

Frank Stewart Dethridge Memorial Lecture 1991

*The Hon. Mr Justice David Malcolm
Chief Justice of Western Australia*

THE NEGLIGENT PILOT AND THE HIMALAYA CLAUSE: A SAGA OF DISAGREEMENT

It is a great honour to be invited to deliver to the 1991 Frank Dethridge Memorial Address. My consciousness of the honour is made particularly acute by even the most cursory examination of the list of distinguished and learned jurists who have delivered this address. The purpose of the address is, of course, to honour the memory of Frank Stewart Dethridge who was the founding President of the Maritime Law Association which was established on 1 April 1974. Mr Dethridge presided over the first meeting of members of the Association in May 1975. At the time of the meeting in the following year, however, he fell ill and died in June 1976. It was then that the decision was taken that this address should be given at each annual meeting of the Association. The first of the addresses was given by Sir Ninian Stephen, a Justice of the High Court of Australia. Sir Ninian knew Frank Dethridge personally. I knew him only by reputation as the senior partner of Mallesons. Fourteen years ago when concluding the first of these addresses Sir Ninian described Frank Dethridge as follows:

He was a man learned in the law and with a great interest in and much experience of shipping law. Those members of the Victorian Bar fortunate enough to be briefed by him in shipping matters were the wiser for his counsel. His wisdom, kindness and moderation will long be remembered in the profession. He had developed to an exquisite degree that high art of the instructing solicitor, how to teach counsel what he does not know but needs to learn for the case in hand, while conveying the impression all the while that it is he, the instructing solicitor, who is collecting pearls of wisdom as they fall from counsel's lips.

From my experience at the Bar such solicitors are of the kind that counsel dream about but rarely meet.

When I first considered what topic related to Maritime Law I should select as the topic for my address I was tempted to include a detailed critical analysis of the decision of the High Court in *The Oceanic Crest*, reported as *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626. That was a case in which *The Oceanic Crest* damaged a wharf at Dampier. At the time the vessel was under the control of a pilot who had been provided by Pilbara Harbour Services Pty Ltd, which controlled the port under statutory authority. Under the *Shipping and Pilotage Act 1976* (WA) pilotage of vessels entering or leaving the port was compulsory. The pilot was employed by Pilbara, and had been appointed a pilot for the port by the Governor under the Act. The wharf was owned by Hamersley Iron Pty Ltd. Hamersley sued Pilbara and Oceanic to recover damages. The defendants exchanged notices of contribution and indemnity.

Wallace J found that the damage had been caused by the negligence of both the master and the pilot whom he held were both Oceanic's servants. Damages were awarded against Oceanic. Hamersley's claim against Pilbara was dismissed on the basis that Oceanic was the 'particular employer' of the pilot and that it, not the 'general employer' Pilbara, was vicariously liable for his negligence. The contribution claims were dismissed. On appeal to the Full Court the finding that the master was negligent was set aside, but the findings of fact were not otherwise disturbed. The Full Court held Oceanic vicariously liable for the pilot's negligence. Burt CJ and Smith J with Brinsden J dissenting, held that Pilbara was not vicariously liable for the negligence of the pilot. Accordingly the dismissal of Hamersley's action against Pilbara and the dismissal of Oceanic's claim for contribution and indemnity were affirmed. Oceanic appealed to the High Court seeking judgment against Pilbara for contribution or indemnity.

Section 410B(2) of the *Navigation Act 1912* (Cth) provides that:

Notwithstanding anything contained in the law of the Commonwealth or of a State or Territory, the owner or master of a ship navigating under circumstances in which pilotage is compulsory under a law of a State or Territory is answerable for any loss or damage caused by the ship, or by a fault in the navigation of the ship, in the same manner as he would if pilotage were not compulsory.

