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WRONGFUL ARREST OF SHIPS: A TIME FOR CHANGE

Sir Bernard Eder

"WRONGFUL ARREST OF SHIPS: A TIME FOR CHANGE"— A REPLY TO SIR BERNARD EDER

Martin Davies

WRONGFUL ARREST OF SHIPS: REJOINDER BY THE HONOURABLE MR. JUSTICE EDER

Sir Bernard Eder

TULANE UNIVERSITY SCHOOL OF LAW

CONTRASTING VIEWS

Contrasting Views on the Wrongful Arrest of Ships

The following three Articles are presented as companion pieces representing contrasting views on the wrongful arrest of ships. The first Article was written by the Honourable Mr. Justice Bernard Eder of the High Court of England & Wales. Sir Bernard delivered a version of this Article as the 2013 William Tetley Lecture in Maritime Law at Tulane University Law School on February 19, 2013. The Tetley Lecture is an endowed lecture in honor of Professor Tetley for his distinguished service to Tulane University Law School's maritime program, his contributions to scholarship, and his service to the international maritime community.

Shortly after delivering the Tetley Lecture, Sir Bernard agreed to have his Article published in the *Tulane Maritime Law Journal* and kindly allowed the editors to solicit a reply from Martin Davies, Tulane University Law School Professor and director of the Tulane Maritime Law Center. Sir Bernard in turn wrote a rejoinder to Professor Davies's reply.

These three Articles offer unique insights into the practical ramifications of wrongful arrest and the right of shipowners to claim compensation for losses incurred while a vessel is under arrest.

Wrongful Arrest of Ships: A Time for Change

Sir Bernard Eder*

 The Honourable Mr. Justice Eder was appointed a Justice of the High Court of England & Wales in January 2011 when he also received a knighthood. He is assigned to the Queen's Bench Division, where he sits as a trial judge, and also to the Commercial Court in London. He took a law degree at Downing College, Cambridge (1st Class, 1971-1974), was admitted to Inner Temple in 1975, and thereafter practised as a barrister at 4 Essex Court/Essex Court Chambers specialising in international and commercial work including shipping. He took silk (Queen's Counsel) in 1991. He is currently the Senior Editor of *Scrutton on Charterparties and Bills of Lading*.

I would first like to extend my thanks to the Tulane Maritime Law Center and its Director, Martin Davies, for extending this invitation to speak this evening. It really is a great pleasure to be here. This Center is known throughout the world for its learning and scholarship with regard to matters maritime and, in particular, the study of maritime law. So it is not only a pleasure but also a great privilege and honour to be here this evening.

In addition, this is, of course, the annual Lecture, named in honour of Professor William Tetley. Now, I have known Bill Tetley for many years. Much longer than he has known me. When I qualified as a young barrister in 1975—almost forty years ago—and started to practise shipping law, one of the very first books I bought was Tetley's *Marine Cargo Claims*. It was then in its first edition. I could not have survived without it. Ever since, it has stood on my bookshelf—now in the Royal Courts of Justice. I do not say that I have always agreed with all his views, but there can be no doubt that Bill Tetley was then and remains the leading shipping lawyer in the world. I owe him a debt of thanks.

It is also a great pleasure to be here because the topic this evening is one which has been of great interest to me for a very long time. And I should note in passing that it seems that it is also a topic which is of some interest to Professor Tetley.[1] But I should confess that I have been campaigning to try to change the law with regard to wrongful arrest of ships for many years. I gave a paper on this topic in 1996 for the London Shipping Law Centre[2] and delivered a lecture on the same topic in 2004 at the International Congress of Maritime Arbitrators (ICMA).[3] I even produced a pamphlet which I distributed in London. All to no effect. In broad terms, the law has remained unchanged. So I make no apologies for returning once again to this topic: the right of a shipowner to claim

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1. *See* William Tetley, Q.C., *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895 (1999).

2. Bernard Eder Q.C., Wrongful Arrest of Ships, Paper for the London Shipping Law Centre (Dec. 12, 1996) (unpublished manuscript) (available at the London Shipping Law Centre).

3. Bernard Eder Q.C., Int'l Cong. of Maritime Arbitrators XV, Wrongful Arrests of Ships: A Revisit (2004) (transcript available at http://www.essexcourt.net/uploads/publications/wrongfularrestofshipsarevisit.pdf).

compensation for loss caused by the detention of the owner's ship while under arrest.

I. INTERNATIONAL PERSPECTIVE

This is, of course, not a new topic. As with many, if not most, matters maritime, it has some history—and it is necessary to consider the international backdrop. Any claimant seeking to arrest a ship to obtain security for a claim will normally consider the advantages and disadvantages of particular jurisdictions. It is the pre-eminent example of forum shopping. So it is unsurprising that this topic has been raised at the international level, and over the years there have been attempts to try to harmonise domestic laws. For example, it was the subject matter of some debate in the lead-up to what became the 1952 Arrest Convention.[4] However, in the event, no agreement was reached. The result was that all questions regarding whether a claimant was in any particular case liable to pay compensation for the arrest of a ship (and other related matters) were left to be determined by the law of the contracting state in whose jurisdiction the arrest was made or applied for.[5]

The topic was again raised for consideration in the lead-up to what became the International Convention on Arrest of Ships, 1999.[6] Indeed, it would seem that this gave rise to some rather "hot" debate in particular because of the difference between Anglo-Saxon and continental laws in this context.[7] But, again, it was impossible to reach agreement.[8] The result is that the circumstances in which a shipowner may claim compensation for wrongful or "unjustified" arrest continue to vary widely from country to country.

A. English Law

So what is the law in England? In essence, it is that a shipowner will be unable to recover any compensation at all for wrongful arrest save

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4. International Convention Relating to the Arrest of Seagoing Ships art. 2, May 10, 1952, 439 U.N.T.S. 193.

5. *Id.* art. 6.

6. United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships, Geneva, Switz., Mar. 1-12, 1999, Final Act and International Convention on Arrest of Ships, 1999, art. 6.2-.3, U.N. Doc. A/CONF.188/6 (Mar. 19, 1999).

7. *See* FRANCESCO BERLINGIERI, BERLINGIERI ON ARREST OF SHIPS: A COMMENTARY ON THE 1952 AND 1999 ARREST CONVENTIONS 377 (4th ed. 2006).

8. *See* United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships, *supra* note 6.

only on the basis that the arrest has been obtained by *mala fides* or *crassa negligentia*.[9]

This test derives from the speech of The Right Honourable T. Pemberton Leigh in the Privy Council in *The Evangelismos*[10] and followed subsequently in numerous cases including *The Volant*[11] and a further decision of the Privy Council, *The Strathnaver*.[12]

B. Terminology

With regard to this summary of the law, it is necessary to consider terminology. First, by "wrongful arrest" I mean an arrest founded on a claim which is ultimately rejected on its merits by the court or abandoned by the claimant. *Mala fides* speaks for itself. It is bad faith or malice. *Crassa negligentia* requires some explanation. For the avoidance of doubt, the test as formulated does *not* require *both mala fides and crassa negligentia*. They are stated in the alternative. My tutor at Cambridge used to say that people use Latin when they do not know—or are at least uncertain—what they mean. That may be somewhat harsh. But there is no doubt that the term *crassa negligentia* has caused, and continues to cause, some confusion. In *The Strathnaver*, Sir Robert Phillimore stated: "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 . . . ."[13] This suggests perhaps a narrow meaning of the term. However, the term has been variously translated as *crass negligence*[14] or *gross negligence*.[15] In *The Walter D. Wallet*, the judge (Sir Francis H. Jeune) treated it as equivalent to acting "without reasonable or probable cause" which perhaps suggests a broader test.[16] In *Gulf Azov Shipping Co. v. Idisi*, the Court of Appeal applied the test: "absence of any 'serious regard to whether there were adequate grounds for the arrest of the vessel.'"[17]

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9. NIGEL MEESON & JOHN A. KIMBELL, ADMIRALTY JURISDICTION AND PRACTICE ¶¶ 4.32-.37 (4th ed. 2011).

10. (1858) 14 Eng. Rep. 945 (P.C.) 948; 12 Moo. P.C. 352, 359 (appeal taken from Eng.).

