
Wrongful arrest of ships: a case for reform

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There should always be good reasons for reform in the law and such reasons, undoubtedly, include 'balance of justice' and 'uniformity'. The attraction of the common law is that, if the judges are unrestrained by International Convention rules or statutes, it is their prerogative to develop the law by adapting old principles or creating new ones, when changes in other spheres of the law, or society, or the commercial world, call for new law. Wrongful arrest of ships is an area in need of such reform.

I. Introduction¹

Under English law,² the test for wrongful arrest, as derived from the old authorities of the Privy Council, *The Evangelismos*³ and *The Strathnaver*,⁴ requires proof by the owner of the arrested ship of *mala fides* or *crassa negligentia* on the part of the arresting party. This is the phraseology most commonly used to represent the test derived from these decisions, although it has been elaborated by subsequent cases, as will be seen below. The question is, therefore: Is it necessary to disturb the law which has been settled for more than 150 years? Are there any compelling reasons for its re-examination? The fact that the test was formulated in very different conditions and has not been critically examined in the context of modern commercial litigation is itself a reason for its reassessment. Some other reasons are explored below.

The complacency with, or resistance to disturbing, this test can be explained by the reason that claimants should be protected by affording them the right to arrest a ship to obtain security for their legitimate claims against the defendant who is, in many, if not most, cases a one-ship

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¹ This is an extended version of the subject dealt with in the forthcoming 3rd edition of 'Modern Maritime Law' by this author, expected later in 2013.

² The Arrest Convention 1952 does not deal with wrongful arrest of a ship but leaves the matter to be decided by the law of the state in whose jurisdiction the ship is arrested. The issue of whether the Convention should contain a provision on the right of the owner to claim damages for wrongful arrest was hotly debated; the civil law countries were in favour of such a provision and the common law countries were against it: see Berlingieri *Arrest of Ships* (5th edn Informa 2011) ch 16. Thus, the situation in which such liability arises differs from country to country; the law of each country, State Party to the Convention, can be found in this chapter.

³ *The Evangelismos* (1858) 12 Moo PC 352; *Walter D Walle* [1893] P 202 (proof of actual damage is not necessary to sustain an action in a court of Admiralty for wrongful arrest, if the seizure of the vessel was the result of *mala fides* or *crassa negligentia*, implying malice).

⁴ (1875) 1 App Cas 58 ('*mala fides*' or 'malicious negligence').

company with one tangible asset moving from one jurisdiction to another; claimants are faced with the risk of that asset being either sold or lost at sea. In addition, there is a policy reason that English jurisdiction should be amenable to claimants and a lower threshold of the test for possible wrongful arrest might discourage them from bringing their claims to this jurisdiction. In some other common law jurisdictions that have applied this test, however, the attitude of courts is changing,⁵ as will be seen later, and an emphasis is placed on providing a balance between claimants and defendants and recognising that the interests of justice must be served.

The rigid English test, in effect, provides claimants with immunity from being sued for damages because they know that the defendant will be discouraged from seeking compensation for wrongful arrest. There have been cases where claimants have abused the 'right to arrest', again discussed further below, including: when an unreasonable demand for high security was made; when an undertaking from the owners' P&I club was not accepted and the arrest continued until the arrestor's demands were met; when the foundation of the claim had not been thoroughly examined; when the claimant did not have the requisite standing to arrest; and when the ship was not in the beneficial ownership of the alleged defendant. In such situations, the owner has not been able to discharge the burden of proof that the claimant acted out of malice, bad faith or *crassa negligentia*, except in exceptional cases. The present law does not help the owner to obtain justice for his losses incurred by reason of a wrongful arrest not only in terms of the costs to put up security, but also commercial losses and liabilities paid to third parties. Granting an owner his legal costs when he succeeds in litigation on the merits or in his application that the arrest was not justified is not sufficient compensation.

Would the reason of justice, alone, not be sufficient to justify revision of the test? The time is ripe to do so, particularly because of the developments in other common law jurisdictions.⁶ These show, however, that there are inconsistencies in the application of the test because of different phrases that have been used by the judges, and the need for uniformity is another important reason for reform of the law in this area.

This article sets out the problems arising from the current test, its history and the tort of malicious prosecution, examines some decisions which have applied the test, looks for modern trends and explores the available options as to whether reform, if at all possible, can be achieved.

2. The problem

2.1 The test of malice or *crassa negligentia*

When *The Evangelismos* was decided by the Privy Council in 1858, the arrest of the ship, rather than the issue of the writ, constituted the commencement of the action in order to found jurisdiction, so the claimants' right to proceed in rem needed to be protected. In addition, no precedent could be found in Admiralty law of an action for the wrongful arrest of a ship by means of Admiralty process, nor was such an action available in the common law courts.⁷

In *The Evangelismos*, a collision occurred on the Thames in darkness, and the vessel that had caused the damage escaped. On the morning of the next day, the owners of the damaged ship, the *Hind*, arrested the *Evangelismos* which was found in the docks. By reason of having damage to her bow, she was taken to be the missing colliding ship. She was kept under arrest for three months and could not perform her voyage to carry coal to the Levant, until bail was

⁵ For example see the Singaporean case of *The Vasily Golovnin* [2008] SGCA 39 (albeit obiter comments).

⁶ A most thorough and critical analysis of the law as developed in common law jurisdictions is provided by Michael Woodford 'Damages for wrongful arrest: section 34, Admiralty Act 1988' (2005) 19 *MLAANZ Journal* 115–47.

⁷ Procedures changed with the merger of the common law courts with the Admiralty Court by the Supreme Court of Judicature Act 1873.

found for her release. After examination of witnesses, Dr Lushington found that it had not been sufficiently proved that the *Evangelismos* was the guilty ship and dismissed the action with costs. Upon application for wrongful arrest and detention, damages were refused to her owner because the judge considered that the arrest had been made in the bona fide belief that she was the ship that had been in collision and that there had been no *mala fides* in the proceedings.

On appeal (the case reached the Privy Council), it was argued that the arrest was without probable cause, in that there was no shadow of reason for charging the *Evangelismos* as being the guilty ship. Reliance was placed on previous decisions, including: *The Orion*,⁸ in which damages were awarded for having been arrested by mistake for six days; *The Glasgow*,⁹ where the ship was arrested upon mistake of law and demurrage and costs were awarded; *The Nautilus*,¹⁰ which was arrested by the salvor, who had already been paid for its services and was condemned to pay damages in costs and expenses for groundless arrest.

The defendants argued that the arrest was bona fide and invoked the jurisdiction of the court. There being no authorities with regard to granting damages for wrongful arrest in Admiralty courts, they relied on common law authorities concerning false imprisonment and malicious prosecution of a person, as applied by the common law courts.¹¹ In cases of malicious prosecution, malice *and* the absence of reasonable and probable cause were, and still are, required to be proved by the person contesting the prosecution in order to succeed.¹²

Applying this principle by analogy, the Privy Council affirmed the decision of the court below and held there was nothing whatever to establish the appellant's proposition. Although it was true that the identity of the ship was not proved, there were circumstances which afforded ground for believing that this ship was the one that had been in collision with the *Hind*.¹³ The appeal was dismissed and the owner, whose vessel should not have been arrested and detained for three months, was not even compensated for the legal costs incurred to contest the wrongful arrest.¹⁴

⁸ (1852) 14 ER 946.

⁹ (1855) 166 ER 1065.

¹⁰ (1856) 14 ER 1044.