It was contended on behalf of Oceanic that a person who undertakes the provision of pilotage services and who employs pilots for that purpose is under a duty to provide a pilotage service which will be carried out with

reasonable care and skill by a competent pilot. Pilbara owed such a duty to Oceanic because it was carrying on the business of providing pilotage services in a port where it had the sole right to provide them and where pilotage was compulsory. Alternatively, a duty was owed because the port was of such a nature that pilotage services were necessary in the interests of safety, and Pilbara had the sole right to provide them. To the extent that *Fowles v Eastern and Australian Steam Ship Co Ltd* [1916] 2 AC 556 was authority to the contrary and was correctly decided, it was distinguishable on the ground that Pilbara was in private enterprise and voluntarily embarked upon the business of pilotage. If *Fowles* could not be distinguished or confined to its own facts, it ought to be reviewed in the light of the developments which had taken place in the scope of the functions of government and the modern law of vicarious liability, including the development of the organisation test. It was submitted that these contentions were consistent with s.410B(2) of the *Navigation Act*, which did not require that the pilot be deemed to be servant or agent of the ship owner. Alternatively, if it did, it was only for the purposes of determining the liability of the ship owner for loss or damage, or for determining whether the ship owner was guilty of contributory negligence. In any event, s.410B(2) did not affect the right of the ship owner to recover from the pilot the amount of any liability he had incurred by reason of the pilot's negligence. It followed that where the pilot was the servant of an employer who undertook the provision of pilotage services, s.410B(2) would not affect the right of the ship owner to recover against the pilot's employer. Pilbara's liability to indemnify was independent of any concurrent liability on its part to Hamersley for the purposes s.7 of the *Law Reform (Contributory Negligence and Joint Tortfeasors Contribution) Act 1947* (WA). Where by reason of s.410B(2) a ship owner is liable to a third party for damage caused by the negligence of a pilot, the ship owner is entitled to be indemnified by the pilot's employer. Alternatively, the right of recovery is a right to recover damages for negligence.

These contentions were rejected by the majority which comprised Gibbs CJ, Wilson and Dawson JJ. They held that Pilbara was not vicariously liable for the negligence of the pilot, because such liability was impliedly excluded by s.410B(2) and also because the pilot was a public officer executing an independent duty which the law cast on him. In their view such a person is alone responsible for tortious acts which he may commit in the course of discharging the duties of his office and for such acts the government or body which he serves or which appoints him has no vicarious liability: cf *Enver v The King* (1906) 3 CLR 1969; *Field v Nott* (1939) 62 CLR 660 at 675;

and *Little v The Commonwealth* (1947) 75 CLR 94 at 114. The majority also held that this principle was not confined to cases in which the Crown or a public authority is sought to be made liable for the tort of a public officer. Brennan and Deane JJ dissented. The minority held that Pilbara was vicariously liable for the pilot's negligence. As Brennan J said at 664:

In the light of the development of the law relating to vicarious liability, *Fowles* should not now be seen as an obstacle to holding that a trading corporation which is empowered by its constitution (or by a special statute) to employ a licensed pilot to pilot ships under compulsory pilotage is vicariously liable for negligence in the piloting of a ship by a pilot employed by it.

It followed that unless the vicarious liability of Pilbara at common law was excluded by s.410B of the *Navigation Act* Oceanic would be entitled to contribution under the *Tortfeasors' Contribution Act*. On this point both Brennan and Deane JJ accepted Oceanic's contention that s.410B did not affect the relationship between the master of the ship and the pilot in connection with the conduct of a ship by the pilot. As it did not give to the owner or master of the ship any control over the pilot and the piloting of the ship, the section could not affect the vicarious liability of the pilot's general employer for negligence committed in the course of pilot's employment. It merely created a parallel, statutory liability in the owner or master.

The decision in *The Oceanic Crest* reflects a fundamental disagreement regarding adherence to the traditional view of a pilot as a public officer exercising an independent duty rather than as an employee of an enterprise. It also reflects a fundamental difference about the approach which should be taken to the liability of a trading corporation carrying on the business of pilotage for the negligence of a pilot employed by it. I have resisted the temptation of further analysis. As I was counsel for the unsuccessful appellant it might be thought that any criticism I would make of the majority decision would be less than objective. I will content myself with saying that an opportunity was lost to bring the law relating to pilotage into the twentieth century. It remains based upon the idea that the pilot was 'an independent professional man' as described by Lord Loreburn in *Fowles* at 562. It could easily have been held that this idea was not applicable where the employer was a trading corporation which employed the pilot to provide pilotage services to other for the purposes of profit to itself.

