
Damages for Wrongful Arrest: section 34, Admiralty Act 1988

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The arrest of ships is a recognised feature of international maritime commerce and international maritime jurisdiction. Very often legitimate claims will go unsatisfied unless there is recourse to an effective and efficient system of maritime arrest. Ships, their owners and insurers are expected, in the ordinary course of their business, to be ready to deal with in rem claims arising in connection with the use or deployment of the ship or the business of the owner or charterer.

Nevertheless, the party that avails itself of procedures providing for in rem claims and the arrest of ships under the Admiralty Act must be ready to justify its conduct and to prove that it was entitled to take advantage of the remedy of arrest¹

Introduction

The *Admiralty Act 1988* (Cth) (the Act) provides certain maritime claimants entitlements to arrest ships and other *res* in order to obtain security for their claims. Jackson² notes that it cannot be argued at the time of the arrest that it is improper because there is a good defence to the claim. Shipowners may suffer significant financial losses through the arrest of their ships, even where a brief delay is caused to the ship's sailing schedule; significant commercial pressures may be cast upon shipowners to settle any claim.³ Hill⁴ notes that a cause of action for wrongful arrest lies within the English traditional maritime procedure, but that it is very rarely pursued due to the perceived harshness of the test that shipowners must surmount: *mala fides* or *crassa negligentia*.⁵ Consequently, Admiralty scholars have devoted little time to the critical analysis of the test for wrongful arrest.⁶

In 1982 the Australian Government referred all aspects of the Admiralty jurisdiction in Australia to the Australian Law Reform Commission (ALRC) for inquiry, review and report, the product of which was the ALRC 1986 report entitled "Civil Admiralty Jurisdiction" ("the ALRC Report").⁷ The ALRC considered the traditional test in Admiralty for obtaining damages for wrongful arrest and proposed that a provision

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¹ *Tisand Pty Ltd v The Owners of the Ship MV "Cape Moreton" (Ex "Freya")* [2004] FCA 1191 (Federal Court of Australia, Allsop J, 10 September 2004), at [32]-[33].

² DC Jackson, *Enforcement of Maritime Claims*, (2000) London: LLP Professional Publishing, p. 398.

³ See, for example, *Compania Financiera Soleada SA v. Hamoor Tanker Corporation Inc* [1981] 1 WLR 274 (Court of Appeal); see also N Meeson, *Admiralty Jurisdiction and Practice*, (2003) London: Informa Professional, p. 133.

⁴ C Hill, *Maritime Law*, (2003) London: LLP, pp. 118-9.

⁵ *The Evangelismos: Xenos v. Aldersley and Ors* (1858) 12 Moo 352; (1858) 14 ER 945. See S Nossal, "Damages for the wrongful arrest of a vessel", *Lloyd's Maritime and Commercial Law Quarterly*, 1996, 368, where arguments for a less onerous test based upon a broader reading of *The Evangelismos* are advanced.

⁶ See A Mandaraka-Sheppard, *Modern Admiralty Law*, (2003) London: Cavendish, p. 132; N Meeson, *The Practice and Procedure of the Admiralty Court*, (1986) London: LLP, p. 17; C Hill, *Maritime Law*, (2003) London: LLP, pp. 118-9; Jackson, note 3 above, p. 398; Meeson, note 4 above, pp. 133-5.

⁷ Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33, (1986), Canberra: Australian Government Publishing Service, p. xii.

providing a cause of action for such damages be included in the Admiralty legislation making it less onerous for shipowners to make successful claims.⁸ Section 34 of the Act is in the same terms as proposed by the ALRC and states:⁹

Damages for unjustified arrest, &c.

34.(1) Where, in relation to a proceeding commenced under this Act-

(a) a party unreasonably and without good cause-

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property,

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

... (my emphasis)

The purpose of this article is to offer some comments about how s 34 may be interpreted by the Australian courts, particularly the phrase “unreasonably and without good cause”. The international jurisprudence concerning wrongful arrest will be reviewed in order to supply a context in which s 34 may be critically examined. A line of English cases in the second half of the nineteenth century, commencing with the landmark Privy Council decision in *The Evangelismos*,¹⁰ supply the foundation for any consideration of wrongful arrest in the common law world and those decisions will be reviewed. Two International Conventions were concluded over the last half of the twentieth century, each of which contains an article concerning wrongful arrest; those provisions will also be considered. The leading decisions on wrongful arrest from a number of states will be reviewed. The situation in South Africa and Nigeria, the only other states to have enacted a cause of action for claims for wrongful arrest, are discussed. Having supplied a context, the Australian decisions that have referred to s 34 will be reviewed and s 34 will be analysed.

Historical position on wrongful arrest

The Evangelismos

The Privy Council decision in *The Evangelismos*¹¹ provides the traditional test for damages for the wrongful arrest of ships in Admiralty. The case concerned a collision between two ships at the mouth of the river Thames. The day after the collision the owners of one of the ships commenced proceedings for damages and obtained a warrant from the Admiralty Court for the arrest of the *Evangelismos* on the assumption that she had been involved in the collision. The *Evangelismos* was arrested several days later on 29 October 1857, and released on 21 January 1858 when bail was entered.

The action for damages failed at first instance. Dr Lushington held that the plaintiffs had failed to prove that the *Evangelismos* was involved in the collision. The owners of the *Evangelismos* unsuccessfully applied for an order that the plaintiff be condemned in damages for the losses sustained in consequence of the arrest and detention. His Honour stated:¹²

⁸ Note 8 above, pp. 256-7.

⁹ Note 8 above, p. 279.

¹⁰ Note 10 above.

¹¹ Note 10 above.

¹² Reported in *The Evangelismos*, note 6 above. 352; 946.

[T]he arrest of *The Evangelismos* had been made in the *bona fide* belief that she was the vessel which had been in collision with *The Hind*, and ... there had been no *mala fides* in the proceedings...

The owners of the *Evangelismos* appealed to the Privy Council, submitting¹³ that an ordinary practice prevailed in the Admiralty Court that an arresting party was to be condemned in costs and damages in circumstances of groundless arrest and consequential detention, relying upon *The Orion*,¹⁴ *The Glasgow*¹⁵ and *The Nautilus*.¹⁶

The only report of *The Orion*¹⁷ is to be found in a footnote to *The Evangelismos*.¹⁸ Following a collision, a vessel was arrested and released after six days when it was discovered that the wrong ship had been arrested. The arresting party was condemned in costs and damages.

In *The Glasgow*,¹⁹ the master sold his vessel at Savannah without the authority of the English owner in circumstances where the vessel had been extensively damaged in a hurricane at a remote location and neither the owner nor the master had any credit by which funds could be raised. The new owner of the ship repaired her and recommenced sailing. The former owner arrested her when she called at Liverpool. Dr Lushington held that the sale by the master was valid, noting that he had only recently clarified the law on this point in another matter, and without conducting any analysis of the availability of damages for wrongful arrest in Admiralty, said:²⁰

The ship has been detained a great length of time (I am sorry to say she was not bailed), to his loss; I must give demurrage and costs.

Perhaps the inference to be drawn is that plaintiffs may find it more difficult to defend claims for damages for wrongful arrest on the basis of mistake of law where the legal principles involved are clear.

In *The Nautilus*²¹, salvage services had been rendered to a vessel and her cargo. Two Justices of the Peace attended the vessel and, notwithstanding a jurisdictional impediment, which both the salvors and the shipowners agreed to waive, and the parties having agreed to be bound by the decision, awarded 53 L for salvage. The salvors refused to accept the award and arrested the vessel on a salvage claim for 250 L. The owners brought 53 L into court, which they tendered to the salvors who ultimately accepted the tender after the ship remained under arrest for a period of time. The shipowners applied for the salvors to be condemned in costs and damages occasioned by the improper arrest. Without making reference to any authority on damages for wrongful arrest, Dr Lushington stated:²²

It appears to me that this is a grossly factious proceeding, and I shall decree costs and damages.

¹³ Dr Addams and Dr Twiss. See *The Evangelismos*, note 6 above, 355-6; 946-7.

¹⁴ (1852) 12 Moo 356; 14 ER 946.

¹⁵ (1855) 1 Swab 145; 166 ER 1065.

¹⁶ (1856) 1 Swab 105; 14 ER 1044.

¹⁷ Note 15 above.

¹⁸ *The Evangelismos*, note 6 above.

¹⁹ Note 16 above.

²⁰ Note 16 above, 151-2; 1069.

²¹ Note 17 above.

²² Note 17 above, 105; 1044.

Although not referred to in submissions in *The Evangelismos*, *The Gloria de Maria*²³ was decided not long before *The Evangelismos* and involved a similar set of circumstances to *The Nautilus*.²⁴ In that case, salvors not satisfied with a salvage award both appealed the salvage award and commenced independent proceedings *in rem* against the salvaged ship and arrested her. Dr Lushington²⁵ held that the action in the High Court of Admiralty was "... clearly illegal to all intents and purposes..." and that it was:

... clearly a case in which I am called to do justice to the schooner, and put her in the same situation that she was in before. I must, therefore, pronounce for the costs, damages, demurrage, and expenses.

The submissions made for the respondent²⁶ in *The Evangelismos* centred on the *bona fides* of the plaintiffs in arresting the *Evangelismos* and that no authority existed in Admiralty where damages had been awarded without the existence of *mala fides* or fraud in the transaction. *The John*²⁷ was referred to, and reference was also made to the availability of an alternative remedy at common law for malicious prosecution. *The John*²⁸ concerned whether or not title to a ship had passed to a conditional assignee who had possession of the ship and had put her to use. The ship had not been arrested. Sir Christopher Robinson made orders restoring the vessel to the plaintiff and awarded what his Honour described as equitable compensation for the period during which the vessel was at the use of the conditional assignee. His Honour did not refer to, nor did the case concern, the availability of damages for wrongful arrest.

The Right Honourable T. Pemberton Leigh delivered the opinion of the Privy Council²⁹ in *The Evangelismos*, stating:³⁰

Undoubtedly there may be cases in which there is either *mala fides*, or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages...

The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it? Their Lordships are of opinion, that there is nothing whatever to establish the Appellant's proposition. It is true the identity of the ship was not proved, but there were circumstances which afforded ground for believing that this ship was the one that had been in collision with the barge.

The decision in *The Evangelismos* provides an objective assessment of the subjective intention of the arresting party, objectively viewing the evidence supporting the erroneous arrest. The question is, was the arrest motivated by actual or implied malice?

²³ (1856) 1 Swab 106; 14 ER 1044.

²⁴ Note 17 above.

²⁵ Note 24 above, 106; 1044.

²⁶ By Dr Deane QC and Mr Vernon Lushington; note 6 above, at 356-7; 947.

²⁷ 2 Hagg. Adm. Rep. 317.

²⁸ Note 28 above.

²⁹ The Right Hon Sir Edward Ryan, the Right Hon Sir Creswell Creswell and the Right Hon Sir John Taylor Coleridge also present.

³⁰ Note 6 above, 359-60; 948.

The English decisions post 'The Evangelismos'

A line of decisions followed *The Evangelismos* in the last half of the nineteenth century in England. Those decisions serve to demonstrate the application of the test from *The Evangelismos*.

In *The Active*,³¹ an action for damages following a collision was dismissed by Dr Lushington at the conclusion of the case for the plaintiff on the basis that the vessel arrested had not been sufficiently identified as a vessel involved in the collision.³² An application for damages for wrongful arrest was filed. Dr Lushington referred to *The Evangelismos* and stated that for damages to flow "... there must have been on the part of the [plaintiff] either *mala fides*, or such *crassa negligentia* as implies malice."³³ Dr Lushington noted³⁴ that the plaintiffs had made bona fides inquiries which must have been expensive and that had they not arrested the vessel she may have left the port and defeated all proceedings. Costs only were awarded.

*The Eleonore*³⁵ concerned a salvage claim for 800 L via which a vessel was arrested and detained for 10 days prior to its release with the consent of the salvors. The entire value of the ship, freight and cargo amounted to approximately 832 L and the value of the salvage services was estimated by a magistrate post release at 10 L. A legislative provision withdrew the jurisdiction of the court in circumstances where the value of the property saved did not exceed 1,000 L.³⁶ The owners of the vessel applied for damages for wrongful arrest. *The Evangelismos* was referred to by the respondent, who argued that this was not a case of *mala fides* or *crassa negligentia*. Dr Lushington stated:³⁷

It is impossible to lay down a general rule as to costs and damages applicable to all cases. Great injustice might be done if costs and damages were allowed in every case where a vessel, freight and cargo, after arrest, proved to be of less value than 1000l. The Court must look at all the circumstances.

