Shipowners' Liabilities: Elder Dempster Revisited[1]

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INTRODUCTION

Carriage of goods by sea by its very character makes it very difficult to clearly define its parties and thus the positions of the parties. This is evidenced in the relationship between carrier and shipper. The carrier enters into the contract with the shipper[2] by undertaking to carry goods from one port to another. However, it is usually not the shipper who receives the goods at the destination, but the consignee.

Even though the consignee is not a party to the original contract of carriage between the carrier and the shipper, there are instances when a contractual relationship can sometimes be established between him and the carrier. An example of this is where a contract contained in a bill of lading can be transferred to the consignee, when he receives the document[3]. An implied contract can also be established between the carrier and the consignee when the later claims the goods at the destination[4]. Contracts can also be established between the carrier and consignee through an "agency clause"[5] or "third parties" clauses[6] in certain jurisdictions.

[1] This essay won the Morella Calder Prize for 1997 [Ed].
[2] Some authors prefer to use the term "freighter"
[3] **The** ***Bills of Lading Act*** 1855 (UK) and its Australian equivalents.
[4] ***Brandt v Liverpool Brazil and River Plate Steam Navigation Co. Ltd.*** [1924] 1 K.B. 575
[5] ***New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd (The Eurymedon)*** [1975] AC 154.
[6] Rejected within the English legal system.

Within the shipping business the way in which goods are transferred is of importance to the shipowner. Throughout the centuries the use of ships to carry goods from one destination to the other has been regarded as a joint venture between the ship and her cargo. The ship was the shipowner's contribution to that venture; e.g. the name of the ship was, and still is, clearly mentioned in the onboard bill of lading.

Within the English legal system, it depended upon the documents and circumstances in each case. The question posed was whether the carrier was deemed to be the charterer or the shipowner[7]. Usually, the liable party would be a contracting party otherwise it would have been against the doctrine of privity of contract.

However in England, as in the rest of the world, the master of the ship personally signed the bill of lading when the goods were delivered on board by the shipper. Often this action helped determine the carrier, since the master was regarded as the agent of the owners[8]. This constituted prima facie evidence that the master signed the bill of lading on behalf of his principal, the shipowner, and therefore the contract of carriage of goods by sea was made with the owner of the ship[9] that is to say, the owner has the prima facie responsibility for goods on board his ship[10].

[7] ***Samuel v West Hartlepool Steam Navigation*** (1906) 11 Com. Cas. 115 at 125. ***Steamship Calcutta Co. Ltd v Andrew Weir and Co.*** (1925) 31 Com. Cas. I11 at 111-112

[8] ***Samuel v West Hartlepool Steam Navigation*** (1906) 11 Com. Cas. 115 at 125. ***Steamship Calcutta Co. Ltd v Andrew Weir and Co.*** (1925) 31 Com. Cas. 111 at 111-112 see also some cases such as ***Grant v Norway*** (1851) 10 **C.B.** 665; 138 E.R. 263 and ***Stumore v Green*** (1868) L.R. 2 Q.B. 86 at 98.

[9] ***Schuster v McKeller*** (1857) 7 E. & B. 704 at 723 and ***Sandemann v Scurr*** (1866) L.R. 2 Q.B. 86 at 98.

[10] ***The St. Cloud*** (1863) B. & L. 4 at p 15. This presumption of the shipowner as a carrier fitted very well into the existing circumstances until the liner traffic commenced during the middle of the nineteenth century.

The so-called "general ships" did not have any planned schedules[11] and thus much depended upon market conditions which made the ships' routes irregular. The master role was that of the owner's agent in foreign ports[12] and to find shipments in order to fill the ship's holds. He was usually also responsible for signing the bill of lading and gave it to the shipper after the goods had been loaded on board the ship. As a result the shipper became closely linked with the ship and her master.

This presumption has changed with the modern situation of liner companies. The routes are advertised or announced in advance. The carrying vessel usually has set routes. However that is not the main factor. The emphasis lies on the promise to carry particular goods between particular ports as advertised by the liner company. Shippers enter into the contract with the liner company or its agent or brokers[13], as is confirmed by using a form of bill of lading marked with the

[11] See ***Scrutton on Charterparties*** (19th ed 1984), p 1: "When the ship is put up for a particular voyage to carry goods of any persons who may be willing to ship her for that voyage, she is said to be 'put on berth' or employed as a general ship"; but Thompson: ***Outline of the Law relating to Bills of Lading,*** (London 1925), p 3 uses the phrase general ship when the ship is not chartered and prepared to carry the goods of anyone who may offer them shipment.

[12] See for instance ***Grant v Norway*** (1851) 10 C.B. 665; 138 E.R. 263, ***The St. Cloud*** (1863) **B.** & L. 4, ***The Figlia Maggiore*** (1868) 2 A. & E. 106, ***Sandemann v Scurr*** (1866) **L.R.** 2 **Q.B.** 86, ***Stumore v Green*** (1868) L.R. 2 Q.B. 86.

[13] "All the regular shipping lines operating from the United Kingdom appear to entrust the business of arranging the cargo to a loading broker. He advertised the date of sailing in shipping paper or elsewhere, and generally prepares and circulates to his customers a sailing card. It is his business to supervise the arrangements for loading, through the actual storage is decided by the cargo superintendent. It is the broker's business also to sign the bill of lading, and issue it to the shipper of his agent in exchange for the freight": Devlin J. (as he then was) in the case ***ofHeskell v Continental Express Ltd.*** [1950] 1 All E.R. 1033 at 1037.

liner's identity regardless of whether the carrying vessel belongs to the liner or is a chartered ship.[14]

The goods are not necessarily delivered along the ship's side. They can be left at the liner's or broker's offices or quarters far away from the port area. The identity of the vessel is not necessarily any longer stated in the document, as for instance is the case with the received bill of lading and most of the sea way bills. The signature of the bill of lading or other documents is now hardly ever carried out by the master. Usually it is done by the shipowner's office staff or senior members of the agent's or broker's staff and it is delivered to the shipper after the ship has left the port.