The capacity of the judiciary at the highest level to disagree on fundamental matters of maritime law has been nowhere more apparent than in the cases involving the Himalaya clause in the context of exemption from liability provisions in bills of lading. In his inaugural address entitled *Australia and*

Maritime Law, Sir Ninian Stephen referred to the significant contribution made by Australian Courts in relation to the liability of stevedores and their ability to claim the protection of exemption clauses in bills of lading. Sir Ninian pointed out that the decision of the High Court in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1955) 95 CLR 43 was widely regarded as authoritative in many jurisdictions beyond Australia. As Sir Ninian put it:

It seemed at the time to have concluded the matter. But to think this was to underestimate the ingenuity of carriers and their drafters. The so-called *Himalaya* clause, taking its name from the vessel in question *Adler v Dickson* [1955] 1 QB 158 has, in the hands of the Privy Council, with inspiration from the shade of the late Lord Reid in *Scruttons v Midland Silicones* [1962] AC 446 opened new avenues for the exemption of stevedores from liability. Their Lordships' decision in *The Eurymedon* [1975] AC 154, on appeal from New Zealand, may provide in many situations a means of protection for stevedores. That decision has been both lauded and criticised in the journals and with the High Court's new responsibilities as a final court of appeal it remains to be seen whether ultimately the views of a majority of three to two, prevailing over a unanimous New Zealand Court of Appeal, will necessarily provide the law for Australia.

The Eurymedon, reported as *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, involved a bill of lading for the shipment of a drilling machine from Liverpool to Wellington which incorporated the Hague Rules in the Schedule to the *Sea-Carriage of Goods Act* 1924. Article III, rule 6, discharged the carrier from all liability for loss or damage unless suit was brought within one year. The bill of lading further stipulated that the same immunity was extended to the carrier's servants or agents, including independent contractors. The carrier was a wholly-owned subsidiary of the stevedore, who acted as the carrier's agents in New Zealand. The carrier had authority to enter into the contract on behalf of the stevedore. As a result of the stevedore's negligence the drill was damaged in unloading and, after the lapse of one year, the consignee bought an action against the stevedore for damages. The stevedore pleaded the time limit in the bill of lading. The Supreme Court upheld that defence. The Court of Appeal unanimously allowed an appeal by the consignee on the ground that the shipper and the stevedore were not bound as between themselves in contract at the time when the bill of lading was signed and delivered because at that stage no consideration moved from the stevedore.

By a majority comprising Lords Wilberforce, Hodson and Salmon it was held that the shipper agreed to exempt the carrier, his servants and independent contractors from liability in respect of the performance of the

contract of carriage; and that the exemption was designed to cover the whole carriage from loading to discharge by whomsoever it was performed. It was also held that the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shipper and the stevedore made through the carrier as agent, which became a full contract when the stevedore performed services by unloading the goods; that the performance of those services for the benefit of the shipper was the consideration for the agreement by the shipper; and that the stevedore should have the benefit of the exemptions in the bill of lading; see per Lord Wilberforce at 167–168. Viscount Dilhorne's dissent was emphatic. He rejected the contention that the shipper agreed to exempt the carrier, his servants and agents and independent contractors from liability and that performance would provide full consideration for the contract otherwise made on behalf of the servant or the independent contractor as agent without consideration. Viscount Dilhorne said at 171:

What was the alleged bargain? If I understood the argument correctly it was that the consignor would exempt any person employed by the carrier in the carriage of the discharge of the drill of all liability if that person performed any services in relation to the carriage and discharge of the drill. The contention was that if such services were performed, that constituted acceptance of the consignor's offer to exempt and consideration for it; and so by performance converted into a full contract.

I admire the ingenuity of the argument. It attempts to overcome the difficulty that clause 1 is expressed to contain an agreement and not an offer and it attempts to overcome the lack of consideration on which in my opinion the appellant's first contention founders; but I do not myself see any material difference between A offering B money if B does work for A and a bargain between A and B that A will pay B money if B does work for A. In each case A is making an offer which B can accept by doing the work.

In my view one really cannot read the agreement set out in clause 1 as stating any such bargain. Indeed, however it is formulated, one has only to contrast the alleged bargain with the language of the clause to recognise that the clause does not express or imply any such bargain containing any such offer.