Dr Lushington awarded costs and damages, stating:³⁸

The Court views with disapprobation the entry of actions in grossly disproportionate amounts. Again, the plaintiffs arrested the vessel without having given any notice of any claim to the master, who was the owner's agent in this country, and without taking any steps to ascertain her value. I think the arrest of the vessel under these circumstances, and for a sum of 800l., was an act of *crassa negligentia* on the part of the plaintiffs. It is true that the plaintiffs withdrew from the action as soon as the value of the vessel was ascertained, but having initiated proceedings, they are responsible for the same.

In *The Kate*,³⁹ tug owners arrested a vessel on a claim for 500 L for services provided. The vessel was detained for several days and then released without bail with the consent of the tug owners. Prior to release, the owners of the vessel appeared and filed affidavits showing the value of the property saved to be 650 L and a notice of

³¹ (1862) 5 L.T. (N.S.) 773.

³² The feature of the evidence was that the *Active* had been in a recent collision shortly prior to going to port, she was in the neighbourhood of the place of collision and some of the damages sustained to her had not been accounted for; the plaintiffs had a number of persons travel to the docks to inspect her, hence the costs.

³³ Note 32 above, 773.

³⁴ Note 34 above.

³⁵ (1863) Br. & L. 185; 167 ER 328.

³⁶ Note 36 above, 186; 328 for the legislative regime.

³⁷ Note 36 above, 187; 329.

³⁸ Note 38 above.

³⁹ (1864) Br. & L. 218; 167 ER 343.

motion seeking the dismissal of the proceedings,⁴⁰ costs and damages for wrongful arrest. The tug owners filed documents indicating the value of the property to be 820 L and even more⁴¹ and resisted the motion on the basis that the court had no jurisdiction to hear the matter and therefore no jurisdiction to award costs and damages. Dr Lushington stated:⁴²

The defendants are not in my opinion entitled to damages, because the circumstances of the case do not shew on the part of the plaintiffs any *mala fides* or *crassa negligentia*, without which, according to the case of *The "Evangelismos"* unsuccessful plaintiffs are not to be mulcted in damages. A similar principle obtains at common law: *Davies v. Jenkins* (11 M & W. 745).

Perhaps the key distinguishing feature between *The Kate* and *The Eleonore* is that there is no report of an assessment by the magistrates of the salvage claim in *The Kate*.

In *The Volant*,⁴³ a second mortgagee of shares in the ship had arrested her even though he was unable to proceed *in rem* without the concurrence of the prior mortgagee or an order of the court to take such action.⁴⁴ The vessel had been under arrest for one month and was released with the consent of the second mortgagee after an affidavit was filed by the owners of the vessel indicating the existence of the first mortgagee. Dr Lushington was not satisfied that the second mortgagee had acted otherwise than in accordance with the legislation, there being no authority on the particular provision, and refused an award of damages, although awarding the defendants their costs. Referring to *The Evangelismos*, he stated:⁴⁵

It is a well-established rule in this Court that damages for arresting a ship are not given, except in cases where the arrest has been made in bad faith, or with crass negligence.... The cases, at any rate, are few in which an unsuccessful plaintiff has been condemned in damages; and the Court is reluctant to condemn a plaintiff to that extent, except the circumstances shew that justice requires it.

The Volant tends to indicate that it will be difficult to obtain damages for wrongful arrest where an arrest is made on the basis of a reasonable, though a later judicially held to be incorrect, view of the law. The decision does mark the Courts' approach to such applications: "justice", in the broad sense of the word, is the touchstone for an award of damages for wrongful arrest and the Court is reluctant to make such awards.

In *The Cheshire Witch*⁴⁶, a vessel had remained under arrest following judgement on the application of the plaintiff in order that an appeal could be considered. The plaintiff did not appeal and the ship was released following correspondence between the parties on the thirteenth day. Later, the shipowners sought damages for wrongful arrest for the twelve days of continued detention. Dr Lushington⁴⁷ awarded damages and noted that the arrest had operated severely on the defendant and "...then it turned out that the plaintiff had no cause of action."

⁴⁰ On the basis that the High Court of Admiralty had no jurisdiction due to the quantum of the claim.

⁴¹ The higher amount is not disclosed in the report of the case.

⁴² Note 40 above, 221; 344.

⁴³ (1864) Br. & L. 321; 167 ER 385.

⁴⁴ Note 44 above, 322; 385 for the legislation regime.

⁴⁵ Note 44 above, 323-4; 386.

⁴⁶ (1864) Br. & L. 362; 167 ER 402.

⁴⁷ Note 47 above, 362-3; 402-3.

The Cheshire Witch was considered by Coleman J in *The Kommunar (No.3)*,⁴⁸ where His Honour noted that the report of the matter was so brief that it was impossible to ascertain the nature or strength of the plaintiff's case and stated:⁴⁹

... *The Cheshire Witch* must be treated as a case where, following judgement against the plaintiff, an appeal was manifestly so hopeless as to deprive the plaintiff of all reasonable grounds for continuing the arrest.

In *Wilson v R*⁵⁰, Cairns LJ⁵¹, delivering the opinion of the Privy Council,⁵² confirmed the principle from *The Evangelismos* and concluded that the circumstances presented to the Collector of Customs of Sierra Leone afforded him "probable cause" to seize two barrels of rum for breach of the local customs laws and that it would have been a dereliction of duty had he not have done so. The use of the phrase "probable cause" is somewhat unfortunate in that it blends that common law phrase from the law of malicious prosecution with the Admiralty concept of wrongful arrest and presents as an opportunity for misunderstanding.

In *The Cathcart*,⁵³ a dispute erupted between parties involved in a rather complicated multiparty financial scheme concerning a vessel. The defendant took the plaintiffs before a magistrate who ordered the plaintiffs to leave the defendant owner in peaceful possession of the vessel. The plaintiffs subsequently arrested the vessel and the defendants claimed damages for wrongful arrest. The plaintiffs argued that they thought that they had an entitlement to arrest the vessel under a mortgage and further that they thought that the defendant wanted to get the ship away in an unseaworthy state contrary to an assurance they had given underwriters. Dr Lushington⁵⁴ held that the contractual arrangements clearly did not support the first limb and that evidence presented on the second limb also failed. The plaintiffs had alleged instances of fraud on the part of the defendants, which were not sustained at trial. Dr Lushington referred to *The Evangelismos* and stated:⁵⁵

The plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel. Add to this, the arrest of the vessel by the plaintiffs was made on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim, and the plaintiffs have attempted to support the proceedings by making charges of fraud against the defendant, which they have failed to prove. I think this is a case for damages.

The Cathcart indicates that mistake as to the identity of a vessel based upon some reasonable indicia, albeit insufficient to sustain a case, is in marked contrast to a mistake arising out of the arresting party not providing documents that are in its hands.

In *The Egerateia*,⁵⁶ an arresting mortgagee of four sixty-fourth shares in a vessel was condemned in costs but not damages after abandoning the action when the vessel had been detained for a number of months at considerable cost. The vessel owners'

⁴⁸ [1997] 1 Lloyd's Rep 22, 30.

⁴⁹ Note 49 above.

⁵⁰ (1866) LR 1 PC 405.

⁵¹ Note 51 above, 410.

⁵² Sir James William Colville, Sir Edward Vaughan Williams and Sir Richard Torin Kindersley.

⁵³ (1867) LR 1 A. & E. 314.

⁵⁴ Note 54 above, 332.

⁵⁵ Note 54 above, 333.

⁵⁶ (1869) 20 LT (NS) 961. It is noted that the report occupies several lines only; the case was heard in the High Court of Admiralty, the judicial officer hearing the case is not noted.

argued that one who had such a very small interest in the ship should not exercise his right vexatiously was rejected. Without referring to any authorities, the Court merely noted that this was not a case for damages.

In *The Margaret Jane*,⁵⁷ salvage services were rendered to a vessel on 24 November 1868. On 3 December 1868, the Receiver of Wrecks valued the ship and cargo at 746 L. On 8 December 1868 the salvors arrested the vessel, her freight and cargo in a salvage action for 2,500 L. The salvors applied for an appraisal of the vessel on 18 December 1868 and received the appraisal on 22 December 1868.⁵⁸ The salvors discontinued the proceedings on 14 January 1869 and the vessel was released. The vessel owners applied for damages for wrongful arrest, arguing that the court had no jurisdiction, the value of the property saved being under 1,000 L. Sir Robert Phillimore⁵⁹ referred to *The Evangelismos* and said:

In this case there is certainly no *mala fides*, and the salvage of the derelict vessel (for such it was) appears to have been one of considerable merit, and as it happened that the officer of the Court has appraised vessels at a higher value than the Receiver of wreck. I think it would be harsh, therefore, to say that when the commission for the appraisal in this case was taken out on 18th of December that the salvors were guilty of *crassa negligentia*; but I think they must have been aware within a short period after the time of taking out that appraisal that the value fixed by the Receiver of wreck was substantially correct, and I shall condemn them in costs altogether, and in damages from the 22nd of December to the time when this vessel might have been released, namely, the 14th of January.

Again, damages flowed once the arresting party became aware of the true state of the facts and continued to detain the vessel. Presumably, had the appraisal been in or about the same amount as that ascribed by the Receiver of Wrecks, damages would have flowed for the entire period of detention.

The Privy Council next considered the issue of damages for wrongful arrest in *The Strathnaver*,⁶⁰ an appeal from the Vice-Admiralty Court of New Zealand. The *in rem* proceedings concerned a salvage claim in relation to a vessel being towed into the port of Wellington. The central issue in the case at first instance was whether the services rendered were salvage services or towage; the court not having jurisdiction to make an award for towage in salvage proceedings. The Privy Council confirmed the first instance judgement that the services rendered were towage and that it was proper that no award be made. Damages were awarded for wrongful arrest at first instance. Sir Robert Phillimore⁶¹ noted that the trial judge had rightly expressed the view that the salvors had prosecuted their claim with *bona fides* and had simply made an error in judgement in bringing the suit and set aside the order as to damages.⁶² His Lordship confirmed the rule in *The Evangelismos* and noted that that decision stood for the proposition,⁶³ "...that in the absence of proof of *mala fides* or malicious negligence, they ought not to give damages against the parties arresting the ship."

In *The Eudora*,⁶⁴ bottomry bond holders arrested a vessel seven days prior to the bond becoming payable. The owners of the vessel moved the court seeking orders for

⁵⁷ (1869) LR 2 A & E 345.

⁵⁸ The quantum of the appraisal is not disclosed in the report of the case.

⁵⁹ Note 58 above, 345.

⁶⁰ (1875) 1 AC 58.

⁶¹ Sir Montague E Smith and Sir Robert P Collier were also present.

⁶² Note 61 above, 66.

⁶³ Note 61 above, 67.

⁶⁴ (1879) 4 PD 208.

the release of the vessel and for the bond holders to be condemned in damages. The bondholders argued that they had communicated with the owners of the vessel but had been given no intimation that the bond would be met and were therefore apprehensive that the vessel would be discharged and leave the jurisdiction before the bond became payable. Sir Robert Phillimore⁶⁵ ordered the release of the vessel, with the consent of the bondholders, on the amount of the bond and adjourned the rest of the motion. The owners of the vessel renewed the motion several days later seeking damages. The bondholders further argued that there existed a practice of the Court whereby the action could be commenced and the vessel arrested without waiting for the bond to become payable and referred to certain decisions in that regard. Those decisions do not support that proposition.⁶⁶ Sir Robert Phillimore, in a three line judgement, indicated that he did not consider this to be a case for damages but did condemn the bondholders in costs.⁶⁷ No authorities were referred to.

In *The Collingrove*, *The Numida*,⁶⁸ two appeals on the same issue were heard together, namely, whether the commission payable on a bail bond was recoverable as costs or only as damages upon a finding of wrongful arrest. In *The Collingrove* the claim was abandoned after judgement was entered on a cross claim, and in *The Numida* the action was abandoned before trial. Sir James Hannen P held that such commission was not part of the costs and could only be recovered as damages for wrongful arrest upon *The Evangelismos* principle.⁶⁹ His Honour further stated:⁷⁰

We do not, however, consider that the bare fact of the proceedings being discontinued entitled the defendant to damages, it is necessary for him to shew that the arrest of the ship was malicious, of the result of gross negligence. This has not been done in [these cases] ... and we therefore dismiss the summons with costs.