11. (1864) 167 Eng. Rep. 385 (Adm.); Br. & Lush. 321.

12. (1875) 1 App. Cas. 58 (P.C.) (appeal taken from N.Z.).

13. *Id.* at 67.

14. *E.g.*, *The Volant*, (1864) 167 Eng. Rep. at 385; Br. & Lush. At 323 (Dr. Lushington).

15. *E.g.*, The Collingrove, The Numida, [1885] P. 158 at 161 (Eng.) (Hannen J.).

16. [1893] P. 202 at 208 (Eng.).

17. [2001] EWCA (Civ) 491, [43], [2001] 1 Lloyd's Rep. 727, 736 (Eng.) (quoting The Kommunar (No. 3), [1997] 1 Lloyd's Rep. 22, 30 (Q.B.) (Eng.)).

C. Other Jurisdictions

So that is the law of England. I am no expert in the law of other jurisdictions around the world. But, in broad terms, it would seem that the law is, or at least has until recently been, similar in many other jurisdictions—in particular those based on the common law.[18] Thus, under U.S. admiralty law, it is my understanding that to recover damages for wrongful arrest, a shipowner must generally show that the seizure was not due simply to negligence but rather resulted from malice, bad faith, or reckless disregard of the shipowner's legal rights.[19]

D. Paddling

In my view, whatever justification may have existed in the past for the rule, the time is now ripe for it to be reconsidered. So I make no apology for raising this matter—again—for debate. I recognise that the views which I hold are not necessarily shared by others. Indeed, I know that there are some who (still!) do not share my views—in particular because any change in the law will, or at least may, have the result of making it less attractive for a would-be claimant to effect an arrest; and because any such result should be avoided at all costs regardless of any injustice that might be caused in any particular case. So I am fully aware of the fact that I am dipping my toes again into rough waters. But, as I have said before, that is no reason to refrain from paddling. And I draw some comfort from the fact that I am not entirely on my own in suggesting a reconsideration of this area of the law.[20]

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18. *See, e.g.*, Armada Lines Ltd. v. Chaleur Fertilizers Ltd., [1997] 2 S.C.R. 617, 625 (Can.); The Maule, [1995] 2 H.K.C. 769 (H.K.); The Kiku Pacific, [1999] 2 S.L.R. 595 (Sing.). See also the very valuable summary and analysis in SARAH C. DERRINGTON & JAMES M. TURNER, THE LAW & PRACTICE OF ADMIRALTY MATTERS ¶¶ 7.73-.78 (2007). It is there stated that the law in South Africa and Australia are "notable exceptions." This is on the basis of specific legislation in those jurisdictions which, although slightly different in wording, provide in broad terms that a party who obtains an arrest "without reasonable and probable cause" (South Africa) or acts "unreasonably and without good cause" (Australia), is potentially liable in damages. However, it seems to me that such tests are broadly similar to that which was referred to in *The Walter D. Wallet*. If that is right, I wonder whether the law in South Africa or Australia is, in truth, any different in substance from the law in England.

19. Frontera Fruit Co. v. Dowling, 91 F.2d 293, 297, 1937 AMC 1259, 1266 (5th Cir. 1937); El Paso Prod. Gom, Inc. v. Smith, Nos. 04-2121, 04-2949, 05-140, 08-4130, 2009 WL 2990494, at *3, 2009 AMC 1733, 1736 (E.D. La. Apr. 30, 2009).

20. *See, e.g.*, Stewart Boyd, *Shipping Lawyers: Land Rats or Water Rats?*, [1993] L.M.C.L.Q. 317, 327-28; Shane Nossal, *Damages for the Wrongful Arrest of a Vessel*, [1996] L.M.C.L.Q. 368. In addition, I should pay tribute to the article by Michael Woodford with reference in particular to section 34 of the New Zealand Admiralty Act 1988. Michael Woodford, *Damages for Wrongful Arrest: Section 34,* Admiralty Act 1988, 19 AUSTL. & N.Z. MAR. L.J. 115 (2005).

I also draw some further comfort from the judgment of Colman J. in *The Kommunar (No. 3)*,[21] where the defendant shipowner sought to recover damages for wrongful arrest. In the event, that claim was dismissed. The case is of particular interest because of the comments made by Colman J. in drawing attention to the potential injustices and anomalies inherent in the present procedures:

> The in rem jurisdiction of the Admiralty Court requires no undertaking in damages from a plaintiff who obtains the benefit of security for his claim by arresting a vessel. Even if the plaintiff's claim fails or he is found to have wrongly invoked the jurisdiction he 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. The absence of a similar facility in Admiralty proceedings in rem may thus leave without remedy an innocent defendant shipowner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or crassa negligentia.[22]

E. The Privileged Position of the Arrestor

These comments are all the more forceful when one considers more generally the privileged position in which a would-be claimant stands when availing himself of the procedure of arrest in the Admiralty Court in England. The following features—at least—stand out. It is convenient to refer to them as the six "No's."

1. No Necessary "Link" with the Jurisdiction

First, it is unnecessary, at least in the first instance, for the claimant to establish any link with the jurisdiction save that the vessel which is sought to be arrested is within the jurisdiction. Neither the claimant nor the defendant shipowner needs to be resident or domiciled within the jurisdiction. The vessel need not be registered in England. The underlying claim need have no connection with the jurisdiction.[23] For

21. [1997] 1 Lloyd's Rep. at 28, 33.
22. *Id.* at 33-34 (emphasis added).
23. Senior Courts Act, 1981, c. 54, § 20(7) (Eng.).

example, the fact that the claim is one based in contract governed by a foreign law is no bar to an arrest. Nor is the fact that the claim is caught by an arbitration clause or a foreign exclusive jurisdiction clause.[24] Of course, the claimant may subsequently be faced with an application for a stay of the proceedings—for example on the basis of any such arbitration clause or foreign exclusive jurisdiction clause or on the grounds of forum non conveniens. But in such a case, the court may, and generally will, require security to be put up in place of the ship as a condition of the grant of its release from arrest.[25]

2. No Advance Notice of Arrest

Second, it is generally unnecessary for the would-be claimant to give any advance notice of the intention to arrest.[26] In the context of the commencement of an "ordinary" claim, this causes little, if any, hardship. But in the context of the commencement of a claim in rem coupled with the arrest of the relevant ship, the detention of the ship can often cause substantial loss. Although the shipowner can put up bail or other security to obtain the release of the ship, this inevitably takes some time to arrange. Even if the actual period of detention is short, the losses can be substantial. It is true that an owner who wishes to prevent the arrest of his ship may have a caution against arrest registered in the Admiralty Registry; but this involves giving the court an undertaking to put up security which ought not to be given without proper consideration of the consequences.[27]

3. No Assessment of Strength of Case

Third, unlike an application for permission to issue an ordinary claim form for service out of the jurisdiction, it is not necessary for a would-be arrestor to show that he has a "good arguable case" or that the claim is one which otherwise has a certain minimum strength. It is generally sufficient that the claim is not "hopeless"—although if it is hopeless the proceedings including the arrest may be set aside. The decision of the Court of Appeal in *The Varna*[28] has highlighted this

24. 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 613 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012).

25. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 26 (Eng.); *see also* MEESON & KIMBELL, *supra* note 9, ¶¶ 4.101-.102.

26. *See, e.g.*, Karl Constr. Ltd. v. Pallisade Props. PLC, [2002] CSOH 26 [45]; (2002) S.C. 270, 289 (Scot.).

27. MEESON & KIMBELL, *supra* note 9, ¶ 4.42.

28. [1993] 2 Lloyd's Rep. 253, 258 (C.A.) (Eng.).

feature of the arrest procedure. As appears from that case, under the then-existing rules of court,[29] a would-be claimant was entitled *as of right* to the issuance of a warrant of arrest provided that the formal requirements of that rule had been complied with—in particular that the requisite affidavit had been filed so as to demonstrate that the claimant had a claim falling within the admiralty jurisdiction against the relevant ship.

