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NEGLIGENCE IN MARITIME DISPUTES REVISITED — THE REQUIREMENT FOR OWNERSHIP OR POSSESSORY TITLE

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Negligence in maritime disputes revisited — The requirement for ownership or possessory title

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Negligence is a common cause of action in maritime disputes. It is usually used by consignees and shipowners who have suffered damage to their property. Under English law, a claimant must have ownership to a property in order to sue for losses flowing from damage to that property. However, in Singapore, the law of negligence has developed in an autochthonous fashion, leading to the position where a claimant without any proprietary interest in the damaged property would nonetheless have locus standi to sue. This paper explains this new development from Singapore and examines whether such an approach is just and appropriate for maritime disputes.

Keywords: Maritime law, negligence, property damage, title to sue, ownership, proprietary interest.

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1 Introduction

The case of *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*[1] (*The Aliakmon*) needs no introduction. It is authority for the proposition that a cargo claimant has no title to sue a shipowner or carrier in negligence if legal ownership or possessory title to the damaged cargo had not passed to the cargo claimant at the time the cargo was damaged.[2] One of the bases of this principle is that under English negligence law there is an exclusionary rule against the recovery of pure economic loss.[3] Pure economic loss is loss that is not consequent upon damage to one's person or property.[4] It follows that a claimant may only recover loss flowing from damage to its own property, rather than the property of a third party. Hence, this creates the requirement to prove ownership or possessory title, which acts as a key element to a negligence claim. This principle has been endorsed by the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd* (*The Starsin*).[5] As a result, it is important for any prospective claimant suing in negligence to be satisfied that ownership vests in the claimant when the property was damaged. In most cases, the claimant pursuing recourse would be the consignee receiving the cargo at the discharge port. If the consignee does not have ownership or title to the cargo when the damage occurred, it would need to enlist the assistance of the shipper by arranging for an assignment of the shipper's rights of suit.[6] Maritime litigants relying on the law of negligence would therefore have to satisfy themselves as to the issue of ownership before the commencement of any legal proceedings.

In Singapore, the development of negligence law has taken an interesting turn. The landmark case of *Spandeck Engineering (S) Ptd Ltd v Defence Science & Technology Agency* (*Spandeck*)[7] held that a single test[8] should determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of loss or damage claimed. The *Spandeck* test rejects the traditional

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1 [1986] 1 AC 785.

2 Ibid 809.

3 *Murphy v Brentwood District Council* [1991] 1 AC 398, 481, 487. See also CT Walton, *Charlesworth & Percy on Negligence* (14th ed, Sweet & Maxwell 2008) para 2-238. For a limited exception which has developed from the exclusionary rule, see *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 80, which will be discussed in Part 5 of this paper.

4 Michaela Jones, *Clerk & Lindsell on Torts* (23rd ed, Sweet & Maxwell 2020) para 1-44.

5 [2004] 1 AC 715, 777.

6 Simon Baughen, 'Charterers' Bills and Shipowners' Liabilities: A Black Hole for Cargo Claimants?' (2004) 10 JIML 248, 253.

7 [2007] SGCA 37, [2007] 4 SLR(R) 100 [71-72].

8 This is a two-stage test comprising of: first, proximity; and second, policy considerations, which are together preceded by a threshold question of factual foreseeability and applied incrementally. See *Spandeck* (n 7) [77], [81], [83], [115].

exclusionary rule and has paved the way for pure economic loss to be recovered by a tort claimant. Since the exclusionary rule was rejected, the Singapore Court of Appeal also specifically rejected the approach in *The Aliakmon*, holding that there is no requirement that a plaintiff must own or have possessory title to the property to sue for losses.[9] This new approach was later tested in the maritime context in *Wilmar Trading Pte Ltd v Heroic Warrior Inc* (*Wilmar*),[10] where the High Court affirmed that a cargo claimant need not prove that it had ownership or possessory title to the damaged property to succeed in a negligence claim.[11] Instead, the test to be used to establish whether a duty of care exists between a tortfeasor and a cargo claimant was the unified test in *Spandeck*.

The Singapore approach clearly diverges from established principles of English negligence law. Questions arise as to how this development will affect issues of recovery and liability for parties in maritime claims. For example, in any cargo dispute, there would invariably be multiple parties involved who have some form of proximity with the shipowner. *The Aliakmon* test ensures that only one of these parties, ie the person who had ownership or possessory title to the cargo at the time of the damage, has locus standi, thereby minimising the risk of indeterminate liability on the part of the shipowner. However, on an application of the *Spandeck* test, it is uncertain how a broad test of proximity can be reconciled with *The Aliakmon* and prevent the imposition of indeterminate liability on a shipowner.

Notwithstanding the above, this paper argues that no reconciliation is necessary because the development in the *Spandeck* test is able to obtain a just and appropriate result in maritime tort cases. To reach this conclusion, the paper will first analyse the decision in *The Aliakmon* and highlight several key factors against the finding of a duty of care if a claimant is not the owner of the damaged property. Second, the paper will briefly trace the development of Singapore negligence law to understand the reason behind the development of the *Spandeck* test. Next, the paper will identify and explain the drawbacks of applying the *Spandeck* test in maritime tort claims. The paper will then present counter-arguments to the drawbacks and explain why the *Spandeck* test is suitable for the modern maritime context.

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9 *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] SGCA 41, [2018] 2 SLR 588 [35].

10 [2019] SGHC 143.

11 Ibid [37].

2 Negligence in *The Aliakmon*

2.1 The findings in *The Aliakmon*

In *The Aliakmon*, the plaintiff purchased steel cargo which was to be shipped on the defendant's vessel. The plaintiff was a trader who intended to on-sell the cargo during the voyage. However, it was unable to do so and faced problems with its bankers' endorsement of the bills of lading. The plaintiff therefore sought the sellers' assistance for the bills of lading to be endorsed in favour of the sellers and for ownership of the cargo to remain with the sellers even during delivery of the cargo. This was notwithstanding the fact that the transaction between the plaintiff and the sellers was on a cost and freight (C&F) basis, which meant that risk passed to the plaintiff when the cargo was loaded on board the vessel. The cargo was damaged during loading operations and the voyage. The issue which arose was whether a duty of care existed between the defendant shipowner and the plaintiff buyer who did not have ownership and possessory title to the cargo at the time of damage.

At that juncture, there were three significant maritime cases with similar factual matrices where a plaintiff did not have ownership of the damaged cargo — *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)*,[12] *The Nea Tyhi*,[13] and *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)*.[14] *The Wear Breeze* had held that ownership and possessory title to the cargo were necessary to the finding of a duty of care,[15] whereas *The Nea Tyhi* and *The Irene's Success* had concluded otherwise.

The plaintiff attempted to rely on the test in *Anns v Merton London Borough Council (Anns)*,[16] as well as the decisions in *The Nea Tyhi* and *The Irene's Success* to argue that a duty existed between a carrier and buyer who was not the owner of the cargo at the relevant time. In doing so, the plaintiff argued that *The Wear Breeze* was decided before the development of the *Anns* test, and that if the *Anns* test were to be applied to the facts of *The Wear Breeze*, a similar conclusion to that in *The Nea Tyhi* and *The Irene's Success* would have been reached.[17] The plaintiff further argued that a rational system of law ought to provide a remedy for buyers of cargo who had not yet obtained ownership or possessory title to the cargo at the time of damage.[18] In particular, reliance was placed on Sheen J's reasoning in

12 [1969] 1 QB 219.
13 [1982] 1 Lloyd's Rep 606.
14 [1982] 1 QB 481.
15 [1969] 1 QB 219, 250.
16 [1978] AC 728.
17 *The Aliakmon* (n 1) 793.
18 Ibid 818.

The Nea Tyhi where he explained that in maritime tort disputes, there are many cases in which cargo is damaged over a long period of time,[19] and the precise time to which such damage occurred may not necessarily coincide with the transfer of rights or ownership to the claimant.[20] The finding of a duty of care would obviate the need for a difficult inquiry into how much of the damage occurred before and after the time ownership had passed, thereby presenting a fair recourse to cargo buyers.[21] Finally, to contend with the policy argument that it would be unjust for a claimant to circumvent the Hague Rules, the plaintiff sought to qualify the duty of care by reference to the bill of lading terms on the basis that those were the bailment terms of the cargo by the sellers to the defendant to which the plaintiff had impliedly consented by reason of the C&F contract.[22]

The House of Lords disagreed with the plaintiff's arguments.