¹¹ For an explanation of this see *Walter D Wallet* (n 3) at 206 (Sir Francis H Jeune): 'No precedent, as far as I know, can be found in the books of an action at common law for the malicious arrest of a ship by means of Admiralty process. But it appears to me that the onus lies on those who dispute the right to bring such an action of producing authority against it. As Lord Campbell said in *Churchill v Siggers*: "To put into force the process of law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case". Why is the process of law in Admiralty proceedings to be excepted from this principle? It was long ago held that an action on the case would lie for malicious prosecution, ending in imprisonment under the writ de excommunicato capiendo in the spiritual court: *Hocking v Matthews*. It can, therefore, hardly be denied that it would have lain for malicious arrest of a person by Admiralty process in the days when Admiralty suits so commenced, just as for malicious arrest on mesne process at common law. But if for arrest of a person by Admiralty process, why not for arrest of a person's property? I can imagine no answer, and the language of the reasons of the Privy Council in the case of *The Evangelismos*, quoted with approval in the late case of *The Strathnaver* appears to me to treat the existence of such an action at common law as indisputable'. In *Walter D Wallet* (n 3) 205–206, where the action of the defendant was commenced clearly without reasonable or probable cause, or was the result of *crassa negligentia*, the court awarded nominal damages.

¹² See eg *Mitchell v Jenkins* (1833) 5 B and Ad 588. For malicious prosecution the plaintiff must prove that the prosecution or arrest was malicious and without reasonable and probable cause; 'malice is not in the sense of spite or hatred but of "*malus animus*" denoting that the party acted by improper motives'. See *Herniman v Smith* [1938] AC 305 (HL), where Lord Atkin held: it is for the judge to decide whether there was want of reasonable and probable cause; and for the jury to decide whether there was malice, eg motives other than a desire to bring to justice someone whom the prosecution honestly believed, on the facts before it, to be guilty [synopsis]. In *Glinski v Mclver* [1962] AC 726 (HL), Lord Devlin concurred with Lord Atkin in *Herniman* and added that if there is no proof of reasonable and probable cause, no questions are for the jury. The judge should keep questions of fact to himself.

¹³ *The Evangelismos* (n 3) 359, applied by the PC in *The Strathnaver* (n 4).

¹⁴ However, in the following cases costs were awarded: *The Active* (1862) 5 LT(NS) 773; *The Volant* (1864) Br & L 321; *The Eudora* (1879) 4 P 208; *The Keroula* (1886) 11 PD 92; and *The Village Belle* (1985–86) 12 TLR 630.

In particular, the Rt Hon T Pemberton Leigh stated the test:

Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides*, or *crassa negligentia*, which implies malice, that would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. . . .

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 gross negligence which is equivalent to it? . . .(emphasis added)

It should be noted at this point, however, that in malicious prosecution cases (see further below) malice is not to be inferred from a finding of groundless prosecution.

3. Is the *Evangelismos* test appropriate?

One commentator, Nossal,¹⁵ interprets this test as containing a narrow rule and a broader rule. He argues that the latter could be applied and damages for wrongful arrest may be awarded in, at least, three circumstances: (i) where the arrest is initiated ‘maliciously’; or (ii) ‘negligently’; or (iii) ‘unwarrantably’, or with ‘so little foundation’. The latter includes cases, the author submits, where the court has no jurisdiction to hear the matter. He contends that the Privy Council did not, perhaps, mean the narrow scope of the rule which has been attributed to it by subsequent cases, and were the House of Lords (now the Supreme Court) invited to re-examine the rule, it would decide that there are, in modern times, insufficient grounds for its stringency. There are some valid points in Nossal’s commentary but, as it appears from later interpretations of the decision, the test, even in its most liberal interpretation, does not warrant the inclusion of merely negligent,¹⁶ or even unwarranted, arrest without an assessment of the subjective state of mind of the arresting party.

Considering the background against which *The Evangelismos* was decided, the test is no longer appropriate at the present time. But judges, in subsequent cases, felt bound by this decision, known as the ‘Admiralty law test’¹⁷ or the ‘historic pedigree’, as opposed to the common law test, discussed below. The fact that the test derives from the test applicable to malicious prosecution cases has caused confusion.¹⁸ Even in malicious prosecution cases, in which a stringent test is required because public prosecutions are concerned with the interests of the public, the test has been, it seems (see below), adapted to present times.

4. Malicious prosecution cases: the common law test

The very early cases in this area had established that to support an action for the tort of malicious prosecution, there must be a want of reasonable and probable cause and malice.¹⁹ Hawkins J in *Hicks v Faulkner*²⁰ defined the two limbs of the test. With regard to reasonable and probable cause, the prosecution must have had:

¹⁵ S Nossal ‘Damages for the wrongful arrest of a vessel’ (1996) *LMCLQ* 368, at 377–78.

¹⁶ Although the Singaporean judge in *Ohm Mariana* [1992] 2 SLR 623 said at 636: ‘the expression “*crassa negligentia*” or “gross negligence” simply means negligence. The vituperative epithet adds nothing to its meaning’. (Reversed by the Singapore CA [1993] 2 SLR 698.)

¹⁷ Referred to by the Singaporean Court of Appeal in *The Kiku Pacific* [1992] 2 SLR 595.

¹⁸ See Woodford (n 6).

¹⁹ See *Reed v Taylor* (1812) 128 ER 472; *Gibson v Chaters* (1800) 126 ER 1196. There must be both a want of probable cause and malice proved to support the action. This was an action for maliciously and without any just or probable cause arresting the plaintiff and holding him on bail.

²⁰ *Hicks v Faulkner* (1878) 8 QBD 167, test approved by Lord Atkin in *Herniman v Smith* (n 12).

An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.²¹

With regard to malice, he said:

As a general proposition, want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one – of fact purely – and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact – *malus animus* – indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.²²

As private prosecutions and arrests of individuals were proliferating in the 17th and 18th centuries, this stringent test was not justified because it discouraged actions to be brought for holding someone on bail in a mere civil suit.²³ The test for malicious prosecution and which questions are for the jury were clarified by the House of Lords in *Herniman v Smith*.²⁴ The House of Lords had another opportunity to refine the test in *Glinski v McIver*,²⁵ where the judge had again put to the jury the wrong questions; *Herniman* was applied.

It was held that:

- (i) it is for the judge to determine whether there was want of reasonable and probable cause, and for the jury to determine any disputed facts relevant to that determination on which he needed their help;²⁶
- (ii) the question of want of honest belief is relevant to that of want of reasonable and probable cause, but that question may be put to the jury only if there is affirmative evidence of want of honest belief;²⁷
- (iii) in the present case there was no such evidence, nor other evidence of want of reasonable or²⁸ probable cause for the prosecution.

The following guidelines for the judges were put forward by their lordships as to the meaning of ‘no reasonable and probable cause’:

In deciding whether there was reasonable and probable cause for the prosecution, the judge cannot ignore the fact of the prosecutor’s belief, which is therefore relevant. Want of reasonable

²¹ *ibid* at 171. The House of Lords in *Herniman v Smith* (n 12) approved the judge’s definition of ‘no probable and reasonable cause’; their lordships only disapproved the judge’s statement at 172 that ‘the reasonableness of the accuser’s belief in the existence of the facts on which he acted is a question of fact for the jury’. The test was considered more recently by the Court of Appeal in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524, where it was held that the judge had directed himself correctly as to the meaning of ‘reasonable and probable cause’: he had set out the standard definition, which required a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.

²² *ibid* at 175; but see *Mitchell v Jenkins* (n 12) that ‘malice is not in a sense of spite’.

²³ *Gibson v Chaters* (1800) 126 ER 1196. In *Sinclair v Eldred* (1811) 128 ER 229 Mansfield CJ said: ‘With respect to the malicious arrest, there never was a period when this species of action ought more to be encouraged, for there is much abuse made of the power of arrest’.

²⁴ Note 12.

²⁵ [1962] AC 726 (HL).

²⁶ *ibid* 742, 768, 779.

²⁷ *ibid* 742, 744, 752, 753, 768.