The liner companies as such have also undergone some developments. They used to be shipowning companies and temporarily added chartered vessels to their fleets. Now it has become more common, due to economic reasons, that they do not own the ships, but instead run a fleet of (time) chartered ships.

Thus the presumption that the shipowner is the carrier no longer exists, since most of the contracts of carriage of goods by sea today are undertaken by liners[15], even if from time to time they have to add to their normal fleets some ships under charterparties (voyage or time) in order to satisfy their business commitments.

Forwarding agents, whose original tasks were agency and other companies have begun to undertake carriage of goods as principals by consolidating several cargoes belonging to different shippers into one container. They issue normal sea transport documents like a bill of lading but they also issue house bill of lading and combined transport

[14] See for McLaughlin: ***"The Evolution of the Ocean Bill of Lading"*** (1925) 35 Yale Law Journal 548 at 563-564.

[5] See for instance, Ramberg: ***"Cancellation of Contract of Affreightment on Account of War and similar Circumstances"*** and ***"The Time-Charterer's Liability against the Bill of Lading Holders"*** (1966) ETL 874 at 882.

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documents[16]. These principals have no connections with the carrying vessel in that sense, being neither her owner nor her charterer. However, they enter into a contract of carriage with the charterer or shipowner, who become the carriers. On the other hand there is no contractual relationship between the previous named shippers (the original ones) and the charterer or the shipowner.

In spite of these changes, there is a tendency to regard or define the shipowner as a carrier and a reluctance to deem someone else to be a carrier. It is sometimes stated in the printed forms of bills of lading that it is signed on behalf of the master[17]. However, there are instances where the shipowner is not defined as the carrier and it is in these cases where the position of the shipowner is even more difficult to determine. In such a situation where the shipowner is no longer defined as the carrier, what responsibilities and obligations rest with the shipowner having regard to bills of lading and goods at sea contracts? This paper shall attempt to examine the position of the shipowner when not defined as the carrier with reference to case law and in particular ***Elder Dempster,***

A DUTY OF CARE: ELDER DEMPSTER ANALYSED

In *Elder, Dempster & Co. and Others v Zochonis &* Co.[18] a well-known shipping company ran a line of cargo steamers from England to West Africa. The shipping company, Elder, Dempster Co.[19] required an additional ship for their regular business and they chartered a ship

[6] See generally about this development for instance by Holloway: ***"Troubled Waters: The Liability of a Freight Forwarders as a Principal under Anglo-Canadian Law"*** (1986) 17 JMLC at 243-260 and Tetley: ***"Responsibility of Freight Forwarders"*** (1987) ETL 79 at pp. 79-80.

[7] See for instance forms of a bill of lading from Uni-Fedder and Container Service AS: ***"In Witness whereof the Master of the said vessel has signed the number of the original Bills of Lading stated below";*** in the forms from for instance DFDA, Central American Service

[8] [1924] A.C. 522 (hereinafter referred to as the ***Elder, Dempster*** *case)*

[19] Hereinafter referred to as the charterers.

from another shipping company[20] on a time-charter basis. The Elder, Dempster Co. were also managers for the African Steamship Co. and the British and African Steam Navigation Co. The bills of lading were issued in the name of all these companies and signed by the master. The form of the bills of lading it is assumed were in the usual form issued.[21] All these companies were sued in addition to the shipowners by the shipper who was also the holder of the bills of lading for alleged damage to the goods due to bad stowage.

The courts also considered the legal position of the defendants in relation to the plaintiff, particularly if the shipowner was not deemed to be the carrier, could he nonetheless rely on the terms of the bill of lading.

Rowlatt, J. at first instance, had no doubts who the carrier was under these circumstances:

> In the first place, it seems to be that there is a contract with the African Steamship Co. on this bill of lading. This is a case where a well-known line of ships found it necessary to supplement its fleet by getting in another upon a time charterer; and people in the commercial world who use the line know nothing at all about that. They think they are shipping by this line; and unless it is clear to the contrary the contract should be regarded as being made with the line.[22]

This part of Rowlatt J's judgment was not amended by the subsequent decisions of the Court of Appeal[23] and House of Lords.[24]

In the Court of Appeal both Bankes L.J.[25] and Scrutton L.J.[26] expressed that the charterers were parties to the contract contained in

[20] Hereinafter referred to as the shipowners.
[21] Lord Sumner in [1924] A.C. 522 at 564 said the bills of lading had been on a "well-known" form.
[22] (1922) LI. L. Rep 69 at 71.
[23] (1923] 1 K.B.420.
[24] [1924] A.C. 522.
[25] [1923] 1 K.B.420 at 436.
[26] Ibid at 443.

the bill of lading.[28] In the House of Lords none of their Lordships commented directly upon this issue. Nonetheless, it is clear from their Lordships' judgments, that all of them presumed the charterers were the carrier. The shipowner was not regarded as a party to the bill of lading's contract and the Court decided, if the owner was liable in tort or was entitled to rely on the terms of the bill of lading. The only possible parties to the contract of carriage were either the charterers or the shipowner. Since it was not the shipowner, it must therefore have been the charterers. Lord Sumner[29] went further. He pointed out that whilst considering the shipowner's position against the shipper, the ship was temporarily placed in a well-known line, trading under a well-known form of a bill of lading.[30] Apparently his Lordship was aware of these circumstances, under which he regarded the charterers, but not the shipowner, as the carrier. But the shipowners were held liable accordance with the terms of the bill of lading, not on the basis of law of tort.

In the Court of Appeal Bankes L.J. said on this issue:

> With regard to the owners I cannot see how they can be in a better position than the charters and grantors of the bills of lading.

Scrutton L.J. stated the following point:

> My view is that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has a contract defining his liability, and that the owner as servant as of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the

Nothing similar can be read in this respect in the judgment of the remaining judge, Eve J. at 446-447..

