THE LIABILITY OF A CARRIER BY SEA

At the beginning of the twentieth century the bill of lading had become one of the valuable instruments in commercial circles. Its importance had been created by the custom of the Merchants and statutory enactments which declared that the bill represented title to the property of the goods in transit. Whoever held the bill of lading had the power to demand and the right to receive the goods therein represented, subject to whatever equities may have attached, when the goods reached their destination. The bill of lading was, however, subject to express, implied and statutory conditions. Due to these conditions the holder of the bill of lading would often find that when loss or damange occurred to his cargo the carrier or shipowner had absolute immunity for which he had expressly contracted. The obvious answer was that the holder should have acquainted himself with the provisions in the bill before accepting. However this was not always practical in commercial circles where time was usually pressing and transactions quick. In reality the only answer was legislation which would set out the minimum responsibilities which the shipowner or carrier would not be able to reduce and the maximum exemptions which he could not increase. The major maritime powers eventually drew up a convention containing such conditions with the recommendation that the conditions be legislatively accepted by the powers concerned. These conditions, or rules, were to become known as the Hague Rules, 1921. But to fully appreciate the Rules it is necessary to recognize the liabilities and immunities which a ship owner or carrier possessed prior to the Rules.

In shipping there are two types of carriers: the common (or general) and the private. By the common law the common carrier is the insurer of the goods he carries with the exception that he shall not be liable for loss of or damage to the goods if such is the result of action of the King's enemies, an Act of God due to an inherent vice in the goods themselves (1), or if it is a voluntary sacrifice for the common good of all (2). The common law liabaility of the private carrier is in doubt. There seems to be no authority on the point. Whether the private carrier is only liable for loss or damage due to his negligence is debateable. In a dissenting judgment in Liver Alkali Co. v. Johnson, (3) Brett. J., felt that private carriers were under a liability recognized by the custom of England to carry goods at their absolute liability with the same exceptions applicable to them as to the common carrier. However in Nugent v. Smith (4) Cockburn, C.J., went out of his way in his obiter dictum to disagree with Brett, J., and declared that no such liability attached to a private carrier. But neither view has binding force.

(1) **Coggs v. Bernard** (1703) **92 E.R. 107**
(2) **Payne's Carriage of Goods by Sea**, 4th Ed. p. 77
(3) (1874) L.R. 9 Ex. 338
(4) (1876) 1 C.P.D. 433

The contract for the carriage of goods in the ship is known as the contract of affreightment and may be of two types: charterparty or bill of lading. The charterparty is used where the whole ship is contracted for a specific purpose during a specific term at a fixed rate. The bill of lading is used where the ship is put up as a general ship and cargo will be accepted from those who wish to ship their goods to the ports at which the ship proposes to call.

The average charterer wishes only to charter the cargo space of the vessel: this is a simple charter. The obligation of the shipowner or carrier for goods carried would be set out in the charterparty. However, if the charterer wishes to sublet a portion of the cargo space a bill of lading would be issued setting forth the conditions under which the bill was issued. This bill of lading, as also in the case of the general ship, is evidence of the contract to carry goods safely subject to the conditions set out in the bill; also bailment is thereby acknowledged (5). Transferring the bill of lading for value passes the right to the title (as possessed by the transferor) to the property in the cargo thereby represented and the right to receive delivery of the cargo at the port of discharge. This right remains effective until complete delivery has been made to the perosn holding the bill (6). The transeferor can only pass the rights which he has himself. There must also be the intention to so pass these rights as well as the intention on the part of the transferee to accept them (7). A transfer may be accomplished by delivery, or indorsement and delivery. In Canada the Bills of Lading Act vests the right of action in the transferee as if the "contract contained in the bill of lading had been made with himself" (8).

Three conditions which every shipowner or carrier must observe are implied by common law to exist in every contract for the carriage of goods by sea unless there are express stipulations to the contrary. These conditions are that the ship is seaworthy, that the ship shall commence and carry out the voyage contracted for with reasonable diligence, and that there shall not be unecessary deviations during the voyage (9). If these conditions are not observed and the commercial purpose of the voyage defeated, the shipper can repudiate the contract. If the breach does not defeat the purpose, action for damages can alone arise. Of these conditions mention will be made only of seaworthiness.

