CHAPTER - 7
EXEMPTION CLAUSES AND THIRD PARTIES

A question has been raised in numerous cases, with regard to the extent to which third parties to contracts may take the benefit of clauses in those contracts excluding or limiting liability for loss or damage. The case law in this area provides an excellent illustration of the intention between, on the one hand, the formal adherence by the judiciary to the privity doctrine, which would prevent Third Parties taking the benefit of exclusion clauses, and the judiciary's desire to find ways round the doctrine so as to effect the contracting parties' intentions.

7.1 BENEFIT TO THIRD PARTIES

A Common Law problems arose where a contracting parties sought to exempt persons who are not the parties to the contract which have been discussed below.

In the first leading case of the twentieth century, Elder, Dempster & Co. Ltd. v. Peterson, Zochonis & Co. Ltd.¹ the question was whether, as a defence to a shipper’s action in tort for negligently stowing cargo, shipowners could rely on an exclusion clause in the bills of lading, despite the fact that contract of carriage was between the shipper and the charterer. The House of Lords reasoning on which the result was based has proved very difficult to understand.²

¹ [1942] AC 522.
² Lord Reid in Midland Silcones Ltd. v. Scruttons Ltd. stated that the task of extracting a ratio from the case was "unrewarding" [1962] AC 446, 479. See also Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd. [1978] 2 Lloyd's Rep. 215, 219 (per Donaldson J. "something of a judicial nightmare") and The Forum Craftsman [1985] 1 Lloyd's Rep. 281, 295 (per Aspin LJ).
Despite this, prior to the (Rights of Third parties) Act 1999 the attempts to rely on exemption clauses encountered great difficulties, primarily because A’s employees or sub-contractors were not parties. The tension between the privity of contract and the commercial expectations of those who take part in multi party transactions produced a very complicated body of law. At times the courts applied the doctrines and prevented a defendant from relying on an exemption clause. At other times and particularly more recently they have been willing to circumvent the doctrine and even to contemplate some form of modification or exemption to it with regard to exemption clauses.

But first, the operation of doctrine of Privity in such cases will be considered. In Sruttons Ltd. v. Midland Silicones Ltd. (1960) 2 All ER 737(CA). A drum of chemicals was shipped from New York to London and consigned to the respondents upon the terms of bill of landing which exempted the carriers from liability in excess of dollar 500 (£179) per package. The drum was damaged by negligence of the appellants, a firm of stevedores employed by the carriers, and the damages amounted to £593. Although the appellants were not a party to the bill of lading, nor expressly mentioned therein, they claimed to be entitled to the benefit of the clause limiting liability.

In the House of Lords, Lord Denning considered that the appellants were protected by an accepted principle of the law of tort, that of voluntary assumption of risk, since the respondents had assented to the limitation of
liability. But the majority of their Lordships unequivocally reasserted the doctrine privity of contract. They held that the appellants could not claim the benefit of an exemption clause in a contract to which they were not a party. Exemption clauses are unambiguously brought within the 1999 Act so that effect can now be given to the commercial expectations of those who take part in multiparty transactions. The Act thus sweeps away technicalities applying to the enforcement by expressly designating third party of exclusion clauses. Common law position remains necessary. First, the common law applies to contracts made before 11 May 2000 and disputes concerning such contracts will continue to come before the courts for sometime. Moreover, there may be cases in which the 1999 Act does not apply or in which, if it does, it will be advantageous for a person to rely on the common law, as where the common law enables the third party to establish a right which arises independently of the contract, for example one based on tort where the party can formulate its claim in tort nothing in the 1999 Act will affect it, although as will be seen, regard may be had to the terms of the contract in determining whether a tortious duty has arisen and the scope of such duty.

In India, it has been held that where a contract is made for the benefit of a third person there may be an equity in favour of the third person to sue upon the contract.\(^3\) and it has been suggested that a person

\(^3\) Khirod Behari Dutt v. Man Govinda AIR 1934, Cal. 682, (1934) 61 Cal. 841, 152 IC 351 relying on observations of Jenkins CJ in Deb Narain Dutt v. Ram Sadhan Mandal (1914) 41 Cal. 137, 20 IC 630, AIR 1914 Cal. 129 and Dwarika Nath Ash. V. Priya Nath Malik (1917) 22 CWN 279, 36 IC 792, AIR 1918 Cal 941; Khirod’s case was not approved by the Privy Council in Kepoong Propecting Ltd. V. Schmit (1968) AC AC 810, (1968) 2 WLR 55 (from Malaysia).
who takes a benefit under a contract may sue on the contract. Thus, a stranger having beneficial interest under a contract can sue in equity to enforce although he himself is a stranger to the contract.