[28] Viscount Cave [1924] A.C. at 533-534, Viscount Finley ibid 547-548, Lord Sumner ibid. 564-565; Lord Dunedin agreed with Lord Sumner ibid 548 and Lord Carson agreed with both Lord Cave and Lord Sumner.

[29] With whom Lord Dunedin and Lord Carson agreed.

[30] [1924]A.C. 522 at 564.

[31] [1923] 1 K B. 420 at 436.

> case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer. In *Hayn v. Culliford,* referred to by the Court, the charterer was not protected by his bill of lading, and it was useless for the owner to claim the benefit of the bill of lading, or say he held its terms. If he held on the terms of the bill of lading its terms did not protect him.

His Lordship was proposing the doctrine of vicarious immunity, that is servants, or agents, could claim the same contractual immunities as their master in spite of the fact that they were not contracting parties to the charterparty. This rule would, of course, be in an absolute contrast to the doctrine of privity of contract and its application would not be confined just to contracts of carriage of goods by sea, but would apply to all contracts.[33]

The House of Lords made the unanimous decision that the owner should be entitled to rely on the same contractual immunities as the carrier, but their Lordships did not agree among themselves.

Viscount Cave gave the following opinion:

> It was stipulated in the bills of lading that "the shipowners" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods on behalf of the charterers, and so can claim the same protection as their principals.

His Lordship noted that the bills of lading were not issued only on behalf of the charterers but also on behalf of the shipowners, the so-

[2] Ibid, at 441-442.

[33] See later ***Mersey Transport Co. Ltd. v Rea Ltd.*** (1925) 21 LI. L. Rep. 375 and the Australian case of the so-called stevedores' problems: ***Gilbert Stokes Kerr Pty. Ltd. v Dalgety & Co Ltd*** (1948) 48 SR (NSW) 435.

[34] [1924] A.C. 522 at 534.

called "express contract theory"[35]. Alternatively, Viscount Cave was prepared to base his decision on the theory of vicarious immunity from liability in torts in the same way as Scrutton L. J.

Viscount Finley gave the following statement on this issue:

> It is said that... this wrongful act..., committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. The contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But, when the act is done in the course of rendering the very service provided for in the bill of lading, the limitation of liability therein contained must attach, whatever the form of the action and whether the owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as these referred to by Scrutton L.J. in his judgment.

Viscount Finley seems to have supposed, that when the shippers delivered possession of the goods to the shipowners an implied contract, or bailment was thereby made between them and the shipowners. The latter should carry the goods on the terms of the bill of lading. This is the "implied contract theory"[37] or the bailment theory, which was also favoured by Lord Summer.[38]

Lord Sumner's first and preferred reason was the implied contract of bailment upon the terms of the bill of lading. But alternatively, Lord

[35] Diplock J. (as he then was) in ***Midland Silicones Ltd v Scruttons*** [1959] 2 Q.B. 170 at 186.
[36] [1924] A.C. 522 at 547-548.
[37] [1959] 2 Q.B. 170 at 187, per Diplock J.
[38] Ibid.

Sumner suggested, that the master, whose negligence was the cause of the damage, was not acting as an agent for the shipowners, but was acting as the charterers' agent and the shipowners would therefore not be vicariously liable for his negligence.

Lord Dunedin agreed with Lord Sumner,[39] but Lord Carson agreed with both Lord Sumner and Viscount Cave,[40] thus endorsing four separate reasons for the decision. These different opinions make it very difficult to establish the actual *ratio decidendi* in relation to the shipowner's position.[41]

Four judges, Lord Dunedin, Lord Sumner, Lord Carson in addition to Viscount Finley approved the implied contract or bailment theory. Three judges, Lord Sumner, Lord Dunedin and Lord Carson, as second choice, preferred the theory that the master was not the servant or agent of the shipowner but was acting as the agent of the charterer. Two judges Lord Carson and Viscount Cave, or possibly three if Lord Finley can be included, adopted the express contract theory, but only two, Lord Carson and Viscount Cave, adopted the vicarious immunity theory[42].

This particular aspect of the case has been described as compressed[43] or very obscure[44]. Donaldson J. (as he then was) described the case as "something of a judicial nightmare."[45] Due to this complexity of the case, it has for a long time been a subject for dispute, both among judges and writers as to the grounds on which their Lordships actually based their opinions, or what was the actual *ratio decidendi* of the case.

39 [1924] A.C. 522 at 522-523.
40 Ibid, at 548.
41 Ibid, at 565.
42 See for instance Lord Keith of Avonholm in ***Midland Silicones Ltd v Scruttons*** [1962] A.C. 446 at 481.
43 [1959] 2 Q.B. 170 at 187, per Diplock J.
44 ***Adler v Dickson*** [1954] 1 Q.B 158 at 182, per Lord Denning.
45 ***Johnson Matthey & Co. v Constantine Terminals Ltd.*** [1976] 2 Lloyd's Rep. **215 8*219.**

VICARIOUS IMMUNITY, BAILMENT AND TORTS

Elder Dempster has been revisited in a number of allied cases.

In *Vita Food Products Inc. v Unus Shipping Co*[46] Lord Wright referred in passing to Lord Sumner's bailment theory, [7] which could indicate, that the Privy Council regarded that approach as the proper *ratio decidendi* of the ***Elder, Dempster case***[4] Among other judges the ***Elder, Dempster case*** was found to be an authority for a general rule of vicarious immunity[49], or alternatively was authority for the proposition of a bailment upon terms, an implied contract of bailment between the shipper and shipowner on the terms of the bill of lading.[50]

Lord Denning found the ***Elder, Dempster case*** authority both for a third parties contract *(jus quaesitum tertidf*[1] and as an implied contract of bailment[52]

[46] [1939] A.C. 277.

[47] Ibid, at 301.