Until the change of the rules in 1986, it was generally thought that the application for the issue of a warrant of arrest was in the nature of an application for a discretionary remedy which lay in the power of the court to grant or to refuse—and so held by Lord Justice Robert Goff in *The Vasso*.[30] It followed that any affidavit in support of such an application had to be "full and frank," failing which the warrant of arrest might be set aside like any other ex parte order which was in the discretion of the court.[31] This view continued to prevail even after the change in the rules.[32] However, as decided in *The Varna*, the effect of the change in the rules was to transform what had previously been (or been perceived to be) a discretionary remedy into a remedy to which the claimant was entitled (namely, as of right) if it had complied with the requirements of the order.[33]

This position remains under the present applicable court rules. In order to obtain the issue of an arrest warrant, the claimant will need to complete a form (ADM4) undertaking to pay the fees and expenses of the Admiralty Marshal and also to make a declaration (AMD5) verified by a statement of truth in standard form with regard to certain particulars as prescribed by Practice Direction 61.5.3 including that the claim arises in connection with the named ship.[34] However, there is no longer any requirement for the claimant's declaration in support of the application for arrest to be full and frank. Whether or not that was the intention behind the change in the rules, I do not know. But that is the position as it stands in England at present.

Of course, the procedure culminating in the official stamping of the arrest warrant is not without scrutiny by the court. The Admiralty Marshal—or the appropriate officer—must and will ensure that the

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29. The Rules of the Superior Court, 1986, S.I. 1986/2289, Order 75, r. 3, § 5 (U.K.).
30. [1984] 1 Lloyd's Rep. 235, 241 (C.A.) (Eng.).
31. *Id.* at 243.
32. *See, e.g.*, The Nordglimt, [1987] 2 Lloyd's Rep. 470, 473-74 (Q.B.) (Eng.); The Kherson, [1992] 2 Lloyd's Rep. 261, 268-69 (Q.B.) (Eng.).
33. *See* Michael Tsimplis & Nicholas Gaskell, *Admiralty Claims and the New CPR Part 61*, [2002] L.M.C.L.Q. 520.
34. CIVIL PROCEDURE RULES, Practice Direction 61—Admiralty Claims § 5 (Eng.).

requirements have been complied with.[35] To that extent, the issuance of an arrest warrant is not automatic. For example, the Admiralty Marshal will generally seek to ensure that the claim is of a type falling within the jurisdiction of the Admiralty Court. But such scrutiny does not, as I understand, extend to an assessment of the strength of the claimant's case—in particular whether the claimant's claim can be said to exceed a certain minimum strength.

4. No Assessment of "Character" of the Defendant

Fourth, the claimant's right to arrest does not depend upon the "character" of the defendant, persuading the court that the defendant is a "debt dodger," or that the defendant is otherwise unlikely to meet the claimant's claim.[36] This position is, of course, in stark contrast to that of a claimant applying to the court in England for a freezing injunction, as to which I want to say more in a moment.

5. No Proportionality

Fifth, the right to arrest is not (generally) limited by the amount of the claim. Thus, a claimant with a claim for $100,000 may arrest a ship worth $10 million, although if a reasonable amount of alternative security is offered in place of the ship, the claimant will not be entitled to maintain the arrest.[37]

6. No Cross-Undertaking in Damages

Sixth—and perhaps most importantly for present purposes—there is no requirement that the claimant provide any cross-undertaking in damages. I assume that this is correct. Certainly, as already noted, the absence of such a facility is noted by Colman J. in *The Kommunar*, as one of the features distinguishing admiralty proceedings from applications for a freezing injunction.[38] And I know of no case in recent times in which a claimant has been required to give a cross-undertaking in damages—still less put up security—to meet any liability for wrongful arrest as a precondition of the arrest of a ship.

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35. CIVIL PROCEDURE RULES, Part 61—Admiralty Claims, r. 61.5 (Eng.).

36. *See* Third Chandris Shipping Corp. v. Unimarine S.A. (The Genie, Pythia and Angelic Wings), [1979] 2 Lloyd's Rep. 184, 191 (C.A.) (Eng.).

37. The Moschanthy, [1971] 1 Lloyd's Rep. 37 (Q.B.) (Eng.); CIVIL PROCEDURE RULES, Part 61—Admiralty Claims, r. 61.5(10) (Eng.).

38. The Kommunar (No. 3), [1997] 1 Lloyd's Rep. 22, 33 (Q.B.) (Eng.).

So far as I am aware, there is only one case in which an attempt was made to force a claimant to put up security—and the attempt was dealt with robustly by Dr. Lushington: "To order security for damages as for a wrongful arrest would be an innovation on the practice of the Court, and would form a serious bar to foreigners suing in this Court."[39]

Until the change in the rules in 1986, I suppose it might have been arguable that because the issuance of the warrant of arrest was not as of right but discretionary, the Admiralty Court in England would have had jurisdiction, inherent in the exercise of the discretion, to require a claimant to give a cross-undertaking in damages—and, if necessary, to fortify such cross-undertaking by appropriate security—as a precondition to the issuance of the warrant of arrest. Even so, the answer might well have been that the requirement of such an undertaking and provision of security was not consistent with the practice of the court—regardless of whether or not there was jurisdiction to do so. But since the change in the rules, if the issuance of the arrest warrant is no longer discretionary but as of right, such an argument must be untenable.

I have set out above what I consider to be at least some of the main features of admiralty proceedings in England which place a would-be claimant in a most privileged position when seeking to arrest a ship. It is against that background that I now turn to consider what, if any, compensation a shipowner is, or should be, entitled to receive for wrongful arrest.

It is convenient to start by considering what the law is—or at least what the law in this area is perceived to be.

F. The Basis of Law in England

For more than 100 years, it seems to have been generally accepted in England that a shipowner cannot claim damages for wrongful arrest save in very limited circumstances. Thus, in *The Volant*, Dr. Lushington stated in terms admitting of no doubt: "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."[40]

The precise origin of this so-called "well-established" rule remains unclear as does its basis or rationale. But its existence can hardly be doubted—and ever since the middle of the nineteenth century it has been treated almost without exception as if an immutable part of English law.

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39. The D.H. Peri, (1862) 167 Eng. Rep. 245 (Adm.) 246; Lush. 543, 544.
40. (1864) 167 Eng. Rep. 385 (Adm.) 386; Br. & Lush 321, 323.

G. The Evangelismos

As I have already mentioned, the leading case which is often regarded as establishing the rule is, of course, *The Evangelismos*, decided a few years before *The Volant*. In *The Evangelismos*, a vessel had collided with the claimant's vessel while the latter was at anchor. Boats from the claimant's vessel gave chase and subsequently lay close to the other vessel while it anchored off Southend, but it set sail and contact was lost. The following day, *The Evangelismos* was found in the West India Docks and was believed to be the vessel which had collided with the claimant's vessel. It was arrested, but it was held at the trial not to be the same vessel. The owners of *The Evangelismos* claimed damages for wrongful arrest during a period of nearly three months.[41] The facts are important because this was not simply a case where it could be said that there was a claim against the ship in question which ultimately failed at the trial. Rather, this was a case where the ship arrested by the claimant was not the relevant ship.

The obvious argument was that there was no jurisdiction to arrest *The Evangelismos* at all—although it does not appear from the argument as reported that the case was advanced on this basis. Nevertheless, the claim for damages for wrongful arrest was dismissed by Dr. Lushington on the basis that the arrest had been made in the bona fide belief that *The Evangelismos* had been in the collision and that there had been no *mala fides* in the proceedings.[42]

An appeal to the Privy Council was dismissed. In giving judgment, The Right Honourable T. Pemberton Leigh said this:

> 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 that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded.
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> 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

41. The Evangelismos, (1858) 14 Eng. Rep. 945 (P.C.) 946; 12 Moo. P.C. 352, 353-54 (appeal taken from Eng.).

42. *Id.*; 12 Moo. P.C. at 354.

> 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.[43]

This passage was considered by Colman J. in *The Kommunar* in the following terms:

> 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 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. The reference at the end of the passage from the judgment just cited to there being circumstances which afforded grounds for believing that the arrested ship was the one that had been in collision suggests that if on the evidence there is a genuine but understandable mistake as to the identity of the vessel, that will not amount to crassa negligentia. Taking the judgment as a whole, it would not appear that mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to [crassa negligentia] in the sense there used.[44]

This analysis suggests that the concept of *crassa negligentia* is very limited indeed. In the course of argument in *The Evangelismos*, the point is made that no authority could be found in the Admiralty Court where damages had been awarded unless there was *mala fides* or fraud in the transaction.[45] I have spent some time searching to find otherwise—without success. And since the decision in *The Evangelismos*, it does not appear that anyone else has been any more successful.