This view was dissented from by the Bombay High Court, and is directly opposed to the decision of the Privy Council in Jamna Das vs. Ram Autar, that a purchaser’s contract to pay off a mortgage cannot be enforced by the mortgagee who was no party to the contract. Indeed, the weight of decisions now is in favour of the view that a person not a party to the contract cannot sue on the contract unless the case comes within one of the recognized exceptions and this seems clearly indicated by the provisions of sub-ss (a), (b), (c) and (e) of s 2. It has accordingly been held that where A mortgages his property to B, part of the consideration for the mortgage being B’s promise to A to pay C the amount which A owed to C, C not being a party to the contract, cannot sue B for the payment.

7  (1911) 39 IA 7, 34 All 63, 13 IC 304; Kepong Propecting Ltd. v. Schmit (1968) AC 810, (1968) 2 WLR 55 (PC).
8  See also Mohammed Ismail Saheb v. Rasool Bi AIR 1930 Mad. 567.
11 A R Iswaran Pillai v. Sonneivevaru V., Tharagran (1913) 38 Mad. 753. AIR 1914 Mad. 701; but see Inganti
It has also been held that if the courts consider that it would be aid of justice to adjudicate between the parties, the courts may allow a third party to a contract to sue for doing justice between the suitors; and a suit by the addressee of an insured article sent by post was entitled to sue if the article was not delivered. A legal representative of a company staying in a hotel under a contract between the company and the hotel were entitled to sue for compensation on account of his death, though he was not a party to the contract.

### 7.2 BURDEN ON THIRD PARTY

A similar problem arises in relation to the burden of an exemption clause. It is a principle of law that a person who is not a party to a contract cannot be subjected to the burden of that contract. So at Common law an exemption clause will, as a general rule only operate so as to take away the rights of the contracting parties, and not those third parties who suffer injury or damage. In *Haseldine v. C.a. Daw & Son. Ltd. 1993*. The owners of a block of flats employed the defendant. Engineers to repair a lift in the building. Owing to their negligence the lift was badly repaired and H, the visitor to the premises, was injured when the lift fell to the bottom of the lift shaft. The defendant was held liable in tort for negligence. Goddard LJ said. It is however argued that it is not right that a repairer who as in the present case, has stipulated with the

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12 Post master General Patna v. Ram Kirpal Sahu AIR 1955 Pat 442.
person who employs him that he shall not be liable for accidents, should none the less be made liable to a third person. The answer to this argument is that the duty to the third party does not arise of the contract, but independently of it.

It has been noted that this reasoning is of special importance where a person bails goods to another in order that may be carried or worked on by the bailee. In turn, the bailee may sub-contract the task of carrying the goods or working on them to a sub bailee. If the contracts between the bailee and sub bailee contains exemption clauses which exonerate the sub-bailee from liability, the bailor will not automatically be bound. The sub-bailee, who cannot be protected against the bailor, who is not a party to the contract, unless the bailer expressly or impliedly consented to the bailee making a sub-bailment containing those conditions.

The 1999 Act does not affect the principle that a third party to a contract can't be subjected to the burden of an exemption clause in that contract. But by section 1(4), a third party who wishes to enforce a term conferring a benefit on him or her can only do so subject to and in accordance with any other terms of the contract. Those other terms may impose burdens and conditions on the enjoyment of any benefit.
7.3 COMMON LAW TECHNIQUES FOR AVOIDING THE
PRIVITY OF CONTRACT IN RELATION TO EXEMPTION
CLAUSES

Perhaps the most significant point is that some of Lordships seemed to accept a principle of vicarious immunity, according to which a servant or agent who performs a contract is entitled to immunity from liability which his employer or principle would have had. Hence, although the ship owners may not have been privity to the contract of carriage (between shipper and charter) they took possession of the goods on behalf of, and as agents for the charters and so could claim the same protection as their principals. At one time the proposition was advanced that where a contract contained an exemption clause, any employee or agent while performing the contract was entitled to the same immunity from liability as the employer or principal. But this principle of ‘vicarious immunity’ was rejected by the House of Lords in Scruttons Ltd. vs. Midland Silicons, (1960) 2 All ER.

