated a questionnaire on port and coastal States' legal and administrative requirements to which admission of foreign ships with private armed guards on board to internal waters or ports is subject.[725] This questionnaire fulfils a twofold purpose. At one extreme, it raises awareness of the various national legislations, policies, and procedures relating to the embarkation, disembarkation, and carriage of private armed guards and of firearms, ammunition, and other security related equipment for use by private armed guards on board foreign ships.[726] At the other, it assimilates the relevant information in a systematic manner, which will assist shipowners and private armed guards operating in dangerous waters.[727]

However, to date, only twenty-two States have completed and returned the questionnaire considered in the previous paragraph.[728] Clearly, this shows that the uncertainty remains. It must follow then that, where a ship enters foreign internal waters and/or ports, and where a shipowner decides to deploy private armed guards on board a ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment, then he/she may still be found in breach of coastal and port States' laws and regulations, and he/she may still be exposed to criminal charges as a result thereof.

Overall, it seems that, for any arguments suggesting that a shipowner should deploy private armed guards on board his/her ship to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis to be less problematic, a consolidation of the laws and regulations pertaining to the use of private armed guards to defend ships from risks associated with sailing through piracy infested waters is necessary. Of course a shipowner, who is keen on deploying private armed guards on board his/her ship to protect a seafarer from the risk of being injured

[725] IMO, 'Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on board Ships' (22 September 2011) MSC-FAL 1/Circ 2.
[726] ibid Section 7.
[727] ibid Section 3.
[728] For more details on the States which have completed and returned the questionnaire, see IMO, 'Private Armed Security: Port and Coastal States' (2018) <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx> accessed 30 January 2019.

or killed by the criminal acts of pirates in the context of his/her employment, may take some steps to eliminate and/or reduce the risk of being found in breach of the laws and regulations of flag States, coastal States, and/or port States, and to avoid the risk of being exposed to criminal charges as a result thereof.

However, this task is insurmountable. Take, for example, a case where, despite the fact that a shipowner has conducted thorough research to ensure compliance with all the applicable laws and regulations, a ship ends up being detained by the authorities of a coastal or of a port State for unlawfully carrying private armed guards on board. A shipowner will ultimately be deprived of his/her most valuable asset which is essential for the continuing performance of services in relation to shipping. This emphasises that by virtue of the aforesaid severe consequences both the policy considerations of preserving a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure are likely to be fatal to any arguments supporting that a shipowner should deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

5.2.3.2. *The lawfulness of the use of force at sea by private armed guards*

Turning now to the topic of the lawfulness of the use of force at sea by private armed guards, the risk of a shipowner being found in breach of the laws and regulations of flag States, coastal States, and/or port States in relation to the use of weapons will be discussed. In maritime practice, the aforesaid risk incurs additional risks of a shipowner being exposed to liability claims and/or criminal charges. Once again, little can be done on the part of a shipowner to avoid the aforesaid risks, rendering it unreasonable to argue that a shipowner should deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

To date, concerns have been raised that the use of private armed guards to defend a ship from risks associated with transiting piracy infested waters may lead to an

escalation in violence at sea that will place seafarers, private armed guards, and third parties at a far greater risk.[729] This implies that more liability claims are likely to arise in relation to loss of or damage caused to the property of seafarers, private armed guards, and/or third parties, and/or in relation to injury or death of seafarers, private armed guards, and/or third parties arising out of or in connection with every unlawful and/or negligent use of force at sea by private armed guards. Similarly, as pointed out in sub-section 5.2.3.1, more criminal charges are likely to arise in respect of every unlawful use of force at sea by private armed guards.[730]

Most certainly, the liability claims and/or the criminal charges mentioned in the previous paragraph will primarily be turned against the individual private armed guard who unlawfully and/or negligently uses force at sea. However, it is possible for such claims and/or charges to extend to the master and the shipowner of a ship carrying private armed guards on board.[731] The grounds upon which the master and the shipowner may be exposed to more liability claims and/or criminal charges associated with every unlawful and/or negligent use of force at sea by private armed guards when thwarting a maritime piracy attack revolve around two facts. As will be seen in sub-section 5.2.3.3, at all times the master remains in command of a ship and retains an overriding authority over the operation of a ship and the safety and security of her passengers, cargoes, and crew,[732] and the shipowner may be found vicariously liable for the torts of his/her employees or of those under his/her control.[733]

---

[729] Scott Fitzsimmons, 'Privatising the Struggle against Somali Piracy' (2013) 24 (1) Small War and Insurgencies 84, 92 to 95. See also Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8, in particular [III]; James Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in Douglas Guilfoyle (ed), *Modern Piracy* (Edward Elgar Publishing 2013) Chapter 10, in particular [10.1].
[730] See above at page 203.
[731] Graham Caldwell, 'Private Security and Armed Military Guards' (2012) 157 (5) The RUSI Journal 16, 17 to 18.
[732] See below at pages 229 to 230.
[733] For more details on vicarious liability, see Mr Justice Langstaff, 'The Employer's Duty of Care' in Daniel Bennett (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013) Chapter 4, in particular [4.88] to [4.112].

It is beyond any doubt that the risk of a shipowner being exposed to more liability claims and/or criminal charges is further increased by the fact that there are serious ambiguities and challenges in the legal framework pertaining to the degree of force allowed to private armed guards when defending a ship from a maritime piracy attack. Murdoch submits in this respect that 'force cannot be used in a manner that is not already permitted by international law'.[734] What this effectively means is that, where a shipowner deploys private armed guards on board his/her ship as an extra layer of protection against risks associated with entering piracy infested waters, force, and especially lethal force, should be used as a last resort. Indeed, force should be used only when this is absolutely necessary and only when the level of force employed is commensurate with the level of threat, and all efforts should be made not to endanger human life in the process of exercising force to deter a maritime piracy attack.[735]

The standing standards set for the use of force at sea by private armed guards when defending a ship from a maritime piracy attack, most commonly known as Rules for the Use of Force (hereinafter RUF), reflect the aforesaid overarching principle, and their salient features may conveniently be summarised in three propositions.[736] First,

---

[734] Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8, in particular [II].

[735] For more details on the topic of the use of force at sea, see *The MV 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea, Judgment, ITLOS Reports 1999,* p. 10 where this issue has been considered in the law enforcement context. Academic circles have suggested, however, that, in so far as the use of force at sea by private armed guards to defend ships from the risk of future maritime piracy attacks is concerned, the degree of force allowed is analogous to that which applies in the law enforcement context. See, for example, Clive Symmons, 'Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and the Law of War Review 21, 44 to 47. See also Andrew Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in Clive Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) Chapter 8, in particular [II]. See finally House of Commons, *Piracy off the Coast of Somalia: Tenth Report of Session 2010-12* (House of Commons, Foreign Affairs Comittee 2012) Ev 80 and 97.

[736] See, for example, IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1443. See also UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015). See finally Allan McDougall, *Use of Force IAMSP-2011-01-UOF-001 v 2.0* (International Association of Maritime Security Professionals 2011); BIMCO, *Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)* (BIMCO 2012); 100 Series™, *The 100 Series Rules*:

all reasonable steps shall be taken to avoid a situation where the use of force at sea by private armed guards may be necessary.[737] In maritime practice, this means that non-violent precautionary measures, such as the hardening of the ship, the use of increased speed, and the use of evasive manoeuvres, to name but a few, shall be applied first in order to protect a ship from risks associated with entering piracy infested waters.

Secondly, if a situation arises where the non-violent precautionary measures are not by themselves enough to thwart a maritime piracy attack, and where the use of force is deemed necessary to protect the health and life of those on board a ship, then force shall be used, but only as part of a graduated response plan.[738] What this effectively means is that warning shots, followed by disabling fire, shall be used before a deliberate direct fire is employed. In every case, the use of force at sea by private armed guards when defending a ship from a maritime piracy attack shall be reasonable and proportionate to the level of threat.[739] Thirdly, the use of force shall not exceed what is necessary and reasonable in the exercise of the right of self-defence, the right of defence of property, the right of defence of others, or the right of defence for the prevention of crime in accordance with the applicable national law.[740]

An International Model Set of Maritime Rules for the Use of Force (RUF) (Globus Intelligence Ltd 2013); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018); BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018).

[737] See, for example, UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Sections 5.1 to 5.6 and 8.1 to 8.15.

[738] See, for example, BIMCO, *Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)* (BIMCO 2012) Section 7.

[739] See, for example, BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7.16; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5.

[740] See, for example, UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Sections 5.1 to 5.6 and 8.1 to 8.15.