[8] Fullagar J. in ***Wilson v Darling Island Stevedoring Co.*** (1956) 95 C.L.R. 43.

[49] Scrutton L.J. in ***Mersey Shipping Transport v Rea Ltd.*** (1925) 21 LI. L. **R.** 375 and ***Waters Trading Co. Ltd. vDalgery & Co. Ltd.*** [1951] 2 Lloyd's Rep. 385.

[50] Langton J. in ***The Kite*** [1933] P. 155 at 181, and Owen J. in the Australian cases of ***Gilbert Stokes & Kerr Pty. Ltd. v Dalgety & Co. Ltd. & Co Ltd*** (1948) 48 SR (NSW) 435. However, Owen J.also relied on bailment as alternative: see ibid at 342-343 and also in ***Walters Trading Co. Ltd. v Dalgety & Co. Ltd.*** [1951] 2 Lloyd's Rep 385 at 388-389. In the latter case Street C.J. at 395 declared immaterial whether the ***Elder, Dempster case*** was based on bailment upon terms or vicarious liability see 387, but the third judge, Herron J. at 395 upheld the vicarious immunity theory. Devlin J. (as he then was) in ***Pyrene Co. Ltd. v Scindia Navigation Co. Ltd.*** [1954] 2 Q.B. 402 upheld both the vicarious immunity theory at 421-422 and the bailment theory at 426-427 as alternative *ratio decidendi* of the ***Elder, Dempster case.***

[51] ***SeeAdler vDickson*** [1955] 1 Q.B. 158 at 182-183 (see comments by Montrose: "Jus Quaesitum Tertio" (1957) 20 MLR 658 at 661 ff.) and ***Midland Silicones vScruttons*** [1962] A.C. 422 at 488.

[52] ***Morris v C. W. Martin & Sons Ltd.*** (1965)2 Lloyd's Rep. 63 at 72.

Other judges had different views, hi ***Mersey Shipping & Transport Co. Ltd. v Rea Ltd.***[53] Lord Justice Bankes said that what the House of Lords had decided in the ***Elder, Dempster case*** was:

> that under the circumstances of the vessel being chartered to form one of the owner's regular line, the proper inference to draw was that the goods were shipped under conditions which would cover both charterer and shipowner.

In ***Adler v Dickson***[55] Lord Justice Jenkins adopted Lord Justice Bankes' opinion about the ***Elder, Dempster*** *case.*[56] Lord Justice Morris said on the other hand that in the ***Elder, Dempster case*** the circumstances existing at the time the goods were received on board was occasion for an implied contract between those delivered, the shippers and those who received, the master on behalf of the shipowners.[57]

Among commentators the ***Elder, Dempster case*** was regarded as an authority for vicarious immunity[58] or alternatively for the proposition of an implied contract or bailment and the express contract theory.[59]

The theory of vicarious immunity would not only affect the shipowner, but also anybody rendering services in conjunction with a

[i3] (1925) 21 LL. L. Rep. 375.
[4] Ibid, at 377.
[5] [1954] 2 Lloyd's Rep. 267.
[56] Ibid, at 280.
[7] Ibid, at 282.
[58] Dworkin: ***"Stare Decisis in the House of Lords"*** (1962) 25 MLR 163, Reiter and Swan: ***Studies in Contract Law*** **p. 300;** ***Restatement of the Law of Agency,*** para. 374 p. 759.
[59] Mankabady: ***"Rights and Immunities of the Carrier's Servants and Agents"*** (1973-1974) 5 JMLC 111 at 114-115 and ***"Comment on the Hamburg Rules"*** in ***The Hamburg Rules on Carriage of Goods by Sea,*** p. 66, Furmston: ***"Return to Dunlop v Selfridge"*** (1960) 23 MLR 376 at 391-392, Guest: ***"Bills of Lading and a Jus Quaesitum Tertio"*** (1959) 75 LQR 312 at 313ff, Treitel: ***"Exemption Clauses and Third****Parties"(l955)* 18 MLR 172 at 173-174. The last three mentioned comments were written before the House of Lords' decision in ***Midland Silicones Ltd v Scruttons*** [1962] A.C. 446.

contract of carriage and generally whenever an agent or servant would be working on behalf of his master. In fact this theory and the theory of third parties contract were breaches in the doctrine of privity of contract. The other theories explaining the reasons for the ***Elder, Dempster case*** however did not infringe any common law principles.

It is somewhat surprising that a quarter of a century elapsed before it was generally recognised that the ***Elder, Dempster case*** might have made a breach in the doctrine of privity of contract.[60] It happened after decisions in two Australian cases, ***Gilbert Stokes & Kerr Pty Ltd v Dalgety & Co. Ltd.***[61] **and** ***Waters Trading Co. Ltd. v Dalgety & Co. Ltd.***[62] In these cases the ***Elder, Dempster case*** was held to be an authority for vicarious immunity and stevedoring companies succeeded in claiming the right to rely on stipulations in bills of lading against their holders, in spite of the fact that they were not parties to the contracts of carriage.

However, if these Australian cases endorsed the theory of vicarious immunity based on the ***Elder, Dempster case*** such attempt received a set-back after the decision of the High Court of Australia in the case of ***Wilson v Darling Island Stevedoring and Lighterage Co. Ltd.***[64] when these cases were overruled. It was rejected by the majority[65] that the ***Elder, Dempster case*** was an authority for doctrine of vicarious immunity and stevedores were held liable in tort against the bill of lading holder, since they were not parties to the contract of carriage evidenced by the bill of lading.

[0] Montrose: ***"Jus Quaesitum Tertio"*** op. cit. p. 659. [61]
(1948) 48 SR (NSW) 435. [62] [1951] 2 Lloyd's Rep.
387.

[63] See for instance Lord Reid in the ***Midland Silicones*** [1962] A.C. 446 at 479: "I must say I have considerable doubt whether Scrutton L.J. can really have intended his rule to be so far-reaching."

[64] (1956) 95 C.L.R. 43.