²⁸ It is noted that the conjunctive ‘and’ is used interchangeably with the disjunctive ‘or’, which has caused confusion in subsequent cases.

and probable cause is not to be inferred from malice. When a police officer preferring a charge has, at every step, acted on competent advice, and has put all the relevant facts known to him before his advisers, it would be hard to say that he acted without reasonable and probable cause.²⁹

Reasonable and probable cause means that there are sufficient grounds for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction ... Objectively there must be reasonable and probable cause for the prosecution, and the prosecutor must not disbelieve in his case ... even though he relies on legal advice.³⁰

If the prosecutor can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge, he cannot be said to have acted upon reasonable and probable cause ... mere belief in the truth of the charge would not protect him, if the circumstances would not have led an ordinarily prudent and cautious man to conclude that the person charged was probably guilty.³¹

A prosecutor ... must have reasonable and probable cause in fact and not merely think that he has.³²

Although there are some slight discrepancies between the dicta cited above, their lordships were in agreement that reasonable and probable cause requires a finding as to the subjective state of mind of the officer responsible and an objective consideration of the adequacy of the evidence.³³ Malice is an independent question of fact and for the jury to decide provided there is a case of no reasonable and probable cause for the prosecution, as the judge may determine following the process explained above. One of the issues considered by the House of Lords was whether it was correct to put to the jury the question of the belief of the prosecutor and this was extensively analysed by Viscount Simonds. It was argued that although the belief of the prosecutor in the guilt of the accused may be relevant to malice, it is not relevant to the question of reasonable and probable cause as to which the test is purely objective. Viscount Simonds thought that this entailed a confusion of thought. The question of belief can only be left to the jury if there is affirmative evidence of the want of it, he firmly stated (at paras 743–44). The reasoning seems to be somewhat circular but the space here does not permit further elaboration on this point, nor is it necessary to do so for the present purposes.

It suffices to say on this issue that it is strikingly surprising that this complex test (involving questions for both the judge and the jury), which is undoubtedly suitable to criminal cases, should be the starting point for and be applicable, by analogy, to Admiralty cases of wrongful arrest of ships.

It has been suggested³⁴ that, in current times, having in mind the Human Rights Convention, the test of 'no reasonable and probable cause' should be based on the guidance applying to public prosecutors in making charging decisions. Current Guidance on 'Charging' to Police Officers and Crown Prosecutors requires both the police and CPS to apply the principles in the Code for Crown Prosecutors when determining charges. The 'Full Code' test requires the prosecutor to charge if there is enough evidence to provide a 'realistic prospect of conviction', and if it is in the public interest to proceed. The 'realistic prospect' is essentially a sufficient evidence test and involves determination of whether a fair minded tribunal properly applying the law would be more likely than not to convict. In some circumstances, a lower 'Threshold Test' is applied, where the police do not wish to release on bail for

²⁹ *ibid* (Viscount Simonds, Lord Reid concurring) at 742–45.

³⁰ *ibid* (Lord Devlin) at 766, 769–70 and 777.

³¹ *ibid* (Lord Radcliffe) at 753–54.

³² *ibid* (Lord Denning) at 758, 759.

³³ Applied in *Moulton v Chief Constable of the West Midlands* [2010] EWCA Civ 524.

³⁴ *Clerk & Lindsell on Torts* 20th edn ch 16 section 3 – malicious prosecution.

prescribed reasons and where not all of the likely evidence is available as yet. This test requires there to be 'at least reasonable suspicion', being compatible with Article 5 of the ECHR.

4.1 The difficulty in applying this test to wrongful arrest of ships

There have been a few older decisions in which the court awarded damages for wrongful arrest of a ship without insisting on proof of malice. In these cases, the underlying claim was not justified and therefore failed.³⁵ In other decisions, the court awarded only costs to the shipowner and not damages because no *mala fides* or *crassa negligentia* was found.³⁶ In another strand of cases, where the test of *mala fides* or *crassa negligentia* was met,³⁷ damages were awarded.

In more recent years, in *The Saetta*,³⁸ Clarke J (having no further guidelines from higher courts) applied the *Evangelismos* test of *mala fides* or *crassa negligentia* and on the facts of the case he held that even if the owners were not liable to the claimants for conversion of the bunkers, it could not be said that the claimants or their solicitors acted with *crassa negligentia* in arresting the ship for payment of the bunkers.

Unfortunately, the test of 'malice or *crassa negligentia*' was not in issue before the Court of Appeal in *The Borag*³⁹ and an opportunity for its review was lost. The ship had been under arrest for 14 days at the action of her managers who colluded with the master to sail to Cape Town, a port which was always avoided upon the instructions of the owners considering the ease with which arrest of ships is obtained there. However, the court recognised that the

³⁵ See eg *The Victor* (1860) Lush 72 (where the cargo on board ship was arrested wrongfully after a collision because the value of the ship and freight was insufficient to meet the collision damage. The cargo was released with costs and damages for its improper detention); *The Cheshire Witch* (1864) Br & L 362 (substantive claim in rem dismissed); *The Cathcart* (1867) LR 1 A & E 333 (wrongful arrest by a mortgagee who ought to have been aware of the facts); *The Margaret Jane* (1869) LR 2 A & E 345 (salvors became aware, after the arrest, of the appraised value of the wreck, which was lower than the sum for which they arrested, therefore they dropped the proceedings. The court condemned them to pay damages although malice was not shown); cf *The Strathnaver* (n 4) where there was error of judgment and no damages were awarded.

³⁶ See eg *The Active* (n 14); *The Volant* (n 14); *The Eudora* (n 14); *The Keroula* (n 14); *The Village Belle* (n 14).

³⁷ In *The Eleonore* (1863) 167 ER 328 arrest of the vessel for salvage in excess amount was wrongful and *crassa negligentia* was shown. In *The Vindobala* (1888) 13 PD 42, (1889) 14 PD 50 (CA), the managers and part owners of the ship had no right to arrest her and were liable to the other owners for any damages resulting from their wrongful act. See also *Walter D Wallet* (n 3), where the concept of 'without reasonable or probable cause' from common law was equated to *crassa negligentia* and nominal damages were awarded.

³⁸ [1993] 2 Lloyd's Rep 268. Upon withdrawal of the ship from the charterers by the owners for non-payment of hire, there was a quantity of bunkers on board which was involuntarily transferred to the owners by the transfer of possession of the vessel back to the owners on termination of the charter. Unbeknownst to the owners, the bunkers, which were subject to a retention clause, had not been paid for by the charterers and so the ship was arrested for conversion. It is interesting, in this connection, to refer to *The Kos* [2010] 1 Lloyd's Rep 87, where the ship was withdrawn for unpaid hire and the charterers, challenging the right of withdrawal, threatened to arrest the ship unless security was put up for their counterclaim. The owners gave a bank guarantee without prejudice to their contention that the demand was unjustified and obtained a declaration from the court that their withdrawal was lawful and valid and the charterers' counterclaim for damages on basis of wrongful withdrawal had been dismissed with costs at a previous hearing. One of the issues before Smith J was whether the costs of providing the guarantee were recoverable. He held the cost of the guarantee was recoverable as costs incidental to the proceedings within the meaning of s 51 of the SCA 1981. It was also argued whether such costs could be recovered as damages on the basis of breach by charterers of an implied term of the contract not to bring invalid claims. Counsel for the owners submitted that an invalid claim is one which is brought without reasonable or probable cause justifying the threats of arrest the charterers made (in the sense of *Walter D Wallet*), but that argument was rejected in the circumstances of this case.

³⁹ [1981] 1 Lloyd's Rep 483. Another Court of Appeal decision was *Astro Vencedor Compania Naviera v Mabanafit GmbH* [1971] 1 Lloyd's Rep 502, in which Lord Denning MR had to decide only whether the umpire, Mr Barclay, had jurisdiction in the arbitration proceedings to decide the issue of wrongful arrest and he held that he had. The umpire, upon the dismissal of the claimants' claims, had awarded damages to the owners for wrongful arrest of the ship by the claimants but his reasons for doing so were not given in the judgment.

owners of a ship which was wrongfully arrested were entitled, at least, to all reasonable expenditure which they had incurred as a result of the wrongful arrest; it said further that, subject to proof, the owners would be entitled to recover loss of profit and expenses thrown away during the time of the ship's detention, but it did not have to decide these items of damages.