It may be worth noting in this respect that, in so far as the use of force at sea by private armed guards is concerned, multiple national laws may be applicable.[741] Take, for example, a situation where a suspected pirate is injured or killed by the deliberate direct fire of a private armed guard on the high seas. In a situation like this, the use of force at sea by the private armed guard will be subject to the laws of the flag State of the ship carrying private armed guards on board; the laws of the flag State of the ship against which force was used by the private armed guard; and the laws of the State of nationality of the victim and of the private armed guard respectively. Had the incident taken place within the territorial waters of a coastal State rather than on the high seas, the laws of the coastal State would also be relevant. This is because all the States listed in the present paragraph may have a right to assert jurisdiction over a dispute and apply their own national laws governing the use of force at sea by private armed guards, in order to defend a ship from a maritime piracy attack.[742]

To make matters worse, although the generally established principles governing the right of self-defence, the right of defence of property, the right of defence of others, or the right of defence for the prevention of crime revolve around the same elements, different States may adopt contending perspectives as to the application of the elements in question.[743] By way of illustration, the generally established principles provide that, when a present and imminent danger to protected interests, such as health and life, property, and/or legal order, exists, a person is justified to use measures to protect himself/herself, a third person, or the society, provided that the

[741] Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [3.2].
[742] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 8.8.
[743] For more details on the different perspectives in relation to the elements of the right of self-defence, the right of defence of property, the right of defence of others, and the right of defence for the prevention of crime, see Brittany Pizor, 'Lending an "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545, 556 to 561. See also Jasenko Marin and other, 'Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain' in Gemma Andreone (ed), *The Future of the Law of the Sea* (Springer 2017) Chapter 10, in particular [3.2.4].

measures employed are reasonable and proportionate to the danger in question.[744] If this is the case, then no criminal charges and/or liability claims will arise for every damage so caused. In practice, however, different States provide different interpretations as to what amounts to a present and imminent danger,[745] and as to what constitutes a reasonable and proportionate measure.[746]

Finally, it should be remembered that, despite the fact that a private armed guard genuinely believed that he/she was acting within the limits of the right of self-defence, the right of defence of property, the right of defence of others, or the right of defence for the prevention of crime, the use of force at sea may still be found unlawful. This is because some States may require an objective assessment for the aforementioned rights of self-defence to be triggered.[747] Likewise, merely the fact that the RUF were followed is not enough to turn the use of force at sea by private armed guards into a lawful one. Complying with the RUF simply serves as a way to reduce the risk of private armed guards acting unlawfully.[748] Ultimately, the decision as to what amounts to lawful use of force at sea by private armed guards, in order to defend a ship from a maritime piracy attack, rests with the law enforcement agents and then the courts of the State exercising jurisdiction over a dispute.[749]

---

[744] Charter of the United Nations and Statute of the International Court of Justice, Article 51.
[745] English criminal law, for example, adopts a subjective perspective when deciding as to what amounts to a present and imminent danger. See Criminal Justice and Immigration Act 2008, (c 4), as amended, Section 76. See also *Palmer v R* [1971] AC 814 where the basic principles of self-defence are set-out.
[746] English criminal law, for example, recognises the use of firearms as one of the options available for the prevention of damage to property; whereas, under Scots law, defence of property does not justify the use of lethal force. See UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 8.9.
[747] Scots criminal law, for example, recognises that a person will only be able to claim self-defence if that person believed that he/she was in imminent danger and had reasonable grounds for that belief. See UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 8.9.
[748] UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Section 8.6.
[749] ibid Sections 8.6 and 8.14.

Of course, I recognise that, where a shipowner is proactive in ensuring that he/she will not be exposed to more liability claims associated with every unlawful and/or negligent use of force at sea by private armed guards when defending a ship from risks associated with sailing through piracy infested waters, he/she may insert into the contract for the employment of private armed guards on board a ship an exemption and/or exclusion of liability clause. Such clauses are most commonly known as 'knock-for-knock' or 'indemnity' clauses and stipulate that liability in relation to loss of or damage caused to the property of the other party and/or in relation to personal injury, illness, or death of the other party arising out of or in connection with the performance of the contract is limited or completely excluded.[750]

Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract appears to be a typical example of a 'knock-for-knock' or 'indemnity' clause inserted into a contract for the employment of private armed guards on board a ship as an extra layer of protection against the risk of future maritime piracy attacks. In so far as the shipowner's position towards the private maritime security company in respect of the exemptions and/or exclusions of liability is concerned, Paragraph (b) (i) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract stipulates that:

> [...] (b) (i) The Owners' Group [shipowner] shall not be responsible for loss of or damage caused to or sustained by the property of the Contractors' Group [private maritime security company] [...] or incur any liability in respect of personal injury, illness or death of any individual member of the Contractors' Group [private maritime security company] [...] arising out of or in any way connected with the performance of this Contract [the contract for the employment of private armed guards on board a ship], even if such loss, damage, injury or death is caused wholly or partially by (i) the act, neglect or default of the Owners' Group

[750] For more details on 'knock-for-knock' or 'indemnity' clauses, see Miso Mudric, 'The Guardcon Contract, Knock-for-Knock Clauses, DCFR and Unfair Terms (Part I)' (2015) 21 Journal of International Maritime Law 51; Miso Mudric, 'The Guardcon Contract, Knock-for-Knock Clauses, DCFR and Unfair Terms (Part II)' (2015) 21 Journal of International Maritime Law 115.

> [shipowner's] and/or (ii) the unseaworthiness of the Vessel. The Contractors [private maritime security company] expressly agree and undertake to hold harmless, defend, indemnify and waive all rights of recourse against the Owners' Group [shipowner] from and against any and all claims, demands, liabilities or causes of action of any kind or character, made by or available to any person or party, for injury to, illness or death of any of the Contractors' Group [private maritime security company], or for damage to or loss of property [...] owned by or in the possession of, the Contractors' Group [private maritime security company].

With regard to the private maritime security company's position toward the shipowner, the exact same provision is made by Paragraph (b) (ii) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON.[751]

Furthermore, with regard to third party claims, an additional exemption and/or exclusion of liability provision is inserted into the BIMCO GUARDCON contract. In this respect, Paragraph (c) (i) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract sets out the private maritime security company's position toward the shipowner by stating that:

> (c) (i) The Contractors [private maritime security company] expressly agree to hold harmless, defend, indemnify and waive all rights of recourse

[751] Indeed, Paragraph (b) (ii) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract states that '(b) (ii) The Contractors' Group [private maritime security company] shall not be responsible for loss of or damage caused to or sustained by the property of the Owners' Group [shipowner] [...] or incur any liability in respect of personal injury, illness or death of any individual member of the Owners' Group [shipowner] [...] arising out of or in any way connected with the performance of this Contract [the contract for the employment of private armed guards on board a ship], even if such loss, damage, injury or death is caused wholly or partially by the act, neglect or default of the Contractors' Group [private maritime security company]. The Owners [shipowner] expressly agree and undertake to hold harmless, defend, indemnify and waive all rights of recourse against the Contractors' Group [private maritime security company] from and against any and all claims, demands, liabilities or causes of any action of any kind or character, made by or available to any person or party, for injury to, illness or death of any of the Owners' Group [shipowner], or of damage to or loss of property [...] owed by or in the possession of, the Owners' Group [shipowner]'.

> against the Owners' Group [shipowner] from and against any and all claims, demands, liabilities, costs or causes of action of any kind, made by or available to any third party [...] arising out of any unlawful and/or negligent act or omission by the Contractors' Group [private maritime security company] in the performance of this Contract [the contract for the employment of private armed guards on board a ship] save to the extent of the Owners' [shipowner's] own negligence.

Similarly, Paragraph (c) (ii) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract sets out the shipowner's position toward the private maritime security company by using the same wording.[752]

Finally, an exemption to the liability regime set out by the provisions just cited is inserted into the BIMCO GUARDCON contract. Indeed, Paragraph (c) (iii) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract states that:

> (c) (iii) [...], the Owners' Group [shipowner] shall be indemnified by the Contractors [private maritime security company] for all claims, liabilities, losses, liabilities to Crew and third parties [...] whatsoever and howsoever arising out of or in connection with the accidental and/or negligent discharge of any Firearms by the Security Personnel.

At first, it seems that the provisions cited in the previous paragraphs provide adequate protection to a shipowner against the risk of being exposed to more liability claims; especially, since they stipulate that a shipowner can be indemnified by the private maritime security company for all claims, liabilities, losses, liabilities to crew and third parties arising out of or in any way connected with the performance of the

[752] Indeed Paragraph (c) (ii) of Clause 15 of Section 7 of the second part of the BIMCO GUARDCON contract states that '(c) (ii) The Owners [shipowner] expressly agree to hold harmless, defend, indemnify and waive all rights of recourse against the Contractors' Group [private maritime security company] from and against any and all claims, demands, liabilities, costs or causes of action of any kind, made by or available to any third party [...] arising out of any unlawful and/or negligent act or omission by the Owners' Group [shipowner] in the performance of this Contract [the contract for the employment of private armed guards on board a ship] save to the extent of the Contractors' [private maritime security company] own negligence'.

contract for the employment of private armed guards on board a ship including all claims, liabilities, losses, liabilities to crew and third parties arising out of or in connection with every unlawful and/or negligent use of force at sea by private armed guards when defending a ship from the risk of future maritime piracy attacks.