*The Keroula*⁷¹ concerned a purported ownership dispute in which the plaintiffs commenced an action of restraint and arrested the vessel claiming a bond for the value of their eight sixty-fourth shares in the vessel for its safe return to England. A bail bond was entered and the vessel was released. The defendants moved the court seeking damages for wrongful arrest, arguing that the plaintiffs did not have standing to arrest the ship because they held the shares merely as security for the payment of a loan to the defendants, the true owners of the vessel. The nature of the plaintiffs' interest in the vessel turned upon the construction of certain letters. Sir James Hannen P found that the plaintiffs did not have standing to bring an action for restraint, saying "But as there was no gross negligence or bad faith on the part of the plaintiffs, I shall not condemn

⁶⁵ Note 65 above, 208.

⁶⁶ Namely, *The Jane* (1814) 1 Dod 461; 165 ER 1378 and *The San Jose Primeiro* (1860) 3 LT (NS) 513. *The San Jose Primeiro* concerned a seaman's claim for moneys to return home, which claim was dismissed and contains no support for the proposition contended and does not even vaguely allude to such a proposition according to the judgement of Dr Lushington. *The Jane* concerned the issue of whether a ship hired by the government could be subject to a bottomry bond though the particular voyage on which she was bound was not stated in the bond. A bond holder arrested the vessel as he did not know where she was bound, a bail bond was entered and she was released without any inconvenience or loss to the government. No statement of principle was made by Sir W Scott in referring to those facts.

⁶⁷ Note 65 above, 209.

⁶⁸ (1885) 10 PD 158.

⁶⁹ Note 69 above, 160-1.

⁷⁰ Note 69 above, 161.

⁷¹ (1886) 11 PD 92.

them in damages.”⁷² His Honour did not canvas the arguments or refer to the authorities.

In *The Walter D Waller*⁷³, a writ in an action of restraint as a co-owner was taken out by a person who was a former part-owner of a vessel on the urging of a current part-owner. The primary cause of action was abandoned at trial. The former part-owner who took out the writ indicated that he had recently transferred his shares in the vessel to another and conceded that he was not an owner at the time of commencing proceedings, “... forgetting the importance of that fact ...”⁷⁴, as his counsel put it. Sir Francis H Jeune indicated that the alternative claim could clearly not be maintained.⁷⁵ Damages for wrongful arrest were resisted on the basis that the vessel was being loaded and evincing an intention to depart when the contract for the sale of the vessel had not been completed in all respects. His Honour stated that it had not been shown that the vessel was detained by the arrest or that any specific pecuniary loss was sustained by the plaintiffs.⁷⁶

The decision largely concerns a comparison of the right to damages at common law and in Admiralty for wrongful arrest. His Honour noted that an award of damages may be made at common law in circumstances where no pecuniary loss has been sustained and considered that there was no reason why such a remedy ought not to be available in relation to the arrest of property, including ships in accordance with the principles set out in *The Evangelismos* and confirmed in *The Strathnaver*.⁷⁷ His Honour stated:⁷⁸

In the present case, I think actual damage there was none. I doubt if, as was urged before me, the ship could have been arrested, when she was, by any proper process, though perhaps an injunction to prevent leaving port until the stipulated policies were given, and the stipulated sums paid, could have been obtained. But she was not detained in port by the arrest, nor was her loading interfered with. Still, the action of the defendants was, I think, clearly, in common law phrase, without reasonable or probable cause; or, in equivalent Admiralty language, the result of *crassa negligentia*, and in a sufficient sense *mala fides*, and the plaintiffs’ ship was in fact seized. Therefore, I think the plaintiffs must be supposed to have suffered some damage, and I fix that damage at 11...

As will be seen below, *The Walter D Waller* has created considerable confusion in that it purports to bring common law concepts into wrongful arrest of ships, an Admiralty concept. In *The Kiku Pacific*⁷⁹, Karthigesu JA, commenting upon the *Walter D Waller*, observed:⁸⁰

The learned President’s mention of the term ‘reasonable or probable cause’ at p 208 must consequently be taken in the context of the judgement. The action which proceeded before the learned President was an action in common law for malicious arrest of a ship as distinct from an action in the Court of Admiralty. The learned President’s reference to the term ‘reasonable and probable cause’, a well established common law principle in actions of malicious prosecutions of persons, must be viewed in this light. Moreover, what was in consideration was not the appropriate test for wrongful arrest of a vessel, but whether

⁷² Note 72 above, 94.

⁷³ [1893] P 202.

⁷⁴ Note 74 above, 205.

⁷⁵ Note 74 above, 203.

⁷⁶ Note 74 above, 205.

⁷⁷ Note 74 above, 208.

⁷⁸ Note 78 above.

⁷⁹ [1999] 2 SLR 595 (Court of Appeal, Singapore).

⁸⁰ Note 80 above, 602-3.

there was a right at common law to nominal damages for the malicious arrest of a vessel where no actual damage had been proved.

In *The Village Belle*⁸¹, the plaintiff owners of sixteen shares in a vessel arrested her for their own security when being pressed for payment by her creditors. An agreement was reached between the plaintiffs and the owner-manager of the vessel that he would buy the plaintiffs' shares in the vessel and discharge all claims upon the vessel within a certain time in consideration of the vessel being released. The vessel was released but the creditor's claims were not discharged and the creditors continued to press the plaintiffs for payment. The plaintiffs re-arrested the vessel and continued their action against the balance of her owners including calling for an account of the vessel's trading for the prior 6 years. Approximately one month later the owner-manager paid off the creditors and counter-claimed for wrongful re-arrest. Sir Francis Jeune P noted that on the one hand, had the managing-owner performed the agreement, there would have been no reason for the plaintiff to pursue the other owners of the vessel.⁸² On the other hand, in order to re-arrest a ship an order was required from the court which was not obtained by the plaintiffs. His Honour concluded that, "... there was no such *crassa negligentia* or *mala fides* in their action as would entitle defendants to damages for wrongful arrest."⁸³

The Village Bell is the last in the line of nineteenth century cases where the issue of damages for wrongful arrest were considered. Nossal⁸⁴ notes that after *The Village Bell*, the issue of damages for wrongful arrest did not arise for consideration in England until many years later in 1971 in *Astro Vencedor Compania Naviera SA v. Mabanafit GmbH*⁸⁵. The decisions referred to above tend to indicate that the development of the law concerning the availability of damages for wrongful arrest was very much settled by the late 1800s. The Admiralty Law commentators of the time also indicate that the law of damages for wrongful arrest was well settled. Hannan and Pritchard⁸⁶, in 1887 noted that "The award of costs and damages is generally a question of discretion, and dependent on the particular circumstances of each case."⁸⁷ They said further, "The court will not decree damages unless there has been *mala fides* or *crassa negligentia* in arresting."⁸⁸ Similarly, in 1884 Roscoe⁸⁹ noted, "If an arrest is made in bad faith or with negligence, or if it be continued longer than is necessary, the owner of the vessel is entitled to ask the Court for damages in respect of such arrest."⁹⁰

The Arrest Conventions

The last half of the twentieth century saw the international shipping community thrash out the issues associated with the arrest of ships in two major stages leading to two international conventions, the *International Convention Relating to the Arrest of Sea-*

⁸¹ (1895-96) 12 TLR 630.

⁸² Note 82 above, 630.

⁸³ Note 83 above.

⁸⁴ See Nossal, note 6 above, 370 for a listing of the cases that considered *The Evangelismos* since that judgement was handed down.

⁸⁵ [1971] 1 Lloyd's Rep 502 (CA).

⁸⁶ JC Hannan and WT Pritchard, *Pritchards' Digest of Admiralty and Maritime Law*, 3rd ed. (1887) London: Butterworths, para. 290-1.

⁸⁷ Note 87 above, para. 290, referring to *The Evangelismos*.

⁸⁸ Note 87 above, para. 291, referring to *The Kate*, *The Strathnaver* and *The Evangelismos*.

⁸⁹ ES Roscoe, *Admiralty Forms and Precedents*, (1884) London: William Clowes and Sons, pp. 15-16.

⁹⁰ Note 90 above, p. 16, referring to *The Volant*, *The Cheshire Witch*, *The Evangelismos*, *The Cathcart*, *The Margaret Jane* and *The Eudora*.

Going Ships done at Brussels on 10 May 1952 (“the 1952 Arrest Convention”) and the *International Convention on Arrest of Ships* done at Geneva on 12 March 1999 (“the 1999 Arrest Convention”). Both International Conventions touched upon the right of damages for wrongful arrest. However, as will be seen below, neither convention achieved a unified approach.

The 1952 Arrest Convention

Australia neither participated in, nor was a signatory to, the 1952 Arrest Convention. The ALRC Report recommended that changes to domestic legislation would be more compatible with the interests of Australia rather than becoming a party to the 1952 Arrest Convention.⁹¹ Article 6 to the 1952 Arrest Convention, so far as is relevant, states:

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

Berlingieri⁹² notes that the inclusion of an Article covering the entitlement of shipowners to damages for wrongful arrest was hotly debated, the civil law states in favour and the common law states against; the difference of view being a product of different tests applied in the different legal systems. Generally, common law states have their test rooted in the rule in *The Evangelismos* and the civil law systems hold the arrestor responsible whenever it is proved that the arrest was unjustified.⁹³ The ‘resolution’ of the debate, as Article 6 provides, was to leave the matter to the *lex fori*.

The development of arrest in Admiralty in common law systems has been set out above. A number of propositions can conveniently be drawn from Berlingieri’s review of the salient features of the availability of damages for wrongful arrest in a number of civil law jurisdictions.⁹⁴ In Denmark, the arrestor is liable for damages if the claim is unjustified, that is, the claim is rejected or the vessel is released and it is shown that the claim made against the vessel could not be sustained at trial.⁹⁵ Similarly, in Holland, Norway and Germany the arrestor is liable in damages if his claim is rejected, irrespective of fault. In Spain the arrestor is liable in damages if the claim fails, proceedings are not commenced within the prescribed time limit or the conditions did not exist for the commencement of a claim *in rem*.⁹⁶ In France, the arrestor may be liable for damages if he has abused his right of arrest, namely, where the arrest is unjustified, the arrest is excessive in comparison to the quantum of the claim, or the quantum of the security requested is excessive.⁹⁷ In Belgium, in addition to the claim being “unjustified”, the shipowners must prove that the arrestor has acted recklessly and knowing that his action would probably cause damage. In Greece, the arrestor is liable if it can be proved that the arrestor knew or ignored through gross negligence that the

⁹¹ See Australian Department of Transport and Regional Services, <http://www.dotrs.gov.au/transinfra/shipping_arrest.htm>.

⁹² F Berlingieri, *Berlingieri on Arrest of Ships: a commentary on the 1952 and 199 Arrest Conventions*, (2000) London: LLP, p. 192.

⁹³ Note 93 above, p. 193, note 111.

⁹⁴ Note 93 above, pp. 195-199.

⁹⁵ See s.639 *Administration of Justice Act* (Denmark), cited in Berlingieri, note 93 above.

⁹⁶ See Article 1416 *Code of Civil Procedure* (Spain), cited in Berlingieri, note 93 above.

⁹⁷ See *Lempy Maritima Enterprise v Mohamed Zaatar and Cie Al Itthad Al Watani – The “Alexamder III”* [1996] DMF 503, 506 (Cour de Cassation, France), cited in Berlingieri, note 93 above.

claim grounding the arrest did not exist. In Italy, damages will only be awarded against the arrestor if, when the arrestor fails in his claim, it is shown that he acted in the proceedings “in bad faith or with gross negligence”.⁹⁸

The 1999 Arrest Convention

The International Maritime Organisation states that the 1999 Arrest Convention aims at providing a:

...widely acceptable legal instrument promoting international trade and transport, by striking a balance between the interests of the owners of cargo and of ships in securing the free movement of ships and the right of the claimant to obtain security for his claim.⁹⁹

The Convention will enter into force six months after the date on which ten States have indicated their consent to be bound by it;¹⁰⁰ as yet, only Bulgaria and Estonia have indicated such consent.