II. OTHER CASES

Nevertheless, it is not uninteresting to note that both before and after *The Evangelismos*, there are numerous cases in which damages have been awarded even though it is at least sometimes difficult to say that the conduct of the claimant involved actual *mala fides* or conduct from which *mala fides* might be implied.

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43. *Id.* at 948; 12 Moo. P.C. at 359-60.
44. [1997] 1 Lloyd's Rep. 22, 30 (Q.B.) (Eng.).
45. *The Evangelismos*, (1858) 14 Eng. Rep. (P.C.) at 947; 12 Moo. P.C. at 357.

Thus, as a footnote to the report of *The Evangelismos*, there are three cited cases viz *The Orion*, *The Glasgow*, and *The Nautilus* in which damages were awarded—but it is impossible to identify from the short notes of those cases the basis upon which this was done.[46] From the terms of the judgment in *The Evangelismos*, they appear to have been treated as cases of *mala fides* or *crassa negligentia*.

The Victor was a collision case in which the claimant endeavoured to make the *cargo* of the opposing ship liable for his loss. Dr. Lushington described this endeavour as "all experiment and an experiment contrary to the long practice of the Court and the elementary principles of law" and, on this basis, awarded damages for wrongful arrest.[47]

The other important cases after *The Evangelismos* were considered by Colman J. in *The Kommunar No. 3*.[48] The first, *The Cheshire Witch*, concerned a claim by a shipowner for damages while his ship was detained for a period of twelve days after the claimant's claim was dismissed pending consideration of an appeal. This is treated by Colman J. as a case where the appeal was manifestly so hopeless as to deprive the claimant of all reasonable grounds for continuing the arrest.[49]

The Cathcart concerned a claim by a mortgagee who arrested the vessel on grounds of non-payment and what were, in effect, charges of fraud against the shipowner. On the facts, it was held that it must have been obvious that non-payment did not entitle the mortgagee to arrest the vessel; and the mortgagee "quite failed to prove" the charges of fraud. It was on this basis that damages were awarded.[50]

In *The Strathnaver*, the Privy Council held that damages were not recoverable in respect of a mere error of judgment in arresting the vessel where there was no *mala fides*.[51] And in *The Walter D. Wallet*, it was held that the test for entitlement to damages for wrongful arrest of a vessel at common law was substantially that for malicious arrest of a person, namely whether there was want of reasonable or probable cause which was equivalent to the admiralty test of *mala fides* or *crassa negligentia* as in *The Evangelismos*.[52]

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46. *Id.* at 946-47; 12 Moo. P.C. at 356-58.
47. The Volant, (1864) 167 Eng. Rep. 385 (Adm.) 386; Br. & Lush. 321, 323 (citing The Victor, (1860) 167 Eng. Rep. 38 (Adm.) 41; Lush. 72, 76-77).
48. [1997] 1 Lloyd's Rep. 22.
49. (1864) 167 Eng. Rep. 402 (Adm.) 402; Br. & Lush. 362, 362.
50. [1867] 1 (L.R.A. & E.) 314 at 332 (Eng.).
51. (1875) 1 App. Cas. 58 (P.C.) at 67 (Eng.).
52. [1893] P. 202 at 207-08 (Eng.).

A. *Loss and Expense as "Costs"?*

For the avoidance of doubt, it seems plain from these authorities that the loss suffered by a shipowner as a result of an arrest cannot be recouped as part of any order of the costs in the shipowner's favour at the end of the action although, as appears in *The Kommunar*, it may be that the court can utilise its discretion on costs to redress what might otherwise be injustice on a shipowner.[53] For example, there is old authority to the effect that a party who has demanded excessive bail will be ordered to pay the costs of the excessive bail.[54]

More recently, the Court of Appeal has decided that the cost incurred by an owner in putting up security to avoid the threat of arrest may be recoverable as costs "incidental to the proceedings."[55] This is one of the last cases that I did at the Bar—and it seems to me both interesting and important. As a result of this decision, if a shipowner puts up security—say a guarantee—in order to avoid the threat of arrest, that shipowner will be able to recover the cost of that guarantee if the claimant's claim fails at the end of the day. But, in contrast, if he does not put up a guarantee—perhaps because of financial constraints—and the ship is arrested, the shipowner will not be able to recover any compensation absent *mala fides* or *crassa negligentia*.[56] That is an anomaly which I would suggest is difficult to justify. In particular, why should the shipowner be in a worse position simply because of his financial inability to put up security?

B. *Underlying Rationale?*

I have found it difficult to understand the basis or rationale of the rule that a shipowner should not be entitled to damages save in the case of *mala fides* or *crassa negligentia*. There is little, if anything, in the reported cases to explain the basis of the rule. Some attempt to provide an explanation may be found in *The Volant*, discussed *supra* Part I, where Dr. Lushington said, "One reason for this may be that the appointed mode of suing in this Court is by arresting the property: another that the

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53. [1997] 1 Lloyd's Rep. 22, 34 (Q.B.) (Eng.).

54. The George Gordon, (1884) 9 P. 46; The Irish Fir, [1943] 76 Lloyd's List L. Rep. 51, 54 (Adm.) (Eng.).

55. ENE 1 Kos Ltd v. Petroleo Brasileiro SA (The Kos), [2010] EWCA (Civ) 772, [51]-[56], [2010] 2 Lloyd's Rep. 409, 420-21 (Eng.). The case subsequently went to the Supreme Court on another point.

56. *See id.* at 419.

property arrested may be released at once upon bail, and therefore the damages are usually inconsiderable."[57]

In my view, these two reasons are hardly very persuasive. The reference to "mode of suing in this Court" is not easy to understand. So far as the modern procedure is concerned, the mode of suing in the Admiralty Court certainly includes the claim in rem which is, of course, invoked by the requisite service of the claim form on the ship. But the commencement and pursuit of such a procedure does not necessarily involve the arrest of the ship in question. The issuance and execution of the warrant of arrest operate independently of the issuance and service of the claim in rem—although in practice these two procedures will often go hand in hand. It may be that originally the mode of suing in the Admiralty Court in England was by arresting the ship in question—although my own researches suggest that by 1864 (that is, when *The Volant* was decided), the distinction between what was then the writ in rem and the warrant of arrest was well in place.

As to the second reason given by Dr. Lushington, it may well be that because the vessel might be released at once on bail, the damages are "usually inconsiderable." But this is not always so. Even when the period of detention is short, the loss suffered by a shipowner can be considerable. In many cases, the shipowner cannot—or cannot easily—put up bail or other security. Why should not the shipowner be protected in such cases?

Another reason sometimes suggested for the rule is founded upon a conceptual analysis of the nature of the arrest procedure. In particular, there is an obvious analogy between the arrest of a ship and the arrest (usually by the police authorities) of a suspected criminal. In the latter case, there is perhaps an important principle of public policy involved, that is, the mere fact that the defendant is ultimately found not guilty should not of itself expose the police authorities to claims for wrongful arrest. In such circumstances, one can well understand the purpose of a rule designed to protect the police authorities that no claim for damages should lie without *mala fides* or reasonable and probable cause. However, it does not seem to me necessarily to follow that such reasoning applies to the case of an arrest of a ship in support of a private law claim in damages which has nothing to do with the criminal law. A comparison with liens is perhaps useful. Where a party purports to exercise a contractual lien in circumstances where the exercise of such lien is held to be noncontractual, it is not difficult to say that the exercise

57. (1864) 167 Eng. Rep. 385 (P.C.) 386; Br. & Lush. 321, 324 (appeal taken from Eng.).

of that lien was a breach of contract and therefore "wrongful" even in the absence of *mala fides* or *crassa negligentia*. In the usual way, breaches of contract do not depend upon showing that the defendant acted with malice—or stupidly. It is sufficient to show that the defendant acted in breach of his contract.