Remember, however, that such provisions may be rendered void, and therefore unenforceable, under an unfair contract terms regime.[753] Under English law, for example, any provisions trying to exempt and/or exclude liability in relation to personal injury, illness, or death will be rendered void pursuant to Section 2 (1) of the Unfair Contract Terms Act 1977, (c 50), which, as seen in chapter 2, stipulates that a person cannot by reference to any contractual term exclude or restrict his/her liability for personal injury or loss of life resulting from negligence.[754] The result is that, notwithstanding an exemption and/or exclusion of liability clause may be inserted into the contract for the employment of private armed guards on board to defend a ship from risks associated with sailing through piracy infested waters, a shipowner may still be found exposed to more liability claims.

Overall, the crux of the above analysis is that, once again, commercial initiative fails to offer adequate protection to a shipowner who deploys private armed guards on board his/her ship as an extra layer of protection against the risk of future maritime piracy attacks. Indeed, in eliminating or reducing the aforesaid risks, international cooperation rather than commercial initiative is necessary to reach a compromise on how the use of force at sea by private armed guards to defend a ship from maritime piracy attacks should be regulated. Pizor, for example, suggests in this regard that States need to amend their self-defence laws in a way, in which a well-defined and unified regime in respect of self-defence laws will be articulated.[755]

---

[753] Miso Mudric, 'The Guardcon Contract, Knock-for-Knock Clauses, DCFR and Unfair Terms (Part II)' (2015) 21 Journal of International Maritime Law 115, 128 to 132.
[754] See Section 2.2 at pages 33 to 34.
[755] Brittany Pizor, 'Lending an "Invisible Hand" to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy' (2012-2013) 45 Case Western Reserve Journal of International Law 545, 561.

5.2.3.3. *The command structure of private armed guards on board a ship*

Closing with the topic of the command structure of private armed guards embarked on board a ship, the risk of a shipowner being found in breach of his/her international obligations to maintain safety at sea, to protect human life at sea, to avoid damage to the environment and to property, and to enhance maritime security, particularly under the International Management Code for the Safe Operation of Ships and for Pollution Prevention, as amended, and the International Code for the Security of Ships and Port Facilities, as amended, will be considered. This is yet another example of a risk which cannot be reduced and/or eliminated through the means of commercial initiative. For that it would not be reasonable to impose an obligation on a shipowner to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

In general, it is accepted that, notwithstanding the fact that private armed guards may be deployed on board to defend a ship from risks associated with entering piracy infested waters, at all times the master remains in command of the ship and retains an overriding authority over the operation of the ship and the safety and security of her passengers, cargoes, and crew.[756] Most certainly, this is prescribed by Regulations 34-1 of Chapter V and 8 (1) of Chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended. Indeed, these Regulations provide that the master has an absolute discretion to take or execute any decision, which, in his/her professional opinion, is necessary for the protection of human life at sea and the protection of the marine environment and to maintain the safety and security of a ship.

[756] IMO, 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1405/Rev. 2, Annex, Section 5.9.1; IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board Ships in the High Risk Area' (25 May 2012) MSC. 1/Circ. 1443, Annex, Section 5.6.1. See also UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) Sections 3.15 and 5.1 to 5.6. See finally BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Global Counter Piracy Guidance for Companies, Masters, and Seafarers* (Witherby Publishing Group 2018) Section 7.16; BIMCO, ICS, IGP&I Clubs, INTERTANKO, INTERMANAGER and OCIMF, *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea* (Version 5, Witherby Publishing Group 2018) Section 5.

In view of this rule, Clause 8 of Section 4 of the second part of the BIMCO GUARDCON contract, which is the most typical example of a standard contract form utilised when employing private armed guards on board a ship, explicitly recognises that at all times, a master remains in command of a ship and retains an overriding authority on board a ship by stipulating that:

> (a) The Master shall, at all times throughout the duration of this Contract and the performance of the Security Services, have and retain ultimate responsibility for the safe navigation and overall command of the Vessel. Any decisions made by the Master shall be binding and the Contractors undertake to instruct the Security Personnel accordingly. […].[757]

Nevertheless, merely the fact that a contract for the employment of private armed guards on board a ship contains such term is not enough on its own to ensure that a shipowner complies with the aforesaid international obligations.

Adding further complications to this matter is the fact that a contract for the employment of private armed guards on board a ship often sets limits to the master's overriding authority on board the ship; most notably, by stipulating that, under no circumstances, the master's overriding authority on board a ship outweighs every private armed guard's right of self-defence. By way of illustration, Clause 8 of Section 4 of the second part of the BIMCO GUARDCON contract provides that:

> […] (c) Each of the Security Personnel shall always have the sole responsibility for any decision taken by him for the use of any force, including targeting and weapon discharge, always in accordance with the Rules for the Use of Force and applicable national law.

[757] See also Clause 2 of Annex D of the BIMCO GUARDCON contract stipulating that 'I acknowledge and agree that, at all times throughout the duration of the Voyage and the performance of the Security Services, the Master shall have and retain ultimate responsibility for the safe navigation and overall command of the Vessel and that any decisions made by the Master shall be binding on me. I undertake to act upon the instruction of the Master at all times during the Transit. […]'.

> (d) Nothing in this Contract shall be construed as a derogation of the Master's authority under SOLAS. Accordingly, the Master retains the authority to order the Security Personnel to cease firing under all circumstances. However, for the avoidance of doubt, nothing in the Clause shall compromise each of the Security Personnel's right of self-defence in accordance with applicable national law.[758]

As one can reasonably understand, the clause just cited includes some contradictory provisions. At one extreme, Paragraph (d) of Clause 8 of Section 4 of the second part of the BIMCO GUARDCON contract recognises that the master retains an overriding authority on board a ship, and that the master's overriding authority extends far enough to order the private armed guards on board a ship to cease firing under all circumstances. At the other, it recognises that, when defending a ship from the risk of future maritime piracy attacks, every private armed guard on board a ship retains the right to decide on his/her own as to whether to use force in exercise of his/her right of self-defence in accordance with applicable national law. Therefore, it seems that the aforesaid provisions are to the effect that the master is deprived of the final decision as to a key area of the ship's security. In particular, the master is deprived of the final decision as to whether force should be used to thwart maritime piracy attacks.

---

[758] See also Sections 5.4 to 5.6 of the UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances* (Version 1.3, Crown Copyright 2015) stating that '5.4 […] The Master will be responsible for determining and exhausting all available options before recommending potential armed intervention to overcome a piracy threat. The Master has the authority to decide when the security team are armed (noting that firearms should be stored while not transiting the HRA [High Risk Area]). 5.5 The Master should provide approval of the course of action to be adopted by the security team leader who must in turn communicate this to the members of the security team. Subject to the terms of the agreed command and control structures and standard operating procedures, and to paragraph 5.6 below, if there is insufficient time for the security team leader to seek approval from the Master before a course of action is taken, they should inform the Master as soon as possible afterwards and explain their reasoning for acting as they did. 5.6 Under the law of England and Wales the use of force must be proportionate and reasonable in the circumstances as the defendant genuinely believed them to be and can only be used in the context of self-defence, protection of others, prevention of crime or the protection of property. The decision to use force must lie with the person using force […]. Neither the Master nor the security team leader can command a member of the security team against that person's own judgement to use force or to not use force'.

The result is that, where a private armed guard decides to take action to use force to thwart a maritime piracy attack without the master's prior approval or directive, a shipowner may still fall short of his/her international obligations under the International Management Code for the Safe Operation of Ships and for Pollution Prevention, as amended, and the International Code for the Security of Ships and Port Facilities, as amended; even in cases where the parties have been proactive to insert a clause into the contract for the employment of private armed guards on board a ship stipulating that the master retains an overriding authority on board the ship. Clearly, this highlights that the risk of a shipowner being found in breach of the aforesaid international obligations cannot be avoided through the means of commercial initiative. For that Williams and Hasebe, writing separately, suggest that a revision of Regulations 34-1 of Chapter V and 8 (1) of Chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended, has to be considered.[759]

So far, I have focused on the extent to which a shipowner has to use private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. The upshot of this analysis is that both the policy consideration of the preservation of a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure stipulate that a requirement to deploy private armed guards on board a ship will rarely, if ever, be necessary to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

This implies that a shipowner's failure to deploy private armed guards on board his/her ship will rarely, if ever, expose the shipowner to liability in negligence for

[759] Eniola Williams, 'Private Armed Guards in the Fight against Piracy' in Efthymios Papastavridis and other (eds), *Crimes at Sea* (Hague Academy of International Law 2014) Chapter 9, in particular [4.3]. See also Hasebe Masamichi, 'The Use of Privately Contracted Armed Security Personnel (PCASP) to Defend against the Threat of Piracy: Differences between Japan and the UK' (2014) 4 Journal of Maritime Researches 43, 48.

personal injury or loss of life caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment. Having said that, I will therefore continue by ascertaining the extent to which a shipowner has to re-route a ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

5.3. An obligation to re-route a ship from a dangerous route

Though re-routing a ship from a dangerous route has been recognised as an option available to shipowners in the fight against maritime piracy,[760] in reality, only a few shipowners have opted for that solution to protect ships from risks associated with sailing through piracy infested waters. Leaving aside cases where re-routing a ship from a dangerous route is not possible because the ship's destination is in and/or around piracy infested waters, the most obvious reason for a shipowner to continue to instruct his/her ship to take a dangerous route rather than a safer but potentially longer route may be traced back to the direct economic consequences of doing so.