Australia participated in the Diplomatic Conference convened by the General Assembly of the United Nations to consider and adopt a convention on the arrest of ships.¹⁰¹ The latest public word from the Australian Department of Transport and Regional Services on the 1999 Arrest Convention is that comments have been sought from interested parties about the 1999 Arrest Convention and its potential impact on the current operation of the *Admiralty Act* should Australia become a party and that those comments are being analysed and considered.¹⁰²

The former Article 6 of the 1952 Arrest Convention has been amended¹⁰³ and, so far as is relevant, provides:

2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:
 - (a) the arrest having been wrongful or unjustified; or
 - (b) excessive security having been demanded and provided.
3. The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected. (*my emphasis*)

Berlingieri states that the same reasons that prevented the adoption by the international community of a uniform rule applying to damages for wrongful arrest continued to prevail in the late twentieth century and the issue was again debated without resolution,¹⁰⁴ the matter being once more left to the *lex fori*.

Berlingieri notes¹⁰⁵ that the inclusion of the words “or unjustified” in Article 6 was the subject of lively debate and that the United Kingdom proposed that “unjustified” be removed from Article 6 on the grounds that it might conflict with United Kingdom law:

⁹⁸ See Article 96 *Code of Civil Procedure* (Italy), cited in Berlingieri, note 93 above.

⁹⁹ See International Maritime Organisation, <http://www.imo.org/Legal/mainframe.asp?topic_id=359>.

¹⁰⁰ See Article 14 1999 Arrest Convention.

¹⁰¹ See resolution 52/182 of 18 December 1997.

¹⁰² As at November 2004 the last comment is to be found on the Department of Transport and Regional Services website at <http://www.dotrs.gov.au/transinfra/shipping_arrest.htm>. The web page notes that it was last updated on 24 September 2002.

¹⁰³ The significant amendment to Article 6 was the inclusion of a provision imposing a requirement for security for arrest to be provided by the arresting party.

¹⁰⁴ Note 93 above, p. 340.

¹⁰⁵ Note 105 above.

...which is based on the premise that, with the exception of wrongful arrest, a claimant should not be penalised for having arrested a ship, even if the action fails on the merits.¹⁰⁶

The United Kingdom further argued that the term was ambiguous in that an arrest may be justified on the facts available to the claimant at the time of the arrest but be unjustified when the true facts become clearer. Several delegations opposed the removal of “unjustified” from Article 6, arguing that it would result in a narrowing of the protection afforded to shipowners who would be compelled to prove bad faith on the part of the arrestor in order to obtain compensation for the damages flowing from wrongful arrest.¹⁰⁷ Three proposals were ultimately put forward: remove “unjustified”, remove “wrongful” or keep both terms.¹⁰⁸

The transcript of the first reading of the proposed 1999 Arrest Convention on 4 March 1999, demonstrates the legal cultural divergence on the test to be enshrined.¹⁰⁹ The Danish delegate stated:

We prefer to have the word “unjustified” in. The reason for this is that the system in our country is that if someone causes a lawsuit doesn’t win, he would have to pay for whatever costs opponents will have. It has nothing to do with preventive arrest.

The German delegate stated:

As to term “unjustified”, it should be retained, because this term is regulated and widely accepted because the defendant is entitled to damages if the claim fails.

In contrast, the delegate from the United Kingdom said:

If we must keep something I would propose deletion of word “unjustified”. The notion is novel and ambiguous.

Berlingieri reports that the issue of “unjustified” arose again on 8 March 1999 during the second reading of the proposed 1999 Arrest Convention.¹¹⁰ Reference was made to the fact that the draft Article 6(3) left the matter to the *lex fori* and the phraseology employed in Article 6(2) was consequently not of particular gravity. Ultimately, “unjustified” was left in Article 6 after the United Kingdom withdrew its objection. However, the delegate from Iran summed up the situation well, when referring to draft Articles 6(2) and (3) he stated:

It seems to me that when we are drafting the Convention we should clarify and should go more in the detail of the debate. If everything is left to the discretion of the Court we do not reach uniformity.¹¹¹

The question is, what “wrongful or unjustified” means in Article 6. The answer appears to be that it means a variety of things to a variety of States and that there is no unified approach taken to wrongful arrest by the international community. Tetley thought that Article 6(2) enabled courts to grant damages for the distinct categories of wrongful arrest, unjustified arrest or excessive security being demanded and stated:

These provisions are an important recognition of the need to sanction arrests inspired by bad faith, malice or gross negligence on the part of the claimant (in other words,

¹⁰⁶ See point 26 of the United Kingdom comments on the 1994 Draft Articles, set out in Berlingieri, note 93 above.

¹⁰⁷ Note 93 above, p. 527.

¹⁰⁸ Note 93 above, pp. 342-3.

¹⁰⁹ Set out in Berlingieri, note 93 above, pp. 530-1.

¹¹⁰ Note 93 above, pp. 531-3.

¹¹¹ Note 93 above, p. 533.

“wrongful” arrests, as understood in the United Kingdom, United States, Canada and other countries of common law tradition). The Convention goes further, however, in also permitting damages to be assessed and countersecurity to be imposed, in respect of “unjustified” arrest (in other words, arrest effected erroneously, without proper legal foundation, but not motivated by bad faith or gross negligence). This position is taken by many civilian jurisdictions. Common-law jurisdictions, on the other hand, have tended to award costs (at most) for bona fide arrest effected by simple mistake of law. The final text appears to have enshrined the civilian rule.¹¹²

It is worthwhile pausing at this point to refer back to s 34 of the Act, particularly the title of the provision, which reads, “34 Damages for unjustified arrest etc.”. A perusal of the ALRC report and the Explanatory Memorandum to the Act, as discussed below, contain no analysis of the differences in approach taken to damages flowing from arrest in the civil system compared to the common law system and in particular the significance of the words “unjustified” in this context.

Article 6(2) does not limit the class of potential claimants of damages for wrongful arrest, the only requirement of standing being that the loss or damages was caused in consequence of the wrongful arrest. This is in sharp contrast to the position under s 34 of the Act which allows a “party” to apply for damages for wrongful arrest.

However, it is noted that Australia is a signatory to neither the 1952 Arrest Convention nor the 1999 Arrest Convention. The ALRC specifically observed that Australia did not ratify the 1952 Arrest Convention as the proposed domestic legislation was more consistent with Australia’s interests.¹¹³

The current position on wrongful arrest in various States

England

In *Astro Vencedor Compania Naviera SA v. Mabanafit GmbH*,¹¹⁴ Lord Denning MR commented that “There have not been many claims for wrongful arrest recently.”¹¹⁵ Indeed, it appears that the last time that there was any real analysis of the test for damages for wrongful arrest in England was in *The Village Bell* in 1896.

The latest English decision on wrongful arrest is the decision of Coleman J in the High Court in *The Kommunar*.¹¹⁶ His Honour had previously¹¹⁷ set aside the writ and ordered the release of the arrested vessel on the basis that at the time of the arrest the defendant owners were not the same legal entity as the owners, charterers or party in possession of the vessel when the cause of action arose.¹¹⁸ The defendants sought damages for wrongful arrest arguing that the plaintiffs were aware of all the relevant facts as to the proper party who would be liable *in personam* in relation to the proceedings at the time of the arrest and that *in rem* jurisdiction did not exist on the basis contended. The vessel had been transferred to the defendant company after the

¹¹² W Tetley, “Arrest, Attachment, and Related Maritime Law Procedures” (1999) 73, 5-6 *Tulane Law Review* 1895, 1970-1.

¹¹³ An international convention may only be used as an aid to the interpretation of domestic legislation when that domestic legislation is passed to give effect to the international convention, even if the domestic legislation does not refer to the convention. See *The Banco* [1971] P 137, 151 per Lord Denning.

¹¹⁴ [1971] 1 Lloyd’s Rep 502, 504.

¹¹⁵ An award of damages for wrongful arrest had been made by the umpire; that aspect of the umpire’s decision was not in dispute on the appeal and thus damages for wrongful arrest was not raised before the Court of Appeal.

¹¹⁶ *Centro Latino Americano de Comercio Exterior SA v Owners of the Ship “Kommunar” (No.3)* [1997] 1 Lloyd’s Rep 22.

¹¹⁷ [1997] 1 Lloyd’s Rep 8.

¹¹⁸ See s 21(4) *Supreme Court Act 1981* (UK).

date upon which the cause of action arose as a result of the privatisation of Russian state assets; that much had been raised by the defendants in the affidavit supporting their motion seeking *inter alia* the release of the vessel. The plaintiffs took advice from two professors of Russian law, each of whom supplied an affidavit supporting the plaintiffs' entitlement to evoke the English *in rem* jurisdiction. The vessel had been commercially operating as a fish factory ship for the greater part of the six months detention, although she was inoperable for a period of approximately five weeks.

Colman J¹¹⁹ noted that *The Evangelismos* governed the recovery of damages for wrongful arrest¹²⁰ and interpreted that decision as comprising the following principles:

Two types of cases are thus envisaged. Firstly, there are cases of *mala fides*, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. It is, as I understand the judgement, in the latter sense that such a phrase as "*crassa negligentia*" and "gross negligence" are used and are described as implying malice or being equivalent to it.

His Honour held that there was no evidence to suggest that the plaintiffs acted with *mala fides*; their expert evidence indicated that the subject debts owed from the state-owned company were transferred, along with certain assets, to the privately-owned plaintiff company and that they believed on this basis that they were entitled to bring proceedings against the vessel.¹²¹ Turning to *crassa negligentia*, his Honour noted that the defect in the proceedings arose out of the discontinuity of the legal personality whom owned the subject vessel, which had its origin in the complicated privatisation of Russian state assets and was first brought home to the plaintiffs in an affidavit in support of the defendant's motion for release of the vessel from arrest.¹²² His Honour considered that the assumption that the vessel could properly be arrested under English law was not so groundless as to amount to *crassa negligentia* and that:¹²³

It is entirely understandable that, at least up to service of the notice of motion in March, 1996, [the plaintiff] should have pursued the proceedings *in rem*. They relied on London solicitors very experienced in this field. The solicitors themselves could not be said to have overlooked an obvious defect in the proceedings.

Turning to the continued detention of the vessel for the period after the plaintiffs received the affidavit material, his Honour noted that legal advice had been taken and stated:

They were, in my judgement, entitled to take the view that the contents of the experts' reports provided at least an arguable basis for maintenance of their position that the English Court had jurisdiction... To characterize their continued pursuit of the proceedings and maintenance of the arrest as without reasonable and probable cause would be putting the threshold of *crassa negligentia* far too low.¹²⁴

¹¹⁹ Note 117 above, 29-30.

¹²⁰ *The Cheshire Witch, The Cathcart, The Margaret Jane, The Strathnaver and The Walter D. Wallet* were also reviewed.

¹²¹ Note 117 above, 31.

¹²² Note 122 above.

¹²³ Note 122 above.

¹²⁴ Note 117 above, 32.

Finally, his Honour considered a period of 6 days during which the vessel remained under arrest, with the release orders stayed, while the appeal was under consideration by the plaintiffs. His Honour referred to *The Cheshire Witch* and held that he had granted leave to appeal if necessary in the circumstances of a complicated case and that a relatively short delay to take time to consider an appeal was not so unreasonable as to amount to *crassa negligentia*.¹²⁵

It is interesting to note how the phrase “without reasonable and probable cause” crept into his Honour’s judgement; the common law wrongful arrest cases were not referred to.

Canada

In *Armada Lines Ltd v. Chaleur Fertilizers Ltd*,^{126 127} Chaleur Fertilizers Ltd (“Chaleur”) entered into a contract with Armada Lines Ltd (“Armada”) for the transportation of a cargo of fertiliser and then failed to produce a cargo for loading onto Armada’s ship by the agreed date. Armada commenced an action *in rem* against the cargo and an action *in personam* against Chaleur for breach of contract and the cargo was arrested pursuant to rule 1003 of the *Federal Court Rules (Can)*.¹²⁸ Chaleur secured the release of the cargo by posting security in the amount of \$80,000. Approximately twenty months later Chaleur successfully applied to strike out Armada’s *in rem* action, with the arrest of the cargo and the security undertaking being set aside. Armada continued with its *in personam* claim and Chaleur counterclaimed for damages for wrongful arrest.