First, a long line of cases stood for the principle of law that legal ownership and possessory title are key ingredients to the finding of a duty of care.[23] In examining these cases, Lord Brandon highlighted the importance of ensuring a control mechanism for tortious liability, in particular for pure economic losses.[24] He explained that the rule where legal ownership and possessory title are necessary is not only widely accepted, but more importantly, it has the merit of drawing a readily ascertainable line to exclude unwarranted claims and prevent indeterminate liability.[25] The simplicity and certainty of such a rule would enable claimants to be easily advised of their rights of suit.[26] Further, Lord Brandon thought that it was not possible to create a strictly limited exception for the claimant's situation where it had willingly agreed for ownership to remain with the sellers. If such an exception were allowed, the floodgates of litigation would be opened.[27]

Second, the House of Lords took the view that the absence of such a duty did not create an unfair result for buyers who had no title to the cargo. It was always open to buyers to include a term in their sale and purchase contract stating that the sellers should either exercise their right of recovery on

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19 For example, due to the leakage of oil or water, by inadequate ventilation, or by overheating or by seawater taken aboard during heavy weather.

20 *The Nea Tyhi* (n 13) 612.

21 *The Aliakmon* (n 1) 815.

22 Ibid 813.

23 *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Simpson & Co v Thomson* (1877) 3 App Cas 279; *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243; *The World Harmony* [1967] P 341; *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127; *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter)* [1986] 1 AC 1.

24 *The Aliakmon* (n 1) 816.

25 *Elliott Steam Tug Co Ltd* (n 23).

26 Ibid 139–140.

27 *The Aliakmon* (n 1) 816.

behalf of the buyers or assign such right to the buyers. If this precaution had been taken, the law would have provided the buyers with a fair and adequate remedy for their loss.[28]

Third, *The Irene's Success* and *The Nea Tyhi* had applied the *Anns* test erroneously. The *Anns* test was not meant to reopen issues relating to the existence of a duty of care settled by past decisions, especially if strong policy considerations such as those mentioned above were already set in place by *The Wear Breeze*. A correct application of the *Anns* test would therefore have excluded the finding of a duty based on policy objections at the second stage of the *Anns* test.[29] Noticeably, the Court in *The Irene's Success* had actually agreed with the policy objection that the finding of such a duty might enable a claimant to sidestep a shipowner's defences under the Hague Rules.[30] In light of the above, *The Irene's Success* and *The Nea Tyhi* were respectively overruled and *The Wear Breeze* was reaffirmed as good law.[31]

Fourth, the claimant's argument that the duty of care could be qualified by the terms of the contract was misplaced. The terms of a contract of carriage would invariably include the Hague Rules, and the House of Lords could not see how the intricate blend of responsibilities and liabilities under the Hague Rules could be melded into a tortious duty. The claimant's argument to rely on bailment to transplant such terms into a tortious duty was also flawed because the bailment terms were between the sellers and the defendant. Without an attornment, no bailment arose between the claimant and the defendant.[32] Further, if bailment and consequentially a duty of care qualified by the terms of bailment existed between the plaintiff and the defendant, there would have been no need for the principle of collateral contracts[33] or the Bills of Lading Act 1855 (UK).[34] Hence, no such duty could have existed.

In light of the above, the House of Lords reaffirmed the principle that a claimant can only sue a shipowner in negligence if the plaintiff had ownership or possessory title to the cargo at the time of the damage.

2.2 Key points in *The Aliakmon*

The following points derived from *The Aliakmon* are relevant for the further discussion below on the approach to be taken for maritime disputes.

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28 Ibid 819.
29 Ibid 816.
30 *The Irene's Success* (n 14) 486.
31 *The Aliakmon* (n 1) 786.
32 Ibid 818.
33 *Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575.
34 *The Aliakmon* (n 1) 818. See also *The Wear Breeze* (n 12) 241.

First, the recurring theme in English cases is that the test for negligence is always geared towards creating certainty and preventing indeterminate liability. Proximity, which is an essential element of negligence, is by itself unsatisfactory[35] and vague. Indeed, Lord Roskill in *Caparo Industries Plc v Dickman* (*Caparo)* had cautioned that using words such as 'proximity' and 'foreseeability' to determine the existence of a duty is problematic because such words are imprecise. Further, these words function as labels which are merely descriptive of the very different factual situations which can exist in particular cases.[36] If one solely relies on proximity as a test for negligence, it would be easy to make wide sweeping generalisations to create a duty of care.[37] This inherent weakness of proximity necessitates a much needed balance in the form of the policy consideration argument in both the *Anns* and *Caparo* tests. Even though the two-stage test in *Anns* was overruled, *Anns* nevertheless highlighted the importance of policy consideration to prevent indeterminate liability. The second stage of the *Anns* test therefore survived and lived on in the 'fairness' limb of the *Caparo* test. The continuing existence of policy consideration within the test for negligence ensures an adequate level of check and balance to prevent an over expansion of the law of negligence.

Second, maritime tort cases are not afforded a special status which grants an exception to the exclusionary rule to the recovery of pure economic loss. Throughout the history of Commonwealth jurisprudence, maritime cases are known to be unique because certain exceptions and rules apply which may render a different outcome on the case. For example, unlike the usual six-year limitation period for contract and tort cases under English law, most cargo claims have a one-year limitation period[38] and collision claims have a two-year limitation period.[39] It is therefore no surprise that in *The Aliakmon* an attempt was made to create an exception for cargo interests who did not have title or ownership to the cargo.[40] Notwithstanding this effort, the House of Lords denied recognising any alleged lacuna in the law and maintained the exclusionary rule to ensure certainty in tort cases.[41] It has been suggested that there was no purpose in forsaking certainty to create a special exception for cases of pure economic loss because a shipowner should be able to anticipate the extent of its liability

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35 Justin Tan, 'Proximity as Reasonable Expectation' [2019] SJLS 147, 148.

36 *Caparo Industries Plc v Dickman* (*Caparo)* [1990] 2 AC 605, 628.

37 See for example *The Irene's Success* (n 14) 485, where a duty of care was established because of the proximity between a shipowner and buyer — it was reasonable for any shipowner to know that any cargo carried will be bought and sold in the course of a carriage. Such purchase could be on 'cost, insurance, freight' terms where title is not necessarily passed to the buyer. This position was overruled in *The Aliakmon* (n 1).

38 Article 3(6) of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules).

39 Article 7 of the Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels 1910.

40 *The Aliakmon* (n 1) 819.

41 Ibid.

and to make necessary insurance arrangements.[42] The overruling of dissenting cases[43] further extinguished any hopes of reviving an argument that an exception ought to be conferred on such maritime cases.

Third, in considering whether a duty of care is owed in the maritime context, much deference is given to existing legal frameworks such as the Hague Rules as well as the principles of bailment and collateral contracts. For instance, the House of Lords thought that it would be unfair to allow a circumvention of the Hague Rules just to find a duty of care in favour of a claimant who did not own the cargo. This is because a shipowner who accepts cargo does so in reasonable anticipation that the eventual owner of the cargo would also be subject to the Hague Rules. It would also be conceptually difficult to synthesise the numerous rights, defences, limitations and exceptions under the Hague Rules into a tortious duty. There was a reluctance to use bailment to justify the importation of terms into the tortious duty because such a course of action would render the principle of collateral contracts redundant. Hence, the courts would not hesitate to rely on policy consideration to preserve the sanctity of existing legal concepts.

Fourth, the facts in *The Aliakmon* were considered to be unusual in nature, which did not warrant the finding of a duty.[44] In *The Aliakmon*, the buyers were traders who were unable to on-sell the cargo. To avoid problems arising out of their bankers' endorsement of the bills of lading, the buyers sought the sellers' assistance for the bills of lading to be endorsed in favour of the sellers and for ownership of the cargo to remain with the sellers.[45] The House of Lords' view was that such an arrangement was extremely rare and that there was little impetus to find a duty of care in such exceptional circumstances to aid a plaintiff who had voluntarily assumed risk.

The above points will be revisited below in Parts 4 and 5 as they relate to the arguments for and against the applying the *Spandeck* test. For now, the paper will discuss the development of the law of negligence in Singapore.

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42 GH Treitel, 'Bills of Lading and Third Parties' [1986] LMCLQ 294, 301.
43 See *The Irene's Success* (n 14) and *The Nea Tyhi* (n 13).
44 *The Aliakmon* (n 1) 797.
45 Ibid 785.

3 Development of the law of negligence in Singapore

3.1 The rise of the *Spandeck* test

As discussed above, the divergence of Singapore law began in *Spandeck* where it was held that a single test should determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of loss or damage claimed. The test as a whole is to be applied incrementally with references to the facts of decided cases, and begins with a threshold question of factual foreseeability, followed by a two-stage test of proximity and policy considerations.[46]

In analysing cases from across the Commonwealth, the Court of Appeal concluded that a different approach to the recovery of pure economic loss was not justified under Singapore law.