Nevertheless, I consider it appropriate to say a few words as to whether it would be reasonable to argue that a shipowner should re-route his/her ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment for three reasons. The first reason is dictated by logic. It goes without saying that re-routing a ship from a dangerous route is effective in eliminating and/or reducing the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment.

The second reason emanates from judicial practice. On various occasions, the courts have expressed the view that, when there is a risk to the health and life of a seafarer, the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law

[760] IMO, 'Piracy and Armed Robbery against Ships: Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships' (12 June 2015) MSC. 1/Circ. 1333/Rev. 1, Annex, Section 32. See also UK Department of Transport, *Guidance to UK Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence against Merchant Shipping* (Crown Copyright 2011) Section 4.5.

duty of care to safeguard the health and safety of a seafarer in the context of his/her employment may extend far enough to encompass precautionary measures of considerable difficulty and/or cost, such as a requirement to evacuate a dangerous area completely or to abandon a dangerous activity altogether; depending, of course, on how imminent and how serious the risk in question is.[761]

The third reason aligns with principle. Where the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks have been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place, the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is real and of considerable high level.[762] Similarly, the likely gravity of the harm of a seafarer, if the risk at hand materialises, is of great seriousness.[763] Hence, the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment is serious enough to justify the adoption of hard precautionary measures.

Overall, the aforesaid reasons prescribe that there is in principle no objection to arguing that an obligation should be cast upon a shipowner to re-route his/her ship from a dangerous route to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. Nonetheless, a requirement to re-route a ship from a dangerous route to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis may be precluded for policy reasons. It is thus necessary to test the hard precautionary measure of re-routing a ship from a dangerous area against the policy considerations I identified in section 5.1.[764]

---

[761] See, for example, *Latimer v AEC Ltd* [1953] AC 643 (HL) 653 per Lord Porter and 659 per Lord Tucker; *Watt v Hertfordshire County Council* [1954] 1 WLR 835 (CA) 838 per Lord Justice Denning; *Longworth v Coppas International* 1985 SC 42 (CS) 46 per Lord Davidson; *Graham Hopps v Mott MacDonald* [2009] EWHC 1881 (QB) [131] per Mr Justice Christopher Clarke.
[762] See Chapter 5, Section 5.2 at pages 189 to 190.
[763] ibid.
[764] See above at page 188.

5.3.1. Fairness

As with the hard precautionary measure of deploying private armed guards on board a ship,[765] I maintain that there are two difficulties over the operation of the policy consideration of fairness when ascertaining the extent to which a shipowner has to re-route a ship from a dangerous route, with a view to protecting a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Both of these difficulties are likely to impose considerable limits to the practical significance of the policy consideration at hand in the present context.

First, there is the possibility in fact that more equally-effective precautionary measures are available against a particular risk. In such cases, the policy consideration of fairness will rule out the precautionary measure of the highest cost from the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in a particular case. In the present context, however, the practical significance of this possibility is rather limited. As one can reasonably understand, in its nature, the hard precautionary measure of re-routing a ship from a dangerous area is effective in eliminating and/or reducing the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment.

Secondly, there is the possibility in fact that more equally-effective precautionary measures are not available against a particular risk. In such cases, the policy consideration of fairness aims to avoid a gross disproportion between the risk in question and the necessary precautionary measures by setting limits to the extent to which a shipowner has to take measures to protect a seafarer from the risk of being injured or killed in the context of his/her employment. Once again, this possibility is of limited practical significance in the present context. I explained earlier in section 5.1 that, for present purposes, I assume that the voyage to be undertaken is in

[765] Chapter 5, Section 5.2, Sub-Section 5.2.1 at pages 194 to 196.

designated high risk areas, in areas in which a significant number of maritime piracy attacks have been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have occurred.[766]

This implies that the probability of the risk of a seafarer being injured or killed by the criminal acts of pirates is real and of considerably high level. Similarly, the likely gravity of the harm of a seafarer, if the risk at hand materialises, is of great seriousness. If so, it is hard to say that the policy consideration of fairness will preclude the hard precautionary measure of re-routing a ship from a dangerous route from the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

5.3.2. The preservation of a 'desirable activity'

I submitted in sub-section 5.2.2 that shipping qualifies as a socially valuable activity capable to trigger the policy consideration of preserving a 'desirable activity'.[767] In testing then the hard precautionary measure of re-routing a ship from a dangerous route against the policy consideration at hand, I argue that a requirement to re-route a ship from a dangerous route to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis may be enough to prevent shipping from being undertaken at all, to a particular extent or in a particular way, or to discourage a shipowner from undertaking functions in connection with shipping, but only in some exceptional circumstances.

The aforementioned exceptional circumstances become rather evident if one distinguishes between cases where re-routing a ship from a dangerous route is not possible because the ship's destination is in and/or around piracy infested waters and

[766] See above at page 187.
[767] See above at pages 196 to 197.

cases where re-routing a ship from a dangerous route is possible because the ship's destination is not in and/or around piracy infested waters. Logic dictates that, where a shipowner has no choice but to route a ship through a dangerous area, then the policy consideration of the preservation of a 'desirable activity' will rule out a requirement to re-route a ship from a dangerous area to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. This is because such a requirement will clearly be enough to prevent shipping from being undertaken, at least in and/or around piracy infested waters.

Where, on the other hand, a shipowner has the choice to instruct his/her ship to take a safer but potentially longer route, then a further distinction needs to be drawn between cases where re-routing a ship from a dangerous route incurs additional operational costs, which have a negative impact on the profit enjoyed by the shipowner, and cases where re-routing a ship from a dangerous route incurs additional operational costs, which can drive the shipowner out of business. In the former category of cases, the policy consideration of the preservation of a 'desirable activity' will not set any limits to imposing an obligation on a shipowner to re-route his/her ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Remember, here, my earlier premise that, for the policy consideration of the preservation of a 'desirable activity' to be triggered, something more than a mere decrease in commercial profit is required.[768]

In the latter category of cases, however, the policy consideration of the preservation of a 'desirable activity' will be fatal to any arguments suggesting that a shipowner should take the hard precautionary measure of re-routing his/her ship from a dangerous area to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. This is because such an obligation will clearly be enough to discourage a shipowner from undertaking functions in connection with shipping.

[768] See Chapter 3, Section 3.3 at pages 131 to 134.

Before moving on to test the hard precautionary measure of re-routing a ship from a dangerous area against the policy consideration of the consequences of taking the alleged precautionary measure, it may be worth noting here that, in so far as the indirect consequences are concerned, there is an overlap between the policy consideration of the preservation of a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure. It is thus only logical that they will be considered together in the following sub-section.

5.3.3. The consequences of taking the alleged precautionary measure

In this sub-section I argue that the indirect consequences of the hard precautionary measure at hand are highly unlikely to trigger the policy consideration of the preservation of a 'desirable activity' and the policy consideration of the consequences of taking the alleged precautionary measure to negate any arguments suggesting that an obligation should be cast upon a shipowner to re-route his/her ship from a dangerous area to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. To this end, the following points need to be considered.

On the one hand, the consequences of re-routing a ship from a dangerous route from the perspective of a seafarer's reasonable expectations are relevant. Little needs to be said in this regard, since the effectiveness of the hard precautionary measure at hand is self-evident. On the other hand, the consequences of re-routing a ship from a dangerous route from the perspective of a shipowner's reasonable expectations need to be discussed. In this respect, the indirect consequences of a requirement to take the hard precautionary measure at hand to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis are of greatest interest. Or, putting the matter another way, the ordinary risks emerging from re-routing a ship from a dangerous route need to be assessed.

Of course, I recognise that the hard precautionary measure of re-routing a ship is likely to give rise to additional risks of a shipowner being found in breach of his/her obligation to proceed with utmost despatch in the context of a time charterparty, with a view to incurring liability for loss of time, for expenses incurred by reason of a commercial ship proceeding via a safer but longer route, and/or for market losses to the cargo caused by delay.[769] However, the aforementioned risks are risks which can be eliminated and/or reduced through the means of commercial initiative.