Viscount Dilhorne was clearly of the opinion that the appeal could only succeed by re-writing the language of the clause. He also noted that, at the end of his speech in *Midland Silicones v Scuttons Ltd* [1962] AC 446 at 472, Viscount Simonds referred to the judgment of Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 with which Dixon CJ entirely agreed. Viscount Simonds said that he also agreed with every

line and word of it, and he referred in particular to the passage in the judgment of Fullagar J in which he protested against a tendency by some artifice to save negligent people from the normal consequence of their fault: see at 70. Lord Simon dissented broadly on the grounds set out in the judgments of the New Zealand Court of Appeal.

The opportunity for the High Court to consider the matter, which was foreshadowed by Sir Ninian Stephen, arose in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231, commonly known as *The New York Star*. In that case the stevedore, when sued by the consignee of goods stolen from its wharveside store, relied upon a time bar provision contained in a bill of lading issued to the consignor by the sea carrier. The bill of lading contained a Himalaya clause. On this occasion their Lordships were unanimous, but their disagreement with the majority in the High Court was fundamental. The case went to the Privy Council by special leave. The provisions of the bill of lading were in substance identical with those considered by the Privy Council in *The Eurymedon*.

The action was heard at first instance by Sheppard J before whom it was contended by the consignee that:

- (a) there had been a fundamental breach by the stevedore of its obligation as bailee of the goods (the 'fundamental breach' point);
- (b) one of the necessary conditions for applying the Himalaya clause had not been satisfied in that it had not been shown that the carrier had authority to act on the stevedore's behalf in accepting the bill of lading (the 'agency' point);
- (c) the bill of lading ceased to have any operation after the goods passed over the ship's rail and the stevedore held them in his capacity as a bailee rather than as an independent contractor contemplated by the bill (the 'capacity' point).

Sheppard J rejected all of these contentions, though he found that the necessary agency had been established only by ratification.

In the Court of Appeal the same contentions were advanced on behalf of the consignee and rejected. The Court found that agency was directly established by the evidence so that reliance on ratification was not necessary. In addition, however, the consignee was given leave to take a fresh point, namely: that there was no proof of consideration moving from the stevedore so as to entitle it to the benefit of defences and immunity clauses in the bill of lading (the 'consideration' point). The Court of Appeal accepted that contention, allowed the appeal and awarded damages to the consignee.

In the Privy Council, Lord Wilberforce, albeit by implication, was somewhat critical of the way in which the case had been dealt with in the High Court. In *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1980) 144 CLR 300 at 303–304, his Lordship said that in the High Court of Australia:

... the ‘agency’ point and the ‘consideration’ point were again argued, but rejected by the majority of the Court (Barwick CJ, Mason and Jacobs JJ). There was also argument upon the ‘fundamental breach’ point, but this was not dealt with in the judgments.

As to the ‘capacity’ point, senior counsel for the consignee expressly disclaimed reliance upon it (not surprisingly since Glass JA had described it as ‘without substance’) and argument upon it was not heard. However, the majority of the Court, (Barwick CJ dissenting) decided the appeal in favour of the respondent on this point.

Finally, it should be mentioned that the Board’s decision in *Satterthwaite’s* case was followed without question by the trial Judge and the Court of Appeal. Their Lordships understand that there was no argument in the High Court upon the correctness of this decision however two members of the majority (Stephen and Murphy JJ) expressed disagreement with it.

It was in these circumstances that special leave was granted.

The point which the Privy Council was called upon to decide was the ‘capacity’ point. Their Lordships, however, stated their position upon the other points, upon which argument was addressed by the respondent. Lord Wilberforce said at 304 that the decision in *The Eurymedon* was a decision in principle that the *Himalaya* clause is capable of conferring upon a third party falling within the description ‘servant or agent of the carrier or any independent contractor employed by the carrier’ the defences and immunities conferred by the bill of lading upon the carrier, as if such persons were parties to the contract contained in or evidenced by the bill of lading. In particular, stevedores employed by the carrier may come within it and would normally and typically do so. While their Lordships acknowledged that there would be room for evidence concerning the precise relationship of carrier and stevedore and as to the practice of the relevant port, the principle was one of general application. Secondly, their Lordships regarded the factual situation in *The New York Star* as typical of that which the Board thought sufficient in *The Eurymedon* to confer the benefit of exemption on the stevedore. Thirdly, their Lordships rejected the ‘fundamental breach’ point.