There are however, a number ways in which the doctrine of privity may be avoided at common law. The willingness of the courts to do so have varied. The application of the doctrine in some cases can be seen as a part of the process by which courts sought to alleviate the position of those affected by onerous terms, for instance, clause seeking to exclude liability for personal injury resulting from negligence, now prohibited by statute the reluctance to save negligent people from the normal consequence of their fault, however extended beyond such cases and may have influenced the decision in Scruttons vs. Midland Silicons Ltd.(1960) 2 All ER, since
that decision, the perceived need to support established commercial practice and to avoid redistributing the risks of transactions has led to greater judicial dissatisfaction with the operation of privity in such situations and a greater willingness to avoid the operation of the doctrine.

There are two methods of avoiding the privity doctrine at common law; (i) contractual route and (ii) tortuous route. The contractual route involves the identification of a second contract between the claimant B and the person wishing to rely on the exemption clause. The second route is based on the exemption clause showing that the claimant B, in its contract with A, assumed the risk of damage or loss resulting from the negligence of the defendant so as to qualify or negate the defendant’s tortuous duty of care to it or, more narrowly, the duty created by virtue of the defendant being a bailee or sub-bailee of goods. In its wider form this was not favoured by the majority in Scruttons Ltd, v. Midland Silicones Ltd.(1960) 2 All ER, but has since attracted some support.14 Before examining these, the position where the contracting party intervenes to protect the defendant has been discussed as follows

7.3.1 PROMISE NOT TO SUE

Where the contract containing the exemption clause can be construed as a promise by the claimant not to sue the third party defendant, if the contracting party intervenes in the proceedings to protect the defendant, the Court may stay or dismiss the claimant’s claim.

7.3.2 AGENCY

The Courts may be able to imply that a party (A) to a contract containing an exemption clause which is intended to benefit third parties such as its employees or sub-contractors was either acting as agent for the third parties or as agent for the other party to the contract (B) so as to direct contractual relationship between B and the employees or sub-contractors. This device was first employed during the nineteenth century, when England was (as it is again) covered by a network of small railway companies and a contract made with one might entitle the holder of a ticket to travel on one or more of them. In such circumstances, the passenger was not allowed to say that only the company which was a party to the primary agreement was protected by the exemption clauses contained in it. The Courts were ready to find either that the contracting company was acting as agent for the other companies, or that it was acting as agent for the passenger. The passenger was thus brought into a direct contractual relationship with the other companies. In reliance on the principle of agency many enterprises have framed contractual clauses designed to protect their employees and sub-contractors from liability.

In Scruttons Ltd. v. Midland Silicones Ltd.,(1960) 2 All ER, the House of Lords left the question open whether the stevedores could have been protected if the carriers had contracted as agents on their behalf. Lord Reid said I can see a possibility of success of the agency argument if Firstly the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability Secondly the bill of lading makes it clear that the carrier, in addition to contracting for these
provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore Thirdly the carrier has authority to do that, or perhaps later ratification by the stevedore would suffice, and Fourthly that any difficulties about consideration moving from the stevedore were overcome.

7.3.3 CONTRACT BY PERFORMING SPECIFIED ACT

Lord Reid’s speech encouraged the use of "Himalaya" clauses,\textsuperscript{15} which extend the defences of the carrier to servants, agents and independent contractors engaged in the loading and unloading process. In New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon),\textsuperscript{16} the Privy Council considered the extent to which such an exclusion clause contained in a bill of lading could be relied on by the third party stevedore, an independent contractor employed by the carrier, who was sued by the consignees of goods for negligently damaging the goods while unloading them.

The majority of the Privy Council gave effect to the clause by regarding the shipper as having made an offer of a unilateral contract to the stevedores to unload the goods on terms incorporating the exclusion clause. The offer was accepted by the stevedores by commencing work. In the words of Lord Wilberforce, the bill of lading:

Brought into existence a bargain initially unilateral but capable of

\textsuperscript{15} So called after the vessel in Adler v. Dickson (1995) 1 QB 158.