Suffice to say here that, in the aftermath of a line of cases in which the issue of a shipowner's right to refuse to follow the charterers' routeing instructions, for fear of the risk of future maritime piracy attacks, arose for consideration,[770] international shipping associations, such as the Baltic and International Maritime Council (hereinafter BIMCO) and the International Association of Independent Tanker Owners (hereinafter INTERTANKO), have now adopted war or piracy clauses drafted in a way that specifically addresses the aforesaid risks and provide shipowners with better protection.[771] This arguably suggests that the policy consideration of the consequences of the alleged precautionary measure will not preclude the hard precautionary measure under examination from the precautionary measures that

[769] For more details on the risk of a shipowner being found in breach of his/her obligation to proceed with utmost despatch in the context of a time charterparty, see Paul Todd, *Maritime Fraud and Piracy* (2nd Edition, Informa 2010) Chapter 1, in particular [1.134] to [1.173]; Paul Todd, *Charterparties and Piracy Today* (Create Space Independent Publishing Platform 2014) Chapter 3; Terence Coghlin and others, *Time Charters* (7th Edition, Informa 2014) Chapter 5, in particular [5.27] to [5.32]; Yvonne Baatz, 'Charterparties' in Yvonne Baatz (ed), *Maritime Law* (4th Edition, Informa 2017) Chapter 4, in particular [6] to [8]; Niger Cooper, 'Of Terrorists, Pirates, Foul Weather and Other Perils to International Trade: The Commercial Allocation of Risk under Time Charters, with Particular Reference to Issues of Maritime Security' in Baris Soyer and other, *Charterparties: Law, Practice and Emerging Legal Issues* (Informa 2018) Chapter 3, in particular [3.3].

[770] See, for example, *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2011] EWHC 70 (Comm); *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2012] EWHC 70 (Comm); *Tsakos Navigation SA v Kormrowski Bulk Shippin KG (GMBH & Co) (The Paiwan Wisdom)* [2012] EWHC 1888 (Comm).

[771] See, for example, the BIMCO CONWARTIME 2013 War Risks Clause, the BIMCO Piracy Clause for Time Charterparties 2013, and the INTERTANKO Piracy Clause – Time Charterparties. See also the BIMCO VOYWAR 2013 War Risks Clause, the BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs 2013, the BIMCO Piracy Clause for Single Voyage Charter Parties 2013, and the INTERTANKO Piracy Clause – Voyage Charterparties.

should have been taken by a shipowner to meet the legal standard of care required of a shipowner in the situation under discussion in the present thesis.

Overall, a shipowner should re-route his/her ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment; if, and to the extent that, a comprehensively drafted war or piracy clause is inserted into a time charterparty. This implies that, in maritime practice, a shipowner should be proactive to ensure that, where the voyage to be undertaken is in designated high risk areas, in areas in which a significant number of maritime piracy attacks have been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks have taken place, an adequately drafted clause is inserted into a time charterparty.

5.4. Conclusion

It must be clear from the present chapter that the extent to which a shipowner has to deploy private armed guards on board his/her ship or to re-route his/her ship from a dangerous route to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment is largely a matter of policy. Indeed, I have identified three main policy considerations, which are likely to be fatal to any arguments supporting that a requirement to take any of the aforesaid hard precautionary measures should be necessary to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis.

First, the policy consideration of fairness has been considered, though I have suggested that its practical significance is likely to be very limited. In maritime practice, both the hard precautionary measures considered in the present chapter are effective in eliminating and/or reducing the risk of a seafarer being injured or killed by the criminal acts of pirates in the context of his/her employment and this curtails the applicability of the policy consideration under examination in the present context.

The policy consideration of fairness will not therefore rule out the hard precautionary measure of deploying private armed guards on board a ship or the hard precautionary measure of re-routing a ship from a dangerous route from the legal standard of care required of a shipowner in the situation under discussion in the present thesis.

There is, however, a second, and much more significant policy consideration; that of the preservation of a 'desirable activity'. In so far as the hard precautionary measure of deploying private armed guards on board a ship is concerned, the ordinary risks emerging from the use of private armed guards to defend a ship from risks associated with entering piracy infested waters will likely be risks, which can trigger this policy consideration. This is because the aforesaid risks can be avoided or reduced through the means of international cooperation rather than commercial initiative. The result is that it would not be reasonable to cast an obligation upon a shipowner to deploy private armed guards on board his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment.

Where, on the other hand, the hard precautionary measure of re-routing a ship from a dangerous route is under consideration, the policy consideration of preserving a 'desirable activity' does not preclude altogether an obligation to take this measure from the legal standard of care required of a shipowner in the situation under discussion in the present thesis. Nonetheless, the policy consideration at hand is likely to set two limits to the extent to which a shipowner has to re-route his/her ship to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. The first revolves around cases where re-routing a ship from a dangerous route is not possible because the ship's destination is in and/or around piracy infested waters. The second refers to cases where re-routing a ship from a dangerous route incurs additional operational costs and exceptional costs of transaction, which can drive a shipowner out of business.

Finally, the policy consideration of the consequences of taking the alleged precautionary measure has been taken into account. This policy consideration

arguably precludes the precautionary measure of deploying private armed guards on board a ship from the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis, since the ordinary risks emerging from the use of private armed guards to defend a ship from the risk of future maritime piracy attacks will likely be risks, which can only be eliminated and/or reduced through the means of international cooperation. However, it will be unlikely for it to do so with regard to the hard precautionary measure of re-routing a ship from a dangerous area. This is because the ordinary risks emerging from re-routing a ship from a dangerous area will likely be risks, which can be avoided or reduced through the means of commercial initiative.

Chapter Six

Conclusion

In the end result, the present thesis has been concerned with a complex factual situation, maritime piracy, in relation to an equally complex chapter of the English law of negligence, the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Its practical significance is to show what a shipowner should or should not do to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. In a wider context, this is essential to shed light into the legal grounds upon which a seafarer, or the dependants of a seafarer, may be entitled to claim compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment.

In chapter 2 of the present thesis I have attempted to explain why I have adopted an English negligence law perspective for the purposes of the present thesis. The crux of this chapter is that a seafarer's employment agreement (hereinafter SEA) and the regulatory framework may well provide for compensation, if a seafarer is injured or killed by the criminal acts of pirates in the context of his/her employment. Nonetheless, the protection offered by the SEA and the regulatory framework to a seafarer, or to the dependants of a seafarer, may be rather unsatisfying in this regard. In every case, the law of the parties and the regulatory framework do not stand in the way of a seafarer's, or of the dependants' of a seafarer, right to bring an action in negligence claiming compensation from a shipowner for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment. Thus, it is necessary to turn to the English law of negligence to deal with the question of compensation for injury or death caused to a seafarer as a result of a maritime piracy attack in the context of his/her employment.

Having perused one by one all the elements of the tort of negligence, I have found that, in the situation under discussion in the present thesis, the breach of duty of care element is likely to be more problematic. For that I have then attempted in chapter 3 of the present thesis to rationalise the process of the application of the test of the hypothetical reasonable person when determining the precautionary measures that should have been taken by a shipowner to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment; especially in cases in which the alleged negligence consisted of a shipowner's failure to take measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. What has therefore been attempted as a rationalisation of this process may be summarised in three propositions.

First, I have argued that the element of cost should be abandoned as one of the factors, which have to be weighed by the courts in this regard. Conversely, the element of the magnitude of the risk should be the most significant factor to be considered by the courts when determining the precautionary measures that should have been taken by a defendant to meet the legal standard of care in a particular case. Secondly, I have argued that the concept of policy should continue to have a role to play in the process of the application of the test of the hypothetical reasonable person in this context. However, any considerations about policy should be just one of the factors that have to be weighed by the courts. Thirdly, I have argued that any evidence of the practice commonly followed by those engaged in a particular activity should be of minimum value in the process of the application of the test of the hypothetical reasonable person in the situation under discussion in the present thesis. Instead, emphasis should be placed on the outcome of a proper and sufficient risk assessment.

In chapter 4 of the present thesis I have attempted to sketch the content of the soft precautionary measures, which a shipowner should take to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. First, a

shipowner should carry out a maritime piracy specific risk assessment, with a view to introducing and enforcing a maritime piracy specific ship security plan for the particular voyage to be undertaken. In this regard, a shipowner should conduct a maritime piracy specific risk assessment when the voyage commences and should update such an assessment during the voyage. A shipowner should then inform a seafarer about the outcome of a maritime piracy specific risk assessment. In particular, a shipowner should warn a seafarer about the risks of rendering his/her service on board a ship which is bound to transit piracy infested waters during a voyage and should instruct a seafarer as to how such risks may be reduced or avoided during that voyage. Finally, a shipowner should harden the vessel against the risks identified by the maritime piracy specific risk assessment. This involves adopting appropriate equipment to harden the vessel against risks associated with entering piracy infested waters, adequately manning the ship to put in place the maritime piracy specific ship security plan, and properly training a seafarer in this regard.