First, there is nothing inherent in the type of damage caused by negligence which necessitates a different approach. Instead, it is the circumstance in which the economic loss has arisen which warrants the imposition of a duty of care.[47] As Lord Oliver said in *Murphy*, the reason behind a claimant's failure to recovery under most economic loss cases was not that the loss sustained was 'economic' in nature. Instead, the reason was either based upon the remoteness of the damage or the proverbial 'floodgates' argument.[48] Since the existence of a duty depends on the circumstance rather than the type of loss, it is therefore incorrect to adopt an unduly restrictive and inflexible approach (in the form of an exclusionary rule) towards the determination of whether a duty exists in all cases involving economic loss.[49] Indeed, this has also been the approach taken by the Australian courts where they have held that the test for the recovery of economic loss should neither be inflexible nor absolute, and that the exclusionary rule should not apply if there was an absence of endless indeterminate liability.[50]

Second, there are cogent policy reasons in Singapore to allow claims for pure economic loss, especially in relation to immovable property. A string of cases in the 1990s highlighted the scarcity of land in Singapore,[51] and that the financial outlay in such properties is likely to represent a significant

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46 *Spandeck* (n 7) [77], [81], [83], [115].

47 Robby Bernstein, *Economic Loss* (2nd ed, Sweet & Maxwell 1998) 21. See also the lower court's decision in *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350, 375; *Murphy* (n 3) 485.

48 *Murphy* (n 3) 485.

49 Bernstein (n 47) 21.

50 See *Sutherland Shire Council v Heyman* (*Sutherland*) (1985) 60 ALR 1, 32; *Bryan v Maloney* (1995) 69 ALJR 375, 380.

51 *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] SGCA 30, [1999] 2 SLR(R) 134 (*Eastern Lagoon*) [43]; *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1995] SGCA 79, [1995] 3 SLR(R) 653 (*Ocean Front*).

investment for a person, including those who may have strong nexus to the property but who may not necessarily be the registered owner.[52] Although the aforementioned cases which have allowed for the recovery of pure economic loss were all related to the economic value of land, the Court saw no reason not to extend lability for pure economic loss to other situations, so long as the issues of indeterminate liability and policy can be adequately dealt with. In this connection, the Court found that the incremental approach would provide a necessary safeguard against the unintended consequence of indeterminate liability as well as to discourage arbitrariness in determining liability.[53]

Third, the Court also found that the danger of indeterminate liability did not solely lie in cases of pure economic loss — it could similarly manifest in cases involving physical loss and damage. Hence, the adoption of a single test would avoid confusion and serve to constrain liability even in those extremely rare cases where physical damage might possibly result in indeterminate liability.[54]

Ultimately, the Court thought that a single test to determine the existence of a duty of care for all claims of negligence would generate certainty in the law and eliminate the perception that there are two or more tests which are equally applicable at any one point in time.[55]

3.2 The application of the *Spandeck* test in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd (NTUC Foodfare)*

NTUC Foodfare was a significant case because it expressly rejected the position in *The Aliakmon* where a plaintiff must own or have possessory title to the property to sue for loss flowing from damage to that property.[56] In *NTUC Foodfare*, an airtug driver negligently collided with a pillar supporting a food kiosk which was leased and operated by the claimant. The kiosk was closed for repairs and safety inspections, thereby resulting in the claimant suffering from loss of profits. The claimant sued the airtug driver and his employer to recover economic losses. It was found that the defendants owed a duty of care to the claimant because the operation of a heavy vehicle within an airport's commercial area created both causal and physical proximity between the parties, with no policy factors militating against the recognition of such a duty of care.[57]

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52 See *Ocean Front* (n 51) where a duty was found between a management corporation of a condominium (who was not the owner of the property) and the developer of the condominium.

53 *Spandeck* (n 7) [69].

54 Ibid [71].

55 Ibid [72].

56 *NTUC Foodfare* (n 9) [35].

57 Ibid [46]–[53].

The Court of Appeal went further to reject the argument that the claimant had suffered a relational economic loss, which was different from pure economic loss and would therefore fall outside of the ambit of the *Spandeck* test. The defendants contended that the loss in the current case was a relational economic loss since the claimant's losses flowed from damage to a third party's property[58] and that special factors had to be proven before a duty of care existed. As a matter of doctrinal coherence, the Court reiterated that the *Spandeck* test was meant to establish a single test for the determination of a duty of care in all cases of negligence, irrespective of the type of loss.[59]

Further, other Common Law jurisdictions have also rejected a separate test for relational economic loss. For example, in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (*Caltex Oil*),[60] the High Court of Australia allowed an operator of an oil terminal to recover the costs of transporting oil from a refinery to the terminal when a dredge negligently damaged a pipeline of the refinery. The pipeline was not owned by the operator and the loss was not consequent upon damage to the operator's property. In holding that the owners of the dredge knew that the operator specifically, as opposed to a general class of persons, would suffer economic loss due to negligence on the dredge's part, a duty would exist without the need to prove further special factors.[61] In Canada, claimants have also been allowed to recover relational economic loss without the existence of special factors. In *Canadian National Railway Co v Norsk Pacific Steamship Co* (*Norsk*),[62] the Supreme Court of Canada allowed a railway company to recover expenses of rerouting railway cars across a bridge when it was damaged by the defendant's tug. Similar to *NTUC Foodfare* and *Caltex Oil*, the railway company in *Norsk* did not own the damaged bridge but was merely the principal user. However, it was found that because the operations of the railway company and the bridge owner were closely linked, proximity was therefore established between the railway company and the tug owner such that latter would owe the former a duty of care.[63]

This holding of *NTUC Foodfare* is noteworthy because the rejection of a separate test for relational economic loss essentially paves the way for a tenant or lessee of a property to sue a tortfeasor for economic losses.[64] In the maritime context, time and voyage charterers are to an extent 'tenants' of a ship who have acquired a right to use the ship.[65] Further, terminals, jetties and shore-based facilities

58 Ibid [58]–[59].
59 Ibid [60].
60 (1976) 136 CLR 529, (1976) 11 ALR 227.
61 Ibid 555–556, 576–577, 593.
62 [1992] 1 SCR 1021.
63 Ibid [274]–[287].
64 *NTUC Foodfare* (n 9) [33].
65 *Timber Shipping Co SA v London & Overseas Freighters Ltd (The London Explorer)* [1972] 1 AC 1, 14; *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638, 654.

are often leased and operated by third parties. This raises questions as to the extent of a shipowner's duty which will be discussed further in Parts 4 and 5 below.

3.3 Application to the maritime context in *Wilmar*

Wilmar Trading Pte Ltd v Heroic Warrior Inc (*Wilmar*) is the first case that applied the *Spandeck* test in the maritime context. In *Wilmar*, the plaintiff purchased a cargo of palm oil products under a free on board (FOB) contract. During the loading operations, a surge of air pressure caused damage to the vessel and the loaded cargo. The plaintiff argued that the defendant shipowner was negligent because there were structural weaknesses and over-pressurisation due to insufficient venting of the cargo tanks. Further, the plaintiff alleged that the defendant had failed to properly control the manifold valve to regulate air pressure into the tanks.[66]

Under an FOB contract, property usually only passes upon payment.[67] In this regard, the plaintiff was unable to provide any evidence to prove that payment had been made for the cargo. Indeed, the Court found that it was unlikely for a buyer to have been presented with the relevant documents for payment at the time of loading.[68] As a result, the plaintiff was not the owner of the cargo at the time it was damaged, and this placed the plaintiff in a similar situation as the appellants in *The Aliakmon*. Notwithstanding the plaintiff's lack of ownership, the Court affirmed the holdings of *Spandeck* and *NTUC Foodfare*.[69] With the removal of the exclusionary rule, the issue at hand was whether the defendant shipowner owed the plaintiff a duty of care. In this regard, the Court found that the relationship between the plaintiff as an FOB buyer and the defendant as the shipowner was sufficiently proximate. This was because under an FOB contract, the FOB buyer is responsible for nominating a ship to carry a cargo and a shipowner ought to have known that its negligence would cause loss to an FOB buyer who bore the risk of damage.[70] The Court also found that there were no countervailing policies against the finding of such a duty. Whilst it was acknowledged that indeterminate liability was a concern, the Court dismissed any such notions of indeterminacy because in the current context, the only parties at risk were FOB buyers such as the plaintiff, and these buyers were within an identifiable class of persons.[71] As such, there was a duty owed by the defendant to the plaintiff and the defendant was found to be liable.

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66 *Wilmar* (n 10) [3].
67 Ibid [27].
68 Ibid [29].
69 Ibid [35]–[37].
70 Ibid [39], [41].
71 Ibid [42]–[43].

The result of *Spandeck*, *NTUC Foodfare* and *Wilmar* places Singapore negligence law in a diametrically opposite position to English law. Cargo buyers who do not yet have title to the cargo are free to sue the carrier. How would this affect maritime cases in general? The paper will now address several problems of applying the *Spandeck* test in maritime cases.

4 Problems applying the *Spandeck* test in maritime cases

4.1 Indeterminate liability for shipowners and the problem of proximity

The first problem with the application of the *Spandeck* test to the maritime context is that it may lead to indeterminate liability for shipowners.[72]

If the *Spandeck* test is used in all cases of negligence, the key principle which determines an existence of a duty would be proximity. Whilst proximity can be employed as a means to limit indeterminacy,[73] such an argument is potentially a double-edged sword. As mentioned earlier in Part 2.2, proximity is by itself unsatisfactory, imprecise[74] and highly dependent on varying factual context.[75] An undue reliance on proximity may result in a court making sweeping generalisations to create a duty of care.