[65] Dixon CJ. Fullagar and Kitto JJ., but Williams and Taylor JJ dissenting.

Fullagar J[66] agreed with Lord Justice Bankes in ***Mersey Shipping & Transport Co. Ltd. v Rea Ltd.*** and Lord Morris in ***Adler v Dickson*** about the ***Elder, Dempster case*** and confined its authority to its facts. His conclusion about the authority of the ***Elder, Dempster case*** **was:**

> that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he received the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.

After the ***Midland Silicones v Scruttons*** case all speculation about vicarious immunity and third parties' right under the contract were finally put to rest. The House of Lords in the ***Midland Silicones*** case (Lord Denning dissenting) agreed that the ***Elder, Dempster case*** had not introduced any new legal principles into the English legal system. However, it was not overruled, and as such since it was distinguished on grounds of different circumstances[69] and that no bailment existed in the ***Midland Silicones*** case.[70]

Nonetheless the ***Elder, Dempster case*** was considered by their Lordships. Viscount Simonds[71] and Lord Keith of Avonholm[72] expressed their acceptance of Fullagar J.'s judgment in ***Wilson v Darling Island Stevedoring Co.*** about the ***Elder, Dempster case,*** Lord Morris referred to Lord Sumner's judgment in the ***Elder, Dempster***

' With whom Dixon CJ. agreed. Kitto J. agreed in substance but his approach was different.

The U.S. Supreme Court relied on this case in ***Herd & Co. v Krawill Machinery Corp.*** [1959] 1 Lloyd's Rep. 305. [18] [1962]A.C.466.

[9] **In** the ***Midland Silicones*** case, a stevedoring company was claiming the limits of liability stated in the bill of lading towards its holder in litigation in tort, but the stevedores were not parties to the contract evidenced by the bill of lading. [70] [1962]A.C.422at470. [1] Ibid, at 469-470. [72] Ibid at 481.

case but did not state his view on the true *ratio decidendi* of the case. Lord Denning probably found the ***Elder, Dempster case*** as an authority for a doctrine of a third parties' contract,[74] but Lord Reid did not however comment on the ***Elder, Dempster case.***

In a recent decision by the Court of Appeal, ***The Kapetan Markos (No.2),***[15] Lord Justice Mustill said perhaps the correct rationalisation of the ***Elder, Dempster*** *case* was the one adopted by Fullagar J. in the ***Wilson v Darling Island Stevedoring Co.*** case.[76]

Logically, after the House of Lords' decision in the ***Midland Silicones*** case, scholars have omitted vicarious immunity as an alternative explanation of the ***Elder, Dempster case*** in recent publications and just confined the alternatives either to the bailment (implied contract) theory or the theory of the express contract.[77]

The writer proposes that it is inevitable to conclude that the implied or bailment theory is the proper decidendi of the ***Elder, Dempster case.*** After all it was approved by four of their Lordships and it involves no novel principles of law. It has in principle been accepted in subsequent cases such as ***Adler v Dickson, Wilson v Darling Island Stevedoring Co., Midland Silicones v Scruttons,*** and perhaps also ***The Kapetan Markos.***

The concept behind this theory is clear. The master received the goods on board the ship for ocean carriage and in exchange for it he gave the shipper a receipt, a signed bill of lading. The shipper accepted

[3] Ibid, at 494: "Whether or not the view of the facts in the ***Elder, Dempster case,*** which are expressed by Lord Sumner, in his judgment, which commended the agreement of Lord Dunedin and Lord Carson, can be regarded as a satisfactory explanation of the case, a similar view was also expressed by Diplock J. (as he then was) at the first instance."

[4] Ibid, at 482 ff.

[5] [1987] 2 Lloyd's Rep. 321.

[76] Ibid, at 331.

[77] ***Chitty on Contracts*** (27th ed. London 1992), para. 905, Treitel, ***The Law of Contract*** pp. 467-468, Rose: ***"Return to Elder, Dempster"*** (1982) 4 Anglo American Law Review 7 at 8.

it without any reservation and therefore accepted its terms. An implied contractual relationship between the shipowner and the shipper had been established in the nature of bailment upon the terms of the bill of lading.[7fi] This theory is in one way in line with cases concerning the general authority of the master to bind the shipowner, but it is also parallel to the case of ***Brandt v Liverpool™*** when an implied contract was established upon the terms of the bill of lading between its holder and the carrier when the former delivered the bill of lading to the latter and demanded the goods upon its terms and the carrier accepted it by delivering the goods. In the ***Elder, Dempster case*** the situation is the reverse of that in the Brandt v Liverpool case. Logically the same rule should apply, whether the bill of lading is accepted as a receipt in exchange for the goods or when the goods are handed over in exchange for a receipt.

In the *Elder, Dempster case* the master himself signed the bill of lading. The question arises, if the authority of the case is confined to this fact or if it would apply as well to cases when the charterer signs the bill of lading, whether it is signed on behalf of the master, shipowner or no reference at all is made to the ship.

The former opinion was adopted by Lord Keith in the ***Midland Silicones*** case which prevents an establishment of a contract between the case[80] and accepted as correct by Carver[81] and Wilford.[82] Fullagar J. in ***Wilson v Darling Island Stevedoring and Lighterage*** said the same rule might apply but it was unnecessary for him to decide it. Lord Bankes in ***Mersey Shipping & Transport Co. Ltd. v Rea Ltd.***

[!] Not shipowner and shipper, even if the former is under the same contractual duty towards the carrier (the charterer of the ship) to carry the same goods to the same destination, see ***Scotson v Pegg*** (1861) 6 H. & N. 295, confirmed by the Privy Council in ***New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd (The Eurymedon)*** [1975] AC 154.

[9] [1924] 1K.B. 575.

[0] [1962]A.C.422at481.

[11] Carver, ***Carriage of Goods*** (1981), s. 717.