The warranty that the ship is seaworthy is absolute. It is not that the shipowner or carrier will do his best to make the ship seaworthy; it is that the ship is reasonably fit in all respects to carry the cargo to its destination safely, bearing in mind the conditions which can be reasonably anticipated on such a voyage. The ship should be in a fit state as to repair, equipment and crew, and in all other respects, to encounter

(5) **Russian Steam Navigation Co. v. Silva, (1863) 13 C.B. (N.S.) 610**
(6) **Barber v. Meyerstein, 39 L.J.C.P. 187**
(7) **Sewell v. Burdick, (1884) 10 App. Cas. 74 (H.L.)**
(8) **R.S.C. 1927, c. 17, S2**
(9) **Scrutton on Charterparties and Bills of Lading, 13th Ed., p. 96**

the ordinary perils of the voyage (10). Therefore a latent defect could be a breach of this warranty although careful inspection could not reveal the defect (11). Carver in his book "Carriage by Sea" considers the problem of seaworthiness:

> ".....the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all probable circumstances of it. To that extent.... the shipowner.....undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed the question to be put is: Would a prudent shipowner have required that it should be made good before sending his ship to sea had he known of it? If he would have, the ship is not seaworthy within the meaning of the undertaking." (12)

Seaworthiness also includes cargo worthiness. The ship must be fit to receive the cargo. Such fitness depends upon the quality and type of cargo and the anticipated duration of the period of carriage. The stowage of the cargo itself, although negligently done, cannot amount to unseaworthiness unless the safety of the ship is thereby endangered (13). If the stowage does not create unseaworthiness it is merely a case of bad stowage and will give rise to damages.

When the ship has left its moorings with no intention of returning it has entered a new stage (14). There is an implied warranty of seaworthiness at the beginning of this new stage. If the ship is unfit to encounter expected perils, although it may have been completely seaworthy whilst it was lying in the loading port taking cargo, the warranty is broken (15). On the completion of one stage the ship must have the degree of fitness which is required for the next stage. The conception of stages is marked by different physical conditions, the exact limits of which are impossible to define. The determination of a stage and the commencement of a new stage will depend upon the circumstances; the location of the ship, nature of the cargo, and the duration of the anticipated voyage. To illustrate: it is not a breach of warranty to start a voyage without enough fuel for the entire trip, but if this is done there must be enough fuel to complete the first stage and for refueling and so on with the different stages. To do otherwise cannot be excepted under any clause of negligence on the part of master or crew in running the ship. If the ship so set out there would be a breach of the warranty of seaworthiness (16). There is, however,

(10) **Dixon v. Sadler** 5 M. & W. 405
(11) **The Glenfruin**, (1885) 10 P. 103
(12) 8th Ed. p. 25
(13) **Kopitoff v. Wilson**, 1876 1 Q.B.D. 377
(14) **Reed v. Page**, (1927) 1 K.B. 743
(15) **Cohn v. Davidson**, 46 L.J.Q.B. 305
(16) **The Vortigen** (1899) P. 140

no warranty that seaworthiness will remain during the stage. If from any cause the ship later becomes unseaworthy resulting in loss or damage to the cargo the shipowner or carrier would be liable only if the cause was one for which he was answerable. If the ship is damaged by perils of the sea, the shipowner or carrier need not repair the ship. But if the ship is not repaired it cannot proceed on the voyage as it is then entering a new phase in an unseaworthy condition (17).

If the implied condition of seaworthiness is broken before the commencement of the performance of the contract, either party to it may declare it void. If, however, the unseaworthiness is discovered after the commencement, the only remedy is damages for actual loss or damage caused by the unseaworthiness. If the damage is caused by anothed peril, which is not associated with the unseaworthiness, the shipowner or carrier may rely on an exception clause for protection, if he can so bring himself within it. He cannot do this if the cargo is damaged in consequence of the unseaworthiness even though the immediate cause thereof may be an expected peril (18).

If a breach of the warranty of seaworthiness is to be relied upon, the plaintiffs must first establish a prima facie case that the ship was unseaworthy at the commencement of a stage. Once this is shown the shipowner or carrier must then prove that in fact the vessel was seaworthy. If the shipowner or carrier does show that the vessel was seaworthy he will then have to show that the damage or loss was caused by one of the excepted perils in order to relieve himself of liability.

From the foregoing it is to be observed that when the common carrier or general ship receives goods to be carried for reward it is implied at common law, in the absence of an express contract, that he shall carry and deliver the goods safely, subject to the four exceptions above mentioned. These are common law exceptions and cannot be relied upon if the shipowner or carrier has not taken reasonable care to avoid the danger (19) or if he has not provided a seaworthy vessel at the commencement of the voyage.