Armada succeeded at first instance in its breach of contract claim and Chaleur failed in its counter claim.¹²⁹ The Federal Court of Appeal set aside the judgement, dismissed the breach of contract claim and awarded Chaleur \$36,651.27 in damages for the wrongful arrest of the cargo consisting of \$32,000 for the loss of use of working capital resulting from the posting of the security, the balance being interest costs associated with maintaining the security.¹³⁰ Heald JA¹³¹ noted the similarity between arrest under rule 1003 and the relief provided by a *Mareva* injunction and that, “In each instance, the onus is undoubtedly cast upon the plaintiff to show that the arrest requested is necessarily for the protection of its rights.” His Honour noted the requirement of an undertaking as to damages for the issue of a *Mareva* injunction and said:¹³²

While Rule 1003 does not specifically require an undertaking as to damages for wrongful arrest, I think it to be a necessary inference that the plaintiff assumes the consequences of such an arrest.

Heald JA concluded that if a plaintiff obtains an arrest of cargo which later turns out to be “illegal”, the plaintiff “... must suffer the consequences of that illegality...”;

¹²⁵ Note 125 above.

¹²⁶ [1997] 2 SCR 617.

¹²⁸ See R Margolis, “Damages for the Wrongful Arrest of a Vessel: the venerable rule confirmed – *Armada Lines v. Chaleur Fertilizers*” (1998) *Lloyd’s Maritime and Commercial Law Quarterly* for a discussion of this decision.

¹²⁹ Now, see rule 481 *Federal Court Rules 1998* (Can).

¹³⁰

¹²⁹ Per Reed J, (1993) 60 FTR 232.

¹³⁰ [1995] 1 FC 3.

¹³¹ Note 131 above, 20.

¹³² Note 132 above.

Armada had arrested the cargo without legal justification and damages must flow from that fact.¹³³

Armada appealed to the Supreme Court of Canada solely on the issue of damages for wrongful arrest. Iacobucci J considered the damages awarded to maintain the security and concluded that item was recoverable as costs.¹³⁴ Turning to damages for wrongful arrest,¹³⁵ His Honour referred to *The Evangelismos* and stated that he was:

... not aware of any Canadian case where a court has awarded damages for wrongful arrest in the absence of conduct amounting to either malice or gross negligence.¹³⁶

His Honour noted that neither of the Courts below had made findings of bad faith or gross negligence, nor did the evidence led support such a finding and held that damages should not have been awarded for wrongful arrest.

Iacobucci J referred to the appellants' argument that the law on wrongful arrest should be aligned with the law of *Mareva* injunctions¹³⁷ and stated that despite the appeal of such an argument, the rule in *The Evangelismos* was of long standing and whether it operated harshly upon defendants was a question best resolved by the legislature.¹³⁸ His Honour further noted that in all of the common law jurisdictions, Australia was the sole country that had departed from the rule in *The Evangelismos* and that departure did not occur through judicial means but instead by specific legislative enactment.

United States of America

The basis of the right to recover damages for wrongful arrest has been settled in America since Holmes J¹³⁹ made the following landmark statement in *Frontera Fruit Co v. Dowling*:

The gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice or gross negligence of the offending party... The reasons for the award of damages are analogous to those in cases of malicious prosecution. The defendant is required to respond in damages for causing to be done through the process of the court that which would have been wrongful for him to do himself, having no legal justification therefor and acting in bad faith, with malice, or through a wanton disregard of the legal rights of his adversary.¹⁴⁰

While Holmes J aligns the test for damages for wrongful arrest *in rem* with malicious prosecution, like the test from *The Evangelismos*, *mala fides* or *crassa negligentia* must be demonstrated. *Frontera Fruit Co v. Dowling* continues to be applied unquestioningly.¹⁴¹

¹³³ Note 132 above.

¹³⁴ The Court was also constituted by La Forest, Heureux-Dube, Sopinka, Gonthier, Cory and Major JJ.

¹³⁵ The loss of the use of working capital.

¹³⁶ Note 127 above, 625.

¹³⁷ Note 127 above, 626.

¹³⁸ Note 127 above, 627.

¹³⁹ Delivering the judgment for the Circuit Court of Appeals, Fifth Circuit. The Court was also constituted by Foster and Sibley JJ.

¹⁴⁰ 91 F.2d 293 (5th Cir 1937) 297.

¹⁴¹ See, for example, *Allied Maritime, Inc v The Rice Corporation*, unreported, United States District Court for the Southern District of New York, Shira A. Scheindlin USDJ, 12 October 2004 at [10].

Hong Kong

In *The Amigo*,¹⁴² Barnett J considered a summons seeking damages for wrongful arrest, having previously¹⁴³ set aside a warrant of arrest on the grounds of material non-disclosure to the Registrar when taking out the warrant of arrest.¹⁴⁴ Further, the statement of claim disclosed no cause of action and was “wholly ineptly drafted” though the deficiencies could have been cured.¹⁴⁵ The claim *in rem* sought the recovery of possession of the vessel on the basis that property in the vessel was not intended to pass until full payment had been received, which had not occurred.

Barnett J noted that the law on the issue was settled and that damages may be recoverable if a ship is arrested by reason of *mala fides* or *crassa negligentia*, referring specifically to *The Evangelismos* and *The Walter D Wallet*.¹⁴⁶ His Honour had been referred to various other authorities, in relation to which he stated, “The only assistance to be derived from them is that each case very much depends upon its own facts.”¹⁴⁷ Further:

The cases give no real assistance. Each of the two cases to which I have referred might very well have been decided the other way. One might be forgiven for thinking that the arrest of the wrong vessel is rather more heinous than mere oversight of capacity on the part of the arresting party.¹⁴⁸

His Honour concluded that “bungling and inept though it [the conduct of the plaintiff] may have been”, it did not amount to *mala fides* or *crassa negligentia*.¹⁴⁹ The shipowners further argued that the plaintiffs were advised in writing very early on that the statement of claim lacked any reasonable cause of action and that damages should flow from that date.¹⁵⁰ His Honour noted that *The Cheshire Witch* and *The Margaret Jane* offered some support for the contention but concluded that taking the overall conduct of the plaintiff into account he was “equally unpersuaded” that the arrest was unduly continued.¹⁵¹

In *The Maule*,¹⁵² the Court of Appeal of Hong Kong had previously dismissed an appeal against orders of Barnett J striking out a writ and set aside a warrant of arrest. It had been held that the plaintiff mortgagee had no cause of action as the mortgage did not permit it to sell the subject vessel without accelerating the loan, which had not been done before issuing the writ.¹⁵³ Barnett J had also ordered an inquiry as to damages for wrongful arrest; the appeal concerned that order.

¹⁴² *Victory Star Shipping Company SA v The owners and all those Interested in the Ship 'Amigo' and World Happy Shipping Limited* (unreported, Supreme Court of Hong Kong, Barnett J, No AJ115 of 1991, 22 February 1994).

¹⁴³ The original orders were made on 8 October 1991 and the motion for damages for wrongful arrest came on for hearing on 16 February 1994.

¹⁴⁴ *In personam* proceedings had previously been commenced by the plaintiff, which were wholly inconsistent with the claim *in rem*.

¹⁴⁵ Note 143 above, [6].

¹⁴⁶ Note 143 above, [3]-[4].

¹⁴⁷ Note 143 above, [5].

¹⁴⁸ Note 143 above, [7].

¹⁴⁹ Note 148 above.

¹⁵⁰ 24 May 1991.

¹⁵¹ Note 143 above, [9].

¹⁵² *Banque Worms v The Owners of the Ship or Vessel "Maule" (Cyprus Flag) (formerley known as "Amer Deep")* [1995] 2 HKC 769.

¹⁵³ It is noted that the matter ultimately made its way to the Privy Council on the sole issue of the writ being struck out by Barnett J on the mortgage acceleration point. The appeal was upheld and the matter was

Bokhary JA¹⁵⁴ identified *The Evangelismos* as providing the test to be applied in considering damages for wrongful arrest and indicated that *mala fides* or *crassa negligentia* was required.¹⁵⁵ His Honour stated that the analogy between the tort of malicious prosecution and wrongful arrest was well established and that the phrase “malicious arrest of a ship by means of Admiralty process” was used in *The Walter D Wallet*.¹⁵⁶ His Honour noted that there was therefore justification for the view that there must be some element in the conduct of the arresting party apart from enforcement of his claim to satisfy the test.¹⁵⁷ He referred to a treatise on tort law and noted that the element of malice in a claim for malicious prosecution could not be sustained unless the predominant wish of the accuser is to vindicate the law and that by analogy malice will exist, “...unless the predominant wish of the plaintiff is the enforcement of his claim by a sincere use of the process of arrest.”¹⁵⁸ His Honour stated:

If a plaintiff wrongfully arrested a ship which he knew he could not legitimately arrest, then he would be acting in bad faith. And, short of that, if he wrongfully arrests a ship without applying his mind to whether that was a legitimate cause: proceeding in that cavalier fashion because he was bent on harming the shipowner or putting pressure on him to accede to a demand, then his conduct could, in my view, be described as malicious negligence.¹⁵⁹

Bokhary JA held¹⁶⁰ that it was impossible to say that the plaintiff had acted in bad faith and that it would be going too far to conclude that it had acted in a cavalier fashion as legal advice had been obtained on the proposed course, which was a relevant factor to take into account¹⁶¹.

Nazareth VP noted the test from *The Evangelismos* and, in reference to the phrases *mala fides* and *crassa negligentia*, stated:

What precisely those expressions mean and how they are to be applied to particular circumstances can, I dare say, be matters of some difficulty.¹⁶²

His Honour also noted that the analogy between the tort of malicious prosecution and claims for wrongful damage was well established.¹⁶³

The position emerging from *The Maule* and *The Amigo* is that shipowners will face considerable difficulties in obtaining damages for wrongful arrest in Hong Kong.

remitted back to Barnett J for further consideration. No mention was made of the wrongful damages point in the Privy Council.

¹⁵⁴ With whom Litton VP agreed. Nazareth JA agreed with the reasons of Bokhary JA but delivered a short judgement.

¹⁵⁵ Note 153 above, 772.

¹⁵⁶ Note 153 above, 773.

¹⁵⁷ Note 157 above.

¹⁵⁸ Note 157 above.

¹⁵⁹ This passage from the judgment of Bokhary JA has found support in Malaysia. See *Tamina Navigation Ltd v The Owner of the Cargo Laden On Board The Ship of Vessel MT 'Swallow'* (Defendant), *Newick Shipping Limited* (Interveners) [2003] 683 MLJU 1, 69 per Clement Skinner J (High Court - Kuching). It has not, however, been referred to in the Singaporean judgments mentioned below.

¹⁶⁰ Note 153 above, 774.

¹⁶¹ Citing the landmark House of Lords malicious prosecution decision in *Glinski v. McIver* [1962] AC 726 as support for that proposition.

¹⁶² Note 153 above, 774-5.

¹⁶³ Note 153 above, 775.

Singapore

In *The Euroexpress*,¹⁶⁴ a case primarily concerning items that were to be excluded from the sheriff's expenses, Wee Chong Jin CJ noted that a suggestion had been made in argument that the plaintiffs may have acted in bad faith in arresting a vessel on the basis that two bills of lading on which the appellants' claim was based were fraudulent, as they were either issued or negotiated long before the cargo was loaded on board the vessel.¹⁶⁵ His Honour stated:¹⁶⁶

Claimants are entitled to arrest a vessel or other such property as is permitted to obtain security for the claim. It cannot be argued that the arrest is made in 'bad faith' merely because there is good defence to the claim. In our opinion, for an arrest to be in 'bad faith', there must be some element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, *apart from* the proper enforcement of his claim. In our judgement, no such suggestion had or could have been advanced.

The test proposed by Wee Chong Jin CJ casts the burden on the plaintiff to prove malice in the conduct of the arrestor. This approach is essentially the same as that advanced by the Hong Kong Court of Appeal in *The Maule*.