[82] **Wilford** et **al:** ***Time Charters*** (2nd ed., London 1978), p. 215.

might have been supporting the latter approach, since he regarded the ***Elder, Dempster case*** as an authority for, when a vessel is chartered to be operated in a regular liner service, both charterer and shipowner should be covered by the same conditions and his Lordship did not refer to the presence of the signature. In order to reach a conclusion, it is necessary to investigate more fully their Lordships' judgments in the ***Elder, Dempster case,*** particularly those from Lord Sumner and Viscount Finley.

They both shared the view, that it was unfair and unjust if the bill of lading holder could avoid the contractual terms with the carrier as stated in the bill of lading by suing the shipowner in tort. This idea was described as "absurd".[83]

Lord Sumner refused to accept ***Hayn v Culliford*** as a general authority for shipowners' responsibility in tort. He explained the difference between the cases, that in the ***Elder, Dempster case,*** the ship Grelwyn was temporarily placed in a well-known line, trading under a well-known form of bill of lading. Later he continued by expressing the theory of bailment:

> It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to United Kingdom amounted to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading.

By the word "circumstances" his Lordship might be referring to the master's signature, but that is hardly likely, since he had not mentioned it previously in his approach. He only expressed the fact, that the ship was placed in a well-known line, trading under a well-known form of bill of lading. No other relevant circumstances were mentioned and his Lordship later highlighted this fact by referring again to the items of bailment "stipulated in the known and contemplated form of bill of

[3] Viscount Finley at [1924] A.C. 522 at 547-548. [84]
[1924] A.C. 422 at 485.

lading". A bill of lading signed by the master is not mentioned, as his Lordship did, when he considered the theory that the master was not the servant or agent of the shipowner but was acting as agent of the charterer. It seems therefore that the master's signature was totally irrelevant to Lord Sumner's conclusion on the bailment theory.

Neither is a single reference to the master's signature in Viscount Finley's judgment. His judgement is very generally worded and no specific circumstances are expressed: "the limitation of liability therein contained must attach, whatever the form of the action and whether the owner or charterer be sued." The master's signature is not mentioned and seems therefore to have been irrelevant, as it was in Lord Sumner's judgment.

The fear of the bill of lading holder being able to avoid the contractual terms was one of the main concerns in all their Lordships' judgments and they all had intended to close that gap, even if they disagreed on the actual reasons. It is hardly likely that they have intended to cover only the rarest cases, when the master signs personally the bills of lading (which hardly ever happens nowadays in the liner trade), thus leaving the majority of cases with the result, which is according to their Lordships, both unfair and absurd. It would have been a serious paradox if that was the intention and indeed there are no signs of such considerations in their Lordships' judgments.

All that Lord Sumner and Viscount Finley decided was, when the shipper bails the goods with knowledge, that in the ordinary course of business there might be bailments on well-known accepted terms, such later bailments will not be merely "bald bailments" but bailments upon terms, and such terms will be binding upon the original bailor.[85]

The shipper, the original bailor, may suppose, that the goods will be carried on a chartered ship. It is a common thing within the shipping business. When he delivers the goods to the liner company and if he does not give any instructions to the contrary, he has consented that his

[85] RSTC: "Notes" (1934) 50 LQR at 8.

goods maybe carried on a chartered ship on the usual terms, namely the same one as are stated in the charterer's form of the bill of lading. This acceptance is further confirmed, when the shipper receives the bill of lading with the name of the ship without making any protests. The consent is of course obvious in those rare cases, as in the ***Elder, Dempster case,*** when the shipper delivers the goods directly to the master and receives a bill of lading from him, but that hardly ever happens in a modern liner trade.

The relationship between the shipper and the shipowner, as the charterer working as an agent on behalf of the latter one with an authority (perhaps implied) to make the implied bailment. This approach was endorsed by Lord Denning in ***Morris v C. W. Martin & Sons****[6] and also by Donaldson J. (as he then was) in ***Johnson Matthey & Co. v Constantine Terminals Ltd.****[1]

It may be submitted that the authority of the ***Elder, Dempster case*** is that when a ship is chartered to another shipping or liner company to be operated as a part of their fleets or on their routes, the shipowner is entitled to rely on the terms of the bill of lading in litigation by the shipper or subsequent bill of lading holders, in spite of him not being a party to the contract of carriage evidenced by that bill of lading.

This means the shipowner's position is not dependent upon the signature by the master or anyone else on his behalf since such condition was not laid down in their Lordships' judgments in the ***Elder, Dempster case*** as discussed *supra.*

A TORT PERSPECTIVE

hi recent cases this view seems to have been rejected and the shipowners have been held liable in tort against the bill of lading holders.

[16] [1965] 2 Lloyd's Rep. 63 at 72.

[17] Donaldson J. (as he then was) distinguished the ***Elder, Dempster case,*** but endorsed Lord Denning's opinion from ***Morris v C. W. Martin and Sons:*** see [1976] 2 Lloyd's Rep. 215 at 220-221.

In ***Hiram Walker & Sons Ltd. v Dover Navigation Co. Ltd.***[ss] Lynskey J. declared *obiter* and without referring to the ***Elder, Dempster case,*** that when the charterer of the ship is a carrier, the shipowner becomes a bailee of the goods and responsible in tort for their damage towards the owner.[89]

In *The Forum Craftsman* case[90] the plaintiffs were buyers and bill of lading holders for three vehicles loaded on board the vessel ***Forum Craftsman*** which had been chartered to an Angolan shipping company.

The bills of lading were on the charterer's form and signed by the charterer's agents. The bills of lading all included a jurisdiction and choice of law clause providing that any dispute arising under the bill of lading should be decided by the Tokyo District Court of Japan in accordance with Japanese law.

The vehicles were damaged shortly after the loading. The plaintiffs sued the shipowners, Icax Shipping S.A. of Panama in tort in England.