"Excepted perils" have been mentioned above. Since the common law gave certain rights to, and imposed liabilities upon, the shipowner or carrier, he attempted to better his position by stipulations in the contract with the shipper to exempt him from liability. The shipowner or carrier still had to use due diligence in respect of the excepted perils in caring for the safety of the goods carried (20). The excepted peril was relied upon when the shipper proved that his goods had not been delivered or had been delivered damaged. The carrier would attempt to show that the loss or damage was caused by the excepted peril; that the excepted peril was the direct and dominant

(17) **Worms v. Storey**, (1855) II Ex. 427
(18) **The Europa**, 1908 P. 84
(19) **Nugent v. Smith**, supra
(20) **Notara v. Henderson**, (1872) LR7QB 225

cause, (21) and not the remote cause. The growth of the excepted clauses was rapid until there existed little liability on the part of the shipowner or carrier (22).

Excepted perils in charterparties were unobjectionable because decreased liabilities enabled shipowners to carry freight at a lower rate. The charterer had plenty of time to acquaint himself with the terms of the contract. This was not true of the bill of lading. It was passed freely from hand to hand as part of the currency of trade, conferring on its holder both rights and liabilities. It was of the utmost importance to trade that the bill of lading should pass freely and quickly. Eventually consignees for value who had no control over the terms agreed upon, became interested in the bill of lading not having had the opportunity of examining it to ascertain its true value and the security enbodied therein. Too infrequently such consignees found that ship owners and carriers were under no liability for loss of or damage to cargo. The bill of lading in so many cases was nothing but a useless piece of paper. With the turn of the twentieth century the need of legislation to control the extent to which the shipowner or carrier could protect himself against loss of or damage to the goods in his bailment was most pronounced. The situation threatened the use of the bill of lading in the business world.

In 1893, the Congress of the United States of America passed what was commonly known as the Harter Act. The purpose of the act was to make it unlawful for a shipowner or carrier to contract for certain exemptions from liability and to provide in favour of the shipowner or carrier certain statutory exemptions. The act applied to all contracts made in the U.S.A. and to any consignments entering that country.

In 1910 the Canadian parliament, influenced by the Harter Act, the Australian enactment of 1904 and the dire need in trade for statutory control, enacted the Water-Carriage of Goods Act (23). By section 4 of the act certain clauses in bills of lading which exempted shipowners or their servants from liability for certain acts were prohibited and any attempt to extend such exemption made illegal. Section 6 abolished the absolute warranty of seaworthiness and compelled the shipowner to "exercise due diligence to make the ship in all respects seaworthy." Section 7 listed circumstances of losses for which the shipowner would not be liable. The Act was to apply to cargo on ships carried from any Canadian port.

In 1921 the major maritime powers agreed upon what were to become known as the Hague Rules. These Rules were presented as a standard with the recommendation that maritime countries should legislatively accept them. In 1924 the English parliament did incorp-

(21) **Leyland Steamship Co. v. Norwich Union Co.** (1918) A.C. 350
(22) **Scrutton, supra, Art. 79, Note 3, p. 244**
(23) 1910 10 Ed. VII c. 61.

orate the Rules in the Carriage of Goods by Sea Act. In 1936 a similar enactment was placed on the Canadian statute books (24) which repealed the 1910 act and its subsequent amendments. The desired effect of the 1936 act was to have a stereotyped series of clauses forming part of all contracts of affreightment controlling rights and liabilities of the parties regardless of their wishes.

Sections 2 and 5 of the Carriage of Goods by Sea Act, 1936 (which hereinafter will be referred to as the Act) provides that the Act shall affect only the bill of lading "or similar document of title" on outgoing cargoes whether the destination is another Canadian port or not. By Section 4 the Rules as set out in the Schedule are to be considered part of the bill of lading and are to be so expressed within the bill of lading. By Article V the Rules are not applicable to charterparties, but the article stipulates that "if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of these Rules." Where third parties have acquired possession of bills of lading for value which are documents of title in property and not just evidence of a contract between shipowner and charterer, the Rules as set out in the Act will apply. By Article VI the Rules shall not apply to goods covered by a non-negotiable receipt marked as such, provided the shipments are not "ordinary commercial shipments made in the ordinary course of trade." By Section 5 Canadian coasting trade is not bound by the Rules if the cargo, regardless of its nature, is covered by a non-negotiable receipt, marked as such. The Rules apply to the type of cargo as set out in Article I; the meaning of cargo or "goods," does not apply to live animals nor to deck cargo so carried.