In certain circumstances, it is possible that arrest proceedings (even for the sole purpose of obtaining security for the claimant's claim) may constitute a breach of contract giving rise to a claim for damages.[58] But this is wholly exceptional; the law concerning the arrest of ships may be said to operate in an entirely different way. In such a case, the arrest is effected not by the claimant itself but *by the court*. Certainly, it will only be effected by the court on the application or at the instance of the claimant. But, as a matter of analysis, it is the court, not the claimant, which effects the arrest. Thus, in England, Civil Procedure Rule (CPR) 61.5(8) provides, "Property may only be arrested by the Marshal or his substitute." It is in this context that the analogy with the common law cases on malicious prosecution can possibly be said to be relevant.

Similarly, it can be said that a would-be claimant has a statutory right both (1) to commence proceedings in rem provided that the "claim" is one falling within a recognized category and, after the change of the rules in 1986, (2) to the issuance of the warrant of arrest.[59] The claim may ultimately be held to be "good" or "bad," but the fact, for example, that the claim is subsequently dismissed does not of itself mean that the claimant did not—at the time of the arrest—have a claim which justified arrest. On this basis, it is difficult, if not impossible, to describe the arrest as "wrongful" save in circumstances of *mala fides* or *crassa negligentia*.

For these reasons, I fully recognise that any suggestion that an owner should be entitled as of right to claim damages for wrongful arrest merely because the underlying substantive proceedings are rejected by the court or abandoned by the claimant may go too far. Almost certainly, in England, that would require an amendment to primary legislation. However, this does not explain why the court should not necessarily insist upon some kind of cross-undertaking in damages from the claimant as a precondition of lending its assistance to the arrest of the relevant ship. That is certainly what an English court almost invariably

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58. *See, e.g.*, Marazura Navegacion S.A. v. Oceanus Mut. Underwriting Ass'n (Berm.) Ltd., [1977] 1 Lloyd's Rep. 283, 288-89 (Q.B.) (Eng.); Mike Trading & Transp. Ltd v. R. Pagnan & Fratelli (The Lisboa), [1980] 2 Lloyd's Rep. 546, 552 (C.A.) (Eng.).

59. CIVIL PROCEDURE RULES, Practice Direction 61—Admiralty Claims § 5 (Eng.).

requires from a claimant on any application for any injunction, including a freezing injunction.

C. *The Freezing Injunction*

The "freezing injunction" is a relative newcomer in England. In effect, it is an injunction or order which a claimant may, in appropriate circumstances, obtain on an urgent basis from the court, usually without notice to the defendant, to "freeze" the defendant's assets—that is to say, to prevent the defendant from transferring, disposing of, or otherwise dealing with its assets otherwise than in the usual course of business.[60] It is a draconian remedy, once described as a "nuclear weapon," and in appropriate circumstances, it may apply not only to assets within the jurisdiction but to any assets worldwide.[61] In certain respects, it is similar to an arrest—although, notably, unlike a claim in rem, it gives no security as such: it merely operates to "freeze" assets pending the outcome of the main proceedings.[62]

D. *The Cross-Undertaking in Damages Required as a Condition of an Injunction*

For present purposes, what is important is that an English court will almost invariably require a claimant seeking an injunction—including a freezing injunction—to give a cross-undertaking in damages whereby the claimant undertakes to the court that if the defendant suffers any loss as a result of such freezing injunction and the court considers that the claimant should compensate the defendant for such loss, the claimant will comply with such order.[63] The result is that if the injunction is ultimately discharged, the court may order the claimant to pay compensation to the defendant for any loss suffered by the injunction. Of course, such an order is not automatic. It remains within the discretion of the court whether or not to order an assessment or inquiry as to damages suffered by the defendant.[64]

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60. CIVIL PROCEDURE RULES, Part 25—Interim Remedies & Security for Costs (Eng.).
61. Bank Mellat v. Nikpour, [1985] Fleet Street Rep. 87, 92 (C.A.) (Eng.).
62. *See* Z Ltd. v. A-Z, [1982] 1 Lloyd's Rep. 240, 244 (Q.B.) (Eng.).
63. Congentra AG v. Sixteen Thirteen Marine SA (The Nicholas M), [2008] EWHC (Comm) 1615, [30], [2008] 2 Lloyd's Rep. 602, 609 (Eng.).
64. *See, e.g.*, Yukong Line Ltd. v. Rendsburg Invs. Corp., [2001] 2 Lloyd's Rep. 113, 123 (C.A.) (Eng.); N. Principal Invs. Fund Ltd. v. Greenoak Renewable Energy Ltd., [2009] EWHC (Ch) 985, [19]. In *F. Hoffmann-La Roche & Co. v. Secretary of State for Trade & Industry*, [1975] H.L. 295 at 371 (Eng.), Lord Diplock expressed the view that quantification of compensation under a cross-undertaking should generally be on the basis of a notional breach of

The question then arises: Why does the court require a cross-undertaking in damages in these circumstances? And what is the history behind this insistence?

E. Courts of Equity

The answers to these questions lie deep in the nineteenth century when the law relating to the grant of injunctions was in its early stage of development.

According to Lord Diplock in *F. Hoffmann-La Roche & Co. v. Secretary of State for Trade & Industry*, the practice of requiring a claimant to give a cross-undertaking in damages as a condition of the grant of an interim injunction originated during the Vice-Chancellorship of Sir James Knight Bruce during the 1840s.[65] This dating is apparently based upon an observation of Sir George Jessel in *Smith v. Day*.[66]

In fact, it appears that this practice probably originated well before the 1840s: see the Australian decision of *National Australia Bank Ltd. v. Bond Brewing Holdings, Ltd.*,[67] where Judge Brooking draws attention to the earlier authorities. Whatever may be the precise date of origin of this practice, it remains of considerable interest. As explained in the *Bond Brewing* case, "It is because damage flowing from the act of the court is not—unless one of the recognised causes of action exists—compensable in damages that equity requires its undertaking or bond or other appropriate safeguard."[68]

The question then arises: Why should the position with regard to the arrest of a vessel be any different? Similar reasoning would seem to apply, that is, if the position is indeed that an owner cannot in law claim compensation from the act of the court (that is, the arrest of a ship) unless one of the recognised causes of action exists (for example, an action based on *mala fides* or *crassa negligentia*), then it must at least be arguable that equity should require the cross-undertaking or some other appropriate safeguard.

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contract between the parties to the effect that the injunctor would not prevent the injunctee from doing the injuncted acts—although this has not been finally settled.

65. [1975] H.L. 295 at 360 (Eng.).
66. (1882) 21 Ch. 421 (Eng.).
67. [1991] 1 VR 386 (Austl.).
68. *Id.* at 601.

F. Counter-Arguments?

What possible arguments are there then for not following the early example shown by the courts of equity in, what I would suggest, are circumstances comparable to the arrest of a ship?

1. The Arrest of a Ship Is Not a Discretionary Remedy but Is "as of Right"?

First, there is an argument that what I have just said is wrong, that is, the grant of an interlocutory injunction depends upon principles quite different from the issuance and execution of a warrant of arrest so that any "comparison" is simply untenable. To a certain extent, this is no doubt true. In particular, as I have said, there can be no doubt that the grant of an interim injunction is discretionary; whereas, as I have already noted, post-*The Varna*, the present state of the law in England is to the effect that the issuance of a warrant of arrest is essentially *as of right* subject to the claimant's complying with certain formal requirements.[69] But, at least so far as the position in England is concerned, this is a result of the change of the rules of court in 1986; and there appears to be no reason in principle why, by a further change in the rules, we could not revert in England to the perceived position before 1986.

2. The Order for Release

Another possible way round the difficulty posed by the change of the rules in 1986 is to focus not so much on the initial procedure culminating in the arrest, but rather on the procedure available to obtain the release of the ship. The position appears to be that the Admiralty Court in England has a power to order a release.[70] Such power will be exercised, for example, if the court is persuaded that the claimant is seeking to maintain the arrest for an excessive amount. In an appropriate case—even if not in every case—why should not the court say: the court will exercise its power to release the ship unless the claimant gives a cross-undertaking in damages and, if necessary, fortifies that undertaking with appropriate security? The only answer would seem to be that this is not the usual practice.[71]

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69. The Varna, [1993] 2 Lloyd's Rep. 253, 255-57 (C.A.) (Eng.).
70. *See* CIVIL PROCEDURE RULES, Practice Direction 61—Admiralty Claims § 8 (Eng.).
71. *See* MEESON & KIMBELL, *supra* note 9, ¶ 4.75.