The defendants applied for a stay of action on grounds that the plaintiffs had promised the defendants that the dispute would be referred to the Tokyo District court.[91] The counsel for the defendants submitted by referring to the ***Elder, Dempster case*** that the owners are entitled to rely on the terms contained in the bill of lading, even if they are not parties to the contract, because there was a bailment of the cargo to the shipowners in return for which the shippers obtained bills of lading. They expected to receive such a bill of lading and are bound by its terms as against both charterers and owners, because either (1) the shipowners are agents of the charterer and rely on their principal's

[18] (1949) LI. L. Rep. 84.

[9] Ibid, at 91.

[0] [1984] 2 Lloyd's Rep. 102.
Another ground for the claim of stay of action was that the Tokyo District Court was the most appropriate and convenient forum for the resolution of the disputes between the parties, but that was rejected.

contract or (2) a bill of lading was expected and given, and accordingly the bailment was on the terms contained in the bill of lading.

Sheen J. took, in this context, into consideration the words of Lord Sumner in the ***Elder, Dempster case*** was concerned solely with whether the shipowners were protected by the exceptions and limitations stipulated in the bills of lading. His Honour also referred to the ***Midland Silicones*** case, which made it clear that the doctrine of privity of contract was still a fundamental principle in common law. The defendants in this case were not party to the contract contained in the bill of lading so that even if the plaintiffs had become a party to this contract of carriage the defendants could not enforce the jurisdiction clause and since this action was a claim in tort, the jurisdiction clause in the bill of lading was found inapplicable. The stay of action on this ground was therefore rejected.

With full respect to Sheen J., it is difficult to predict his view on the ***Elder, Dempster case*** and why it was not applicable. It is hard to believe that his Honour rejects that there was bailment upon the terms of the bill of lading in the ***Elder, Dempster case,*** but that is though the most logic explanation of misjudgment. He refers to Lord Sumner's point on that issue in the ***Elder, Dempster case*** but does not make any attempt to consider it and says only, all that the ***Elder, Dempster case*** consisted of was that the shipowners were protected by the exceptions and limitations of liability stipulated in the bills of lading. The reason for that was of course that there was a bailment upon the terms of a bill of lading and consequently all conditions stated in the bill of lading would apply to that bailment. One should therefore presume that the jurisdiction clause would be binding between the parties to the bailment in the same way as they are binding between parties to the contract of carriage. Perhaps Sheen J. does not find any bailment existing in the present case and that could perhaps explain his approach but he does not express that opinion in his judgment.

In an Australian case ***J Gadsen Pty. Ltd and Another v Australian Coastal Shipping Commission***[oo] bills of lading were issued by and signed on behalf of the charterer, but no reference was made to the ship or shipowner. The consignees of the bills of lading sued the shipowners in tort for damaged goods. The shipowners claimed that they were entitled to rely on the conditions of the bill of lading in accordance with the ***Elder, Dempster case.*** This was rejected by the Court of Appeal, since the shipowners were not parties to the bills of lading and were therefore liable in tort towards the goods owner.

In ***The Golden Lake,***[93] the owner of the goods who was also an indorsee of a bill of lading sued the shipowner, New Mecca Shipping Corporation, in tort for damaging the goods during a voyage from Yokohama to Singapore.

The bill of lading was signed by World Shipping Co. Ltd. either for themselves as principals or for Sheyang Shipping Co. Ltd. who were the operators of the vessel, but it was not signed on behalf of the shipowners or for their benefit. It does not say in the judgment whether the ship was chartered to Sheyang Shipping nor what the relationship was between Sheyang Shipping and World Shipping Co. Ltd., for instance if the latter were the former's agent. In fact it is irrelevant for the outcome of the case since it only concerns the relationship between the shipowners and consignees of the bills of lading.

The shipowners' counsel submitted that the plaintiffs had no recourse in fact and in law against the defendants as there was no contractual relationship between them. This was rejected by the judge, since it was established that the consignee or owner of cargo could bring a claim in tort against shipowners for damage to his cargo. Alternatively, shipowners' counsel relied on the ***Elder, Dempster case*** as an authority for the proposition that the owners of the ship take the goods and agree to carry them (a) on the basis of the terms appearing on the bill of lading (the express contract theory) or (b) as an implied

[2] [1977] 1 NSWLR575 (Court of Appeal). [93]
[1982] 2 Lloyd's Rep. 632.

contract between the owners and shippers containing the terms of the bill of lading, regardless of who signed the bill of lading and on whose terms they were.

The judge (Chua J.) rejected this claim. After considering the various interpretations of the ***Elder, Dempster case*** including the ***Midland Silicones v Scruttons*** Ltd. case be concluded that the Elder Dempster case had not introduced new principles into common law and the old doctrine of privity of contract was still good law. He also distinguished the ***Elder, Dempster case*** from the case under consideration on the ground *inter alia,* that in the former the bill of lading although issued in the charterer's form, was signed by the master who was the servant of the shipowner, but in the present case the bill of lading was signed by the World Shipping Co. Ltd. either for themselves or for Sheyang Shipping Co. Ltd., but not for the shipowner. His Honour continued by saying:

> On the evidence before me, the defendants are the carriers.[94] They are not a party to the contract evidenced by the bill of lading and cannot be a party as it does not purport to make them a party. The bill of lading was not signed on their behalf or for their benefit. The defendants are common carriers and liable to the plaintiff for the fill measure of their loss.[95]

Another distinction was made between the ***Elder, Dempster case*** and the present one, that in the former case the shipper himself was the holder of the bill of lading and the consignee of the goods, but in the latter case a consignee was the bill of lading holder.[96]

This reasoning does not sound convincing. A consignee of a bill of lading is in the same position as the shipper. He inherits all his rights

[4] The word "carrier" in this context cannot mean that the shipowners are the parties to the contract of the carriage, it must be applied in the meaning that they are the "actual carrier", namely those who carry the goods on behalf of the carrier.

[95] [1982] 2 Lloyd's Rep. at 636.