\textsuperscript{16} (1975) AC 154, Although sometimes overlooked, the negligence claim in the case was being brought by the buyers (consignees) not the shipper. The buyers were held to be bound by the shipper's contract which arose when the buyers presented the bill of lading and took delivery. See Treitel, The Law of Contract, (9th ed 1995) p. 570-571.
becoming mutual, between the shipper and the [stevedores], made through the carrier as agent. This became a full contract when the [stevedores] performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the [stevedores] should have the benefit of the exemptions and limitations contained in the bill of lading.  

The exclusion clause in question was expressed to be entered into by the carrier as agent for its servants, agents and independent contactors, and therefore "the exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be". Further, In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions.

17 (1975) AC 154, 167-8.
18 (1975) AC 154, 167.
19 (1975) AC 169, Lord Wilberforce emphasised the difficulty of analysing many of the common transactions of daily life within the classical "slots" of offer, acceptance and consideration; (1975) AC 154,..., 167. In dissenting speeches, Viscount Dilhorne and Lord Simon of Glaisdale emphasised that artificial reasoning should not be employed in contractual interpretation with the effect of rewriting contractual provisions. Viscount Dilhorne stated that ...clause 1 of the bill of lading was obviously not drafted by a layman but a highly qualified lawyer. It is a commercial document but the fact it is of that description does not mean that to give it efficacy, one is at liberty to disregard its language and read into it that which it does not say and could have said or to construe the English words it contains as having a meaning which is not expressed and which is not implied." (1975) AC 154, 170, At p. 172, he referred with approval to the judgment
Nevertheless, the reasoning of Lord Wilberforce in *The Eurymedon* has been criticised as artificial, primarily because it effectively rewrites the Himalaya clause, which was an agreement between the shipper and the carrier and from which it is difficult to detect an offer of a unilateral contract made by the shipper to the stevedore.

The *Eurymedon* was not received with enthusiasm in other jurisdictions and in *Port Jackson Stevedoring Pvt. Ltd. v. Salmond and Spraggon (Australia) Pvt. Ltd. (The New York Star)* the High Court of Australia sought to restrict its application. Unloaded goods were stolen from the stevedores' possession, and the consignees sued the stevedores in negligence. The stevedores unsuccessfully attempted to rely on a Himalaya clause in the bill of lading. Stephen and Murphy JJ thought that, as a matter of policy, a decision in favour of the consignees would encourage

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21 Since the carrier desires the result that holders of the bill of lading should not sue his servants or independent contractors, he can achieve this by procuring that they promise not to sue, by contracting to indemnify the servants or agents against claims, and by making it clear to the consignor and holder of the bill that he has done so. The carrier would then be able to obtain the staying of any action against the third party in breach of this agreement. See F Reynolds (1974) 90 LQR 301, 304.

22 It was distinguished by the Supreme Court of British Columbia in *The Suleyman Stalskiy* (1976) 2 Lloyd's Rep 609, and by the Kenyan High Court in Lummus Co. Ltd. v. East African Harbours Corp (1978) 1 Lloyd's Rep. 317, 322-323, because it was not shown that the carrier had authority to contract on behalf of the stevedore. See also Herrick v. Leonard and Dingley Ltd. (1975) 2 NZLR 566.

23 (1981) 1 WLR 138 (PC). See N Palmer, Bailment (2nd ed, 1991) pp. 1600-1601, for the view that the case might have been decided on the basis of bailment.

24 Even though they were considering a situation in which all four of Lord Reid's conditions could be said to
carriers to insist on reasonable diligence on the part of their employees and contractors. Furthermore, a policy of extending protection to stevedores would merely benefit ship-owning nations to the detriment of those countries, such as Australia, which relied on these fleets for their import and export trade. The Privy Council unanimously reversed the High Court of Australia. It warned against confining The Eurymedon to its facts, and stated that in the normal course of events involving the employment of stevedores by carriers, accepted principles enabled and required stevedores to enjoy the benefit of contractual provisions in the bill of lading.\(^{25}\)

This approach has not been applied in other contexts. It is in such contexts that the 1999 Act is likely to make a real difference. It is moreover, inevitable even in carriage of goods by sea, 'so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the ship-owner... that technical points of contract and agency law will continue to be invoked.'