3. Practice?

Third, there is the argument that whatever the rules may say, the fact is that the practice of the Admiralty Court in England has never been to extract a cross-undertaking in damages from an arresting claimant. That is probably right, but the question then arises as to whether such practice should be continued.

4. Precedent?

Fourth, it may be suggested that the authorities preclude such a course. However, any such suggestion is obviously incorrect. At most, the authorities are to the effect that *in general* no claim for damages lies absent *mala fides* or *crassa negligentia*.[72] But any such rule of law does not preclude the Admiralty Court extracting a suitable cross-undertaking in damages from the arresting claimant as a precondition of the court acceding to the claimant's request for the issuance and execution of the warrant of arrest. Indeed, consistent with the cases I have cited, 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 a cross-undertaking in damages should be required.

5. Impracticable?

Fifth, it may be suggested that such a course is impracticable. I do not know what, if any, weight to give to such a suggestion; but this is obviously a matter which must be taken into account. I recognise that arrests often take place at very short notice—sometimes late at night or on weekends. And plainly the procedure for the issuance of claims in rem and warrants of arrest should not become over-cumbersome. But I can see no reason at present why there should be any practical difficulty in a procedure which requires, as a matter of standard form, a cross-undertaking in damages from the claimant.

It may be said that this does not go far enough and that in addition the would-be claimant should fortify the cross-undertaking by providing some form of security. I would strongly support such a requirement; although I recognise again that this would involve some assessment of the form and amount of security to be provided which would introduce a potential element of delay. But similar matters arise for consideration in the context of the grant of a freezing injunction and are generally dealt

72. The Evangelismos, (1858) 14 Eng. Rep. 945 (P.C.), 948; 12 Moo. P.C. 352, 359 (appeal taken from Eng.).

with as a matter of routine. The difficulties, in that context, do not appear to be insuperable.

6. Discouragement of Arrests?

Sixth, there is, I know, a strong view that any such change in practice would potentially operate to discourage claimants from effecting arrests in any jurisdiction where such cross-undertaking might be required. Of all the reasons advanced against any change in practice, it is this reason which probably carries most weight. Ultimately, it is an economic reason—not a legal reason. But I suppose it is none the worse for that. I am not sure that I am the best person to judge the "economics" of this argument.

G. The Human Rights Act 1998

Finally, I should mention a further point which would suggest that the law as stated in the textbooks requires to be reviewed. This turns on the effect of article 1 of Protocol No. 1 to the European Convention on Human Rights, which now forms part of the "Convention Rights" given effect in England by the Human Rights Act 1998.[73] I should make plain that this is not an original thought of my own, but was first suggested to me some years ago by my former pupil, Mr. Peter Duffy.[74] There is no doubt that under that article, "[e]very natural or legal person" including a shipowner "is entitled to the peaceful enjoyment of his possessions"—and this would seem to include a legal entitlement to the use of a ship.[75] Any interference with such peaceful enjoyment must satisfy what is described as the "fair balance" test.[76] According to Peter Duffy Q.C., it would seem at least arguable that a law that prevents an innocent shipowner from recovering compensation for the detention of its ship in the absence of being able to prove *mala fides* or *crassa negligentia* on the part of the arresting party fails to satisfy the "fair balance" test—in particular having regard to the particular features of existing admiralty law and practice referred to above which so favours the arresting party.[77]

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73. Human Rights Act, 1998, c. 42, § 1(3), sch. 1 (Eng.).

74. Peter Duffy Q.C. was one of England's greatest legal minds particularly in the area of human rights until his untimely death.

75. *See* Protocol to the Convention for the Protection of Human Rights & Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. No. 009.

76. *See* HUMAN RIGHTS LAW AND PRACTICE 658 (Lord Lester of Herne Hill, Lord Pannick & Javan Herberg eds., 3d ed. 2009).

77. STEPHEN GROSZ, JACK BEATSON & PETER DUFFY, HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION 112 (2000).

Well, I accept that that is a somewhat controversial note. But, given this is the Tetley Lecture, that is perhaps not a bad point to end this lecture save only to ask the question: so what now? Unfortunately, I cannot answer that question. I have now been battling without success for over twenty years!

My thanks again to this Center and Martin Davies for inviting me here and to you all for coming to listen. I hope at least that I have given you food for thought—and perhaps even that I have inspired you to take up the cudgels in support of my modest campaign.

"Wrongful Arrest of Ships: A Time for Change"—A Reply to Sir Bernard Eder

Martin Davies*

I thank the Honourable Mr. Justice Bernard Eder for agreeing to deliver the 2013 William Tetley Lecture in Maritime Law, and also for having the good grace to allow me a short reply to his Article, in which I intend to restate some of the arguments in support of the orthodox position in relation to damages for wrongful arrest of ships.

Sir Bernard argued eloquently that the time has come to abandon the age-old rule that damages for wrongful arrest should only be awarded in cases of what English law calls *mala fides* or *crassa negligentia*, and what American law calls malice, bad faith, or reckless disregard of the shipowner's rights. Entertaining though Sir Bernard's attack on the orthodox position was, he did not clearly suggest what position the law should adopt if it does, indeed, abandon the existing rules. If one follows Sir Bernard's argument by analogy to the freezing order to its logical conclusion, his suggested change to the law would be dramatic and far-reaching, and it would bring an end to many, if not most, ship arrests for all but the largest of claims.

Sir Bernard's definition of "wrongful arrest" is disquieting, to put it mildly: "[A]n arrest founded on a claim which is ultimately rejected on its merits by the Court or abandoned by the claimant."[1] Is it really defensible to argue that any arrest is wrongful if the underlying claim turns out ultimately to be unsuccessful, whether because of the court's resolution of disputed issues of fact that were not clearly apparent at the time of the arrest, or the court's determination of legal issues that were not clearly settled when the claim was brought, or for any other reason? If so, the stakes in any in rem action would become vertiginously high: win, or be left with a bill for tens, perhaps hundreds, of thousands of dollars in damages for an arrest that ultimately proved wrongful, but which appeared at least plausible when it was made. To award damages

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1. Sir Bernard Eder, *Wrongful Arrest of Ships: A Time for Change*, 38 TUL MAR. L.J. 115, 118 (2013)

against every plaintiff[2] whose claim proves ultimately to be unsuccessful would be to tip the balance so far in favor of the defendant shipowner that only the very largest or most obvious of deserving claims would ever be brought.

As Baroness Hale of Richmond, J.S.C., observed recently in the Privy Council, in *Crawford Adjusters v. Sagicor General Insurance (Cayman) Ltd.*: "Clearly, it cannot be open to every successful defendant to round upon his unsuccessful claimant or prosecutor, no matter how great the collateral damage. Defining the circumstances in which he can do so is fraught with difficulty . . . ."[3] In the context of wrongful arrest of ships, the difficult task identified by Baroness Hale would be to find a happy medium between awarding damages only when the plaintiff's claim was obviously doomed on the merits from the start, so that an arrest is merely vexatious (in circumstances of what English law calls *mala fides/crassa negligentia*), and awarding damages whenever the plaintiff's claim ultimately proves to be unsuccessful, however plausible it might have seemed at the outset. No intermediate test suggests itself as an obvious solution and, with respect, Sir Bernard's Article suggests none. If there were an acceptable intermediate position, one might have expected it at least to have been suggested during the past few centuries of practice in the admiralty jurisdiction, but that has not happened.

Sir Bernard argues by analogy from what English law now calls the freezing injunction or freezing order (previously called the *Mareva* injunction or, in some jurisdictions, the *Mareva* order[4]), where the claimant is required to give a cross-undertaking in damages that "bites even if the unsuccessful claimant was entirely without malice."[5] However, the analogy between freezing injunctions and ship arrests is far from being exact. If no security is provided by the shipowner, a ship arrest immobilizes only one of the shipowner's assets, the ship itself, and

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2. Sir Bernard's paper uses the term "claimant," the term now used in English courts for the party that American courts still call "plaintiff." I shall stick with the American usage unless quoting from an English decision, referring to English practice, or paraphrasing Sir Bernard himself. Both countries call the plaintiff/claimant's opponent "defendant."