So whether a shipowner fails to conduct a proper and sufficient maritime piracy specific risk assessment, to properly inform a seafarer about the outcome of the maritime piracy specific risk assessment, or to adequately harden the vessel against the risks identified by the maritime piracy specific risk assessment, the result will be the same: the shipowner will be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment. Therefore, a seafarer, or the dependants of a seafarer, will have reasonable grounds to bring a claim in negligence against the shipowner for compensation to be obtained for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment, provided that the rest of the elements of the tort of negligence are also fulfilled.

What has finally been addressed in the present thesis is the question of the extent to which a shipowner has to take hard precautionary measures to protect a seafarer from the risk of being injured or killed by the criminal acts of pirates in the context of his/her employment. Leaping then into chapter 5 of the present thesis, for the

purposes of which I have assumed that the voyage to be undertaken is in designated high risk areas, or in areas in which a significant number of maritime piracy attacks has been reported, or in areas in which a significant number of incidents of injury or death of seafarers as a result of maritime piracy attacks has occurred, I have attempted to shed light into the question just described.

In particular, I have argued that a shipowner should rarely, if ever, deploy private armed guards on board his/her ship to discharge his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. Conversely, a requirement to re-route a ship from a dangerous route may be necessary to meet the legal standard of care required of a shipowner in discharge of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis; but only when re-routing a ship is possible because the ship's destination is not in and/or around piracy infested areas; and when re-routing a ship from a dangerous route does not incur additional operational costs, which can drive a shipowner out of business.

What emerges from the conclusions just described is that a shipowner, who fails to deploy private armed guards on board his/her ship, will not be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis. Conversely, a shipowner, who fails to re-route his/her ship from a dangerous route, may be found in breach of his/her common law duty of care to safeguard the health and safety of a seafarer in the context of his/her employment in the situation under discussion in the present thesis; but only when re-routing a ship is possible because the ship's destination is not in and/or around piracy infested areas; and when re-routing a ship from a dangerous route does not incur additional operational costs, which can drive a shipowner out of business. Hence, only in the aforesaid exceptional circumstances, a seafarer, or the dependants of a seafarer, will have reasonable grounds to bring a claim in negligence against a shipowner for compensation to be

obtained for personal injury or loss of life, which the seafarer suffered as a result of a maritime piracy attack in the context of his/her employment; if, and to the extent that, the rest of the elements of the tort of negligence are also fulfilled.

Notwithstanding the focus of the present thesis on the specific facts of maritime piracy, its value goes beyond the maritime piracy context. The present thesis has addressed questions as to the process of the application of the test of the hypothetical reasonable person, which are common not only to all cases in which the issue of liability and compensation for personal injury and loss of life, which a seafarer suffered in the context of his/her employment, arises for consideration, but also to all cases in which the issue of liability and compensation for personal injury and loss of life, which a shore-based employee suffered in the context of his/her employment, is under examination. On top of that, the recent shift of employer's liability to the English law of negligence by virtue of Section 69 of the Enterprise and Regulatory Reform Act 2013, (c 24), emphasises the need to elucidate the process of the application of the test of the hypothetical reasonable person in this area, in order to ensure that employees continue to enjoy the same level of protection. Therefore, I maintain that the analysis of the present thesis may offer an understanding of the future evolution of the English law of negligence in this regard.

Bibliography

Books

Andreone G (ed), *The Future of the Law of the Sea* (Springer 2017).

Baatz Y (ed), *Maritime Law* (4th Edition, Informa 2017).

Beale H (ed), *Chitty on Contracts* (33rd Edition, Sweet & Maxwell 2018).

Bennett D (ed), *Munkman on Employer's Liability* (16th Edition, LexisNexis 2013).

Brown J, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy 2012).

Burrows A, *Remedies for Torts and Breach of Contract* (3rd Edition, Oxford University Press 2004).

Chaumette P (ed), *Seafarers: An International Labour Market in Perspective* (Editorial Gomylex 2006).

Chircop A, McDorman T, and Rolston S (eds), *The Future of Ocean Regime-Building* (Brill Online Books and Journals 2009).

Coghlin T, Baker A, Kenny J, Kimball J, and Belknap T H Jr, *Time Charters* (7th Edition, Informa 2014).

Dimitrova D, *Seafarers' Rights in the Globalised Maritime Industry* (Kluwer Law International 2010).

Finn P D (ed), *Essays on Torts* (Sydney: The Law Book Co Ltd 1989).

Fitzpatrick D and Anderson M (eds), *Seafarers' Rights* (Oxford University Press 2005).

Fogarty A, *Merchant Shipping Legislation* (3rd Edition, Informa 2017).

Francioni F and Ronzitti N (eds), *War by Contract, Human Rights, Humanitarian Law and Private Contractors* (Oxford Scholarship Online 2011).

Freedland M, *The Personal Employment Contract* (Oxford University Press 2006).

--, Bogg A, Cabrell D, Collins H, Countouris N, Davies ACL, Deakin S, Prassl J, *The Contract of Employment* (1st Edition, Oxford 2016).

Gestel R, Micklitz H, and Rubin E L (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017).

Guilfoyle D (ed), *Modern Piracy* (Edward Elgar Publishing 2013).

Hutchinson T, *Researching and Writing in Law* (4th Edition Thomson Reuters Australia 2018).

Jones M A (ed), *Clerk & Lindsell on Torts* (22nd Edition, Sweet & Maxwell 2017).

Knight A and Ruddock L (eds), *Advanced Research Methods in the Built Environment* (Wiley – Blackwell, 2008).

Lavelle J (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law 2014).

Lewis R (ed), *Labour Law in Britain* (Basil Blackwell 1986).

Linden A M (ed), *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968).

McConville M and Chui W H (eds) *Research Methods for Law* (2nd Edition Edinburgh University Press 2017).

McIvor C, *Third Party Liability in Tort* (1st Edition, Hart Publishing 2006).

Mulheron R, *Principles of Tort Law* (Cambridge University Press 2016).

Musi M (ed), *Port, Maritime and Transport Law Between Legacies of the Past and Modernisation* (Bonomo Editore 2018).

Oliphant K and Wagner G, *Employer's Liability and Worker's Compensation* (De Gruyter 2012).

Owen D G (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1997).

Papastavridis E and Trapp K N (eds), *Crimes at Sea* (Brill 2014).

Proelss A (ed), *United Nations Convention on the Law of the Sea: A Commentary* (1st Edition C H Beck – Hart – NOMOS, 2017).

Rubin A, *The Law of Piracy* (2nd Edition, Naval War College Press 1998).

Schildknecht J, Dickey R, Fink M, and Ferris L (eds), *Operational Law in International Straits and Current Maritime Security Challenges* (Springer 2018).

Soyer B and Tettnborn A (eds), *Charterparties: Law, Practice and Emerging Legal Issues* (Informa 2018).

Symmons C (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011).

Todd P, *Maritime Fraud and Piracy* (2nd Edition, Informa 2010).

--, *Charterparties and Piracy Today* (Create Space Independent Publishing Platform 2014).

Walton C (ed), *Charlesworth & Percy on Negligence* (14th Edition, Sweet & Maxwell 2018).

Watkins D and Burton M, *Research Methods in Law* (2nd Edition Routledge 2017).

Witting C, *Street On Torts* (15th Edition, Oxford University Press 2018).

Zunarelli S and Musi M (eds), *Current Issues in Maritime and Transport Law* (Bologna: Bonormo Editore 2016).

Journal Articles

Abila S and Tang L, ‘Trauma, Post-trauma and Support in the Shipping Industry: the Experience of Filipino Seafarers after Pirate Attacks’ (2014) 46 Marine Policy 132.

Adascalitei O, ‘The Maritime Labour Convention 2006 – A Long Awaited Change in the Maritime Sector’ (2014) 149 Procedia – Social and Behavioural Sciences 8.

Ali S I, Yusoff Z M, and Ayub Z A, ‘Legal Research of Doctrinal and Non-Doctrinal’ (2017) 4 (1) International Journal of Trend in Research and Development 493.

Bateman S, ‘Sub-Standard Shipping and the Human Costs of Piracy’ (2011) 3 (2) Australian Journal of Maritime and Ocean Affairs 57.

Bauer P, ‘The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?’ (2007-2008) 8 Chicago Journal of International Law 643.

Beever A, ‘Negligence and Utility’ (2017) 17 (1) Oxford University Commonwealth Law Journal 85.

Birnie P W, ‘Piracy: Past, Present and Future’ (1987) 11 (3) Marine Policy 163.

Black J I, ‘Reflections on the Negotiation of the Maritime Labour Convention 2006 at the International Labour Organisation’ (2006) 31 Tulane Maritime Law Journal 35.

Booth L, ‘Effect of Piracy Long Term’ (2015) 29 Maritime Risk International 69.

Brodie D, ‘Damages Claims (EU Directive on Safety and Health at Work) (Scotland) Bill’ (2015) (125) Employment Law Bulletin 4.