The common law obligation to provide a seaworthy ship for the cargo is abolished by the Act in Section 3. By Article III, Rule 1 the carrier is obliged to use only "due diligence" that the ship be seaworthy "before" and " at the beginning" of the voyage. This due diligence on the part of the carrier, as well as the other minimum responsibilities set out in the Rules, cannot be lessened, and any attempt to do so would be "null and void and of no effect" by virtue of Article III, Rule 8. The obligation to exercise due diligence applies also to servants and agents of the carrier (25).

There is a difference of opinion as to whether or not this legislative obligation to use due diligence to provide a seaworthy ship "before" and "at the beginning" of the voyage has done away with the doctrine of "stages." Scrutton L.J. seems to be of the opinion that it has, because now, provided the shipowner or carrier has done all he is required to do "before" and "at the beginning" of the voyage, any subsequent act would be neglect or default in the navigation or manage-

(24) **The Carriage of Goods by Sea Act, 1936, R.S.C. 1 Ed. VIII c. 49**

(25) **W. Angliss and Company (Australia) Proprietary, Limited v. Peninsular and Oriental Steam Navigation Company 1927 2 K.B. 456**

ment of the ship on the part of the master or the carrier's servants which is excepted by Article IV, Rule 2 (a). (26). But Chorley and Giles state:–

> "....it always seems most reasonable to argue that without express words the Act cannot be taken to have abolished the doctrine of stages in connection with the contracts to which it applies." (27)

Further, they state that the obligation imposed by Article III, Rule 2 is not to be cut down by any protection given by Article IV, Rule 2(a) and referred to a House of Lords case to justify this belief (28).

Rule 1 of Article III continues to provide that the carrier shall use due diligence to "properly man, equip, and supply the ship" and provide proper cargo holds according to the cargo to be shipped aboard. Rule 2 provides for the complete handling of the cargo, subject to Article IV, from the time it is accepted until it is discharged at its consignment port.

The maximum exemptions which the carrier cannot increase are found in Article IV. Under Rule 1 the carrier is absolved from liability for loss of or damage to the cargo which results from unseaworthiness but not for want of due diligence on the part of the carrier, his servants or agents. In other words the carrier is responsible for negligence in not exercising due diligence. Scrutton L.J. feels little is gained by the shipowner under this rule:

> ".....if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants or agents; if due diligence has been used the vessel in fact will be seaworthy." (29)

The only time the shipowner would gain relief would be in the case of a latent defect, but under Rule 2(p) of Article IV an express exception is "latent defects not discovered by due diligence." Therefore Scrutton L.J. feels the "due diligence" clause of Rule 1 possesses no improvement for the carrier which is not covered by the later Rule. With this view MacLachlan J. agrees. (30)

The second portion of Rule 1 of Article IV casts the onus on the carrier or any other person claiming exemption under this section to prove that due diligence was exercised when the loss or damage results from unseaworthiness. The consignee has but to show that his goods were damaged when delivered, or never delivered, and the onus is cast upon the carrier to prove that due diligence was exercised as required by the statute. Once the carrier has proved that he used due diligence to make the ship seaworthy he will be obliged to show that the damage or loss resulted from an excepted peril, in order to protect himself. This excepted peril must also be the causa causans, or causa proxima, and not just a causa sine qua non.

(26) **Supra**, p. 509
(27) **"Shipping Law"** 2nd Ed. p. 116
(28) **Northumbrian Shipping Co. v. E. Timm & Son.** 1939 A.C. 397
(29) **Supra**, p. 513
(30) **"Merchant Shpping"** 7th Ed. p. 376

Rule 2(a) of Article IV provides that the carrier shall not be responsibile for any loss of or damage to cargo which results from the the "act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." The Courts have construed this clause strictly against the shipowner and have expressed reluctance to extend the clause beyond its clear meaning. The difficulty arises from the fact that many things are done on a ship which have no connection with "the navigation" or "the management of the ship." The only act, neglect, or default which is covered by the exception is that which relates directly to the safety of the vessel. Any act, neglect, or default which directly or indirectly relates to the care of the cargo and not to the ship is not covered by the rule. The rule applies from the moment the cargo is accepted until it is discharged at the port of consignment. The main difficulty lies of course in what is meant by "navigation" and "management."