3. [2013] UKPC 17, [82], [2013] 3 W.L.R. 927, 955-56 (appeal taken from Cayman Is.).

4. The name *Mareva* injunction derived from the English decision *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.) (Eng.). Ironically, this was not the first reported case in which such an order was made. The first reported example was actually decided a month earlier than *Mareva*. *See* Nippon Yusen Kaisha v. Karageorgis, [1975] 2 Lloyd's Rep. 137, 138 (C.A.) (Eng.). Given that the order is only made when the claimant can show some degree of financial evasiveness on the part of the respondent, the Karageorgis brothers, defendants in the first case, should perhaps be grateful that the order was not forever dubbed "the *Karageorgis* injunction."

5. *Crawford Adjusters*, [2013] UKPC 17, [86], 3 W.L.R. at 957 (Baroness Hale J.S.C.).

only until such time as security is given to secure its release. The rest of the shipowner's business continues untouched.

In contrast, the freezing/*Mareva* injunction is rightly called the claimant's "nuclear weapon,"[6] because it freezes all of the defendant's assets, and is frequently granted in relation to any of the defendant's assets anywhere in the world. A worldwide freezing order effectively brings the whole of the defendant's global business to a screeching halt, because any bank holding any of the defendant's funds, or any third party dealing with the defendant, may find itself in contempt of the English court if it continues to deal with the defendant in any manner that requires movement of the defendant's assets. It does not seem unreasonable to require a claimant who is prepared to launch such a "nuclear weapon" to make good any losses the defendant suffers if the weapon was launched without good reason.

Is the position of a plaintiff arresting a ship really analogous? I would suggest not. Ship arrest does not paralyze a shipowner's whole business in the way that a freezing order can. In practice, few ships are actually arrested, and even fewer remain under arrest for any extended period of time. Most solvent shipowners are able promptly to provide security, either to have their ship released from arrest or to avert a threatened arrest. In the case of "bluewater" ships trading internationally, that security is usually provided at little or no cost to the shipowner by a letter of undertaking given by the ship's P&I club. The potentially high costs of actual arrest that Sir Bernard emphasizes are usually borne only by shipowners who are, or are soon to be, insolvent. That is precisely the kind of case in which the plaintiff's interests are most in need of protection.

Even if one were to ignore these practical realities and were to imagine a situation in which every in rem action were to lead to an actual arrest, holding up every allegedly wrongdoing ship for at least some inconvenient period of time, Sir Bernard's argument is still not particularly compelling. Sir Bernard makes much of the fact that even a short detention of an oceangoing ship may cause the owner much expense and inconvenience, which is undeniably true. Nevertheless, Sir Bernard's argument leads to the fairly unattractive proposition that the bigger and more costly the allegedly wrongdoing ship (and its cargo, which would be held up without fault on its part during any actual arrest), the more that ship could operate with impunity because the cost

6. Anglo E. Trust Ltd v. Kermanshahchi, [2002] EWHC (Ch) 1702 (Neuberger J.) (Eng.).

of detention would be so great, which makes the prospect of a counterclaim for wrongful arrest a daunting one.

Sir Bernard uses the example of a $100,000 claim on a $10 million ship as a way of making the point that there is no rule of proportionality in arrest cases, so that a claimant with a relatively small claim can cause considerable and costly inconvenience to a very valuable ship. The very same example can be turned on its head to make exactly the opposite argument. Delay of a $10 million ship may indeed cost tens or even hundreds of thousands of dollars if it persists for even a short period of time. In relative terms, however, such a cost is quite small for a shipowner with such a large operation, carrying millions of dollars of cargo and earning millions of dollars of freight on every voyage, but it might be cripplingly difficult for a $100,000 claimant to give so large an undertaking in damages or, worse, security for a cross-claim in damages. Essentially, Sir Bernard's example focuses attention on the question whether the financial risk of detention as a result of judicial process should fall on the carrying ship's operator or the plaintiff proceeding against that ship. When faced with this crunch question, every country, throughout the long history of the admiralty jurisdiction, has sided with the small local plaintiff against the large, often foreign, shipowner.

If Sir Bernard really does mean to say that damages for wrongful arrest should be awarded whenever the underlying claim turns out to be unsuccessful, then he is arguing for a position that would put admiralty practice far out of step with the situation that exists in the courts of common law. I would suggest that the torts of malicious prosecution and abuse of process provide a closer analogy than Sir Bernard's chosen analogy of the freezing injunction. These torts provide the only recognized basis in Anglo-American common law for providing redress for an abuse of legal process by unjustifiable litigation. The very name of the tort of malicious prosecution makes it clear that proof of malice is necessary in order for a plaintiff to recover damages, just as it is necessary for a defendant shipowner to show *mala fides* in order to recover damages for wrongful arrest. Furthermore, unlike American law, which has long known a tort of malicious civil prosecution (the Restatement (Second) of Torts calls it "wrongful use of civil proceedings"),[7] English law[8] only extended the tort of malicious

7. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

8. Strictly speaking, the case cited *infra* note 9 is not binding as a matter of English law, because it was decided by the Privy Council on appeal from the Cayman Islands. Because the Judicial Committee of the Privy Council is made up of judges of the Supreme Court of the United

prosecution to civil cases in mid-2013, some four months after Sir Bernard's Tetley Lecture, and then only by a bare majority of three to two, over two vigorous dissents.[9] Until 2013, English courts were very firmly of the view that a defendant wrongly sued in a civil proceeding had no remedy in damages, even if the plaintiff had proceeded maliciously:

> [T]he bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action.[10]

In the similar but distinct tort of abuse of process, there is no requirement that the action was brought without reasonable cause, but rather the action must have been brought for an improper purpose, "merely [as] a stalking-horse to coerce the defendant in some way . . . outside the ambit of the legal claim upon which the Court is asked to adjudicate."[11] The analogy in a ship arrest case would be that of an action perhaps properly brought but with an ulterior motive other than the success of the claim—in other words, an action brought maliciously or in bad faith (*mala fides*), the very same standard as that applied in *The Evangelismos* in the context of wrongful ship arrest.

In summary, the remedies available under Anglo-American common law for what American law calls "wrongful use of civil proceedings" are just as restrictive as the standards applied by admiralty courts in cases of allegedly wrongful arrest—indeed, in England, they were even more restrictive until very recently. Admiralty practice is not the anomaly, freezing injunction practice is, and for good reason given the "nuclear weapon" nature of the remedy.[12]

Kingdom, the convention is to regard Privy Council decisions as being highly persuasive, but not formally binding, authority about English law.

9. See *Crawford Adjusters*, [2013] UKPC 17, 3 W.L.R. at 927, which was decided on June 13, 2013. Sir Bernard Eder's Tetley Lecture was delivered on February 19, 2013.

10. Quartz Hill Consol. Gold Mining Co. v. Eyre, (1883) 11 Q.B. 674, 688 (Bowen L.J.). There were some exceptions to this rule, such as malicious civil proceedings for bankruptcy or the winding-up of a company. They are listed by Lord Wilson J.S.C. in *Crawford Adjusters*, [2013] UKPC 17, [67], 3 W.L.R. at 948.

11. Varawa v Howard Smith Co., (1911) 13 CLR 35, 91 (Isaacs J.) (Austl.), *quoted with approval in Crawford Adjusters*, [2013] UKPC 17, [63], 3 W.L.R. at 946-47 (Lord Wilson J.S.C.).