So far as the 'capacity' point was concerned, the argument was that, at the time when the loss occurred, the goods had been discharged and were no longer in the custody of the carrier. Consequently, the stevedore was acting not as an independent contractor employed by the carrier to perform the carrier's obligations under the bill of lading, but as a bailee. His liability, in that capacity, was independent of and not governed by any of the clauses of the contract. Thus, the situation could be distinguished from *The Eurymedon*, on the facts. It was pointed out by Lord Wilberforce at 307 that the stevedore's charges were in fact paid by the ship's agent on behalf of the carrier, which suggested that the stevedore had been engaged by the carrier. At all events, although the provisions of the bill contemplated that the carrier's liability shall cease on delivery ex-ship's rail, notwithstanding that the consignee received delivery at some point removed from the ship's side and any custom of the point being to the contrary, their Lordships took the view that the provisions had to be interpreted in the light of actual practice. Lord Wilberforce said at 309:

These provisions must be interpreted in the light of the practice that consignees rarely take delivery of goods of the ship's rail but will normally collect them after some period of storage on or near the wharf. The parties must therefore have contemplated that the carrier, if it did not store the goods itself, would employ some other person to do so.

Lord Wilberforce also pointed out at 309 that the provisions of the bill contemplated that the carrier may have not insisted that the consignee take delivery as soon as the goods left the ship's tackle. It was recognised that the carrier may continue to have some responsibility for the goods after discharge. His Lordship said at 309-310:

He cannot after all dump them on the wharf and leave them there. So to suppose would be commercially unreal and is not contemplated by the bill of lading. Clause 5 in terms attributes responsibility to the carrier as bailee and defines the period in express terms as 'continuing after leaving the ship's tackle'. There is nothing in the latter part of cl.8 that is inconsistent with this. It merely provides that delivery ex-ship's rail shall constitute due delivery and that the carrier's liability shall cease at that point. But this leaves open the option not to insist on delivery ex-ship's rail, and leave, to be governed by cl.5, his responsibility if he does not.

Their Lordships stated at 310 that they were in agreement on the capacity point (and on the appeal as a whole) with the judgment of Barwick CJ who was the sole dissident in the High Court.

In these circumstances, one might have been pardoned for thinking that following the abolition of appeals to the Privy Council from Australia in 1986, the High Court might be anxious to review the present position and would be supported in so doing by New Zealand. As to New Zealand I note that the present Chief Justice, Sir Thomas Eichelbaum was junior counsel to Mr Michael Mustill QC (as he then was) for the successful appellant stevedore in *The Eurymedon*. So far as the High Court is concerned, an application for special leave to appeal was recently refused in *Rockwell Graphic Systems v Fremantle Terminals Ltd* (1991) 65 ALJR 514. In that case the consignor, Rockwell, sued the stevedore for damages for negligence as bailee which resulted in damage to a printing press owned by the consignor. The printing press was carried from the United Kingdom to Fremantle in the *De Loris* pursuant to a bill of lading. The bill was a port to port bill and contained a *Himalaya* clause extending the benefit of defences and immunities conferred by the bill upon the carrier to independent contractors employed by the carrier. The consignee's case was that on 4 August 1986, while the printing press was in the custody and control of the stevedore and was being conveyed on a low bed trailer, the printing press fell from the trailer and was damaged beyond repair by reason of the negligence of the stevedore its servants and agents. The stevedore sought to rely upon the exemption and immunity clauses in the bill of lading.

The stevedore applied for an order that the action be permanently stayed on the ground that, on the authority of *The New York Star*, the stevedore was entitled to invoke the protection afforded to the carrier under the bill even after the goods had been discharged over the ship's rail. In any event, the stevedore claimed that it was entitled to the benefits conferred upon the carrier under the bill of lading pursuant to s.11(2) of the *Property Law Act 1969* (WA). Reliance was also placed upon the Hague Rules. The stay was granted by Seaman J who also granted the consignee leave to appeal to the Full Court. On the hearing of the appeal counsel for the consignee conceded that on the present state of the authorities and, in particular, in light of the decision of the Privy Council in *The New York Star*, the appeal must be dismissed. It was accepted that the consignee had no prospect of success in the matter, unless the High Court was persuaded to affirm its decision in *The New York Star* in preference to the decision of the Privy Council on the 'capacity' point.