The decision of Colman J in *The Kommunar (No 3)*⁴⁰ shows how difficult it is for the owner to succeed in his claim for damages for wrongful arrest. Although the arresting party knew that the beneficial owners and the person in possession of the ship were, when the cause of action arose, a different entity from the owners of *The Kommunar* at the time of the arrest (owing to privatisation of the company which would be liable in personam), the owners did not succeed in their claim for damages. Contesting the arrest, they argued that the conduct of the arresting party amounted to *crassa negligentia* and on that basis they claimed damages. Colman J, referring to the Rt Hon T Pemberton Leigh of the Privy Council in *The Evangelismos*, understood the test to be as follows:

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 [emphasis added]. It is, as I understand the judgment, in the latter sense that such phrases as '*crassa negligentia*' and 'gross negligence' are used and are described as implying malice or being equivalent to it ... Taking the judgment as a whole, it would not appear that the mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to CN [*crassa negligentia*] in the sense there used.⁴¹

For convenience, the test will be referred to below as the '*Evangelismos/Kommunar*' test, unless reference to the former case is only relevant contextually. On the evidence of the *Kommunar*, Colman J considered that whether or not the conduct amounted to *crassa negligentia* it was quite impossible to say that it should have been obvious to the arresting party, or their legal advisers, that the claim in England was bound to fail, given the relatively complicated privatisation process and the complex analysis of the Russian legislation. He further said that the difficulty in granting damages, including wasted costs or other expenses incurred during a wrongful arrest, is inherent in the procedural rules of arrest of ships under English law. This is so because the in rem jurisdiction of the Admiralty Court requires no undertaking in damages from a claimant who obtains the benefit of security for his claim by arresting a vessel, even if he has wrongfully invoked the jurisdiction. He continued:

... [h]e will not have to compensate the shipowner for the expenses and losses arising out of the arrest unless *mala fides* or *crassa negligentia* is proved. This is a rule of English law which can bear very harshly on shipowners who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in the civil law systems. The more widely used procedure for obtaining security for a claim in *personam* in English law is the Mareva injunction, but there is an undertaking in damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction.⁴²

The absence of a similar provision in the CPR (Admiralty proceedings in rem) leaves without remedy an innocent defendant shipowner who has suffered loss by an unjustified arrest but who is unable to establish malice or *crassa negligentia*. Recognising the injustice suffered by the shipowner, the judge did not exercise his discretion to allow a reduction of the

⁴⁰ [1997] 1 Lloyd's Rep 22.

⁴¹ *ibid* 30.

⁴² *ibid* 33.

shipowner's recoverable costs (incurred as a result of the wrongful arrest) in order to give credit for the benefit of the bunkers remaining on board.

At about the same time, the English court held in *The Peppy*⁴³ (arrested by the manager for alleged outstanding balance of account) that the arrest, which amounted to a repudiatory breach of the management agreement, was wrongful and the owners suffered recoverable loss by reason of the arrest. It was shown, however, in this case that the conduct of the director of the managing company was dishonest. On the facts, it was found that there was no outstanding balance of account at the time of the arrest because there was a variation of the agreement to defer payments until the vessel was sold.

4.2 The confusion

From the interpretation of the test by Colman J above, there seem to be two categories of cases which will fall within the current test of wrongful arrest:

- (i) '*mala fides* arrest', where it is shown from primary evidence that the arrestor did not have an honest belief in the reason for the arrest or
- (ii) 'obviously groundless arrest, objectively judged, from which it can be inferred that the arrestor did not believe in, or did not give serious regard to, its entitlement'. What this entails is that there should be an objective assessment of the subjective state of mind of the arresting party (i.e. assessing the reasonableness of his belief). Mere absence of reasonable care to ascertain entitlement to arrest the vessel would not necessarily amount to *crassa negligentia*.

This alternative test has been taken to be equivalent to the test of 'without reasonable and probable cause' (objectively judged). But it is important to note what Colman J said about this phrase in *The Kommunar*:

... To characterise 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.⁴⁴

What Colman J meant is that without an assessment of the subjective state of mind of the arrestor, the threshold would be too low. The phrase probably stems from the interpretation given to the test in *Walter D Waller*,⁴⁵ in which the concept of 'without reasonable or⁴⁶ probable cause' was borrowed from the common law malicious prosecution cases and was equated to *crassa negligentia*. It seems to the author that, upon a literal construction, 'without reasonable and probable cause', in the context of wrongful arrest of ships, should mean that there are no reasonable grounds for the arrest and/or the cause for the arrest is 'more likely than not' to fail. It is submitted that this phrase, in civil cases, as opposed to the malicious prosecution cases, should require only an objective assessment of the situation without inquiring about the subjective belief of the arrestor. When courts use this phrase as being the test for wrongful arrest of ships, confusion arises because different meanings can be ascribed to it.

To compound the confusion, 'no reasonable and probable cause' has been regarded to be the common law test applicable to the malicious prosecution cases, as opposed to the Admiralty law test.⁴⁷ However, as seen in *Glinski v McIver*,⁴⁸ the 'common law' test requires also malice,

⁴³ [1997] 2 Lloyd's Rep 722.

⁴⁴ *The Kommunar (No 3)* (n 40) at 32.

⁴⁵ Note 3.

⁴⁶ As noted earlier (n 28), the conjunctive 'and' is used interchangeably with the disjunctive 'or'.

⁴⁷ It is interesting to note that the Singaporean court (1st instance) in *The Ohm Mariana* [1992] 2 SLR 623 endorsed the test of 'no reasonable and probable cause', while the Court of Appeal of Singapore rejected it in *The Kiku Pacific* (n 17), as it thought it was the common law test applicable to malicious prosecution cases and was different from the Admiralty law test of *The Evangelismos*, being the appropriate test to be applied to wrongful arrest of ships.

⁴⁸ Note 25.

which cannot be inferred from a finding of 'no reasonable and probable cause', although the latter was defined to include the subjective aspect of 'no honest belief' in the prosecution. By comparison, as discussed above, the Rt Hon T Pemberton Leigh suggested that the real question to be asked in cases of wrongful arrest of a ship is this: 'is the action so unwarrantably brought, or brought with so little foundation, that it rather implies malice, or gross negligence which is equivalent to it?' In a sense, he conflated the two limbs of the test applicable to malicious prosecution cases by using the word 'malice'. Thus, there has been confusion as to the application of the test as is apparent from the decisions analysed by Michael Woodford⁴⁹ in his scholarly article mentioned earlier.

5. Recent decisions – are new trends emerging?

In *Gulf Azov v Idisi*,⁵⁰ the Court of Appeal applied the test, namely: 'in the absence of any serious regard to whether there were adequate grounds for the arrest of the vessel', and damages were awarded. In this case, there was clear evidence of wrongful detention of both the ship and her crew in Nigeria by the owners of the cargo. They demanded US\$17 million (an extortionate amount) as security for the release of the ship. Although the P&I club offered security in an LOU for US\$1.5 million, it was rejected. After an impasse in negotiations, US\$3 million was accepted as security. The claimants in the English action (owners and P&I club) obtained a freezing order on the sum of US\$3 million pending execution of the agreement and instituted proceedings alleging that the agreement to pay US\$3 million was voidable for duress and that the vessel had been wrongly detained. They obtained a judgment in default and the defendants applied to set it aside. The judge decided in favour of the claimants and, on appeal, the Court of Appeal affirmed the judgment and held, on the point of wrongful detention, that there was no objective justification for the amount claimed and the question was whether the arresting party believed that there was. It appeared from the evidence that, in the absence of any serious regard as to whether there were adequate grounds for the arrest for which they demanded such a high amount of security, wrongful arrest was overwhelmingly established (ie the *Evangelismos/Kommunar* test was met).