In *The Eymar*,¹⁶⁷ a vessel was arrested in relation to a dispute over damaged cargo. Prior to the arrest the plaintiffs requested that the defendants supply a guarantee from a P&I Club in relation to the claim. The defendants agreed to that course subject to certain reservations which were not accepted. The plaintiffs arrested the vessel, after which the defendants indicated their acceptance of the plaintiffs' security terms and supplied the letter of undertaking sought, noting it was given under protest. The plaintiffs then refused to release the ship and demanded that a bail bond be filed. On the same day, the defendants successfully applied to the court for orders *inter alia* setting aside the warrant, releasing the vessel and staying the proceedings on the basis that the bill of lading contained an arbitration clause. The plaintiffs appealed to the High Court of Singapore where Chao Hick Tin JC touched upon the issue of damages for wrongful arrest, noting that the issue of whether damages for wrongful arrest should be ordered was able to be determined in the arbitration and, citing *The Evangelismos* and *The Strathnaver*, that *mala fides* or malicious negligence on the part of the plaintiffs must be shown.¹⁶⁸

On the plaintiffs' refusal to consent to the release of the vessel upon the defendants offering the undertaking sought, Chao Hick Tin JC stated:

The only question is whether the fact that the defendants agreed to furnish the letter of undertaking 'under protest' gave the plaintiffs a reasonable cause not to release the vessel. It seems to me that that expression meant, in the context, no more than that the defendants were reserving their rights, which they were entitled to do. In my opinion since alternative security had been furnished to the plaintiffs in terms which the plaintiffs had asked for, the plaintiffs had no further reason not to release the vessel... [T]he plaintiffs' refusal ... to accept the letter of undertaking amounted to at least malicious negligence. The arrest was clearly continued unnecessarily.¹⁶⁹

¹⁶⁴ *The Owners of Cargo Lately Laden on board The 'Euroexpress' v The 'Euroexpress' (Owners of) (Banque Indosuez & Anor, Interveners)* [1988] 3 MLJ 367 (Court of Appeal of Singapore).

¹⁶⁵ Note 165 above, 371.

¹⁶⁶ Note 166 above.

¹⁶⁷ [1989] 2 MLJ 460 (High Court of Singapore).

¹⁶⁸ Note 168 above, 465.

¹⁶⁹ Note 169 above.

In *The Ohm Mariana*, GP Selvam JC awarded damages for wrongful arrest in circumstances where the plaintiffs, who were found to be part or beneficial owners of the vessel, manufactured a document which had the effect of indicating that disbursements made by them in relation to the vessel were agents' claims for disbursements rather than part or beneficial owners' disbursements, in order to ground the right for them to proceed *in rem*.¹⁷⁰

GP Selvam JC referred to a number of the Admiralty authorities on wrongful arrest and the common law decisions concerning abuse of process and wrongful arrest and stated:

... it is evident that the cause of action for wrongful arrest in admiralty law is akin to the tort of abuse of legal process in general and wrongful seizure of goods or wrongful arrest of person in particular. In each case, arrest *per se* will not be the basis of liability...

The true basis of the claim therefore is, to use the common law phrase, 'without reasonable or probable cause', and to use the admiralty language '*crassa negligentia* or *mala fides*'. (See '*The Walter D Waller*'... and '*The Strathnaver*'...) The expression '*crassa negligencia*' or '*gross negligencia*' simply means negligence. The addition of the vituperative epithet adds nothing to its meaning...

The justification for the principle is that when an admiralty action *in rem* is brought, the arrest of the *res* is the necessary foundation of the action. Should the *res* be arrested under a mistake of fact or law but *bona fide*, the law will not punish the claimant as an award of costs is a sufficient penalty to discourage unfounded litigation. The execution of the law causes no harm: *execution juris non habet injuriam*.¹⁷¹

In *The Tanto Utama*, a vessel was arrested in relation to a claim for the price of bunkers supplied to it and barging charges. The owners of the vessel applied to set aside the writ and arrest warrant and for damages for wrongful arrest on the basis that the bunkers contracts were made with the charterers of the vessel, not the owners. The claim was settled and the action discontinued prior to the hearing; the Registrar ordering the plaintiff to pay damages resulting from the wrongful arrest. The plaintiff appealed the Registrar's order, arguing that the bunkers were supplied at the request of the master on behalf of the owners. The owners argued that the plaintiff had contracted with the charterers and had dealt with the agents of the charterers.¹⁷²

Lim Teong Qwee JC referred to *The Evangelismos*, *The Euroexpress*, *The Eymar* and *The Ohm Mariana* and noted that damages would be justified, "... if the arrest was an act of *mala fides* or of *crassa negligentia* from which may be implied malice..."¹⁷³ His Honour reviewed the evidence and concluded that, based upon the circumstances disclosed by the evidence, it could not be said that the plaintiffs knew that the contracts were made with the charterers as opposed to the owners and that it could therefore neither be said that the arrest was made in bad faith or maliciously nor so unwarrantably brought or brought with so little colour or so little foundation that it implied malice.¹⁷⁴ The appeal was allowed.

¹⁷⁰ *Pacific Navigation Co Pte Ltd v The Owners of and Other Persons Interested in the Ship or Vessel 'Ohm Mariana' ex 'Peony'* [1992] 2 SLR 623 (High Court, Singapore).

¹⁷¹ Note 171 above, 635-7.

¹⁷² *Golden Island Diesel Oil Trading Pte Ltd v Owners of the Ship or Vessel 'Tanto Utama'* [1995] 1 SLR 767 (High Court, Singapore).

¹⁷³ Note 173 above, 768.

¹⁷⁴ Note 173 above, 772.

In *The Dong Nai*,¹⁷⁵ Abdul Malik Ishak J referred to the statement of principle from *The Evangelismos*, noting the endorsement of that decision in the Court of Appeal of Singapore in *The Euroexpress*, in awarding damages for wrongful arrest.¹⁷⁶ The affidavit supporting the warrant of arrest contained material inaccuracies, claiming an untranslated document to indicate certain matters which it did not. Further, the underlying proceedings for damages for late delivery and certain other port charges could not be sustained because the claims being made by the shippers and consignees of cargo were not made against the plaintiffs.

In *The Kiku Pacific*,¹⁷⁷ a vessel was arrested by a company that physically supplied her with bunkers. Neither the shipowners nor the bunkers company were aware that there was a chain of back-to-back sales contracts in relation to the bunkers such that contractually, the parties were several links apart. Pending the resolution of the dispute, the shipowners offered security in February 1996, which was rejected by the bunkers company. In March 1996 the shipowners offered further security in the form of a letter of undertaking from the London Steamship P&I Club providing for the claim to be subject to English jurisdiction. This was rejected by the bunkers company which sought a first class bank guarantee and United Arab Emirates jurisdiction. The vessel was arrested at Singapore on 8 July 1996 and released on 10 July 1996 following the provision of security by the owners in the form of a letter of undertaking from the London Steamship P&I Club on the same terms as previously offered, save for Singapore being the jurisdiction. The shipowners counterclaimed for damages for wrongful arrest. Both the claim and counterclaim were dismissed at first instance by Choo Han Teck JC. The shipowners appealed to the Court of Appeal.

Karthigesu JA¹⁷⁸ noted that, in dismissing the counterclaim, Choo Han Teck JC said that the cornerstone of an action for such damages was malice, or gross negligence implying malice,¹⁷⁹ and had rejected the use of the term “reasonable and probable cause” in claims for damages for wrongful arrest.¹⁸⁰ The appellants acknowledged that the test for wrongful arrest was malice but argued that malice could not be inferred where there was no “reasonable or probable cause” for the arrest and relied upon the common law wrongful arrest decisions as setting out the proper test. Karthigesu JA analysed the decisions advanced by the appellants; those Admiralty decisions that had picked up the phrase “reasonable and probable cause”¹⁸¹ and stated:

While the use of the term ‘reasonable and probable cause’ is well established in actions for malicious prosecution, we are uncomfortable with the import of such a term into admiralty law as part of the test for wrongful arrest for a vessel.¹⁸²

His Honour referred to the classic statement of the definition of “reasonable and probable cause” from the judgement of Hawkins J in *Hicks v. Faulkner*.¹⁸³ In an action for malicious prosecution, he stated:

¹⁷⁵ *Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam* [1996] 4 MLJ 454.

¹⁷⁶ Note 176 above, 465.

¹⁷⁷ [1999] 2 SLR 595 (Court of Appeal, Singapore).

¹⁷⁸ The Court was also constituted by Yong Pung How CJ and LP Thean JA.

¹⁷⁹ Note 178 above, 598.

¹⁸⁰ See note 178 above, 598-9, where Karthigesu JA sets out the analysis conducted by Choo Han Teck JC on the rejection of the “reasonable and probable cause” cause test.

¹⁸¹ *The Walter D Wallet, The Ohm Mariana, The Eymar*.

¹⁸² Note 178 above, 604.

¹⁸³ (1881) 8 QBD 167, 171.

... In the context of a civil action ... ‘reasonable and probable cause’ would be paraphrased as an honest belief in the action, founded upon reasonable grounds which would lead an ordinary prudent and cautious man to the conclusion that the action would probably succeed. In our view, this would be too similar to the standard of proof for civil cases and would suggest that a plaintiff who fails in his action on a balance of probabilities is liable to pay damages for wrongful arrest. That would be stating the threshold for wrongful arrest of a vessel at too low a level, and would discourage potential plaintiffs from pursuing their claims because of the heavy damages which they might incur if they are subsequently unable to prove their claim at trial.

We were therefore of the opinion that the term ‘reasonable or probable cause’ is not appropriate in the context of the wrongful arrest of a vessel, as it would cause confusion, and more importantly dilute the threshold required for an action in wrongful arrest to succeed.¹⁸⁴

Karthisesu JA said that the test laid down in *The Evangelismos* was to be applied and the question to be asked was:

... in bringing the action against the owners, did [the plaintiff] know or honestly believe that they could not legitimately arrest the ship so as to imply malice, or in arresting the vessel, did [the plaintiff] fail to apply their mind as to whether they could legitimately arrest the vessel, and nevertheless proceeding to arrest the vessel because [the plaintiff] was bent on putting pressure on the owners to acceded to their demand, so as to imply gross negligence; and in refusing the security offered by the owners in March 1996, was [the plaintiff’s] refusal malicious or grossly negligent.

His Honour noted that the bunkers company had relied upon correspondence created at the time of supplying the bunkers which demonstrated its understanding that it had a maritime lien over the vessel in the nature of a bunker supplier’s maritime lien. However, it could have easily made inquiries in that regard which would have indicated that that was not the case in Singapore.¹⁸⁵ Reference was also made to changes to the factual matrix on which the claim was prosecuted. His Honour concluded that the claim was both legally and factually complicated and the changes to the factual matrix were within the periphery of the essential facts and that the plaintiff was neither malicious nor grossly negligent in bringing the action.¹⁸⁶

The owners also argued that plaintiff was malicious or grossly negligent in not accepting the initial P&I Club security, there being no difference in the law between Singapore and England concerning the claim. His Honour noted that at the time the security was offered the vessel was not under arrest and it may have been arrested in a jurisdiction that was more favourable to the plaintiff than England and the fact that the vessel was ultimately arrested in Singapore does not impugn the reason for the initial rejection of security.¹⁸⁷ The Plaintiff was awarded the costs of the appeal.

South Africa

Section 5(4) of the *Admiralty Jurisdiction Regulation Act 105 of 1983* (SAf) (“the South African provision”)¹⁸⁸ provides:

¹⁸⁴ Note 178 above, 605.

¹⁸⁵ Note 178 above, 606.

¹⁸⁶ Note 178 above, 607.

¹⁸⁷ Note 178 above, 607-8.

¹⁸⁸ The provision was introduced following the “Report on the Review of the Law of Admiralty” by the South African Law Commission.

Any person who makes an excessive claim or requires excessive security¹⁸⁹, or without reasonable and probable cause¹⁹⁰ obtains the arrest of property or an order of Court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage.

The “without reasonable and probable cause” aspect of the South African provision has recently been considered by the High Court of South Africa in two separate decisions, by Comrie J in *MV Heavy Metal*¹⁹¹ and by Thirion J in *MV Cape Athos*^{192,193}.

*MV Heavy Metal*¹⁹⁴ primarily concerned an application by the owners of an arrested surrogate ship for counter-security under the South African legislation¹⁹⁵ and the consequential discharge of a warrant of arrest in the event that such security is not provided. In the course of his judgement, Comrie J commented upon the phrase “reasonable and probable case” in s 5(4) and noted that the phrase was well known to South African law in the context of actions for malicious prosecution, and that Parliament should be taken to have intended the phrase to bear the same meaning.¹⁹⁶ His Honour considered the South African and English malicious prosecution decisions and concluded that “...a person who acts with an honest belief at the time, founded on reasonable grounds, does not act ‘without reasonable and probable cause’”.¹⁹⁷ He observed:

It seems to me that by invoking such a well-known phrase, the intention was to import both the subjective and objective elements referred to earlier. However, ‘malice’ is not a requirement.¹⁹⁸

Comrie J noted that such an assessment had to be conducted on the basis of the evidence available to the claimant at the time it launched its arrest application.¹⁹⁹

In *MV Cape Athos*,²⁰⁰ a vessel was arrested by the defendants pursuant to a court order as security for arbitration proceedings to be instituted by them in England.²⁰¹ That order was subsequently set aside eight days later and the vessel was released on the basis that the arrest was inconsistent with a non-arrest clause contained in an agreement between the parties. The plaintiff successfully sued the defendants under s 5(4).