In the case of The Glenochil (31), the engineer in an attempt to secure stability pumped water into the ballast tanks without inspecting them. The result was leakage through a broken tank and damage to the cargo. The Court decided the act was done in the management of the ship, although negligently done. The intention was to care for the safety of the vessel and not connected in any way with the cargo. If there is mismanagement in the care of the cargo although it involves using part of the ship for such care, and damage results, there can be no claim that there was mismanagement in the care of the ship (32). Every act on the ship does not always relate to the ship as a whole. The outstanding English case on this problem is Gosse Millard, Ltd. v. Canadian Government Merchant Marine Ltd. (33). Here the ship carried a cargo of tinplates subject to the Rules. During the voyage the ship sustained damage and put into dock for repairs. Workmen entered by means of the hatches of the hold where the tinplates were stowed. The hatches were not properly covered and rainwater entered. Damage resulted to the tinplates. The carrier declared that the damage resulted in the management of the ship. The Court held that the negligence had nothing to do with the management of the ship. To hold otherwise would involve an improper use of language the Court declared. This was clearly negligence in not caring for the cargo as required by Article III, Rule 2. Nothing would be left of the obligation to care for the cargo as required if the Court had not decided as it did. What is management of the ship is a question of fact in each case. The exception provided by Article IV, Rule 2(a) is a general negligence exception but as there are words of positive obligation subject to these words of exception, the presumption always is that the obligation is greater than the exception. As pointed out by MacLachlan J. the

(31) (1896) P. 10
(32) Foreman & Ellams Ltd. v. Federal Steam Navigation Co. (1928) 2 K.B. 434
(33) 1929 A.C. 223

test is: (i) was it done in the proper handling of the ship as a ship, even though it was done negligently? or (ii) was it simply a failure on the part of the carrier to fulfill the obligation of caring for the cargo? (34)

The rest of Rule 2 contains the exceptions in case of fire, perils of the sea, Act of God, etc. Some of these are the old common law exceptions, while the others are embodied in the Act with the conception of equitable protection for the carrier. The last clause is the general clause: "any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier" (35). The first three words are very general; they are not intended to give protection against all risks. They are to be interpreted as being ejusdem generis with the previous exceptions set out provided a genus can be found. The ejusdem generis rule provides that where special words are followed and amplified by general words the latter are to be confined in their application to things of the same genus as the preceeding specific words. Here, however, it is difficult to find a genus wide enough to cover the exceptions. Therefore it might seem sufficient if the carrier were to show that the loss or damage was not due to his negligence even though he could not show the exact cause of the loss. As set out by the section the onus of disproving negligence rests with the party claiming exemption under the section.

Leaving Rule 2 of Article IV, which is by far the most interesting, it will be noted that the Act has numerous other beneficial rules for both carrier and shipper. The carrier cannot be responsible for the loss of or damage to cargo which results from reasonable deviations in an attempt to save life or property (36); nor can the carrier be responsible for over a certain sum per unit in case of loss or damage unless the value be declared (37); nor is the carrier responsible for destroying dangerous goods unless they be accepted as such (38); and a shipper is not responsible for any loss or damage sustained by the carrier unless caused by the act, fault, or neglect on the part of the shipper, his agents or servants (39).

The bill of lading, which is so vital in the world of commerce and finance, is thus covered by the Act in the aspects therein set out. Commerce has guaranteed that although the holder of the bill of lading acquires no better title than his predecessor in title in spite of the consignee being a bona fide holder for value, the consignee will be aware of the minimum responsibilities and liabilities imposed upon the carrier as well as the maximum exemptions which cannot be altered

(34) **Supra**, p. 378
(35) Article IV, Rule 2(q)
(36) Article IV, Rule 4
(37) Article IV, Rule 5
(38) Article IV, Rule 6
(39) Article IV, Rule 3

except against the interest of the carrier (40). Consequently the bill of lading can pass freely and quickly with the guarantee of protection to those concerned. This, as pointed out, applies to cargoes outward bound from a Canadian port, and, also it should be added, to cargoes inward bound from another country which likewise has legislatively accepted the Hague Rules.

Might it not be wise to have the Rules apply to all incoming cargoes as well as outgoing? It is agrued that to attempt to have such an application would be an attempt to impose Canadaian legislation upon a contract made outside of Canada; the only connection with Canada is that it is the ultimate destination of the subject matter of the contract. But would it be so unreasonable to argue that once the subject matter or the title to the subject matter has come within Canadian jurisdiction the Rules as set out in the Act should then attach to the contract? There seems to be no real objection. Many shipments come to Canada from foreign countries which do not statutorily recognize the Hague Rules. It is the consignee in the Canadian consignment port who should be protected by the Rules; why not apply the Act to all incoming as well as outgoing shipments regardless of where the contract of affreightment is drawn up.

(40) Article V

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