For illustration, the ingredients of proximity under the *Spandeck* test include physical, causal and circumstantial proximity.[76] Physical proximity is closeness, in the sense of space and time, between the plaintiff and the defendant. Causal proximity is closeness in the causal connection between the defendant's conduct and the loss suffered by the plaintiff. Circumstantial proximity is the closeness in the factual relationship between the plaintiff and the defendant.[77] These three proximities are non-binary in nature[78] and the exercise of finding proximity focuses on determining the degree of

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72 As mentioned above, *The Aliakmon* and other English cases have taken a cautious and conservative approach when expanding tort jurisprudence for the fear of opening the floodgates and generating indeterminate liability for tortfeasors. See *The Aliakmon* (n 1) 816.

73 As in *Wilmar* where a shipowner will only be liable to an identifiable class of persons. See *Wilmar* (n 10) [42]–[43].

74 Tan (n 35) 148.

75 See Kit Barker, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461. See also JF Keeler, 'The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care' (1989) 12 Adel L Rev 93, 101–102; Richard Kidner, 'Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence' (1987) 7 LS 319, 332; *Caparo* (n 36) 628.

76 *Spandeck* (n 7) [78].

77 For example, circumstantial proximity exists in an employer–employee and a professional–client relationship.

78 A binary factor supporting the existence of a duty is one that is either present or absent on the facts of the particular case. Examples include control, knowledge, and vulnerability. See Tan (n 35) 161.

closeness between two things. In this regard, there is no rule governing the degree of closeness of two entities in order for any of these three proximities to be present.[79] There are also no guidelines as to whether which or how much of these three proximities need to be present before an actual duty of care exists. The exercise of determining proximity is therefore extremely arbitrary and potentially unreliable.

In cases involving the carriage of goods by sea, the concern, as expressed in *The Aliakmon*, was with the extension of a duty of care to inland parties receiving cargo.[80] The common parties involved in the carriage of goods by sea are the shipper, the consignee, the notify party, the buyers, the sellers, the contractual carrier, and the physical carrier. If the *Spandeck* test is applied, it is not difficult to find a requisite level of physical, causal, or circumstantial proximity between such entities and shipowners. These proximities would be more evident in situations involving inland parties receiving cargo, such as cases where commodities are on-sold to a further chain of buyers in a string of contracts. In such situations,[81] where would the line be drawn to limit the extent of liability of carriers? The proximities would also apply to less significant entities such as the notify party. In this regard, although a notify party is not privy to the contract of carriage, it is listed on the obverse side of the bill of lading and may be the ultimate buyer of the cargo.[82] The notify party may need to arrange inland transport of the cargo for manufacturing or processing purposes, especially if a freight forwarder was involved in the carriage of the cargo.[83] There is also a customary duty on the carrier to 'notify' the notify party of the vessel's arrival.[84] By reason of the above, there is arguably a degree of closeness between a carrier and the buyer (or the notify party who may be the buyer) because the carrier would have knowledge of the notify party's existence and that the cargo on board the vessel may be delivered to an eventual buyer. From a proximity perspective, there is a level of causal and circumstantial proximity at the very least. It will therefore be open to a court applying the *Spandeck* test to find the existence of a duty of care. Assuming a duty of care exists, a carrier who effects late delivery of the cargo may be liable to a notify party for wasted costs and expenditure if the notify party, in anticipation of receiving the cargo

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79 Ibid 161–162.

80 See *The Aliakmon* (n 1) 816, where Lord Brandon said that 'if an exception to the general rule were to be made in the field of carriage by sea, it would no doubt have to be extended to the field of carriage by land'.

81 For example, the facts in *The Aliakmon* (n 1) and *The Irene's Success* (n 14).

82 Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd ed, Informa Law 2016) para 3.124.

83 See Nikos Passas and Kimberly Jones, 'The Regulation of Non-Vessel Operating Common Carriers (NVOCC) and Customs Brokers' (2007) 14 JFC 84, 90, where freight forwarders are listed as notify parties if they are involved in the carriage of goods by sea. See also NJJ Gaskell, 'Economic Loss in the Maritime Context' [1985] LMCLQ 81, 102: freight forwarders may incur losses in re-routing the cargo if there was damage or delay to the cargo.

84 See Nicholas Gaskell, *Bills of Lading: Law and Contracts* (2nd ed, Routledge 2015) paras 14.2–14.8, where it is suggested that there is a legal duty between the carrier and the notify party.

by a certain date, had arranged for vehicles, equipment and labour to transport the cargo inland for further processing.[85] The use of proximity in the *Spandeck* test can therefore open more avenues to liability for shipowners. The policy argument used in *Wilmar* to allay the fears of indeterminacy[86] (that the only parties at risk were within an identifiable class of persons) is to an extent self-serving because if proximity is established between a shipowner and a notify party or even an entity upland who will eventually receive the cargo, that entity will naturally become part of the identifiable class of persons.

Turning to allision cases, the *Spandeck* test and *NTUC Foodfare* has ushered in a new level of exposure for carriers where tenants and lessees of jetties, terminals and other fixed floating objects will be able to sue an errant shipowner directly for economic losses. Arguably, this should not come as a surprise because the courts in Australia[87] and Canada[88] have already moved in a similar direction. In fact, the class of persons to which shipowners owe a duty to does not stop at tenants or lessees but extends to licensees and users of the property.[89] In light of this development, a question that ensues is where does one draw the line on the scope of a carrier's exposure?

This is important because the incremental expansion of the duty of care in other Common Law jurisdictions to wider categories of persons will cement the new level of exposure faced by shipowners. For example, in collision cases, it is now arguable that charterers of a damaged ship may be entitled to sue the owner of an opposing ship for economic losses. Such a proposition is clearly against the ratio in *The Mineral Transporter*, where a time charterer of a ship was barred from claiming loss of profits during repairs following a collision caused by the opposing shipowner's negligence.[90] Supporting the ruling in *The Mineral Transporter* is also the counter-argument that the ruling in *NTUC Foodfare* does not extend a shipowner's duty to a charterer of an opposing ship, because unlike the claimant in *NTUC Foodfare* who was a tenant having exclusive possession of a property, a charter of a ship is not a lease and a charterer does not acquire possession of the ship.[91]

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85 This is common in the bulk cargo industry where the notify party may not be the consignee but is the ultimate buyer of cargo to which such cargo needs to be further transported from the discharge port to an inland plant for processing. See also Gaskell (n 83) 102 for the argument that freight forwarders may incur losses in re-routing the cargo if there was damage or delay to the cargo.

86 See *Wilmar* (n 10) [42]–[43].

87 See *Caltex Oil* (n 60).

88 See *Norsk* (n 62).

89 Ibid [20]: the claimant had a licence agreement with the owner of the damaged bridge and the claimant sued the shipowner for losses because such losses could not be recovered under the licence agreement.

90 See *The Mineral Transporter* (n 23).

91 *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, 163; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatorana (The Scaptrade)* [1983] 2 AC 694, 701–702.

However, in light of the developments in *Norsk* and *Caltex Oil* which allow licensees to recover economic loss, *The Mineral Transporter* may no longer be relevant.[92] In *Norsk* and *Caltex Oil*, the claimants were not tenants but users and licensees of the damaged property. This is akin to the concept of charterers being users of a ship as opposed to being tenants.[93] Applying the *Spandeck* test incrementally with such precedents is likely to result in the finding of a duty of care between an errant shipowner and the user of an opposing ship, ie a charterer. This would in turn have a ripple effect through the maritime industry because there would be an increased need for insurance to deal with the new risks faced by shipowners.[94]

4.2 Conflict with established frameworks of recovery and existing legal regimes

The removal of the exclusionary rule may create a whole host of problems causing friction with established frameworks of recovery for cargo claims.

First, the existence of a duty between cargo owners and carriers in the facts of *The Aliakmon* and *Wilmar* allows claimants to circumvent the rights bestowed on carriers by the Hague or Hague-Visby Rules. As mentioned in Part 2.2 above, the English courts had highlighted this danger[95] and even cautioned that it was impossible to synthesis the complex obligations of the Hague Rules into a tortious duty of care.[96] Even in recent times, the sanctity of the Hague Rules over tortious claims have been upheld by courts and supported by academics alike.[97] This approach is also supported by the general position that a plaintiff cannot sue a defendant in tort to avoid exceptions and limitations in a pre-existing contract between them.[98] Although article 4 bis of the Hague-Visby Rules extends the defences of the rules to tort claims, this merely means that a party to a contract of carriage cannot improve his position by disregarding the contract and suing in tort.[99] It neither prevents a party who

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92 See James W Sherphard, 'The Murky Waters Of Robins Dry Dock: A Comparative Analysis of Economic Loss in Maritime Law' [1986] 60 Tul L Rev 995, 1012–1013 where the author opined that in light of the developments in Australia, *The Mineral Transporter* may not have halted the trend to move away from the strict test as espoused in *The Aliakmon*. See also BS Markesinis, 'An Expanding Tort Law — The Price of a Rigid Contract Law' (1987) 103 LQR 354, 379–381 where the criticisms of the strict test in *The Aliakmon* were canvassed.