Bryant W, Townsley M, and Leclerc B, ‘Preventing Maritime Pirate Attacks: A Conjunctive Analysis of the Effectiveness of Ship Protection Measures Recommended by the International Maritime Organisation’ (2014) 7 Journal of Transportation Security 69.

Bolle P, ‘The ILO’s New Convention on Maritime Labour: An Innovative Instrument’ (2006) 145 International Labour Review 135.

Buckland W, ‘The Duty to Take Care’ (1935) 51 Law Quarterly Review 637.

Caldwell G, ‘Piracy and the Zero Incentive Approach’ (2012) 12 (3) Lloyd’s Shipping and Trade Law 2.

--, ‘Private Security and Armed Military Guards’ (2012) 157 (5) The RUSI Journal 16.

--, ‘Due Diligence and Privately Contracted Armed Security Personnel’ (2012) 12 (5) Lloyd’s Shipping and Trade Law 1.

Chagas Lessa J C, ‘The Maritime Labour Convention: An Overview’ (2016) 22 Journal of International Maritime Law 379.

Chalk P, ‘Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses’ (2010) XVI (II) Brown Journal of World Affairs 89.

Christodoulou Varotsi I, ‘Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organisation: Limitations and Perspectives’ (2012) 43 (4) Journal of Maritime Law and Commerce 467.

Dias R M W, ‘Trouble on Oiled Waters: Problems of *The Wagon Mound (No 2)*’ (1967) 25 (1) Cambridge Law Joournal 62.

Dickinson E D, ‘Is the Crime of Piracy Obsolete’ (1924-1925) 38 Harvard Law Review 334.

Fitzsimmons S, ‘Privatising the Struggle against Somali Piracy’ (2013) 24 (1) Small War and Insurgencies 84.

Galani S, ‘Somali Piracy and the Human Rights of Seafarers’ (2016) 34 (1) Netherlands Quarterly of Human Rights 71.

Georgiou K S, ‘Piracy and Off-Hire: Charterparty (Time) – NYPE Clause 15’ (2010) 10 (6) Lloyd’s Shipping and Trade Law 4.

Girvin S, ‘English and Scottish Shipping Law’ (2011) Lloyd’s Maritime and Commercial Law Yearbook 79.

Gold M, ‘And Justice for Ali? An Analysis of a Shipowner’s Duty of Care in Piracy and Armed Robbery Attacks’ (2016) 47 (4) Journal of Maritime Law and Commerce 501.

Goudkamp J and Murphy J, ‘Tort Statutes and Tort Theories’ (2015) 131 (Jan) Law Quarterly Review 133.

Goudkamp J, ‘A Revolution in Duty of Care’ (2015) 131 (Oct) Law Quarterly Review 519.

--, ‘Breach of Duty: A Disappearing Element of the Action in Negligence?’ (2017) 76 (3) Cambridge Law Journal 480.

Ghosh P K, ‘Strategies for Countering Somalian Piracy: Responding to the Evovling Threat’ (2014) 70 (1) India Quarterly 15.

Guilfoyle D, ‘Somali Pirates as Agents of Change in International Law-Making and Organisation’ (2012) 1 (3) Cambridge Journal of International and Comparative Law 81.

Hartshorne J, ‘Confusion, Contradiction and Chaos within the House of Lords post *Caparo v Dickman*’ (2008) 16 (1) Tort Law Review 8.

Herbert R, ‘The Compensation Act 2006’ (2006) 4 Journal of Personal Injury Law 337.

Hodgkinson S, ‘Current Trends in Global Piracy: Can Somalia’s Successes Help Combat Piracy in the Gulf of Guinea and Elsewhere?’ (2013) 46 (1) Case Western Reserve Journal of International Law 145.

Howarth D, ‘My Brother’s Keeper? Liability for Acts of Third Parties’ (1994) 14 Legal Studies 88.

Huggins S and Hartnett L K, ‘Somali Piracy – Are we at the End Game?’ (2015) 46 Case Western Reserve Journal of International Law 355.

Hutchinson T and Duncan N, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83.

Jeffrey R, ‘An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defence against Pirates’ (2010) 42 (4) Journal of Maritime Law and Commerce 507.

Kamal-Deen A, ‘The Anatomy of Gulf of Guinea Piracy’ (2015) 68 (1) Naval War College Review 93.

Kumar Gosh P, ‘Strategies for Countering Somalian Piracy: Responding to the Evolving Threat’ (2014) 70 (1) India Quarterly 15.

Li KX and Mi Ng J, ‘International Maritime Conventions: Seafarers’ Safety and Human Rights’ (2002) 33 (3) Journal of Maritime Law and Commerce 381.

Limb P QC and Cox J, ‘Section 69 of the Enterprise and Regulatory Reform Act 2013 – Plus Ca Change?’ (2014) 1 Journal of Personal Injury Law 1.

Liss C, ‘Losing Control? The Privatisation of Anti-Piracy Services in the Southeast Asia’ (2009) 63 (3) Australian Journal of International Affairs 390.

Liwang H, Sorenson K, and Osterman C, ‘Ship Security Challenges in High-Risk Areas: Manageable or Insurmountable?’ (2015) 14 World Maritime University Journal of Maritime Affairs 201.

Logie J, ‘Affirmative Action in the Law of Tort: the Case of the Duty to Warn’ (1989) 48 (1) Cambridge Law Journal 115.

Lush A, ‘Troubled Waters’ (2011) 155 (4) Solicitors Journal 11.

Markesinis B, ‘Negligence, Nuisance and Affirmative Duties of Action’ (1989) 105 (Jan) Law Quarterly Review 104.

Masamichi H, ‘The Use of Privately Contracted Armed Security Personnel (PCASP) to Defend against the Threat of Piracy: Differences between Japan and the UK’ (2014) 4 Journal of Maritime Researches 43.

McConnell M, ‘The Maritime Labour Convention 2006 – Reflection on Challenges for Flag State Implementation’ (2011) 10 World Maritime University Journal of Maritime Affairs 127.

Mineau M, ‘Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy’ (2010) 9 Journal of International Business and Law 63.

Morgan J, ‘The Rise and Fall of the General Duty of Care’ (2006) 22 (4) Professional Negligence 206.

Mudric M, ‘The Guardcon Contract, Knock-for-Knock Clauses, DCFR and Unfair Terms (Part I)’ (2015) 21 Journal of International Maritime Law 51.

--, ‘’The Guardcon Contract, Knock-for-Knock Clauses, DCFR and Unfair Terms (Part II)’ (2015) 21 Journal of International Maritime Law 115.

Mulheron R, ‘Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015’ (2017) 80 Modern Law Review 88.

Nikolic N, Pavletic M, Missoni E, ‘Are We Winning the War with Pirates?’ (2012) 63 (4) International Maritime Health 195.

Nolan D, ‘Varying the Standard of Care in Negligence’ (2013) 72 (3) Cambridge Law Journal 651.

--, ‘Deconstructing the Duty of Care’ (2013) 129 (Oct) Law Quarterly Review 559.

Norris W, ‘The Duty of Care to Prevent Personal Injury’ (2009) 2 Journal of Personal Injury Law 114.

O’Sullivan J, ‘Liability for Criminal Acts of Third Parties’ (2009) 68 (2) Cambridge Law Journal 270.

Oldenburg M, Baur X, Sclaich C, ‘Occupational Risks and Challenges of Seafaring’ (2010) 52 Journal of Occupational Health 249.

Parsons D, ‘Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight against Pirates’ (2010-2011) 35 Tulane Maritime Law Journal 153.

Petrig A, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (2013) 62 (3) International & Comparative Law Quarterly 665.

Pizor B, ‘Lending an “Invisible Hand” to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy’ (2012-2013) 45 Case Western Reserve Journal of International Law 545.

Posner R, ‘The Present Situation in Legal Scholarship’ (1980) 90 Yale Law Journal 1113.

Power V, ‘The Impact of Brexit on Shipping and Ports Law’ (2018) 3 Journal of International Maritime Law 181.

Purshoouse C, ‘Arrested Development: Police Negligence and the *Caparo* ‘Test’ for Duty of Care’ (2016) 23 Tort Law Journal 1.

Roy A, ‘Without a Safety Net: Litigating Employers’ Liability Claims after the Enterprise Act’ (2015) 1 Journal of Personal Injury Law 15.

Saulles D, ‘Nought Plus Nought Plus Nought Equals Nought: Rhetoric and the Asbestos Wars’ (2006) 4 Journal of Personal Injury Law 301.

Smith S, ‘In Defense of Traditional Legal Scholarship: A Comment’ (1992) 63 University of Colorado Law Review 627.

Spearin C, ‘Against the Current? Somali Pirates, Private Security, and American Responsibilisation’ (2010) 31 (3) Contemporary Security Policy 553.

Staniland H, ‘Protecting the Wages of Seafarers Held Hostage by Pirates: The Need to Reform the Law’ (2013) 3 (4) International Journal of Public Law and Policy 345.