### 7.3.4 IMPLIED CONTRACT

Privity questions may also be avoided by the implication of a contract between the claimant and the third party. The circumstances surrounding the transaction may justify the inference of a collateral contract between

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25 At p. 143. Treitel, The Law of Contract (9th ed, 1995) pp. 571-572, submits that the principle of The Eurymedon should not be confined to cases where carriers and stevedores are associated companies or where there is some previous connection between them. He accepts that the protection of Himalaya Clauses does not cover acts wholly collateral to contractual performance, see Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co. (1986) 1 Lloyd's Rep. 155 (goods damaged while they were stored and not during any...
them. Again, this brings a claimant into a direct contractual relationship with the third party so that the third party is entitled to the benefit of the exemption clause. In *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*

P sold to I.S.D. in India certain fire tenders 'L.o.b. London'. The defendant agreed with I.S.D. to carry the tenders to India. The contract of carriage contained a clause limiting the liability of the defendant, a tender was damaged while being loaded but since it had not yet crossed the ship's side, it was still at P's risk. P made good the damage and sued the defendant for the loss, which amounted to more than 1900.

Devlin J. held that P was bound by the exemption clause. Although it was not a party to the contract of carriage, it was entitled to the benefits of the contract and had in consequence also to accept its liabilities. In the *Midland Silicones case, (1960) 2 All ER 737(CA)*, however, it was stated that this decision could be supported 'only upon the facts of the case, which may well have justified the implication of a contract between the parties.' It may therefore be an example of an implied contract, that is to say, all three parties intended P to participate in the contract of affreightment.

When the third party is brought into a direct contractual relationship with one of the parties to the contract by reason of the device of agency or of an implied contract, the exemption clause relied on will be controlled by statute, in particular the Unfair Contract Terms Act 1977, unless the

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26 (1954) 2 Q.B. 402.
27 (1962) A.C. 466, per Viscount Simonds at p. 471, and see p. 470 where Ehley Dempster & Co. Ltd. v. Paterson. Zochomis & Co. Ltd. [1924] A.C., 522 was similarly explained. See also Hispanica de Petroleos S.A. v. Vencedora
contract between them is one which is not subject to the control of the legislation. It has been noted that the position is different where the third party proceeds under the 1999 Act.

### 7.3.5 ASSUMPTION OF RISK, NEGATION OF DUTY

Turning to the non-contractual route the majority in **Scruttons Ltd. vs. Midland (1962) 2 All ER 737(CA)**, rejected Lord Denning's powerful reasoning based on general defence to actions in tort where a claimant has voluntarily consented to take risk of a loss or injury. But in the case of bailment a similar principle may project an employee or sub-contractor. Where a bailor bails goods to a bailee who in turn sub-bails them to third party who damages them. The Third Party may be able to rely on the terms on which the goods were sub bailment containing the exemption clauses. Where this is so the bailor is bound by an exemption clause in a contract to which it is not a party, a defendant who is sued in tort may also rely on an exemption clause in a contract to which the claimant but not the defendant is a party as rest restricting excluding the duty of care that it would otherwise owe to the claimant.

Where this is so the defendant is taking the benefit of an exemption clause in a contract to which it is not a party, a defendant who is sued in tort may also rely on an exemption clauses, so in **Pacific Associates Inc. v. Baxter-1990** a consultant engineer successfully defended a claim for negligence by the contractor by relying on a term of the contract between the employer and the contractor which provided that neither the engineer

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nor any of his staff shall be liable for the acts or obligations under the contract. Purchas LJ stated that the presence of such an exclusion cause, while not directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort if any arising out of the proximity establish between them by the existence of that very contract. The contractual structure may be relevant even where there is no express provision seeking to exempt the third party.

In other contexts the courts have been less attracted by this unilateral contract device though similar results have been achieved by other means. In *Southern Water Authority v. Carey*,28 engineering subcontractors, who were being sued in the tort of negligence, sought to rely on an exclusion clause in the main contract between the employer and head-contractors which excluded liability on the part of all subcontractors, agents and independent contractors. Judge David Smout QC, sitting as an Official Referee, doubted that unilateral contract reasoning could be applied beyond the specialised practice of carriers and stevedores and described it as "uncomfortably artificial". In particular The Eurymedon was held inapplicable because it could not be said that the head-contractors were agents for the subcontractors. Nevertheless, effect was given to the exclusion clause in an alternative way by finding that it negatives the duty

28 (1985) 2 All ER 1077.
of care which would otherwise have existed. A similar result was achieved in **Norwich City Council v. Harvey**, where a building was damaged by fire as a result of the negligence of the sub-contractor. The main contract provided that the building owner was to bear the risk of damage by fire, and the sub-contractor contracted on the same terms and conditions as in the main contract. The owner sued the sub-contractor in tort. The Court of Appeal held that, although there was no direct contractual relationship between the owner and the subcontractor, nevertheless they had both contracted with the main contractor on the basis that the owner had assumed the risk of damage by fire. Hence, the subcontractor owed the owner no duty of care in respect of the damage which occurred.