93 See *The London Explorer* (n 65) 14. See also *The Hill Harmony* (n 65) 654.

94 Gaskell (n 83) 112–113.

95 *The Irene's Success* (n 14) 486.

96 *The Aliakmon* (n 1) 818

97 See *Deep Sea Maritime Ltd v Monjasa A/S ('The Alhani')* [2018] EWHC 1495 (Comm), [2018] 2 Lloyd's Rep 563, [61]; *Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd ('The New York Star')* [1980] 2 Lloyd's Rep 317, 322; Sir Guenter Treitel and Professor Francis Reynolds, *Carver on Bills of Lading* (4th ed, Sweet & Maxwell 2017) para 9-183.

98 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 184–94; *Midland Bank Trust Co v Green (No 3)* [1979] Ch 384, 522.

99 Treitel (n 42) 304.

has no contractual relationship with the shipowners (ie the claimants in *The Aliakmon and Wilmar*) from suing in tort, nor does it extend the rights and defences of the Hague-Visby Rules to a tort case where there was no contract of carriage in the first place. The use of the *Spandeck* test may therefore generate a manifestly unfair outcome for shipowners who would usually be entitled to rely on the Hague Rules as an established framework to defend against cargo claims.

Second, the *Spandeck* test may create a rift between the principle of bailment and concepts such as contract and negligence. Historically, bailment gave rise to the imposition of a duty of care long before the development of the 'neighbour' principle[100] and the Hague Rules. There is therefore a level of sanctity to the principle of bailment and a degree of commonality between bailment and negligence. The finding of duty in bailment is likely to have a parallel finding of a tortious duty.[101] Further, there is also much overlap between the principles of bailment and that of contracts of carriage.[102] In *The Aliakmon*, the buyers did not have a remedy in bailment because the contract (and consequently the terms of the bailment) was between the sellers and the shipowner. Without an attornment, no bailment could arise between the buyer and the shipowner.[103] If the *Spandeck* test is applied, a party may be liable to a cargo claimant in negligence notwithstanding the absence of a bailment relationship or a contract between them. Proximity may therefore lead to a redundancy of familiar principles in cargo claims such as possession and privity of contract. A greater divide between the mechanics of bailment, contract and negligence may ensue if the *Spandeck* test finds a duty between a shipowner and a buyer without ownership of the cargo.

5 Rationalising the *Spandeck* test

Notwithstanding the problems highlighted above, this paper contends that the use of the *Spandeck* test can be justified and that the development of negligence law in the *Spandeck* test is appropriate, even for the modern maritime context.

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100 Simon Baughen, 'Bailment's Continuing Role in Cargo Claims' [1999] LMCLQ 393, 394.

101 See *Henderson* (n 98) 205, where it was suggested that the nature of the duty imposed on bailees is similar to that of the duty of care in tort. See also Gerald McMeel, 'The Redundancy of Bailment' [2003] LMCLQ 169, 180 where it was said that the duty to take care of a bailee was merely one species of the general duty to take care under tort and that the suggestion in *Henderson* would amount to a tortious recharacterisation of bailment. See Norman Palmer, *Palmer on Bailment* (3rd ed, Sweet & Maxwell Thomson Reuters 2009) para 1-047.

102 *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270 [63].

103 *The Aliakmon* (n 1) 818.

5.1 Rationalising the risk of indeterminate liability and justifying the use of proximity

It is argued that undue weight was given to the notion of indeterminate liability in *The Aliakmon*. *The Aliakmon* does not provide any substantial rationale behind the House of Lords' closing of the floodgates. There was merely a superficial discussion of the fear that shipowners would have increased exposure to an indeterminate class of claimants for the recovery of economic losses.[104] However, to truly answer the question of whether indeterminate liability exists, one needs to: (i) understand the components of indeterminate liability; and (ii) apply it to the relevant context, which in this discussion, is the maritime industry.

On the first point, the issue of indeterminate liability has two components, namely, liability to an indeterminate class and liability for an indeterminate amount.[105] There is less concern for the latter component because the problem of liability for an indeterminate amount can be addressed using the doctrine of remoteness, where it can be argued that indeterminate losses suffered are not reasonably foreseeable.[106] Further, in the maritime context, liability for an indeterminate amount can be controlled by limitation regimes established in international Conventions[107] and package limitation.[108] There is therefore sufficient safeguard against liability for an indeterminate quantum. The critical concern is on the former component of liability to an indeterminate class. In this regard, the problem should only arise if the law entitles an unascertainable class of victims to recover for their losses. In other words, there is no problem of indeterminate liability if the law restricts recovery to a reasonably determinate class of victims.[109] Bringing this discussion back to the maritime context, the question that ensues is whether the relevant test for negligence can identify a reasonably determinate class of victims in a particular factual matrix involving economic losses. It is submitted that the proximity requirement under the *Spandeck* test is able to achieve this.

Notwithstanding the drawbacks of the proximity test as being inherently vague and unreliable, most Common Law jurisdictions have utilised it in one form or another to justify the existence of a duty of care to a claimant recovering economic losses.

In Australia, the court in *Caltex Oil* adopted the known plaintiff test and found that the defendants knew that the plaintiff specifically (in this case, a specific user of the damaged pipeline), as opposed

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104 Ibid 818–819.
105 Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 LQR 249, 254–255.
106 *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 [75].
107 See eg arts 2 and 6 of the Convention of Limitation of Liability for Maritime Claims 1976.
108 See eg art 4(5) of the Hague-Visby Rules.
109 *NTUC Foodfare* (n 9) [43].

to a general class of persons, would be likely to suffer economic loss due to negligence on their part. It can be argued that the known plaintiff test in *Caltex Oil* is to an extent a proximity-based analysis.[110] In particular, Stephen J in *Caltex Oil* opined that the proper control mechanism to prevent liability to an indeterminate class should be one based upon notions of proximity between a negligent act and the resultant detriment.[111] He further gave a nod to the incremental approach later adopted in the *Spandeck* test by acknowledging that the creation of a precedent bank of cases tracking the sufficiency of proximity in various factual circumstances will help provide certainty in future decisions.[112] If one applies the proximity approach in *Caltex Oil*, it is arguable that sufficient legal proximity would be established between the parties and that a similar result would have been obtained — that the defendant's liability would have been limited to a determinate class, namely, the users of the pipeline.[113] First, there was causal proximity between the defendant's negligence and the plaintiff's loss which was largely the cost of arranging alternative means of oil transport. This loss was a direct consequence of damage to the pipeline as opposed to indirect loss of profits arising out of the plaintiff's collateral commercial arrangements which were affected by the disruption.[114] Second, because the defendant knew that the pipeline led to the plaintiff's oil terminal, the defendant had knowledge that a determinate class of persons would suffer a specific type of loss (the cost of arranging for alternative means of transportation of the oil) should there be disruptions to the pipeline.[115] In light of the above, the nexus between the defendant's negligence and the specific loss suffered, coupled with the defendant's knowledge, not only created an adequate level of proximity but also limited the liability for economic loss to a determinate class of persons. The proximity approach therefore works in this context.

Moving to Canada, the Supreme Court in *Norsk* utilised a 'joint venture' principle and found that a claim for relational economic loss may succeed if the plaintiff and the owner of the damaged property were in a form of a 'joint venture' with one another such that their operations were 'closely allied'.[116] In *Norsk*, the operations of a railway company was found to be 'closely allied' with the owner of a bridge because the former was the main user of the bridge. When the bridge was damaged by a third party, the railway company was entitled to bring a suit in negligence against the tortfeasor because it

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110 The proximity approach continues to exist in the Australian courts when determining whether a duty of care exists. See Andrew Robertson, 'Proximity: Divergence and Unity' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing 2016) 21–32.

111 *Caltex Oil* (n 60) 574.

112 Ibid 575.

113 *NTUC Foodfare* (n 9) [67].

114 *Caltex Oil* (n 60) 577.

115 *NTUC Foodfare* (n 9) [66].

116 *Norsk* (n 62) [274]–[287]; *Clerk & Lindsell on Torts* (n 4) para 8-141.

shared a close relationship with the owner of the damaged property. Similar to the known plaintiff test, the joint venture principle seeks to resolve the concern of liability to an indeterminate class by allowing a restricted class of persons who share a sufficiently close relationship to the owner of the damaged property to sue a tortfeasor. A more significant similarity is that, like the known plaintiff test, the joint venture principle is, in essence, also a proximity-based analysis. In other words, the same result would have been reached if a proximity approach were used in *Norsk*. First, there is physical proximity because the master of the errant tug had operated exclusively within the river spanned by the bridge, hence creating a limited theatre of operations comprising the activities of the bridge's users and the vessels that travel under the bridge.[117] Second, there is causal proximity because the loss suffered by the railway company (the cost of rerouting trains that would otherwise have travelled across the bridge) flowed directly from the damage done to the bridge. Third, the tug owners must have known that if the bridge were damaged, railway companies who used the bridge (who belong to a determinate class of persons) would suffer a specific type of loss (in this case the cost of arranging for alternative means to route their railway cars).[118] By reason of the above, a nexus can be formed between the railway company and the tug using the proximity approach. Such a conclusion is supported by McLachlin J who made a similar point in *Norsk*, where she opined that proximity may be understood as a controlling concept covering a number of disparate circumstances[119] which ultimately avoids the spectre of unlimited liability.[120] The proximity approach therefore not only works in the Canadian context but also serves to resolve the problem of liability to an indeterminate class of persons.

