

## CARRIERS 2 — COMMON-SENSE 0

### *Ports of Auckland Ltd v. Southpac Trucks Ltd* *Tasman Orient Line CV v. New Zealand China Clays Ltd (The Tasman Pioneer)*

The New Zealand Supreme Court recently delivered two significant judgments on the limits of carrier liability in *Ports of Auckland Ltd v. Southpac Trucks Ltd*<sup>1</sup> and *Tasman Orient Line CV v. New Zealand China Clays Ltd (The Tasman Pioneer)*.<sup>2</sup> Although the factual context of these two cases is very different, a broadly similar approach and ideological attitude towards limitation of carrier liability in domestic and international commercial law emerges from both judgments of the Supreme Court.<sup>3</sup>

#### *Ports of Auckland*

Southpac Trucks Ltd imported a Kenworth truck from Australia to New Zealand. The truck was carried by Australia New Zealand Direct Line, a division of CP Ships (UK) Ltd. CP Ships engaged Ports of Auckland Ltd (POAL) to discharge the truck and transfer it to a storage area. POAL subcontracted carriage of the truck to Southern Cross Stevedores Ltd, which in turn subcontracted actual carriage to Wallace Investments Ltd. While the truck was being driven on the wharf by an employee of Wallace, an employee of POAL driving a forkhoist on unrelated business collided with the truck, causing just over NZ\$60,000 worth of damage. POAL accepted that its forkhoist driver was negligent, but argued that it was entitled to limit its liability to NZ\$1,500 under the Carriage of Goods Act 1979 (NZ) (COGA).<sup>4</sup>

The COGA applies as a mandatory near-code to all modes of domestic carriage of goods within New Zealand.<sup>5</sup> It bars common law proceedings against certain carriers and imposes instead, subject to a few exceptions,<sup>6</sup> a uniform statutory scheme of limited liability for contracting carriers and actual carriers as defined in the COGA.

Southpac argued that the COGA did not apply to POAL in these circumstances. First, POAL was neither the contracting carrier<sup>7</sup> nor the actual carrier<sup>8</sup> of the truck at the time that it was damaged. The forkhoist driver was effectively a third party to the relevant carriage of goods scenario. Second, the bar against common law tort proceedings only applied where a carrier is sued “as such”, in other words, in its capacity as a contracting carrier or actual carrier of the goods that have been lost or damaged. On this

<sup>1</sup> [2009] NZSC 112; [2010] 1 NZLR 363 (Blanchard, Tipping, McGrath, Wilson and Anderson JJ). The judgment of the Court was delivered by Blanchard J.

<sup>2</sup> [2009] NZSC 37 (Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ). The judgment of the Court was delivered by Wilson J.

<sup>3</sup> Indeed, in *The Tasman Pioneer* at [8] n 2 the Court expressly refers back to the *Ports of Auckland* judgment as dealing with cognate issues of allocation of risk between carrier and cargo interests.

<sup>4</sup> At [8]-[10].

<sup>5</sup> The COGA does not apply to “international carriage of goods”, which, for maritime carriage, begins when the goods are loaded and ends when they are discharged from the ship: see the COGA, s 2 and *Fletcher Panel Industries Ltd v. Ports of Auckland Ltd* [1992] 2 NZLR 231.

<sup>6</sup> The COGA allows for limited contracting out, and does not apply where the carrier intentionally causes the loss or damage: see the COGA, ss 7 and 8. The COGA also does not expressly cover delay of goods or consequential losses. Common law actions should therefore be available to recover these losses in full.

<sup>7</sup> Defined in the COGA, s 2 as meaning “the carrier who, whether as a principal or as the agent of any other carrier, enters or has entered into the contract with the contracting party”.

<sup>8</sup> Defined in the COGA, s2 as meaning “in relation to the carriage of any goods, ... every carrier who, at any material time, is or was in possession of the goods, or of any container, package, pallet, item of baggage, or any other thing in or on which the goods are or were believed by him to be, for the purpose of performing the carriage or any stage of it or any incidental service; and includes the contracting carrier where he performs any part of the carriage”.

analysis, while CP Ships and Wallace could limit their strict liability as contracting and actual carriers under the COGA, POAL as a third party could not.