May LJ said I do not think that the mere fact that is no strict privity between the employer and the subcontractor should prevent the latter from relying upon the clear basis upon which all the parties contracted in relation to damage to the employer's building caused by fire, of the contractors or subcontractors.

The reasoning in both cases represents a controversial application of

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29 The judge applied the speech of Lord Wilberforce in Anns v. Merton London Borough Council (1978) AC 728, 751-752 to determine whether a duty of care in tort arose between the client and the subcontractors. He found that sufficient proximity existed to render it reasonably foreseeable by the subcontractors that a failure by them to exercise care would lead to loss or damage to the client. He then asked whether there were any considerations which suggested that the scope of that duty should be reduced, and said that the contractual exemption clause, which defined the area of risk which the client was entitled to regard the contractors as undertaking responsibility for, meant that no duty of care arose. Although this precise approach to the establishment of duties of care in negligence is now out of favour, the courts will presumably employ similar reasoning to determine whether it is "just and reasonable" to impose a duty of care: see Caparo Industries plc v. Dickman (1990) 2 AC 605; Murphy v. Brentwood DC (1991) 1 AC 398.

30 (1989) 1 WLR 828. See also Pacific Associates Inc. v. Baxter (1990) 1 QB 993 in which the Court of Appeal held that if, contrary to its view, there would otherwise have been a duty of care owed by the defendant engineer (C) to the plaintiff main contractor (A) for pure economic loss, it would have been negatived by the exclusion clause in the contract.

31 At p. 837. This reasoning does not, however, explain the non-liability (at pp. 833-834) of the sub-contractor's employee who was also sued. This may be the ghost of Elder, Dempster rising from its watery grave, the reasoning being reminiscent of the now rejected doctrine of vicarious immunity; N Palmer, Bailment (2nd 1991) pp. 1609-1610; C Hopkins 'Privity of Contract: The Thin End of the Wedge?' (1990) CLJ 21, 23.
the normal principles for ascertaining whether a duty of care in tort exists. This was particularly so in respect of **Norwich CC v. Harvey (1989) 1 WLR 828**, where the finding of a duty of care should have been non-problematic because the harm in question was property damage and not pure economic loss.

Thus there have been several ways in which third parties have taken the benefit of exemption clauses limiting liability of negligence. These include the rejected doctrine of vicarious immunity, the unilateral contract device and the idea of a contract limiting the scope of a duty of care in tort. By each of these rather artificial techniques, the courts have striven to achieve commercially workable results, despite the privity doctrine. The Supreme Court of Canada has recently gone even further than the English courts in enabling third parties to take the benefit of exclusion clauses by accepting the doctrine of vicarious immunity even where the employee has not been expressly referred to in the exclusion clause. In **London Drugs Ltd. v. Kuehne & Nagel International Ltd.**, the plaintiff bailers entered into a contract of bailment with a warehouseman. The contract contained a limitation clause as follows:

> The warehouseman's liability on any one package is limited to $40 unless the holder has declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability.

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The bailed goods (an electrical transformer) were damaged through the negligent handling of the warehouseman's employees. In the plaintiffs' claim against the employees in the tort of negligence, the question at issue was whether the employees could rely on the limitation clause in the contract. It should be emphasised that there was no express mention of the employees in that limitation clause.