In *The Kallang (No 2)*,⁵¹ Axa Senegal, the insurer of cargo receivers, knowing that the disputes between the owners and receivers were subject to London arbitration arrested the ship in Dakar (the discharge port) not just for obtaining security for the receivers' claim but for establishing jurisdiction. An offer of security from the owners' P&I club was rejected. Axa insisted that the ship would only be released against a bank guarantee answerable to Senegalese jurisdiction. As the court found, it was Axa's intention to use the arrest to force the owners to relinquish the London arbitration clause, which was a breach of the agreement between the owners and the receivers; therefore, they were liable in damages on the basis of the tort of procuring breach of contract (*OBG v Allan*⁵²). There was no need to apply the *Evangelismos/Kommunar* test of wrongful arrest, although the result, on the evidence, might have been the same. Damages were assessed for 10 days' unjustified period of the arrest during which the owners lost the use of the vessel, loss of hire from the next fixture (US\$120,000) and incurred consumption of gas oil and port charges, totalling US\$130,350.

The same tactics were used by the same insurers in *The Duden*⁵³ and the judge decided in the same way on the application of the principle. The only difference here was that the loss had been suffered by the subsidiary bareboat charterer and not by the shipowner. Unfortunately, it was too late to allow the shipowner to amend its case or to join the subsidiary as a party. He

⁴⁹ Note 6.

⁵⁰ [2001] 1 Lloyd's Rep 727.

⁵¹ [2009] 1 Lloyd's Rep 124.

⁵² [2008] 1 AC 1 and see further below.

⁵³ [2009] 1 Lloyd's Rep 145.

was entitled only to an injunction restraining the proceedings in breach of the arbitration clause but not to damages.

By analogy to a wrongful arrest of a ship, it is interesting to note *The Nicolas M*,⁵⁴ which shows the type of conduct of the arresting party that would be examined by the court. Flaux J decided that the charterers, who applied for a freezing order to obtain security against the owners for their counterclaim in London arbitration, had shown a good arguable case of wrongful attachment in New York⁵⁵ by the owners in support of an unsustainable cause. On the facts of this case, the owners of the ship 'had engaged in what, at its lowest, was a discreditable conduct involving perjury' on the part of the captain, in relation to the maintenance of the attachment obtained under Rule B. The judge commented that these owners were the sort of people who would stop at nothing to frustrate the charterers from making any substantial recovery by dissipating their assets, unless restrained by the freezing order.

Do these cases support a new trend? Other than the first and the last decisions referred to above in which there was no difficulty in applying the *Evangelismos/Kommunar* test, the bold tactics used by the claimants in *Kallang* and *Duden*, which are not novel, could be dealt with by applying the *OBG v Allan*⁵⁶ principle, as Lord Hoffmann delineated the tort for wrongfully inducing breach of contract from the tort of causing loss by unlawful means. Proceeding in a cavalier fashion to put pressure on the owner to accede to higher demands of security may not always be said to amount to bad faith, if legal advice had been obtained.⁵⁷

6. Other common law jurisdictions

The test of the *Evangelismos* is also applicable in other common law jurisdictions.⁵⁸ There is no need to refer to these decisions in this article other than to mention some of them briefly as a full account about such decisions has been given elsewhere.⁵⁹ It should be noted that in Australia the Admiralty Act 1988 included section 34,⁶⁰ which is headed 'Damages for unjustified arrest' and provides a different test from the *Evangelismos/Kommunar* test, namely that where a party 'unreasonably and without good cause' demands excessive security, or obtains the arrest of a ship, or fails to give consent for the release of the ship from arrest, that party will be liable in damages. Similarly, in Nigeria the same test is used in the Admiralty Jurisdiction Decree section 13:⁶¹ 'unreasonably and without good cause'.

South Africa also has a legislative provision in the Admiralty Jurisdiction Regulation Act 105 of 1983 (SAF), as amended in 1992.⁶² It includes claims for wrongful or malicious arrest, attachment or detention in the list of maritime claims. The provision is read with section 5(4), which was amended⁶³ in 1992 to mirror the South African common law requirements for damages for wrongful arrest of persons, and reads:

⁵⁴ [2008] 2 Lloyd's Rep 602. The substantive matter was within the jurisdiction of London arbitrators.

⁵⁵ US federal law recognises the tort of wrongful attachment only on showing bad faith, or malice or gross negligence.

⁵⁶ [2008] 1 AC 1.

⁵⁷ See similarly the judgment of the Court of Appeal of Hong Kong in *The Maule* [1995] 2 HKC 769.

⁵⁸ Canada: *Armada Lines Ltd* [1997] 2 SCR 617, although the court below had awarded damages on the basis that the arrest of the cargo was without legal justification, the Supreme Court held that there was no bad faith. Hong Kong: *The Maule* (n 57), mortgagee who arrested the ship without cause of action, as the judge found at first instance, was not held liable in damages by the Court of Appeal because it could not be said he acted in bad faith. Singapore: see nn 16 and 47. In both *The Eymar* [1989] 2 MLJ 460 (Sing HC) and *The Ohm Mariana* (n 16) the test was met and damages were awarded. USA: *Fruit Co Inc v Dowling* 91 F 2d 293 (5th Cir, 1937).

⁵⁹ Woodford (n 6).

⁶⁰ See analysis of this and comparisons with other jurisdictions in Woodford (n 6).

⁶¹ *ibid*.

⁶² The references to South African law and decided cases are available at <http://web.uct.ac.za/depts/shiplaw/booknew> (2011) by Professor John Hare who states, at para 2-1.3 on disclosure that 'claimants and attorneys who play their cards close to their chest run the risk, and rightly so, of being found to have proceeded without reasonable and probable cause'.

⁶³ Prior to the amendment, the test was that the arrest was without 'good cause'.

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

It should be noted that the judge of Appeal, Scott JA, had no difficulty in awarding damages in *The Snow Crystal*⁶⁴ for loss of future charter hire as a foreseeable loss consequent upon delay of the vessel in breach of a dry-docking contract following the arrest.

The amended wording was dealt with in *The Cape Athos*,⁶⁵ in which both the arrestor and the local and foreign instructing attorneys were held jointly and severally liable to the owner of the arrested ship. 'Without reasonable and probable cause' was interpreted by the judge to bear a similar meaning to that given to it in the context of the tort of malicious prosecution, namely that a lack of honest belief negates the defence of reasonable and probable cause. Furthermore, the judge held that the value to be attached to the legal adviser's advice would depend upon whether or not the client had given the adviser all the relevant facts.

The Supreme Court of Appeal considered the notion of 'excessive claim' in *The H Capelo*⁶⁶ and adopted an objective standard to determine what the arrestor should reasonably have regarded as having been recoverable.

In so far as this article is concerned, it is important to refer to a couple of relatively recent decisions which show new trends, particularly with regard to Singapore and Hong Kong where judges, in recent years, have decided that the *Evangelismos* test is too harsh.

The Singaporean courts have recently taken a more liberal approach to this issue⁶⁷ and there has been a U-turn in the attitude of the courts since *The Kiku Pacific*.⁶⁸ This was shown in *The Vasily Golovnin*,⁶⁹ where the Court of Appeal set aside the second arrest effected in Singapore by the bank (lawful holder of the bill of lading) of the sister ship of the carrying ship (which had been arrested at Lomé, Togo, and released) on the grounds that (i) there was no arguable case shown by the bank for non-delivery of the cargo that had been discharged at Lomé, and (ii) the bank failed to disclose material facts that there had been an *inter partes* hearing at Lomé on the same issues which was resolved in favour of the owners.

In relation to the disclosure, it held that it was not only prudent but indeed necessary for a party intending to rely on the arrest of a vessel as security for a potential arbitration award to disclose in the body of the affidavit in support of the ex parte application for a warrant of arrest the material facts. Such facts included that the bills of lading had been switch bills by which the discharge port had been changed, and that the court of the port of discharge had set aside a previous arrest of the ship for the same claims. The disclosure of these facts would have alerted the court to the fact that the owner had delivered the cargo at the correct port.