Thirion J referred to a number of English authorities on malicious prosecution and concluded, like Comrie J in *MV Heavy Metal*, that “reasonable and probable cause” in the South African legislation was intended to bear the same meaning as it did in malicious prosecution.²⁰²

The defendants argued that they had obtained legal advice that the non-arrest clause was no longer binding upon them and could not be enforced by the other parties to the agreement. Thirion J noted:

¹⁸⁹ See *Inter Maritime Management SA v Companhia Portuguesa de Transportes Maritimos EP* 1990 (4) SA 850 for an analysis of the principles at play in an excessive claim excessive security suit.

¹⁹⁰ This phrase previously read, “without good cause”. See D Shaw, *Admiralty Jurisdiction & Practice in South Africa* (1987) Cape Town: Juta & Co, pp. 61-4.

¹⁹¹ *MV Heavy Metal: Belfry Marine Ltd v Palm Base Maritime SDN BHD* 2000 (1) SA 286.

¹⁹² *MV Cape Athos: Cape Athos Shipping Ltd v Blue Emerald Shipping Ltd and Ors* 2000 (2) SA 327.

¹⁹³ For a discussion of the original s 5(4), see Shaw, note 191 above, pp. 61-64.

¹⁹⁴ Note 192 above.

¹⁹⁵ See s 5(2) of the South African legislation; note 192 above, 291-2.

¹⁹⁶ Note 192 above, 294.

¹⁹⁷ Note 192 above, 294-5.

¹⁹⁸ Note 192 above, 295.

¹⁹⁹ Note 192 above, 301.

²⁰⁰ Note 193 above.

²⁰¹ See s 5(3) of the South African legislation.

²⁰² Note 193 above, 335.

Whether in a given case a reasonable person would have accepted the legal advice and would have acted on it remains a question of fact. Moreover, the value to be attached to the legal adviser's advice would depend also on whether the client had put all the relevant facts before the legal adviser. It would also depend on the circumstances under which the advice was given. The test is whether a reasonable person would have believed that the advice was *probably* correct.²⁰³

His Honour noted that the evidence indicated that the defendants had decided that they wanted to seize on the opportunity to arrest the vessel and left it to their lawyers to come up with an argument which would justify the arrest.²⁰⁴ His Honour concluded that the defendants, "... could not reasonably have believed that the provision was no longer of force and effect."²⁰⁵

Nigeria

Ojukwu²⁰⁶ notes that damages may be obtained for wrongful arrest, *inter alia*, under s.13 of the *Admiralty Jurisdiction Decree* (Nigeria)²⁰⁷ which, so far as is relevant, provides:

- “(1) Where, in relation to a proceeding commenced under this Decree-
- (a) a party unreasonably and without good cause-
 - (i) demands excessive security in relation to the proceeding, or
 - (ii) obtains the arrest of a ship or other property under this decree; or
 - (b) a party or other person unreasonably and without good cause fails to give a consent required under this Decree for a ship or other property, the party or person shall be liable in damages to a party to the proceedings being a party or person who has suffered loss or damage as a direct result. (*my emphasis*)

The similarities with s 34 of the *Admiralty Act* are striking. Ojukwu notes²⁰⁸ that an important innovation in Nigeria is the dispensing with the English rules requiring *mala fides* or *crassa negligentia*.²⁰⁹ Ojukwu states that now a defendant "...is merely required to show that the arrest was either unreasonable or without good cause in accordance with section 13 of the Decree ..."²¹⁰ (*my emphasis*). The author is unaware of whether or not there has been any judicial consideration of s 13 of the *Admiralty Jurisdiction Decree* to date.

The current Australian position – the interpretation of s 34

The Australian decisions referring to s 34

No Australian decision has provided guidance upon the principles that are to govern applications under s 34. A number of decisions have made reference to s 34, largely in the context of adjourning the issue of damages *sine die* without any consideration of the

²⁰³ Note 193 above, 336.

²⁰⁴ Note 193 above, 342.

²⁰⁵ Note 205 above.

²⁰⁶ CN Ojukwu, "Arrest and Detention of Ships and Other Property in Nigeria", (2004) 28, 2 *Tulane Maritime Law Journal* 249, 264-6.

²⁰⁷ No. 51 of 1991 (Nigeria), cited in Ojukwu, note 207 above, 264. The other bases of obtaining damages are under Order XI, Rule 2 of the *Admiralty Jurisdiction Procedure Rules* or Order 18 of the *High Court Rules* which both provide remedies to a defendant where a ship is arrested on "insufficient grounds" or where it appears to the court that there was no "probable ground" for instituting the underlying suit.

²⁰⁸ Note 207 above, 267.

²⁰⁹ See *Compania Avegacion Y Financiera Bosnia SA v Mercantile Bank of Nigo Ltd (The "Bosnia" No.2)* [1988] 2 NSC 176, 181-2 for the Nigerian position prior to the *Admiralty Jurisdiction Decree* where *mala fides* or *crassa negligentia* were required to ground a claim for damages.

²¹⁰ Note 207 above.

merits of the claim, or, with respect, in the context of offering arresting plaintiffs encouragement to resolve disputes concerning the terms of release. For these reasons, the decisions must be approached with caution.

In *The Iron Shortland*,²¹¹ the plaintiff arrested a vessel under the surrogate ship provision of the Act²¹². The shipowner applied to the Court seeking orders setting aside of the warrant of arrest, the release of the subject vessel and damages pursuant to s 34. Upon the filing of the notice of motion, the parties came to an agreement, sanctioned by the court, that the vessel be able to continue operating although it was under arrest. The defendant was later ultimately successful on the motion with Sheppard J *inter alia* setting aside the arrest warrant and associated orders. The matter turned upon the construction of aspects of the surrogate ship arrest provision, which had not previously been considered. The issue of damages pursuant to s 34 was adjourned *sine die*. The matter does not appear to have been re-listed for argument on the wrongful damages point.

In *The Greshanne*,²¹³ a vessel was arrested on the basis that the purchase price had not been paid, that is, upon a debt. The vessel had been under arrest for in excess of two months when the shipowners applied to the court seeking *inter alia* the release of the vessel and damages pursuant to s 34. Zeeman J noted that the Act did not authorise the commencement of an action *in rem* for such a claim, and further that the underlying action was so poorly drafted and had structural deficiencies such that it had no prospects of success.²¹⁴ His Honour set the action aside, ordered the release of the vessel from arrest and adjourned the hearing of the application seeking damages pursuant to s 34 *sine die*. Again, it appears that *The Greshanne* was not re-listed for argument on that point.

In *Laemthong Internation Lines Co Ltd v. BPS Shipping*,²¹⁵ primarily a decision concerning the re-arrest provision of the Act,²¹⁶ Mildren J in *obiter dictum* without any apparent reason for the reference, referred to s34 and said without conducting any analysis of s 34 beyond referring to the ALRC Report, that:

... s34 applies only to arrests which are made unreasonably as well as without good cause so as to avoid the possibility of a penalty when the arrest appeared reasonable at the time but turned out to be unjustified. In other words, even if the respondent ultimately fails in its action *in rem* that does not automatically entitle the applicant to damages.²¹⁷

In *The Zoya Kosmodemyanskaya*,²¹⁸ a claim under s 34 was not before the court but the Full Bench of the Federal Court noted that any claim made under s 34(1) should be brought as a cross-claim in the proceedings, or as a separate proceedings.

²¹¹ *Malaysia Shipyard and Anor v "Iron Shortland" as the Surrogate for the ship "Newcastle Pride"* (1995) 131 ALR 738 (Federal Court of Australia).

²¹² See s 19.

²¹³ *Paul Allison and APAI Pty LTD v The Owners of the ship "Greshanne"*, unreported, Supreme Court of Tasmania, No 1757 of 1995, Zeeman J, 12 February 1996.

²¹⁴ Note 214 above, [13]-[14].

²¹⁵ (1995) 127 FLR 91 (Court of Appeal of Northern Territory). The matter ultimately went to the High Court on the sole issue of whether or not "charterer" in s 19 of the Act included a voyage charter; s 34 did not receive any comment in the High Court; see (1997) 149 ALR 675.

²¹⁶ See s 21.

²¹⁷ Note 216 above, 103.

²¹⁸ *Lloyd Werft Bremerhaven GmbH v The Owners of the ship Zoya Kosmodemyanskaya as surrogate for the ships Taras Schevchenko, Delphin and Kazakhstan and Tor Shipping Co* [1997] 1162 FCA (Federal Court of Australia, Full Bench, Beaumont, Burchett and Lindgren JJ, 31 October 1997), [11].

In *The Carina*,²¹⁹ Tamberlin J, in considering the rejection by the plaintiff of a security offered, stated that such rejection could not be said to be "... frivolous, vexatious or unjust ..." and further that the insistence by the plaintiff on its security requirements could not be said to be "... oppressive or an abuse of the court's process in causing the vessel to be detained under arrest ..." as the weight of the objections made by the plaintiff were such that such rejection was open.²²⁰ His Honour continued:

It must also be born in mind that s 34 of the Act permits an award of damages where a person or party unreasonably and without just case fails to consent to the release of a vessel from arrest. This provision is designed to discourage attempts to unreasonably detain an arrested vessel.²²¹

In *McConaghy Pty Ltd v The Yacht "Ragamuffin"*,²²² a vessel was arrested in relation to a dispute over the quantum of a debt for work done on her. The defendant brought an *ex parte* application seeking the release of the vessel on the basis of undertakings being given to the court to pay certain amounts to the plaintiff and other amounts into court as security for the release of the vessel. Allsop J adjourned the proceedings to enable the plaintiff to appear and stated that a remedy is available under s 34 if "... the plaintiff is being unreasonable and without good cause demanding excessive security, or has unreasonably obtained the arrest of the vessel."²²³

The picture starting to emerge from the first instance decisions, neither of which contains any analysis of s 34, is that reasonableness on the part of the plaintiff is the focus of inquiry in s 34. In *The Carina*,²²⁴ Tamberlin J appears to be indicating that "unreasonableness" in the continued detention of the vessel is the touchstone for an award of damages under s 34(1)(a)(i) or (b) and that "unreasonableness" may be found where the arrest is frivolous, vexatious, unjust, oppressive or an abuse of the processes of the court. Of course, Allsop J was squarely referring to s 34(1)(a)(ii) in *McConaghy Pty Ltd v The Yacht "Ragamuffin"*, when he stated that damages were available when a plaintiff has unreasonably arrested a vessel.

The context in which s 34 is to be examined

The key phrase in s 34 that requires interpreting is "unreasonable and without good cause". The Second Reading Speech of the Act demonstrates that the Australian Parliament was very much guided by the ALRC Report in reforming the Admiralty jurisdiction generally and specifically in relation to s 34.²²⁵ Both the text of the Act and the accompanying Explanatory Memorandum are virtually identical to the draft *Admiralty Bill 1988* ("the Bill") and Explanatory Memorandum produced by the ALRC; both are identical in relation to s 34. A strong case is made out for referring to the ALRC Report as an aid to the construction of s 34.²²⁶

The ALRC noted that a power imbalance existed between those arresting ships and shipowners, arising out of the commercial pressures placed upon shipowners through

²¹⁹ *The Owners of the Ship "Carina" v The Owners or Demise Charterers of the Ship "MSC Samia"* [1997] 1001 FCA (unreported, Tamberlin J, Federal Court of Australia, 26 September 1997).

²²⁰ Note 220 above, [9].

²²¹ Note 221 above.

²²² [2004] FCA 433 (Federal Court of Australia, Allsop J, 30 March 2004), [6].

²²³ Note 223 above.

²²⁴ *The Owners of the Ship "Carina" v The Owners or Demise Charterers of the Ship "MSC Samia"* [1997] FCA 1001 (Tamberlin J, Federal Court of Australia, 26 September 1997).

²²⁵ See Commonwealth, *Parliamentary Debates*, House of Representatives, 1988, 1336 and 2051.