Turning to the United States, the courts have adopted a strict approach akin to *The Aliakmon* against the recovery of economic loss. In *Robins Dry Dock Co v Flint* (*Robins Dry Dock*),[121] the Supreme Court established the general rule that economic loss, in the absence of physical damage, is not recoverable. The reason for such a holding is also similar to that of *The Aliakmon*, which is a fear that allowing such recovery would open the floodgates of indeterminate liability.[122] This has, however, been met with dissent,[123] and the exclusionary rule has not been upheld strictly in the United States with future cases

117 *NTUC Foodfare* (n 9) [71].
118 Ibid.
119 *Norsk* (n 62) [258].
120 Ibid [258]–[263].
121 275 US 303, 308–309 (1927), 1928 AMC 61, 64.
122 *Ultramares Corp v Touche, Niven & Co* 255 NY 170, 174 (1931); See also *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 183.
123 See Andrews J's dissenting judgment in *Palsgraf v Long Island RR Co* 248 NY 339, 162 NE 99, 103 (1928). See also William Tetley, 'Damages and Economic Loss in Marine Collision: Controlling the Floodgates' (1991) 22 JML&C 539, 569.

adopting a more flexible approach mirroring that of proximity. For example, in *Union Oil Co v Oppen*,[124] commercial fishers succeeded in recovering loss of future profits arising from an oil spill because the Court found that oil drilling companies could reasonably foresee that their negligent oil drilling operations will cause damage to a known class of persons, which included commercial fishers. This analysis has been endorsed by other decisions,[125] and is similar to the known plaintiff test in *Caltex Oil* which can also be rationalised with the proximity approach as explained above.[126]

Even within the United Kingdom, an exception has developed from the strict exclusionary rule. In *Shell UK Ltd v Total UK Ltd (Shell)*,[127] the exclusionary rule has given way to allow a beneficial owner of a property to sue for economic losses. In coming to this decision, the Court relied on the doctrine of proximity and concluded that a beneficial owner has sufficiently close proximity and dependence on a property to warrant a right to sue.[128] Further, the Court also referred to a trustee–beneficiary relationship and held that the ability of the beneficiary, and even the trustee,[129] to recover economic losses was analogous to a beneficial owner's right to sue. In the author's view, there is a parallel between the 'joint venture' principle and the beneficial owner's right to sue because both have a strong dependence on the affected property which gives rise to a right to sue. The extent of a beneficial owner's dependence on a property and its relationship with the tortfeasor are ultimately questions of proximity which the *Spandeck* test is equipped to answer. In light of the development in *Shell*, it is argued that the exclusionary rule is not entirely immutable and is open to expansion.[130]

In view of the position adopted by cases in several Commonwealth jurisdictions and the United States, there is a clear move away from the general exclusionary rule in *The Aliakmon*. The majority of these approaches can also be explained using the proximity test which essentially derives a similar outcome and resolves the problem of liability to an indeterminate class. In relation to negligence cases arising

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124 501 F 2d 558, 570 (1974).

125 *Burgess v MV Tamano* 370 F Supp 247 (1973); *Pruitt v Allied Chemical Corp* 523 F Supp 975 (1981); Andrew W McThenia and Joseph E Ulrich, 'A Return to Principles of Corrective Justice in Deciding Economic Loss Cases' (1983) 69 Va L Rev 1517. See also *Amoco Transport Co v SS Mason Lykes* 768 F 2d 659 (1985); *Bosnor v LA Barrios* 796 F 2d 776 (1986); *Consolidated Aluminium Corp v CF Bean Corp* 772 F 2d 1217 (1985); *People Express Airlines Inc v Consolidated Rail Corp* 495 A 2d 107 (1985); *J'Aire Corporation v Gregory* 598 P 2d 60 (1979). See also Hebert Bernstein, 'Civil Liability or Pure Economic Loss Under American Tort Law' (1998) 46 Am J Comp L Supp 111, 122–125.

126 *NTUC Foodfare* (n 9) [66].

127 [2010] EWCA Civ 80.

128 Ibid [135]–[136].

129 Ibid [141]–[142]. See also *Chappell v Somers & Blake* [2004] Ch 19; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1989] 1 Lloyd's Rep 568.

130 See PG Turner, 'Consequential Economic Loss and the Trust Beneficiary' [2010] 69 CLJ 445, 446, where the author criticises the expansion of law in *Shell*, arguing that it produces a strange hybrid of tort and trust law. Instead of creating limited exceptions around the exclusionary rule, it is submitted that an overhaul of the exclusionary rule would result in doctrinal coherence for tort law.

out of the maritime industry, it is argued that in cases of cargo claims, there is little risk of indeterminate liability if one uses the proximity approach in the *Spandeck* test. It is not unreasonable for a shipowner to know that its negligent acts would cause loss to entities along the cargo contractual chain which includes buyers who have not yet received title or possession to the cargo. This is because the predominant activity within the maritime industry is the carriage of goods by sea and it would be absurd for a shipowner to allege that he is unaware that the primary reason behind the carriage of goods by sea is to support the sale of goods in the international market. In the modern context of international sale of goods, it is very common to have multiple parties along the contractual chain. In light of the connection between the sale of goods and the carriage of such goods by sea, it is unsurprising that there will be a sufficient degree of proximity between shipowners and entities along the contractual chain, including those who have not received ownership of the cargo. These entities along the contractual chain will form part of an ascertainable class of persons to which the shipowner potentially holds a duty of care to. The strength of such proximity will obviously decline as one goes further up the contractual chain and the courts can depend on a permutation of physical, causal or circumstantial proximity to determine where the duty stops. For instance, in the event a notify party or buyer suffers losses as described in Part 4.1 above,[131] there will be a level of causal proximity present because the shipowner will know that its negligence is likely to cause a known party to suffer a foreseeable loss especially since the shipowner bears customary obligations to the notify party and the shipowner is aware of the notify party's existence in the bill of lading. Such causal proximity would, however, be absent in an entity further up the contractual chain because of the lack of knowledge and physical proximity on the part of the shipowner. The incremental approach and a reference to past cases will also assist in giving context as to when there should be a limit to such a duty. It is therefore argued that there is a sufficient check on the problem of liability to an indeterminate class if one uses the *Spandeck* test in the maritime context and that the fear of indeterminate liability as espoused by the House of Lords in *The Aliakmon* can be allayed.

In a similar vein, there can be an argument for the extension of a duty of care from a shipowner to the charterer of an opposing ship in a collision. To determine whether a charterer falls under a determinate class of persons, it would be important to examine the degree of proximity between the parties and to ascertain whether the shipowner had knowledge of such a class of persons. In this regard, it is argued that in this day and age, it is reasonable for shipowners to have knowledge that most ships are under some form of charter. It would be inconceivable for a shipowner to allege that

[131] For example, additional expenses to transport the cargo inland for further processing.

blue-water ships are trading without the orders of charterers.[132] Charterers are not an unascertainable class of parties[133] because they make up a huge proportion of maritime trade and are ubiquitous in ship voyages. Most ships on long term time charters will usually bear markings of the time charterer on the hull of the ship. For example, the name of the charterer could be written in a variety of formats, including letters, insignias or nautical flag symbols on the ship's hull.[134] Shipowners would therefore have knowledge that other ships encountered in a voyage are likely to be chartered. If a shipowner's negligent navigation causes damage to another ship, it is reasonably foreseeable that the charterer of that other ship[135] would suffer economic loss as a result of the opposing shipowner's negligent act. It follows that there will be a degree of proximity between charterers and other ships encountered in a voyage, and that these charterers would form part of an ascertained class of individuals. Pausing here, it is interesting to note that, in rejecting the position in *Caltex Oil* and insisting on the exclusionary rule, *The Mineral Transporter* explained that the argument that charterers are part of an ascertained class is based on an assumption that the number of individuals in the ascertained class is small. The House of Lords feared that if the class of individuals, though ascertained, contained a very large number of individuals (for instance multiple charterers in a charter chain), the determination of a class of individuals would not, by itself, be a satisfactory control mechanism to avoid indeterminate liability.[136]

This argument, however, does not take into account the practical realities of the maritime context. As mentioned above, it is inconceivable to ignore the fact that most ships in the current global market are chartered and that a negligent interference to a chartered ship would likely cause direct economic loss to the charterers. Whilst it is agreed that there may be a large number of individuals in the ascertained class, for instance that there may be a number of charterers within the charter chain, it is argued that not all charterers in a charter chain would have a right of suit against an opposing shipowner. Similar to the context of cargo claims, proximity will decline as one goes further down the charter chain and a varied application of the three proximities will assist to determine where the duty stops.[137] For instance, a head time charterer is likely to have a closer degree of circumstantial proximity with a shipowner as compared with an end voyage charterer. Further, there is also greater causal proximity between the losses suffered by a head time charterer and a shipowner's negligent

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132 See the first instance decision of *The Mineral Transporter* [1983] 2 NSWLR 564, 570E, 573D, where Yeldham J drew an inference that the opposing shipowner ought reasonably to have foreseen that a specific plaintiff, a charterer, would suffer losses in a collision. See also Gaskell (n 83) 89.