[96] Ibid.

and duties, whether the contractual relationship between the carrier and the consignee is based on the ***Bills of Lading Act*** 1855 or an implied contract.[97] The consignee also takes over the contracts with stevedoring companies and other third parties. The same should also apply to a bailment contract with the shipowner.

The third distinction was that in the ***Elder, Dempster case*** the bills of lading expressly stated that its terms and conditions constituted "the contract between the shippers and the shipowners". In the case under consideration there was no expression that the shipowner could limit his liability. It was stated however in the bill of lading that "The COMPANY shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding one hundred pounds sterling ($100 stg) per package or unit . . .". The judge held that it could not be implied that the shipowners were concluded in the definition of "Company".

This reasoning does not sound convincing either. In the ***Elder, Dempster case*** these words were not found to be important for the final outcome. Secondly, it is not a condition for the establishment of an implied contract on some specifically stated terms or patterns that the identity or description of the parties to the contract is stated in them. The implied contract is established because its parties have behaved in such a way that it is reasonable to assume that a contractual relationship has been created between them upon certain terms based upon the same patterns, like for instance the terms of a bill of lading, it is however irrelevant who were the original parties to that contract. For instance an implied contract in accordance with the ***Brandt v Liverpool*** doctrine is established upon the terms of the bill of lading holder who presents the documents at the destination and the one who

[7] ***See Brandt v Liverpool Brazil and River Plate Steam Navigation Co.*** [1924] 1 K.B. 575. [98] See ***New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd (The Eurymedon)*** [1975] AC 154.

[99] [1924] 1 K.B. 575.

delivers the goods in exchange for the documents. It is irrelevant under this doctrine who are described parties to the contract of carriage evidenced by the bill of lading. Nor are there requirements that the bill of lading holder is mentioned or identified in one way or another in the bill of lading in order to enable him to create the implied contract at the destination.

With full respect to Chua J. to distinguish the present case under consideration and the ***Elder, Dempster case*** on these grounds is not very well founded. Secondly it also has to be borne in mind, that merely a statement of third parties beneficiary in a contract, even if it is done in a clear and doubtless way, is not sufficient to enable him to force the terms of the contract against its parties, unless he can establish a privity of contract between him and either of them. The doctrine of third parties contract does not exist in common law. If it now presumed that the bills of lading in ***The Golden Lake*** had expressly stated that, the shipowners could have claimed the limits of liability.

However, the shipowners would only have been able to uphold these stipulations against the bill of lading holders, if they could prove privity of contract between them and the holders. This should finally show that the phrase "the contract between the shippers and the shipowners" in the ***Elder, Dempster case*** was completely irrelevant for the purpose of allowing the shipowners to rely on the terms of the bills of lading.

None of these cases deal with the situation when the bills of lading have been signed "for the master" or some other references are made to the ship or shipowner and how that would effect the shipowner's position against the bill of lading holders. The only indication might be found by Chua J. in ***The Golden Lake,*** when he distinguished that case and the ***Elder, Dempster case*** inter alia on the grounds that in the latter case, the master himself had signed the bill of lading, but the judge

admitted though that a personal signature from the master was not essential.[10]

CONCLUSION

It is difficult to predict how far these cases will be regarded as precedents within the English legal system. The ***Elder, Dempster case*** has never been applied directly or reconsidered by the House of Lords or other courts. It was merely distinguished but not overruled in the ***Midland Siticones*** case and their Lordships comments were merely *obiter dicta.* To that extent it is still questionable how far the ***Elder, Dempster case*** will be applied in the direction of granting the shipowners right to rely on the conditions of the bills of lading, when they are not parties to the contract of carriage of goods by sea, but sued by a bill of lading holder who is a party to it.[10]

One would though assume that when the bill of lading is signed by the master or someone else on behalf of the shipowner, he should at least be able to invoke the terms of the bill of lading against its holder. Otherwise the ***Elder, Dempster case*** has no authority, but it has never been overruled, as mentioned earlier.

On the other hand, in the absence of the question of the proper authority of the ***Elder, Dempster case,*** the legal developments in recent years have reduced the possible cases, when the shipowners will be entitled to rely on the conditions of the bills of lading in one way or another.

In recent years, some clauses, quite controversial, have been drafted in bills of lading stating one way or another, that the shipowner or the demise charterer of the carrying ship is deemed to be the carrier, but the charterer (voyage or time) is only regarded to be working as an

[0] [1982] 2 Lloyd's Rep. at 636 and see also previously mentioned cases such as ***Steamship Calcutta Co. Ltd. v Andrew Weir Co.*** and ***Wilston Steamship Co. Ltd. v Andrew Weir Co.***

[1] The situation is of course different when the shipowner is sued for instance by goods owner who is not a party to the contract of carriage.

agent on their behalf towards the shipper, e.g. "demise clause". If such clause had existed in ***The Okehampton*** or the ***Elder, Dempster*** *cases* and had been approved, the shipowners would have been deemed to be the carrier, not the charterers.

A more significant landmark in the legal development is the approval of the so-called Himalaya clause in ***The Eurymedon*** [102] and ***The New York Star***[103] cases. A third party (a servant or agent of the carrier) working in connection with the contract of carriage of goods by sea is entitled to rely on the bill of lading's stipulation. A contract is established between them and the shipper through the carrier working as an agent on behalf of his agent or servants. A shipowner would be able to rely on such clauses in an action in tort in a similar way as stevedoring companies.

Since almost all bills of lading to-day have a Himalaya clause the shipowner's position is in fact the same towards the bill of lading holder who is a party to the contract contained in the document whether he is deemed to be the carrier or not. Nevertheless much still rests on the wording of the clause and the court's interpretation of such a clause.

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[102] ***New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd (The*** *Eurymedon)* [1975] AC 154.

[103] ***Port Jackson Stevedoring P*** ***Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust.) Pty Ltd*** *(The New York Star)* (1980) 144 C.L.R. 300.