²²⁶ See s 15AB(2)(b) *Acts Interpretation Act 1901* (Cth).

the detention of their ships.²²⁷ Further, that the test for damages for wrongful arrest in Admiralty, as set out in *The Evangelismos*, was so plaintiff-oriented that plaintiffs seldom need to be concerned with the risk of damages flowing from an arrest.²²⁸ The ALRC concluded that a provision was required to remedy the imbalance between those interests making it less onerous for shipowners to obtain damages for wrongful arrest.²²⁹

On the content of the test, the ALRC referred to the South African provisions and noted that they had been criticised as being too broad and vague and that the Australian provision, "... should attempt to strike a more precise balance between plaintiff and defendant."²³⁰ The ALRC identified one sole limit that should be placed upon the recovery of damages,²³¹ namely, that:

... it should apply only to arrests which are made unreasonably as well as 'without good cause'²³², to avoid the possibility of a penalty where the arrest appeared reasonable at the time but turned out to be unjustified.²³³

It is with this broad purpose in mind that "unreasonable and without good cause" in s 34, falls for consideration.

A major difficulty that arises with interpreting s 34 is the phraseology employed in both s 34, the Explanatory Memorandum and the ALRC Report. The ALRC considers damages for wrongful arrest under the heading "*Damages for Vexatious Arrest*"²³⁴ and refers to the wrongful arrestor as "the vexatious or frivolous plaintiff".²³⁵ Further, the reform question to be asked was "...whether [a] special provision to deter vexatious or frivolous plaintiffs is required."²³⁶ Each of these references purports to conceptualise wrongful arrest in Admiralty with wrongful arrest or abuse of process at common law. The difficulty with this approach, as noted by Karthigesu JA in *The Kiku Pacific*,²³⁷ is that introducing foreign phraseology has the potential to confuse and misstate the area under consideration. These difficulties are compounded by the lack of any reference to the common law cases which would be expected if those principles were being introduced into the provision.

A further complication is introduced by way of the title to s 34, which reads "Damages for unjustified arrest, &c." As discussed above, "unjustified arrest" is a technical term of specific usage in civil law systems and as such represents the basis upon which damages may be awarded for wrongful arrest. In its widest form, damages will be available for "unjustified arrest" where the claim *in rem* fails at trial or is withdrawn by the plaintiff prior to trial, *ipso facto*.²³⁸ The stated purpose of s 34 is inconsistent with its title. Again, the complication is compounded because the ALRC

²²⁷ Note 8 above, pp. 254-5, 256.

²²⁸ Note 8 above, pp. 256-7.

²²⁹ Note 229 above.

²³⁰ Note 8 above, p. 257.

²³¹ Note 231 above.

²³² The phrase "without good cause", while not identified, appears to have been taken from the South African provision as it stood at the time the ALRC Report was written. That provision was amended to read, "without reasonable and probable cause". See note 8 above, p. 36.

²³³ Refer to point 26 of the United Kingdom comments on the 1994 Draft Articles of the 1999 Arrest Convention; see note 8 above, p. 20.

²³⁴ Note 8 above, p. 256.

²³⁵ Note 8 above, p. 257.

²³⁶ Note 236 above.

²³⁷ Note 178 above, 605.

²³⁸ See the discussion of the basis of liability for wrongful arrest in civil law states, note 8 above, p. 18.

neither used the phrase “unjustified arrest” in the body of the report,²³⁹ nor was any reference made to the approach taken in the civil law systems. During the Second Reading Speech of the Bill, Attorney-General Bowen stated that the Bill followed the recommendations contained in the ALRC Report and that the proposed legislation took into account international trends and remained within internationally acceptable limits.²⁴⁰

The Explanatory Memorandum to the Act, which is in the same terms as the draft Explanatory Memorandum produced by the ALRC, provides:²⁴¹

1. Under the present law a party is only liable for damages for unjustified arrest in cases of gross neglect. Substantial loss may be caused by unjustified arrest, although alternative security may have been offered. Cl 34(1) creates a more extensive liability for damages for unjustified arrest of, or unjustified refusal to release, a ship or other property under the Bill. Cl 34 applies only where proceedings are actually commenced under the Bill. The liability for damages arises only where the plaintiff has acted ‘unreasonably and without good cause’, and recovery is limited to loss directly resulting to a party to the proceedings, or a person with a legal interest in the ship or property in question.

Reference: Report, para 301--4; SAF s 5(4).

Again, the phraseology employed is that of “unjustified arrest”. Whatever “unreasonable and without good cause” is intended to mean, the Explanatory Memorandum makes it clear that s 34 was intended to create a more extensive liability for wrongful arrest than existed in Admiralty.

The influence of the South African provision

The ALRC noted that there had been criticism of the vagueness of the language in the South African provision and that the Australian provision should attempt to strike a more precise balance between plaintiff and defendant.²⁴² As noted above, the South African provision was subsequently amended to enshrine the “without reasonable and probable cause” test from the common law. Had the Australian Parliament intended to go down that road, s 34 could have simply recited the common law test. The South African decisions on the amended South African provision are unlikely to assist Australian courts considering s 34.

The text of s 34: the test supplied

The first difficulty that arises with the text of s 34 is determining the legislative intention of the conjunction “and”. Is “and” used conjunctively such that a two staged test is presented and the arrest in question must be both “unreasonable” and “without good cause”?²⁴³ Has there been a mistake in drafting the legislation, with Parliament intending “and” to be the disjunctive “or” so that it need only be shown that the arrest

²³⁹ The first time it appears is in the draft Bill.

²⁴⁰ The Rt Hon Mr Lionel Bowen MP, Second Reading Speech, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 1988, 1336; The Second Reading Speech was also read in the Senate by the Hon Senator Tate, Second Reading Speech, Commonwealth, *Parliamentary Debates*, Senate, 28 April 1988, 2051.

²⁴¹ See the Explanatory Memorandum to the Bill, 21.

²⁴² Note 242 above.

²⁴³ See *Jennings v Price* (1984) 30 NTR 39 (Supreme Court of the Northern Territory, Foster CJ), which discusses this ordinary approach to the interpretation of “and” and “or”.

was either “unreasonable” or “without good cause”?²⁴⁴ Is the phrase to be seen as an instance of hendiadys such that “unreasonable and without good cause” is intended to express a single idea?²⁴⁵ Cremean argues that “unreasonable” and “without good cause” must be read conjunctively.²⁴⁶ This view gains support from the ALRC, which states that the provision, “...should apply only to arrests which are made unreasonably as well as ‘without good cause’”.²⁴⁷ Cremean says:

The first requirement, acting “unreasonably”, looks to assess a person’s conduct to see whether it is unreasonable. The second requirement, acting “without good cause”, looks to the grounds on which a person has acted to see whether such grounds constitute acting without good cause.²⁴⁸

Consistent with that view, the comments of the ALRC and the title of s 34, “without good cause” may be interpreted as meaning “unjustified” in the civil law sense, that is, the claim fails at trial or is withdrawn prior to trial. The failure of the claim, or its withdrawal, is a precondition to recovery both in the common law and civil legal systems. Such an interpretation would be unremarkable. An alternative interpretation of “without good cause” would be to factor in wider notions of justice into that element. However, such an approach would render the second element – “unreasonably” – redundant. If the former interpretation of “without good cause” is accepted, the substance of the test would be found in the interpretation of “unreasonable”. Such an approach would also be consistent with the Australian decisions which have referred to s 34; those decisions fixing upon reasonableness as the touchstone for an award of damages.

“Unreasonable” looks strikingly similar to *mala fides* or *crassa negligentia*. However, the purpose of s 34 demands that “unreasonable” imposes a lower threshold for an award of damages than the test in Admiralty. The ALRC was at pains not to penalise plaintiffs where the arrest appeared reasonable at the time but later turned out to be unjustified.²⁴⁹ A lower threshold may be achieved by conducting an objective assessment of the evidence available to the plaintiff at the time of the arrest,²⁵⁰ as opposed to an objective-subjective inquiry into the state of mind of the plaintiff looking for malice. Cremean states that acting “unreasonably and without good cause” under s 34 is a wider notion than bad faith which does not necessarily translate into requiring malice or implied malice.²⁵¹ Butler and Duncan also indicate that damages may be available under s 34 without the existence of either bad faith or gross negligence and that damages “...may lie in cases of a mere error in judgement”.²⁵²

²⁴⁴ See *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, where the court was prepared to read “and” as “or” and *Ex parte Melvin* [1980] Qd R 391 where the court was prepared to read “or” as “and”.

²⁴⁵ See *Traders Prudent Insurance Co Ltd v The Registrar of the Workers’ Compensation Commission of New South Wales* [1971] 2 NSWLR 513 (Supreme Court of New South Wales, Hope J), which involved the ultimate construction of a phrase as an instance of hendiadys.

²⁴⁶ DJ Cremean, *Admiralty Jurisdiction: Law and practice in Australia and New Zealand* (2003), Sydney: Federation Press.

²⁴⁷ Note 8 above, p. 256.

²⁴⁸ Cremean, note 247 above, pp. 80-1.

²⁴⁹ Note 8 above, p. 257.

²⁵⁰ Those matters should be available in the affidavit supporting the warrant.

²⁵¹ Note 247 above. See also DJ Cremean, “Mala fides or Crassa negligentia?” (1998) *Lloyd’s Maritime and Commercial Law Quarterly*, 9, 11.

²⁵² DA Butler and WD Duncan, *Maritime Law in Australia* (1992), Sydney: Legal Books, p. 70.

The three limbs of s 34

The phrase “unreasonable and without good cause” is a prerequisite to liability for each of the three bases of claim under s 34 and Parliament would ordinarily be taken to have intended that the phrase ought to have the same meaning with reference to each base.²⁵³ However, that presumption may be rebutted.²⁵⁴ Section 34(1)(a)(i) deals with demands for excessive security and s 34(1)(b) with failing to give a consent required under the Act for the release of the *res*. Neither of those grounds, in contrast to damages for wrongful arrest *per se* under s 34(1)(a)(ii), calls for an assessment of the basis in law for the initial arrest. It is submitted that the element of “without good cause” serves no purpose in considering awards under those grounds. An alternative argument is that “unreasonably and without good cause”, for the purposes of ss 34(1)(a)(i) and (b), is an instance of hendiadys and expresses the single idea of reasonableness. Either approach accords with the judgement of Tamberlin J in *The Carina*.²⁵⁵

Conclusions

The international jurisprudence concerning the availability of damages for wrongful arrest of ships has been reviewed and reveals that three main approaches are applied to such applications, namely, a narrow entitlement to damages based upon the Admiralty decisions where *mala fides* or *crassa negligentia* must be demonstrated, a narrow entitlement to damages based upon the test of “reasonable and probable cause” from the common law decisions; and the much broader entitlement to damages in the civil legal systems where the arrest is unjustified.

The ALRC acknowledged the imbalance that existed in Admiralty between shipowners and arrestors of ships, with shipowners facing an overly onerous test in seeking compensation in circumstances of wrongful arrest. Section 34 was recommended by the ALRC and was enshrined in the Act in order to provide balance to the competing interests. Section 34 has not been comprehensively considered in the Australia courts.

A blend of phraseology, from each of the three main approaches to assessing damages for wrongful arrest, is to be found across the ALRC Report, the Explanatory Memorandum to the Act and s 34 itself. The Australian courts will ultimately be presented with a difficult task when they are called upon to interpret s 34. It is submitted that the effect of s 34 is to move the focus from an objective assessment of the subjective intention of the plaintiff in proceedings *in rem* to an objective assessment of the evidence available to that party at that time those proceedings were commenced. That is, under s 34 shipowners do not carry the burden of proving malice, express or implied; it need only be proved that it was unreasonable for the plaintiff to have proceeded *in rem* based on the evidence available at the time those proceedings were commenced. The courts will need to take a robust view in assessing reasonableness if s 34 is to fulfil its purpose.

In a practical sense, the shipping community has not historically prosecuted claims for wrongful arrest in Australian courts. Overcoming the formidable hurdle of *The Evangelismos* has no doubt featured largely in the commercial resolutions of such disputes. The Australian casebooks are devoid of a single decision awarding damages under s 34. The only conclusion that can be drawn is that shipowners lack faith in the

²⁵³ See, for example, *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 (Supreme Court of Victoria) per Hedges J at 452-3.

²⁵⁴ See, for example, *Murphy v Farmer* (1988) 79 ALR 1 per Deane, Dawson and Gaudron JJ at 5-8.

²⁵⁵ Note 220 above.

outcomes they may receive in prosecuting claims under s 34 and continue to negotiate commercial settlements in circumstances of unjustified arrest.