On the cross-appeal by the owner of the ship for wrongful arrest, it was held that the arrest was wrongful. Although the higher threshold of the test of *crassa negligentia* was satisfied, it was further found that the bank could not in all honesty have believed in the validity of its claim, and the court discussed (obiter) the *Evangelismos* test. It questioned the continued validity of the test and conjectured that it might be out of step with modern practice stating (at para 26):

⁶⁴ Case 250/07 *The Snow Crystal* (judgment delivered 27 March 2008).

⁶⁵ *MV Cape Athos* 2000 (2) SA 327 (D).

⁶⁶ 1990 (4) SA 850 (SCA).

⁶⁷ *The Eymar* (n 58) (Singapore HC): the continuation of the arrest after a promise by the shipowner to give security under protest was regarded as wrongful.

⁶⁸ Note 17.

⁶⁹ [2008] 756 LMLN 3, [2008] SGCA 39; the court usefully reviews wrongful arrest decisions of various jurisdictions.

With the historical background in mind and in the light of the legislative reforms undertaken by some other Commonwealth countries, it may be rightly asked if the *Evangelismos* test, which appears conceptually anachronistic, should continue to be the governing rule for wrongful arrest in Singapore. Should not a lower threshold be adopted instead?⁷⁰

In Hong Kong, the court in *The Avon*⁷¹ thought that the test of malice is harsh and something less than that should be required for wrongful arrest, but generally, there is no consistent approach by the courts in adopting a less harsh test.

7. Civil law jurisdictions

In the civil law systems there is no unified approach to wrongful arrest among the civil law countries in Europe. According to Professor Frank Smeele,⁷² there is a north-south divide on the European Continent. In the northern countries, the applicant for arrest is faced with strict liability if his claim fails on the merits, irrespective of fault or good faith. In the south, the law is similar to English law, namely, it requires the various degrees of fault (abuse of rights, gross negligence or bad faith).

For example,⁷³ in Denmark, Finland, Norway, Poland and Germany, the arrestor will be liable in damages when his claim fails, or the arrest was unnecessary or unjustified, irrespective of fault. Similarly, in the Netherlands, the arrestor will make good any loss caused by the arrest if the claim is rejected, even if he reasonably believed that his claim was well grounded. It will be abuse of justice if he demands excessive security. In Italy and Greece, proof of bad faith or gross negligence is required.

Different tests apply in other civil law countries. In Belgium, the claim of wrongful arrest is in tort and the claimant has to prove fault of the arrestor, his damages and causation. Fault is presumed if the arrestor acted recklessly and with knowledge that his action would probably cause damage. In France, the arrestor will be liable in damages if it is subsequently established that he abused his right. Abuse can exist when the arrest was unjustified or the security requested was excessive. In Portugal, there must be proof of carelessness on the part of the arrestor and he will be liable if the arrest proves to be wrongful or the proceedings on the merits did not commence on time. In Spain, the arrestor will be liable if the arrest proves to be wrongful, in the sense that it does not meet the conditions for arrest, or the claim fails, or he does not commence proceedings within the prescribed time. It should be noted that Spain has acceded to the Arrest Convention 1999 (see below).

8. The Arrest Convention 1999

A major objective of this Convention is to achieve a balance between the interests of claimants and owners. For the owner to succeed in his application for wrongful arrest under Article 6(1)(a) of the Arrest Convention 1999,⁷⁴ he must show that 'the arrest is wrongful or unjustified' (emphasis added). Various views about the meaning of these terms were proposed by different delegations.⁷⁵ Although the words used are not defined, it is submitted that they could be interpreted to mean that there was no legal ground for the arrest and thus

⁷⁰ The 'reasonable or probable cause' test was endorsed in *The Ohm Mariana* (n 16).

⁷¹ HKHC (unreported) (27 January 1992).

⁷² Professor Frank Smeele 'Liability for wrongful arrest of ships from a civil law perspective' in *Liability Regimes in Contemporary Maritime Law* Rhidian Thomas (ed) (Informa London 2007) ch 14.

⁷³ See Berlingieri (n 2).

⁷⁴ It is interesting to note that Turkey has enacted a new Turkish Commercial Code (TCC) 2012, which contains rules for the arrest of ships. Although Turkey is not a party to any of the Arrest Conventions, it has adopted the Rules of the 1999 Arrest Convention.

⁷⁵ See Woodford (n 6) and Berlingieri (n 2) on the debate that took place regarding the word 'unjustified' before the passing of the Convention.

it was wrongful or unjustified, judged objectively without looking at the belief of the arrestor; in other words, the arrestor should have taken reasonable care to find out whether there were reasonable grounds for the arrest.

In the English dictionary,⁷⁶ 'unjustified' is defined as something 'wrong, indefensible, inexcusable, unacceptable, outrageous, unjust, unforgivable, unjustifiable, unpardonable, unwarrantable'. Such words would seem to indicate that the conduct is to be judged objectively, applying the standard of what a reasonable man would have done had he been in the position of the arrestor at the time of the arrest. Since the philosophy behind the Convention has been to balance the interests of the parties, the draftsman must have intended to make the test of a lower threshold than malice or *crassa negligentia*, unlike the contrary views expressed by Professor William Tetley.⁷⁷ The Convention also requires that an undertaking in damages is put in place by the arrestor, which is in line with the philosophy of the Convention to provide balance between the interests of the parties.

On 14 September 2011 the Convention came into force amongst its acceding states, following accession by the tenth state, Albania. The 10 states to which the 1999 Convention applies are: Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain and the Syrian Arab Republic. In the remaining 77 countries, the 1952 Convention is still, in force.

9. Why the preceding analysis strengthens the case for reform

It is apparent from the decisions in which wrongful arrest has been upheld that the evidence was clear and there was no difficulty in meeting the higher standard test. However, such cases seem exceptional and the problem of discharging the burden of proof of the present harsh test lies with the run-of-the-mill cases.

The *Evangelismos* test, otherwise referred to as the 'Admiralty law' test, is confusing and deters deserving shipowners from pursuing wrongful arrest claims. Although costs may be awarded to an aggrieved shipowner against a frivolous litigant, that would not be enough to compensate him for serious financial losses that may result from the disruption of business. It is common knowledge in the shipping world that ships operate on tight schedules and to delay a ship or disrupt its schedule can, and usually does, have far reaching commercial consequences.⁷⁸ This test makes the law less than even-handed, so that there is no balance between the interests of the respective parties. Furthermore, the procedural background against which *The Evangelismos* was decided has changed and the law in other jurisdictions has been developing, or reformed, to fit present commercial realities.

Reasons of uniformity and justice require that this outdated test is abandoned.

The objective of uniformity has led to reform in many other areas of the law concerning international trade, shipowners' liabilities and limitation, so that there is consistency and certainty in the application of the law. Why not in this area? Changing the rule in English law may lead other countries, in the common law jurisdictions at least, to follow suit. However, it seems that some of these countries are taking, or have taken, the lead in the reform. Perhaps the easiest solution for broader uniformity would be if the Arrest Convention 1999 was adopted, provided the terms used were clearly defined.

The so called 'common law' test of 'no reasonable and probable cause' as derived from the tort of malicious prosecution has caused confusion. The civil law test is not just one uniform test but entails a diverse terminology and even when the word 'unjustified' arrest is used, it does not have a uniform definition.

⁷⁶ Collins Thesaurus of the English language.

⁷⁷ W Tetley 'Arrest, attachment and related maritime law procedures' (1999) 73(5-6) *Tulane Law Review*, cited in Woodford (n 6) at 128-29.

⁷⁸ As observed by Scott JA in *The Snow Crystal* (n 64).

The 1999 Convention test, as seen above, would require precise definition of the words 'wrongful' and 'unjustified' for uniformity purposes. It seems to the author that this test is intended to be of objective standards without requiring an examination of the subjective state of mind of the arrestor.