12. In *Crawford Adjusters*, [2013] UKPC 17, [86], 3 W.L.R. at 956, Baroness Hale J.S.C. observed that, ironically, the defendant, who claimed damages for malicious civil prosecution, would have been much better off if he had been made the subject of a freezing order because he

Admittedly, "it has ever been thus" is not a very satisfactory answer to the question: "Why is this so?" Sir Bernard very fairly identifies the counter-argument of principle that he regards as carrying most weight against his preferred position, namely that the easy availability of an action for wrongful arrest (or even a requirement for the plaintiff to give a cross-undertaking in damages) would discourage plaintiffs from effecting arrests. As Lord Wilson J.S.C. put it in *Crawford Adjusters*, the recent Privy Council case that changed English law on the tort of malicious prosecution: "Ugly threats by prospective defendants with long pockets would drive prospective claimants from the seat of justice."[13] One might respond, as one English judge did as far back as 1713, that such threats "will be no discouragement at all to him who honestly proceeds on reasonable grounds,"[14] but this surely underestimates the chilling effect that the prospect of a counterclaim for damages for wrongful arrest would have on someone such as Sir Bernard's example of a plaintiff with a claim for $100,000 arresting a ship worth $10 million. Unless and until someone can suggest a plausible happy medium between awarding damages only when the plaintiff's claim was brought out of *mala fides* or *crassa negligentia*, and awarding damages whenever the plaintiff's claim ultimately proves to be unsuccessful, however plausible it might have seemed when brought—and no one has been able to craft such a happy medium so far—the law properly rests (as it has long done) at the former end of the spectrum, rather than the latter.

I close by thanking Sir Bernard again for an entertaining and thought-provoking Tetley Lecture, one that set out to stir up controversy and assail long-standing traditions, much as Bill Tetley himself has so often done. The Tetley Lecture and Sir Bernard's Article were a worthy tribute to a great maritime lawyer.

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could have collected on the claimant's cross-undertaking in damages when the claim failed, whereas under the traditional English view, he had no action for malicious civil prosecution.

13. *Crawford Adjusters*, [2013] UKPC 17, [72], 3 W.L.R. at 950 (Lord Wilson J.S.C.).

14. Jones v. Givin, (1713) 93 Eng. Rep. 300 (K.B.) 307; Gilb. Cas. 185, 209-10 (Parker C.J.).

Wrongful Arrest of Ships: Rejoinder by the Honourable Mr. Justice Eder

Sir Bernard Eder*

Having campaigned for almost thirty years for a change in the law concerning "wrongful arrest," I have read Professor Martin Davies's response[1] to my Article with great interest—and I frankly acknowledge that it is the best attempt at a "demolition job" that I have ever come across. He is to be congratulated! But I remain unpersuaded by his counterarguments and unrepentant about my own views with regard to the need to change the law. I am therefore most grateful to the editors of the *Tulane Maritime Law Journal* for this opportunity to provide this short rejoinder. I do not propose to repeat what I have said, but perhaps I may be permitted to clarify and to emphasise a few points.

First, let me be clear about my proposal, viz that as a precondition to the grant of a warrant of arrest, the would-be arresting party should be obliged (at a minimum) to give to the court a cross-undertaking similar to the one generally required as a matter of English law whenever a claimant seeks to obtain a freezing injunction, that is, an undertaking that if the court later finds that the order made has caused loss to the respondent (or any third party) and decides that the respondent (or such third party) should be compensated for that loss, the applicant will comply with any order the court may make. In my view, that is a most modest proposal. It is, I would suggest, the "plausible happy medium" that Professor Davies refers to at the end of his response. In particular, the following should be noted. First, such cross-undertaking is already part of the standard form for any freezing injunction in the Commercial

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 The Honourable Mr. Justice Eder was appointed a Justice of the High Court of England & Wales in January 2011 when he also received a knighthood. He is assigned to the Queen's Bench Division, where he sits as a trial judge, and also to the Commercial Court in London. He took a law degree at Downing College, Cambridge (1st Class, 1971-1974), was admitted to Inner Temple in 1975, and thereafter practised as a barrister at 4 Essex Court/Essex Court Chambers specialising in international and commercial work including shipping. He took silk (Queen's Counsel) in 1991. He is currently the Senior Editor of *Scrutton on Charterparties and Bills of Lading*.

1. Martin Davies, *"Wrongful Arrest of Ships: A Time for Change"—A Reply to Sir Bernard Eder*, 38 TUL. MAR. L.J. 137 (2013).

Court in England.[2] Second, it is important to note that this formulation does not mean that if the claim ultimately fails, the claimant will necessarily have to pay damages: the court retains a discretion whether or not to enforce the cross-undertaking.[3] Third, it seems to me consistent with ordinary principles of justice as recognised by the courts of equity over 150 years ago when it was decided that a cross-undertaking in damages should generally be required as an express precondition to the grant of injunctive relief.[4]

Second, as a matter of English law, there is a sharp distinction between the commencement of in rem proceedings and the issuance of an arrest warrant. Although the former may be a matter of "right" in circumstances stipulated in the Senior Courts Act 1981[5] (which governs the Admiralty jurisdiction of the High Court), the latter is not—or at least not necessarily. In principle, there is no bar to the introduction of a procedure that would require the provision of a cross-undertaking as I have suggested as a precondition to the issuance of an arrest warrant. All that would be needed is an amendment to the rules of court—in particular Civil Procedure Rule Practice Direction 61 (Admiralty Claims) section 5 and Form ADM4, which, it should be noted, already requires an undertaking of a certain type.[6]

Third, Professor Davies is, of course, right to point out that the analogy between freezing injunctions and ship arrests is far from exact in particular because, unlike the former, the latter is asset-specific (that is, directed only against the particular ship in question), leaving the rest of the shipowner's business untouched. However, the standard cross-undertaking as referred to above is not only required in the context of freezing injunctions: it is generally required whenever the court grants any relief by way of interlocutory injunction—and, as already noted, this has been the position in England for over 150 years. Why should arrestors stand in an any more favoured position?

Fourth, it may be that the occasions when the Court would consider that the cross-undertaking should be enforced will be rare. But that is, in my view, no reason whatsoever not to put in place a proper, effective, and

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2. *See* HM COURTS & TRIBUNALS SERV., THE ADMIRALTY AND COMMERCIAL COURTS GUIDE app. 5, sched. B ¶¶ (1), (7) (2013), *available at* http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-commercial-courts-guide.pdf.

3. *See generally* 2 CIVIL PROCEDURE (WHITE BOOK) §§ 15-33 to -38 (Rupert Jackson ed., 2013).

4. *See* Sir Bernard Eder, *Wrongful Arrest of Ships: A Time for Change*, 38 TUL. MAR. L.J. 115 (2013).

5. Senior Courts Act, 1981, c. 54 (Eng.).

6. CIVIL PROCEDURE RULES, Practice Direction 61—Admiralty Claims § 5.1 (Eng.).

just mechanism to require the claimant to provide a cross-undertaking and, in an appropriate case, to enforce that cross-undertaking by an order for compensation.

Fifth, Professor Davies's discussion of the law concerning the torts of malicious prosecution and abuse of process, including his reference to the recent decision of the United Kingdom Supreme Court in *Crawford Adjusters v. Sagicor General Insurance (Cayman) Ltd.*, is most interesting.[7] However, it is, I would suggest, of little, if any, assistance in the present context. The arrest of a ship involves the invocation by the claimant of the court's coercive powers in support of a private law claim: at the risk of repetition, it seems to me that in that context, the desirability of a cross-undertaking in a form that is generally required whenever the court grants injunctive relief is overwhelming.

Sixth, the argument in support of the present law that "it has ever been thus" is, in my view, unpersuasive. That was one of the arguments that was advanced when the original jurisdiction to grant an interim freezing injunction was exercised in England; in particular, it was said that it was contrary to existing law and practice as confirmed by the Court of Appeal in *Lister & Co. v. Stubbs*.[8] That decision had stood for almost eighty years in support of the general proposition against the grant of what we now call an interim freezing injunction. But the law does not (always) stand still; and the judgment of Lord Denning in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* is worth reading if only because it serves to emphasise the occasional need to go back to first principles, review existing perceived law and practice, and, if necessary, implement a change.[9]

Finally, I draw some comfort from the fact that although I was a lone voice for change when I started my "campaign" over thirty years ago, I now have some dancing partners.[10]

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7. [2013] UKPC 17, [2013] 3 W.L.R. 927 (appeal taken from Cayman Is.).
8. (1890) 45 Ch. 1 at 14 (Eng.).
9. [1975] 2 Lloyd's Rep. 509 (C.A.) (Eng.).
10. *See* Eder, *supra* note 4, at 119-20 & n.20; *see also* Aleka Mandaraka Sheppard, *Wrongful Arrest of Ships: A Case for Reform*, 19 J. INT'L MAR. L. 41 (2013).