In the light of that concession the Full Court would have ordinarily done no more than dismiss the appeal. Counsel for the appellant agreed that this course was appropriate. Counsel for the respondent, however, submitted that the Full Court should look at the nature and merit of the appellant's

case and express a view on the capacity argument. This submission was made notwithstanding that counsel for the respondent said that he embraced entirely the proposition that the appeal must be dismissed. It was contended that the 'capacity' point should be defined and delineated in order to assist the High Court.

In my judgment with which the other members of the Full Court agreed I said:

In my opinion, it is not for this Court to question the correctness of a decision of the Privy Council by which this Court is currently bound. Further, it is not for this Court to speculate upon what attitude the High Court of Australia might or might not take to the decision of the Privy Council in *The New York Star*. The decision of the Privy Council overturned the decision of the High Court. The High Court had decided by majority of four to one (Barwick CJ dissenting) that, on the terms of a bill of lading in substantially the same terms relevantly as the bill of lading in this case, the carrier's obligations qua carrier ceased when the goods passed over the ship's rail and that the defences otherwise afforded to the carrier and the stevedore in terms of the *Himalaya* clause did not apply to the subsequent negligence of the stevedore as a bailee: see per Stephen J at 254, 260–263, 265–266; per Mason and Jacobs JJ at 274, 279–281, 283; and per Murphy J at 285–286. Reference was made to policy considerations applicable in Australia, but not applicable in the United Kingdom, which justified limitations on the scope of the defences available under the *Himalaya* clause: see per Stephen J at 258–260; and per Murphy J at 285.

When *The New York Star* was decided the High Court was bound by the decision of the Privy Council. This is no longer so and it is clearly open to the High Court to decide, if persuaded by appropriate submissions to do so, that it should not longer follow the decision of the Privy Council on the ground that the decision was inappropriate to Australian conditions. In this respect, it significant that in *Nissho Iwai Australia Ltd v Malaysian International Corp. Berhad* (1988) 167 CLR 219 at 231 Mason CJ, Brennan, Deane, Gaudron and McHugh JJ said that the High Court granted special leave, *inter alia*:

... because it was thought that the policy considerations referred to by Stephen and Murphy JJ in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 258–259, 285 would arise for examination ...

In the result the High Court was able to resolve the questions of interpretation in that case without the need to deal specifically with those policy considerations.

Since the decision of the Privy Council in *The New York Star*, the correctness of the decision and their Lordship's earlier decision in *New Zealand Shipping Co. Ltd v AM Satterthwaite & Co. Ltd* [1975] AC 154 (*The Eurymedon*) has been questioned or criticised: see, for example, Rose, *Return to the Antipodes* (1981) 44 MLR 336. The approach adopted by Stephen J in *The New York Star* was preferred to that of Barwick CJ (whose judgment was approved by the Privy Council) by Reynolds, *Again the Negligent Stevedore* (1979) 95 LQR 183 at 187.

Notwithstanding these comments, the *Himalaya* clause and the principle that a bill of lading the shipper might authorise the carrier to employ stevedores on the basis that their liability to the shipper should be not greater than that of the carrier, as stated in *The Eurymedon*, has been approved in Carver, *Carriage by Sea* (13th ed. 1982) paras 381–385 at 253–255. Carver, however, says in paras 298–405 at 258–260 that the true principle on which these cases rest is that of *jus tertii* derived from *Dutton and Wife v Poole* (1678) 2 Lev 210. Thus, it is arguable that the protection of the stevedore is consistent with the third party benefit approach adopted in *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 per Mason CJ and Wilson J at 123–124; per Toohey J at 172; and per Gaudron J at 176. In Western Australia, such an argument may also be reinforced by s.11(2) of the *Property Law Act* 1969. Carver, *op cit* paras 408–410 at 261–262 argues that had these fundamental principles been applied in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 the same result would have been arrived at by the application of the fundamental principle of third party benefit.