10. Suggestions for reform

10.1 (i) By judicial initiative

First, it is suggested that the English courts themselves should revise the test. It seems that English judges are not precluded by the doctrine of precedent. Although there are two Privy Council decisions, there is not yet a decision of the Supreme Court on the issue. The Court of Appeal in *The Borag*⁷⁹ or *Gulf Azov v Idisi*⁸⁰ did not have to consider whether or not the *Evangelismos* test was suitable. Therefore, a bold judge in a future case might feel able to say he is not bound by *The Evangelismos* or *The Strathnaver* because the Privy Council has an advisory role; or he or she may be able to distinguish them in the light of changes in the procedure of arrest of ships and the views held by other judges in England and in the other common law jurisdictions. Thus, a judge might say that the 'orthodox authority' is old, weak and unsuitable for present legal and commercial reality. Another judge might feel bound by the Privy Council authorities but might, nevertheless, express his or her view about what the modern test should be and give leave to appeal.

10.2 (ii) By requiring a cross-undertaking in damages to be provided

It was argued in 1996 by Bernard Eder⁸¹ that English law should be changed and an undertaking in damages should be ordered by the court as a condition of arrest in case of wrongful arrest, as in the case of interim injunctions. He strongly advocated that if it was possible to 'invent' the Mareva injunction, why is it not possible for the Admiralty Court to adopt a practice of extracting a cross-undertaking in damages from an arresting plaintiff? He stated:

There is nothing, so far as I am aware, in any statute prohibiting such practice. And, if necessary, the rules of court can always be changed to recognise the change in practice. It is because the law does not permit a claim for damages to lie absent *mala fides* or *crassa negligentia* that I would suggest that the Admiralty Court should, like the courts of Equity, insist upon such a cross-undertaking in damages.⁸²

This proposal, as a second solution, could be workable to compensate the defendant either for his loss caused by the arrest, if the claim fails, or for the expenses incurred to put up security, in the event the demand is excessive, or in the event the claimant is using abusive tactics to force the owner to accept his terms. Before considering the viability of this solution in the instance of arrest of ships, a brief account of cross-undertakings relating to interim injunctions is given below.

A cross-undertaking in damages is normally a condition for the grant of an interim injunction, whether *ex parte* or on notice. This principle developed in the area of applications for injunctions as early as the 1850s, and Mareva injunctions⁸³ (now freezing injunctions) are merely a particular example of this general rule. But an injunction, as opposed to the arrest of

⁷⁹ Note 39.

⁸⁰ Note 50.

⁸¹ See B Eder QC 'Wrongful arrest of ships: revisited', paper delivered at a seminar held by the London Shipping Law Centre in 1996 and at ICMA XV. It is interesting to note that German courts sometimes require counter-security before the bailiff is entitled to detain the vessel.

⁸² *ibid* 13.

⁸³ S Gee QC 'The undertaking in damages' (2006) *LMCLQ* 181, where he makes a case for reform of cross-undertakings for the protection of third parties affected by them who are not mentioned in the order.

a ship, is a discretionary remedy. There are two reasons why the undertaking in damages is required: first the court is not in a position at the time of the application to determine the rights of the parties but must decide whether there is a serious issue to be tried; if there is, then it considers whether, in all the circumstances, it is just and convenient to make the order sought.⁸⁴ Given the serious damage that can be done to the respondent (the person(s) actually enjoined under the order) its business and reputation by an interim injunction and, especially, by a freezing injunction which is served on third parties, a cross-undertaking became a condition to issuing an injunction (CPR 25, PD 25A para 5.1) and, although the court does not have power to compel the applicant to provide an undertaking, it can withhold the granting of the injunction. So the cross-undertaking is the 'price' and is given to the court (not to the respondent) in return for the court making an interim order without having determined the facts or the claimant's entitlement to it. Otherwise, if the claim fails, the court would not have power, without the undertaking, to award damages to the successful respondent for any loss he may have suffered.⁸⁵ If the claimant later fails to establish his right to the injunction, or if he had failed to make full disclosure and the injunction is set aside, the undertaking can be enforced, at the court's discretion when it examines all the circumstances, by an application of the respondent. If enforcement is granted, damages can be assessed (on normal principles applying to damages and there is no discretion),⁸⁶ or an enquiry can be ordered as to what loss the respondent has suffered, when there is a reasonably arguable case that the injunction has caused some loss or damage.⁸⁷

Similarly, with regard to applying the cross-undertaking solution to an arrest of a ship (which is a without notice application), the court is not in a position to determine the rights of the parties and a cross-undertaking could be the price in return for the issue of the warrant of arrest. However, under the present CPR, strangely, the issue of a warrant of arrest is no longer a discretionary remedy, as confirmed by the court in 1993⁸⁸ and it is accepted since *The Varna*⁸⁹ that there is no scope for full and frank disclosure. If the statutory requirements set out in PD 61 r 61.5.3 are complied with, the claimant is entitled to have the warrant issued. The only provision in the CPR which allows a warrant of arrest not to be issued as of right is in the event the ship was sold after the issue of the writ by any court in any jurisdiction exercising admiralty jurisdiction in rem as a result of which the beneficial ownership has changed (CPR Part 61 r 61.5(4)). It might be argued, therefore, that the court may not have the power, at present, to withhold the stamping of the warrant until a cross-undertaking is provided, unless the CPR are changed.

This has been considered to be the stumbling block unless the relevant rule in the CPR on the issue of a warrant of arrest is reconsidered and amended, so as to make the requirement of a cross-undertaking a condition of the arrest. If need be, the CPR could revert to the pre-1986 position when the court had discretion whether or not to issue the warrant of arrest.⁹⁰ With regard to discretion which is linked to disclosure, it should be noted that the Admiralty and Commercial Court Guidelines 2011 (at F2.5), provide expressly that on all applications without notice it is the duty of the applicant and those representing him to make full and frank disclosure of all matters relevant to the application. Such a duty goes back to *Castelli v Cook*⁹¹

⁸⁴ *Lichter v Rubin* [2008] EWHC 450 (Ch).

⁸⁵ According to Lewison J in *SKB v Apotex* [2005] EWHC 1655 (Ch); *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch): to compensate the innocent party for loss caused by the injunction which ought not to have been granted.

⁸⁶ *Hoffmann-La Roche v Secretary of State for Trade & Industry* [1975] AC 295, at 361; the legal principles as to damages are essentially contractual: *Triodos Bank v Dobbs* [2005] EWHC 108.

⁸⁷ White Book paras 15–33 to 15–36 (Interim remedies).

⁸⁸ *The Varna* [1993] 2 Lloyd's Rep 253. The procedure rules had changed in 1986 and they were interpreted in *The Varna* to mean that the arrest is as of right, unlike the position that existed previously where the court had discretion and the arrestor had to comply with the disclosure rule: *The Vasso* [1984] 1 Lloyd's Rep 235 (CA). It should be noted that in other common law jurisdictions, eg Hong Kong, Singapore and South Africa, the requirement of full and frank disclosure has not been abandoned, since the application is ex parte.

⁸⁹ *ibid.*

⁹⁰ See *The Vasso* (n 88); see also *Eder* (n 81).

⁹¹ (1849) 7 Hare 89.

and it has been regarded as a perfectly well settled principle. It is an essential part of the *quid pro quo* for the court entertaining a departure from the fundamental principle of fairness that an order should not be made without giving the person who is the subject of it a chance to be heard, except in some cases in which short or informal notice can be given unless the circumstances of the application require secrecy. Logically, one would expect the principle of full and frank disclosure to apply also to the arrest of a ship, being a without notice application, as it used to before 1993, or before the CPR changed in 1986. The next step would be to change, or clarify, the Admiralty rule on arrest of ships so that there is consistency with the above principle and guideline.