133 See the charterers' counsel's arguments in *The Mineral Transporter* (n 23) 11D–E.

134 *The Mineral Transporter* (n 132) 570E, 573D; Gaskell (n 83) 89.

135 Similar to the licensee or user in *Norsk* (n 62).

136 See *The Mineral Transporter* (n 23) 24B–H, where seemingly irrelevant analogies on the size of a class were raised.

137 For example, a head time charterer is likely to have greater proximity to the opposing shipowner as compared to the end voyage charterer.

act as opposed to the losses suffered by a sub-charterer. At this stage, it is not possible to precisely state whether a shipowner owes a duty of care to particular type of charterer. The precise delineation of a shipowner's duty vis-à-vis all types of charterers would eventually have to be resolved by a court applying the incremental approach. However, in determining the existence of a duty, it is suggested that less emphasis should be given to the particular type of charterer. Instead, the emphasis of the inquiry should be focused on the three proximities as well as the knowledge of the shipowner.

5.2 Is *The Aliakmon* truly an unusual case?

It has been suggested that the cases[138] where buyers were unable to sue for their losses because they had no ownership of the cargo are unusual facts which do not occur under normal circumstances. For example, in *The Wear Breeze*, the buyers foolishly accepted delivery orders when they were entitled to a bill of lading. In *The Aliakmon*, the buyers agreed that the ownership of the cargo was to remain with the sellers so as to avoid problems arising out of their bankers' endorsement of the bills of lading.[139] The unusual voluntary assumption of risk by the buyers in the respective cases has been a ground to deny a duty of care. It is argued that such a contention is incorrect for the following reasons.

First, the situation where a buyer suffers a loss but have yet to obtain ownership of the cargo is not unusual in nature. With regard to the facts of *The Aliakmon*, it is not uncommon for buyers to be traders whose objective is to resell the cargo rather than to use it. As a result, it is not abnormal to have arrangements with sellers to vary the transfer of title and ownership to assist in trade finance with banks. Further, the fact that there have already been a handful of reported cases in both the United Kingdom[140] and Singapore[141] suggests that these practices may be common in the industry. The vicissitudes of commercial trade may delay the transfer of ownership to buyers, and it would be unjust for the courts to refuse the recognition of a duty of care under such circumstances.[142]

Second, even if the facts are unusual in nature, such facts should not prevent the finding of a duty of care. This is because tort is a civil wrong[143] to which its remedies focus on corrective justice[144] for the

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138 See *The Aliakmon* (n 1) 797. See also *The Irene's Success* (n 14), *The Nea Tyhi* (n 13) and *The Wear Breeze* (n 12).

139 See *The Aliakmon* (n 1) 785.

140 See *The Irene's Success* (n 14), *The Nea Tyhi* (n 13) and *The Wear Breeze* (n 12).

141 See *Wilmar* (n 10).

142 Jeffrey Pinsler, 'Whether a Buyer of Goods Carried by Sea to Whom the Risk in the Goods has Passed Ought to Have a Claim against the Carrier in Tort?' [1986] 28 Mal LR 323, 325.

143 See Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (14th ed, OUP 1995) 3–4.

144 See Jules L Coleman, 'The Practice of Corrective Justice' in David G Owen (ed), *Philosophical Foundations of Tort Law* (14th ed, OUP 1995) 56.

benefit of individuals who have suffered harm.[145] To ensure that a recourse to justice is always open to individuals, one must be careful to not close off such recourse by relying on overriding policy objections.[146] The realities of commercial trade which may delay or prevent the transfer of ownership of the cargo to buyers should not disentitle them to a negligence claim. Even if the transfer of ownership is delayed due to commercial reasons, this does not change the fact that a buyer has a legitimate interest in the cargo because in a sale of goods contract, the buyer is fundamentally contracting for legal ownership of the cargo.[147] Further, in FOB, CIF and CFR contracts, risk passes to the buyers when the cargo is loaded on board the ship.[148] Although risk is different and distinct from ownership or title, it is still a sufficient basis for recognition[149] under maritime law.[150] As such, there is still a degree of proximity between the buyers who have the risk befallen upon them, as well as the shipowners who will be carrying the cargo on board their ship. With the existence of a nexus between a shipowner and a buyer, it would be unjust to not account for the interest of the buyer and the resulting vulnerability which ensues should the buyer resells his cargo in the market.[151]

5.3 Circumvention of the Hague Rules or a case of no contractual relationship?

As mentioned in Part 2 of this paper, one of the reasons why the House of Lords in *The Aliakmon* refused to recognise a duty of care was because a claim in negligence would circumvent the rights offered to a shipowner under the Hague Rules and it was difficult to synthesise such rights and defences under the Hague Rules into a tortious duty.[152] The House of Lords' view was that it would be manifestly unfair for a shipowner to be deprived of its available rights under the Hague Rules should a claim in negligence be pursued.

It is argued that the reliance on the Hague Rules as a policy objection against the finding of a tortious duty is misplaced. In order for the Hague Rules to apply, there must be an existence of a contract of carriage in the first place. If there is no antecedent contract, the Hague Rules cannot apply because

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145 See Ernest Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 1 where the author refers to private law as an expression of the 'bipolar relationship of liability' that is not primarily concerned with the furtherance of the interest of the community as a whole.

146 See John C P Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Tex L Rev 917, where the authors advocate for civil recourse and remedy to be readily available so long as a right exists.

147 Pinsler (n 142) 326.

148 See eg International Chamber of Commerce, *Incoterms 2020*, (ICC Services Publication 2019) 103–107, 113–117, 123–127.

149 Pinsler (n 142) 326.

150 Section 5(2) of the Marine Insurance Act 1906 (UK) provides that risk is a sufficient basis for an insurable interest.

151 Pinsler (n 142) 326.

152 *The Aliakmon* (n 1) 818.

there is no contract to which the Hague Rules can be incorporated into.[153] In this regard, it is pertinent to note that in *The Aliakmon*, the House of Lords found that there was no contract of carriage between the buyers and the shipowner because the buyers were acting solely as agents of the sellers and the cargo was strictly at the disposal of the sellers.[154] The fact that there was no contract between the parties was also clear from the suggestion that the buyers ought to have enlisted the sellers' assistance by arranging for an assignment of the shipper's rights to sue.[155] If there was no contract of carriage between the shipowner and the buyers, then it follows that the Hague Rules would not be applicable. Since the Hague Rules were not applicable in the first place, the effects of the Hague Rules should not be taken into consideration when deciding whether a tortious duty exists.

This issue was considered in *Wilmar*, and the Court found that rights under the Hague Rules were irrelevant because there was no contract of carriage between the plaintiff and the shipowner. In *Wilmar*, the court found that the shipowner was not the contractual carrier under the issued bill of lading and that there was no contract of carriage between the shipowner and the buyer.[156] There was no prejudice to the shipowner because it would not have been able to rely on the Hague Rules in any event.

Generally, it would appear that in cases where the transfer of ownership to the claimant is delayed, there is invariably no contract of carriage between the shipowner and the claimant, thereby excluding the applicability of the Hague Rules. However, the lack of a contractual relationship does not mean that there is no other legal relationship between the parties. There can still be proximity between a buyer and a shipowner because the former has a legitimate interest in the cargo which is in the possession of the shipowner. It would be manifestly unfair to deny recognition of such a duty merely to pay heed to the Hague Rules which would not even be applicable to the parties at that material time of the damage. This is especially so since one of the purposes of tort law is to allow corrective justice against a civil wrong.[157] If unnecessary deference is given to the Hague Rules, a civil wrong would not have been righted and justice would essentially be ignoring a specific category of victims, in particular traders who buy and on-sell cargo.