Stevenson D, ‘Piracy’s Effect on Seafarers: A Way of Life’ (2011) 2 (2) Maritime Law Bulletin 30.

Symmons C, ‘Embarking Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51 Military Law and the Law of War Review 21.

Tavares N, ‘Wilkin-Shaw v Fuller: Liability – Personal Injury – Death’ (2012) 4 Journal of Personal Injury Law 193.

Tiller E and Frank B, ‘What is Legal Doctrine?’ (2006) 100 Northwestern University Law Review 517.

Tomkins N, ‘*Hopps v Mott MacDonald Ltd*: Personal Injury – Employers Liability – Health and Safety at Work’ (2009) 4 Journal of Personal Injury Law 185.

--, ‘Civil Health and Safety Law after the Enterprise and Regulatory Reform Act 2013’ (2013) 4 Journal of Personal Injury Law 203.

Tuckman P, ‘Trench-foot Gove but not Forgotten: Non-Freezing Cold Injurie in a Military Context’ (2013) 3 Journal of Personal Injury Law 162.

Warren R C, ‘Piracy and Shipowners’ Ethical Dilemmas’ (2011) 6 (1) Society and Business Review 49.

Weale J, ‘Piracy and Off-Hire: Extraneous Causes Revisited’ (2010) 4 (Nov) Lloyd’s Maritime and Commercial Law Quarterly 574.

West R, ‘*Willock v Corus UK Ltd*: Personal Injury – Liability – Health and Safety at Work’ (2013) 4 Journal of Personal Injury Law 186.

Whately A T, ‘Historical Sketch of the Law of Piracy’ (1874) 3 The Law Magasine and Review 536.

Wheeler J, ‘Wilkin-Shaw v Fuller: Personal Injury – Liability – Negligence’ (2013) 3 Journal of Personal Injury Law 132.

Whitlow J and Subasinghe R, ‘The Maritime Labour Convention, 2006: A Model for Other Industries?’ (2015) 7 (1-2) International Journal of Labour Research 117.

Williams K, ‘Politics, the Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006’ (2006) 4 Journal of Personal Injury Law 347.

Winfield P, ‘Duty in Tortious Negligence’ (1934) 34 Columbia Law Review 41.

Wrights A and Gercans P, ‘Two Important Charterparty Cases: *The Saldanha* and *The Kos*’ (2010) 8 (2) Shipping and Transport International 26.

Yang Z Wang J, and Li K X, ‘Maritime Safety Analysis in Retrospect’ (2013) 40 (3) Maritime Policy and Management 261.

Zhang P and Phillips E, ‘Safety First: Reconstructing the Concept of Seaworthiness under the Maritime Labour Convention 2006’ (2016) 67 Marine Policy 54.

Ziello A R, Angiole D R, Fasanaro A M, Amenta, ‘Psychological Consequences in Victims of Maritime Piracy: the Italian Experience’ (2014) 65 (1) International Maritime Health 28.

Reports

Brown J, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy 2012).

English Law Commission, *Claims for Wrongful Death* (Law Com No 263, 1999).

Hansen S J, *Piracy in the Greater Gulf of Aden: Myths, Misconceptions and Remedies* (Report 2009:29, Norwegian institute for Urban and Regional Research 2012).

House of Commons, *Piracy off the Coast of Somalia: Tenth Report of Session 2010-12* (House of Commons, Foreign Affairs Committee 2012).

ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships: 2008 Annual Report* (ICC IMB 2009).

--, *Piracy and Armed Robbery against Ships: 2009 Annual Report* (ICC IMB 2010).

--, *Piracy and Armed Robbery against Ships: 2010 Annual Report* (ICC IMB 2011).

--, *Piracy and Armed Robbery against Ships: 2011 Annual Report* (ICC IMB 2012).

--, *Piracy and Armed Robbery against Ships: 2012 Annual Report* (ICC IMB 2013).

--, *Piracy and Armed Robbery against Ships: 2013 Annual Report* (ICC IMB 2014).

--, *Piracy and Armed Robbery against Ships: 2014 Annual Report* (ICC IMB 2015).

--, *Piracy and Armed Robbery against Ships: 2015 Annual Report* (ICC IMB 2016).

--, *Piracy and Armed Robbery against Ships: 2016 Annual Report* (ICC IMB 2017).

--, *Piracy and Armed Robbery against Ships: 2017 Annual Report* (ICC IMB 2018).

--, *Piracy and Armed Robbery against Ships: Report for the Period of 1 January – 30 June 2018* (ICC IMB 2018).

Lennox P and Granatstein J L, *Contemporary Piracy off the Horn of Africa* (Canadian Defence & Foreign Affairs Institute 2008).

MCA, *Merchant Shipping (Maritime Labour Convention) (Shipowner Liability) Regulations ("the proposed regulations")* (25 February 2014) Impact Assessment No DFT00028.

Ministry of Justice, *Memorandum to the Justice Select Committee Post-Legislative Assessment of the Compensation Act 2006* (Crown Copyright 2012).

Oceans Beyond Piracy, *Issue Paper: Defining Contracted Maritime Security* (Denver, CO: One Earthe Future foundstion 2016).

--, *Issue Paper on Privately Contracted Armed Maritime Security* (Denver, CO: One Earth Future Foundation 2017).

--, *Issue Paper: Vessel Protection Detachments* (Denver, CO: One Earth Future Foundation 2017).

--, *Issue Paper: Coastal State Embarked Personnel* (Denver, CO: One Earth Future Foundation 2017).

--, *Issue Paper: State Affiliated Escorts* (Denver, CO: One Earth Future Foundation 2017).

Ploch L, Blanchard C, O'Rourke R, Mason R C, and King R, *Piracy off the Horn of Africa* (Report for Congress, Congressional Research Service 2011).

UNCTAD, *Review of Maritime Transport 2018* (United Nations 2018).

Theses

Fakhry A, ‘Frustration of Contracts of Affreightment in the Event of Capture of Merchant Ships by Pirates in Waters off Somalia’ (PhD Thesis, University of Southampton 2013).

Melendez F E R, ‘A Selection and Comparison of Risk Assessment Methods and Models to be Used for the International Ship and Port Facility Security Code’ (Master Thesis, World Maritime University 2004).

Twyman Ghoshal A, ‘Understanding Contemporary Maritime Piracy’ (PhD Thesis, Northeastern University Boston 2012).

Widd P G, ‘The Seafarer, Piracy, and the Law: a Human Rights Approach’ (PhD Thesis, University of Greenwich 2008).

Yucel A, ‘The Impact of Somali Piracy on Seafarers’ Rights: a Cross-Disciplinary Assessment’ (Master Thesis, Lund University 2012).

Websites

Das M, ‘Living in captivity: Untold stories of Indians held hostage by Somali pirates’ (The News Minute, 29 June 2016) <http://www.thenewsminute.com/article/living-captivity-untold-stories-indians-held-hostage-somali-pirates-45648> accessed 2 February 2019.

Galani S, ‘The forgotten victims of Somali piracy’ (University of Bristol Law School Blog, 7 November 2016) <http://legalresearch.blogs.bris.ac.uk/2016/11/the-forgotten-victims-of-somali-piracy/> accessed 2 February 2019.

Gardner F, ‘Somalia Ship Hijack: Maritime Piracy Threatens to Return’ (BBC, 16 March 2017) < https://www.bbc.co.uk/news/world-africa-39283911> accessed 2 February 2019.

Garfinkle M S, ‘The Psychological Impact of Piracy on Seafarers’ (2012) The Seamen’s Church Institute <http://chaplainsblog.seamenschurch.org/sites/default/files/sci-piracy-study-report-web_0.pdf> accessed 2 February 2019.

ICS and ECSA, ‘Comparison of Flag State Laws on Armed Guards and Arms on Board Vessels’ (February 2017) <http://www.ics-shipping.org/docs/default-source/Piracy-Docs/comparison-of-flag-state-laws-on-armed-guards-and-arms-on-board-2017.pdf?sfvrsn=0> accessed 30 January 2019.

IMO, ‘Shipping Indispensable to the World’ (World Maritime Day 2016) <http://www.imo.org/en/About/Events/WorldMaritimeDay/Documents/World%20Maritime%20Day%202016%20-%20Background%20paper%20(EN).pdf > accessed 30 January 2019.

--, ‘Private Armed Security: Port and Coastal States’ (2018) <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx> accessed 30 January 2019.

Narayan V, ‘Sailor held by Somali pirates for over three years returns’ (The Times of India City, 13 June 2014) <http://timesofindia.indiatimes.com/city/mumbai/Sailor-held-by-Somali-pirates-for-over-three-years-returns/articleshow/36451984.cms> accessed 2 February 2019.

Working Papers

Fedeli T, ‘The Rights and Liabilities of Private Actors: Pirates, Master, and Crew’ (2010) One Earth Future Foundation Working Paper <https://www.yumpu.com/user/oneearthfuture.org> accessed 30 January 2019.