In any event, since *The Eurymedon* and *The New York Star*, reference has frequently been made in the High Court to the need for comity if not uniformity in the context of international transactions 'where great store is set upon certainty and uniformity of application': *Shipping Corporation of India Ltd v Gamlen Chemicals Co. Australasia Pty Ltd* (1980) 147 CLR 142 at 159. The decisions go back to *Midland Silicones*, which has stood for some thirty years. *The Eurymedon* has stood for more than fifteen years and *The New York Star* has stood for more than a decade. Consequently, in the interests of certainty and the protection of transactions which have taken place on the faith of the law as it has previously been declared, these decisions would not lightly be disturbed: *Barbarianis v Lutoney Fashions Pty Ltd* (1987) 163 CLR 1 at 13 per Mason J.

The *New York Star* has been applied in a number of cases since the decision of the Privy Council was pronounced in 1980. It was applied by the Court of Appeal in New South Wales in *Godina v Patrick Operations Pty*

Ltd [1984] 1 Lloyd's Rep. 333 in which the sole question was whether a stevedore was entitled to the benefit of a *Himalaya* clause: per Hutley JJA at 335; and per Samuels JA at 337–338. It was applied to a contract for carriage by land incorporating a *Himalaya* clause in *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431 at 436–438 per Hutley JA (with whom Glass and Mahoney JJA agreed). See also *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606; *Mercedes Benz Australia Pty Ltd v Scancarriers AS*, unreported, S Ct of NSW (No. 10138 of 1980); 25 November 1981 (Rogers J); *Carrington Slipways Pty Ltd v Pacific Austral Pty Ltd*, unreported; S Ct of NSW (No. 13760 of 1984); 2 February 1989 (Rogers J); and *Continental Seagram Pty Limited v ABC Container Line NV Pty Ltd* unreported; S Ct of NSW (No. 12 of 1989); 8 February 1989 (Carruthers J).

In refusing special leave to appeal to the consignor in *Rockwell Mason CJ*, delivering the judgment of the Court said:

The question sought to be raised in this application is one of construction of a bill of lading and as such raises no question of general principle. The application has been brought to this Court principally because the applicants sought a reconsideration of the decision of the Privy Council in *The New York Star* (1980) 144 CLR 300. However, the bill of lading in this case, by reason of the provisions of cl.17(4), differs significantly and in a material respect from the bill of lading in *The New York Star*. There is therefore no basis for a reconsideration of the decision in that case.

Clause 17(4) of the bill of lading provided that:

If the delivery of goods is not taken by the merchant at the time and place when and where the carrier is entitled to call upon the merchant to take delivery thereof whether the carriage called for by this bill of lading is a port to port shipment or combined transport, the carrier shall be entitled without notice to unstow the goods if stowed in containers and/or to store the goods ashore, afloat in the open or under cover at the sole risk of the merchant. Such storage shall constitute due delivery hereunder and thereupon the liability of the carrier in respect of the goods or that part thereof stored as aforesaid (as the case may be) shall wholly cease and the cost of such storage (if paid or payable by the carrier or any agent or sub-contractor of the carrier) shall forthwith upon demand by paid by the merchant to the carrier.

On the face of it, that provision did no more than express within the bill of lading the practice in the light of which Lord Wilberforce said that the provisions in the bill of lading in *The New York Star* must be interpreted, namely:

The practice that consignees rarely take delivery of goods at the ship's rail but will normally collect them after some period of storage on or near the wharf.

In the instant case, therefore, one would not have thought that the incorporation of an express provision reflecting the very practice in the light of which the provisions in *The New York Star* bill had to be interpreted, would give rise to any significant or material difference. In any event, the facts were that while delivery was not taken ex-ship's rail the carrier did not take advantage of cl.17(4), but arranged for the stevedore to carry the printing press and deliver it to the consignee's premises. The damage occurred in the course of the journey. With respect, while the materiality and significance of cl.17(4) were not articulated by their Honours when they refused special leave, I would have thought that in these circumstances there would be more scope for the 'capacity' point than in *The New York Star* itself. I acknowledge, however, that in that case the goods were in fact placed in storage with a stevedore by the carrier. In *Rockwell*, because the carrier did not take advantage of cl.17(4), it does seem possible that the High Court may have passed up an opportunity to examine once again the policy considerations referred to by Stephen and Murphy JJ which the Court was prepared to re-examine when special leave was granted in the *Nissho Iwai* case. As matters stand, the fundamental disagreements between the Court of Appeal of New Zealand and the High Court of Australia, on the one hand, and the Privy Council, on the other, remain unresolved.