The majority of the Supreme Court of Canada\(^3\) held that employees could take the benefit of a contractual limitation clause where (i) the limitation of liability clause, expressly or impliedly, extends its benefit to the employees seeking to rely on it; and (ii) the employees seeking the benefit of the limitation of liability clause have been acting in the course of their employment and have been performing the very services provided for in the contract between their employer and the plaintiff customer when the loss occurred. On the facts of the case, the majority held that:

When all the circumstances of this case are taken into account, including the nature of the relationship between employees and their employer, the identity of interest with respect to contractual obligations, the fact that the appellant knew that employees would be involved in performing the contractual obligations, and the absence of a clear indication in the contract to the contrary, the term 'warehouseman' in s 11(b) of the contract must be interpreted as meaning 'warehousemen'. As such, the respondents are not complete strangers to the limitation of

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\(^3\) Iacobucci J with whom L'Heureux-Dube', Sopinka and Cory JJ concurred; McLachlin J concurred on
liability clause. Rather, they are unexpressed or implicit third party beneficiaries with respect to this clause.34

In Mahkutai's case35 the question before the Privy Council was whether ship-owners, who were not parties to the bill of lading contract, (which was between the charterers, who were carriers, and the cargo-owners, the bill of lading being a charterer’ bill) could enforce against the cargo-owners an exclusive jurisdiction clause contained in that contract. The Privy Council held that they could not because the Himalaya clause in the bill of lading, which extended the benefit of all "exceptions, limitations, provision, conditions and liberties herein benefiting the carrier" to "servants, agents and subcontractors of the carrier" did not include the exclusive jurisdiction clause because an exclusive jurisdiction clause is a mutual agreement and does not benefit only one party. Rather the rights conferred entail correlative objections. Hence there was no question of the third party taking the benefit of the exclusive jurisdiction clause whether by application of the Eurymedon principle or under what Lord Goff referred to as the principle of "bailment on terms" deriving from Lord Sumner's speech in the Elder Dempster case.

Finally, while the Eurymedon principle, or something like it, was commercially necessary, the principle rested on technicalities that would continue to throw up difficulties unless and until it was recognised that, in this area, there should be a fully-fledged exception to the third party rule Lord Goff said the following.

different grounds; La Forest J dissented in part.
There can be no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in The Eurymedon, and later developed in The New York Star, has been widely welcomed. But it is legitimate to wonder whether that development is yet complete. Here their Lordships have in mind not only Lord Wilberforce's discouragement of fine distinctions, but also the fact that the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protection of those terms as against the cargo owners.

The problem of consideration in these cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the ship-owners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the ship-owners; the problem of authority from the stevedores to the ship-owners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle of ratification; and consignees of the cargo may be held to be bound on the principle in Brandt v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd.\textsuperscript{36} Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too
apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law. It is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the Supreme Court of Canada (see London Drugs Ltd. v. Kuehne & Nagel International Ltd)\(^{37}\) and in a different context, the High Court of Australia (see Trident General Insurance Co. Ltd. v. Mc. Niece Bros. Pvt. Ltd)\(^{38}\). Their Lordships have given consideration to the question whether they should face up to this question in the present appeal. However, they have come to the conclusion that it would not be appropriate for them to do so, first, because they have not heard argument specifically directed towards this fundamental question, and second because, as will become clear in due course, they are satisfied that the appeal must in any event be dismissed.

**CONCLUSION**

The commercial inconvenience that results from the application of the doctrine of privity in the context of exemption clauses had led to the recognition by the Supreme Court of Canada of an exception whereby

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36 (1924) 1 KB 575.  
employees and sub-contractors acting in the course of their employment and performing the services provided for in the main contract can rely on an exemption clause in that contract which is intended to protect them.

Prior to the enactment of the 1999 Act there were indications that the artificiality and technical nature of the approach based on New Zealand Shipping Co. Ltd., Vs. A.M. Satterthwaite (1975) (AC), 1954, (The Eyrymedon) inclined senior judges to regard the development started in that decision as not yet complete. They appeared to be prepared to recognise a fully fledged exception to the doctrine of privity where a contract clearly provides that (or example) independent contractors such as stevedores are to have the benefit of exceptions and limitation contained in that contract. The case for such recognition is that the reasons for and justifications of the privity doctrine do not apply where a third party seeks to rely on a contraction party and the third party as far as the performance of the contracting party's contractual obligations is concerned, and it is commercially undesirable to allow a person to circumvent a contractual exclusion clause and thus redistribute the contractual allocation of risk by suing the employee or sub-contractor of the other party to the contract. Since, however, a fully fledged common law exception such as the Canadian one would not be subject to the limitations in the 1999 Act, for exemption that the third party be identified by name, class, or description, the courts may consider it inappropriate to enlarge the statutory provisions by judicial innovation.