It would not be difficult for a claimant to provide an undertaking even in situations where the arrest has to take place in a very short time, as happens in the case of a freezing injunction. Claimants prepare long in advance when they know that the relevant ship is about to come within the jurisdiction and, by and large, obtain security for their claim from the owners' P&I club. Alternatively, the undertaking should be required to be provided at the hearing of an application made by the defendant to set aside the arrest.

It is for the Civil Procedure Rules Committee (CPRC) to undertake the amendment to the CPR⁹² and prescribe the conditions as to when a cross-undertaking should be required. The attraction of this solution is, it is submitted, threefold: (i) it will not delay the process of arrest (as the claimant will be well prepared to give the undertaking); (ii) it will balance the claimant's right of arrest with the owner's right to be able to claim damages should the case warrant it; and (iii) the procedure applicable to the enforcement of cross-undertakings given in the case of interim injunctions⁹³ should be followed, in which case, it is submitted, the judge will have discretion, when an application is made for the enforcement of a cross-undertaking given in the event of a wrongful arrest, as to how to proceed regarding the enforcement of that undertaking and what evidence will be required. In the view of the author, this would help the court to ascertain the position of both parties at that stage when it determines the issue of damages.

10.3 (iii) By the application of the tort of wrongful interference with goods

A third solution may be to equate wrongful arrest of a ship with the tort of wrongful interference with goods rather than applying the test which is suitable to malicious prosecution cases. Conversion under the Torts (Interference with Goods) Act 1977 exists now in three forms: (i) the first form requires a positive wrongful act of dealing with goods in a manner which is inconsistent with the owner's rights and an intention in so doing; the gist of the action is the element of inconsistency with the owner's rights; there need not be any knowledge on the part of the person sued that the goods belonged to someone else nor need there be any positive intention to challenge the true owner's rights; liability is strict and fraud or other dishonesty is not a necessary ingredient in the action; (ii) the second form of conversion is committed where goods are wrongfully detained by the defendant, being equivalent to the old action for detinue; to establish wrongful detention there must have been a refusal to a demand for the return of the goods within a reasonable time; (iii) the third form of conversion lies for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.⁹⁴ For example, if the arrest was without foundation, it would

⁹² The only situation under the CPR where payment of compensation to the shipowner is envisaged is under CPR rule 61.7(5), in the event of arrest notwithstanding the filing of a caution against arrest.

⁹³ Note 87.

⁹⁴ The Torts (Interference with Goods) Act 1977 applies in large part to proceedings for wrongful interference. 'Wrongful interference with goods' means conversion of goods, trespass to goods or negligence insofar as it results in damage to goods, or to an interest in goods, and any other tort insofar as it results in damage to goods, or to an interest in goods. The Act is confined to proceedings in tort. 'Goods' includes all personal chattels other than 'choses in action' and money. See *Halsbury's Laws* vol 45(2) paras 545–48; for new procedural rules see CPR rule 19.5A (added by SI 2001/256).

be inconsistent with the owner's rights. Applying the test of the first form of conversion to the facts of the *Evangelismos* case, there would be no need to examine the knowledge of the arrestor that the ship was not the right ship to arrest nor would there be a need to prove a positive intention to challenge the rights of the owner or to show no honest belief in the right to arrest. Another example in this connection would, perhaps, be fitting the second form of conversion, if the arrestor had not taken reasonable care to ascertain the foundation of his right to arrest the property of the owner which resulted in causing damage to the latter, damages could be awarded upon an action in tort.⁹⁵

To the knowledge of the author, there is one shipping case that points to the possibility of suing for damages for wrongful interference with goods in case of an unjustified or unlawful arrest. *The Van Gogh*⁹⁶ was concerned with a claim for an alleged invalid detention of the ship by the MCA under sections 94 and 95 of the MSA 1995 when it was alleged by the MCA that the ship was dangerously unsafe. The claimant's case against the DoT was that the detention was unlawful, or not justified, and he claimed compensation under the Act or damages on the basis of the tort of wrongful interference with goods, namely conversion. The court held that to justify a detention under sections 94 and 95, the inspector had to have reasonable grounds for his opinion that the ship was dangerously unsafe and the evidence did not support that. On the assumption that the detention was invalid the court held, however, that since the claimant did not commence arbitration proceedings, as provided by section 96 of the MSA 1995, he could not recover compensation. On the issue whether the defendant had committed the tort of conversion, the case advanced by the claimant's counsel was that the test should be 'assumption of control' of the ship by the detention. The judge, referring to previous authorities defining the test of conversion in broad terms, held that the detention notice was not inconsistent with the owners' rights over the ship. The intention of the notice was to prevent the owner from using the ship for a short period and did not involve a sufficiently extensive encroachment on the claimant's rights to constitute conversion; rather, it was a lesser act of interference.

This case may be limited to its own facts because of the special provisions of the detention notice applicable pursuant to the Merchant Shipping Act 1995 and, therefore, be distinguishable from a case of an actual wrongful arrest of a ship where there is interference with the ownership rights of possession and control.

10.4 (iv) A temporary solution

As a solution for owners, in the meantime and in an appropriate case, where an owner becomes liable to a third party by reason of the arrest because he cannot perform the contract with that party, a cause of action may lie in the tort of wrongful inducement of breach of contract, as was reformulated by Lord Hoffmann in *OBG v Allan*, provided the conditions of that tort are met as they were in the *Kallang* case (both cited above). The elements of this tort are: (i) knowledge by the inducer that he is inducing breach of contract; (ii) intention to do so in order to achieve a further end; and (iii) actual breach of contract by the third party.

II. Conclusion

From the foregoing analysis of the problems surrounding the present test applicable to wrongful arrest of ships, it is believed that a case for reform has been made. In the view of the

⁹⁵ *Jarl Tra AB & Ors v Convoys Ltd* [2003] EWHC 1488 (Comm) concerning a successful claim by shippers of timber against the defendant stevedores (sub-bailees of the carrier) for delivery up of certain timber cargoes and damages for wrongful interference; upon the insolvency of the carrier, the stevedores exercised lien over the claimants' goods in respect of handling charges due to them by the carrier, but it was held that the lien clause did not cover such charges. See further a novel theory about liability for the tort of wrongful interference with chattels developed by S Douglas *Liability for Wrongful Interferences with Chattels* (Hart Publishing Oxford 2011).

⁹⁶ [2009] 1 Lloyd's Rep 201.

present author, judges are free from precedent and they may consider adopting a test which is based on negligence on the part of the arrestor. Alternatively, it may be easier if the test 'no reasonable or probable cause' is defined to the effect that it should be simply an objective standard test, namely that it means there are no reasonable grounds of arrest, or that the case was more likely than not to fail, upon an objective assessment without examining what the arrestor believed his case to have been.

Endorsing an old test, on historical grounds, is less than satisfactory, less than just and obstructs uniformity. The reform should aim for a test which must facilitate the balance of justice and enable uniformity in its application.

To speed reform up, however, the solution of amending the rules in the CPR relating to the arrest of ships and/or providing a new rule for the provision of a cross-undertaking in damages, seems attractive.

If policy considerations were in issue, such as that a less stringent test would deter claimants from this jurisdiction, or that it would lead to satellite litigation, it is submitted that:

- (i) lowering the threshold of the test and providing a precise definition of the term used, or providing a new rule in the CPR for a cross-undertaking in damages, will provide balance between the interests of claimants and shipowners which will work for the benefit of this jurisdiction and, most importantly, will serve the interests of justice;
- (ii) in the majority of cases, as admiralty practitioners would be able to confirm, claimants do have a good cause for the arrest; the cases in which the owner needs the assistance of the law for wrongful arrest would not be great in number so as to lead to much satellite litigation, were the threshold of the test to be lowered.

If there is no English reform as suggested in this article or otherwise, it is hoped that, since it has been appreciated by judges in this and other jurisdictions and by commentators (as shown in this article) that the present test of wrongful arrest poses a real problem, it will be for the remaining 77 maritime nations to react collectively and accede to the Arrest Convention 1999 or adopt it wholly or partly into their national law.