However, assuming a contractual recourse exists, would a proximity-based approach lead to a situation where claimants abandon the Hague-Visby Rules and its universally accepted contractual framework in favour of a seemingly flexible tortious action? It is argued that a contractual cause of

153 *Wilmar* (n 10) [15].
154 *The Aliakmon* (n 1) 809.
155 Ibid 819.
156 *Wilmar* (n 10) [24].
157 See Birks (n 143); Coleman (n 144); Weinrib (n 145); Goldberg and Zipursky (n 146).

action remains relevant for claimants and there would be minimal derogation to the significance of the Hague-Visby Rules and its corresponding contractual framework. First, the standard of care in a tort claim utilising the *Spandeck* test would remain analogous to that under the Hague-Visby Rules.[158] For cargo claims in most jurisdictions, there has been no difficulty for a tortious standard of care to be based upon the standards of the Hague-Visby Rules.[159] The Hague-Visby Rules therefore remain materially relevant and applicable even if a tortious cause of action is pursued. Second, the effect of the Hague-Visby Rules would also resonate in a tort claim because article 4 bis of the Hague-Visby Rules provides that the defence and limits of liability in the Rules shall also apply if the cause of action is founded in tort. The English courts[160] have constantly opined that if two parallel causes of action exist in contract and tort, the tortious duty should be qualified with the rights and exceptions available in contract.[161] Hence, the significance of the Hague-Visby Rules would not be overshadowed by the *Spandeck* test. Third, a contractual cause of action provides greater certainty on the choice of law and jurisdiction as these aspects are usually agreed upon by the parties and incorporated into the contract of carriage before the claim arises. In a tortious dispute, the choice of law and forum may depend on a variety of factors such as the place of the incident and the domicile of the involved parties. A contractual approach therefore avoids any potential conflict of law problems by giving certainty to the choice of law and forum.[162] Finally, the measure of damages in contract and tort differs from one another,[163] with the rules under contract law being fairly well developed as opposed to tort law.[164] In light of the above, the Hague-Visby Rules and the contractual cause of action continue to remain attractive and relevant to claimants.

5.4 Circumvention of bailment

Another issue to address is the fate of bailment and how it ties in with any novel developments of negligence law. In *The Aliakmon*, the House of Lords was not persuaded by the buyers' argument that the concept of bailment could have qualified the duty of care with the terms of the contract of carriage. The bailors remained the sellers and so long as no attornment took place, the buyers were not the bailors and no bailment relationship existed between the buyers and the shipowner. However, given

158 FMB Reynolds, 'The Significance of Tort in Claims in Respect of Carriage by Sea' [1986] LMCLQ 97, 98.
159 Markesinis (n 92) 392.
160 See *The Aliakmon* [1985] 2 WLR 289, 328 (CA); *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, 546.
161 Several Civil Law jurisdictions such as Germany and Netherlands have also allowed tortfeasors to rely on defences that they would otherwise have enjoyed if a parallel action could be mounted in contract. See Markesinis (n 92) 390, 392.
162 Ibid 391; Reynolds (n 158), 99–100.
163 *Karim v Wemyss* [2016] EWCA Civ 27.
164 Reynolds (n 158) 98; Markesinis (n 92) 391.

the commonality[165] shared by bailment and negligence, and assuming tort law allows the finding of a duty of care between a shipowner and the buyers, would a cause of action in bailment arise?

It is argued that despite any commonality shared between the two causes of action, ultimately, both bailment and negligence are different concepts, and their respective existence is mutually exclusive. Different tests and requirements apply for both causes of action and they should not be conflated unnecessarily.

Bailment is an independent legal relationship distinct from both contract and tort.[166] In bailment, the key feature which creates a nexus between the bailor and the bailee is whether the bailee has acquired possession of the bailor's goods.[167] This binary requirement is completely different from the test for negligence under English law where the relevant consideration is proprietary interest. In the *Spandeck* test, there is an even greater degree of separation because the relevant consideration is a non-binary element of proximity which analyses the degree of closeness between parties. The *Spandeck* test is not concerned with a binary enquiry as to whether the parties have any possessory or proprietary interest in the damaged property. Further, the principles of bailment and negligence are also distant by reason of their different burden of proof.[168] In light of the above differences, there is no reason justifying a uniform result when applying the test for bailment and negligence.[169]

Turning back to the case of *The Aliakmon*, even if a duty of care were found between the buyers and the shipowner, this would not disturb the findings regarding the issue of bailment because no bailor-bailee relationship would have arisen between the buyer and the shipowner. As the House of Lords rightly found in *The Aliakmon*, the only bailor-bailee relationship which arose was between the sellers and the shipowner. Since the buyers agreed with the sellers for ownership to remain with the sellers and to take delivery of the cargo solely as agents for the sellers, the buyers did not have a superior right of possession against the sellers. The rightful bailor would therefore be the sellers and nothing new would have emerged in relation to the issue of bailment.

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165 See *Henderson* (n 98) 205, where it was suggested that the nature of the duty imposed on bailees is similar to that of the duty of care in tort. See also Gerald McMeel (n 101) 180, where it was said that the duty to take care of a bailee was merely one species of the general duty to take care under tort and that the suggestion in *Henderson* would amount to a tortious recharacterisation of bailment.

166 *Building & Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, 261; *The Pioneer Container* [1994] 2 AC 324, 341–342; *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86, 90; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 [48h]–[48i]; Palmer (n 101) para 1-047.

167 Palmer (n 101) para 1-012; *The Pioneer Container* (n 166).

168 *The Starsin* (n 5) [136]–[138],

169 In fact, it has been suggested that the concept of bailment is too elusive to be of any normative significance: see McMeel (n 101).

Moving on to *Wilmar*, although the Court did not have the opportunity to address the issue of bailment because the plaintiff's cause of action in bailment was withdrawn before the trial, the Court did highlight that should bailment be considered, the relevant issue at hand would be possessory interest as opposed to proprietary interest. [170] The Court also highlighted that if a bailment relationship existed, it might have been a lot easier for the buyer to successfully sue the shipowner because the legal burden would be reversed.[171] Although *Wilmar* can be distinguished from *The Aliakmon* in that the buyers did not agree to an arrangement where title and possession remained with the sellers, it is still arguable whether the buyers had sufficient possessory interest. This is because there was no evidence provided by the buyers to prove that payment was made,[172] and since the buyers bought the cargo under FOB terms to which property passed upon payment, it was questionable whether they had any possessory interest at that point in time because the possessory interest would still vest with the sellers.

Regardless, the outcome of a cause of action in bailment would not affect the cause of action in negligence. As mentioned above, the latter involves the analysis of the degree of closeness between the parties to establish a duty whereas the former is dependent on the element of possession. They are two different and distinct concepts which should not be conflated.

Assuming causes of action in bailment and tort are equally available, would a proximity-based approach create an undue reliance on a tortious cause of action and reduce the significance of bailment as a potential action for cargo claimants? It is argued that this would not be the case and that bailment would still be an attractive option for claimants notwithstanding the seemingly flexible approach provided by the *Spandeck* test. First, the burden of proof is reversed once the claimant proves that the cargo was bailed and damaged. This is extremely advantageous to the claimant especially if it does not have evidence to prove a breach on the part of the bailee. Bailment as a cause of action would therefore remain attractive because claimants would be able to enjoy a tactical advantage in legal proceedings. Second, possession, which is the key element in bailment, is binary in nature. This is opposed to proximity which is non-binary. It is easier for a claimant to prove possession and, consequently, the existence of a bailment, in order to reverse the burden upon the defendant. This is because the inquiry as to whether a defendant has possession or not is a straightforward and binary question. On the other hand, the inquiry as to whether there is proximity between a claimant and a defendant is more complex and arbitrary. A court would have to review the evidence

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170 *Wilmar* [25].

171 Ibid [53].

172 See ibid [29], where the Court found that it was unlikely for a buyer to have been presented with the relevant documents for payment at the time of loading.

surrounding the three proximities before coming to a decision on the existence of a duty. Ultimately, the inquiry focuses on the degree of closeness between parties and such an inquiry is unlikely to be as incisive as an inquiry on the existence of possession. Bailment therefore provides an easier route for claimants in a cargo claim and it is therefore unlikely that bailment as a concept or cause of action will ever take a back seat in cargo claims should the *Spandeck* test be utilised.

6 Conclusion

The maritime industry and its related commercial networks are constantly evolving. Trade is invariably becoming more complex because contractual chains no longer involve a duality of parties. The traditional buyer–seller or owner–charterer framework has expanded to include a multitude of entities. Buyers are likely to on-sell cargo and charterers are expected to re-let a chartered ship to sub-charterers. The law of negligence, which is responsible for regulating civil wrongdoings, should also evolve to ensure that there is adequate recourse for all parties within the modern maritime ecosystem. Whilst it is undeniable that the application of the *Spandeck* test may lead to wider exposure for shipowners, it is argued that this should nonetheless be the way forward because proximity is the approach used by most Common Law jurisdictions and it is largely able to control the problem of indeterminate liability. Further, it is unlikely that any existing legal regimes would be prejudiced by the finding of tortious duties using the *Spandeck* test. Finally, the *Spandeck* test's incremental approach will also act as a useful mechanism to ensure that the development of the law is controlled and that it does not deviate too drastically from the established norm. In light of the foregoing, it is therefore concluded that the *Spandeck* test is suitable for handling negligence disputes in today's maritime context.