This argument, which had found favour with the District Court and a majority of the Court of Appeal, was rejected by the Supreme Court. The Court accepted that the COGA was not “intended to protect someone at fault who was not at the time a carrier vis-à-vis the lost or damaged goods”,<sup>9</sup> but nevertheless concluded that section 2 of the COGA, which defines a carrier as “a person who, in the ordinary course of his business, carries or procures to be carried goods owned by any other person ...; and ... includes a person who, in the ordinary course of his business, performs or procures to be performed any incidental service in respect of any such goods”, was broad enough to encompass POAL’s indirect involvement in arranging the actual carriage of the truck by Wallace. Because POAL was thus a “carrier” in this extended sense, the Court concluded that Southpac’s common law action against POAL was barred by s 6 of the COGA.<sup>10</sup>

The fundamental problem with this conclusion is that it ignores the specific architecture of the framework of limited liability established by the COGA. Under the COGA, the consignee is given the benefit of a direct statutory cause of action against the contracting carrier or, in defined circumstances, the actual carrier.<sup>11</sup> The COGA counterbalances this benefit by delimiting the periods of responsibility for contracting and actual carriers.<sup>12</sup> The right to limit strict liability under the COGA is also, unsurprisingly, available to contracting carriers and actual carriers only.<sup>13</sup> All signs therefore point to a closed liability framework designed to determine the mutual rights and liabilities of those specific parties to the carriage operation, and no others. The statutory limitation of liability scheme provided by the COGA should therefore be interpreted as a carefully crafted partial exception to unlimited common law liability, rather than be read up as an all-encompassing code.

A further problem with the Supreme Court’s conclusion is that it does not seem to accord with basic common-sense. By procuring Wallace to perform the carriage of the truck, rather than carrying the truck itself, POAL apparently ensures that it will not attract strict liability as an actual carrier under the COGA. Nonetheless, on the Supreme Court’s interpretation, this indirect involvement in the logistical chain is sufficient to afford POAL with all of the COGA protections of limitation of liability. Further, because POAL is likely to have some involvement, however indirect, in all cargo movements within its port limits, the effect of the Supreme Court’s judgment is to grant POAL an extensive zone of limited liability within which to play “waterfront dodgems”.<sup>14</sup> It is very difficult to see that this is what Parliament intended.

Why, then, did the Supreme Court reach this conclusion? The Court seems to have been convinced that the success of the COGA depended on its providing an “elegant and clearly expressed solution” to all instances of carrier liability.<sup>15</sup> Any departure from this perceived elegance and clarity would inevitably result in an increase in insurance cost and complexity, a rise in litigation, and the “seamless coverage of carriers under the Act ... [having] holes in it”.<sup>16</sup> Rather than referring the COGA to Parliament to attend to the necessary darning and updating, the Supreme Court appears to have been determined to stretch and distort its fabric until the desired shape and coverage was achieved.

### *The Tasman Pioneer*

Readers of this *Quarterly* will already be familiar with the facts of *The Tasman Pioneer*.<sup>17</sup> Briefly, the master of the vessel took a short cut and struck rocks off the coast of Japan. Rather than immediately notifying authorities and the owners, he steamed on at speed for some hours, falsified his course on the ship’s charts,

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<sup>9</sup> At [29].

<sup>10</sup> At [29]-[33], [40].

<sup>11</sup> The COGA, s 20.

<sup>12</sup> The COGA ss 9, 10.

<sup>13</sup> The COGA, s15.

<sup>14</sup> Pauline Barratt “Waterfront Dodgems – A Dissenting View”, at <http://www.jonesfee.co.nz>.

<sup>15</sup> At [2].

<sup>16</sup> See at [27], [28], [38]-[39].

<sup>17</sup> “Charting the Limits of the Nautical Fault Exemption” [2009] LMCLQ 291.

and involved his crew “in a conspiracy to conceal what had actually occurred”.<sup>18</sup> As a result of the master’s delay in seeking assistance, the cargo interests suffered loss.

The main issue was whether the master’s conduct came within the “nautical fault” exemption in Art 4.2(a) of the Hague Rules, which provides that neither the carrier nor the ship is responsible for loss or damage arising or resulting from the “[a]ct, 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 High Court and a majority of the Court of Appeal, albeit for different reasons, both found that the master’s conduct did not come within the nautical fault exemption. The Supreme Court, however, overruled both Courts in a rather cursory, thinly reasoned judgment.

The Supreme Court focused on three possible interpretations of the nautical fault exemption. First, as Fogarty J had held in his minority decision of the Court of Appeal, the provision could be interpreted broadly, in which case any conduct of a master, no matter how egregious, would fall within the ambit of the exemption.<sup>19</sup> Second, as Hugh Williams J had held in the High Court, the nautical fault exemption might not apply where the master had breached an implied obligation to act in good faith towards the cargo interests. Third, as the majority of the Court of Appeal had held, the exemption might not apply where the behaviour of the master was so outrageous that it cannot be regarded as having been “in the navigation or in the management of the ship”.

The Supreme Court summarily rejected the second interpretation because it “requires the reading into the paragraph of words which do not appear in it”; and because the authorities upon which Hugh Williams J relied in the High Court provided “no support for the introduction into the article of a general requirement of good faith”.<sup>20</sup> The first accusation does not bear any scrutiny. By definition, implication *always* involves reading words into texts; the only question is whether such implication is warranted on a purposive interpretation of the Rules. On this, the Supreme Court failed to elaborate. The second objection on precedent was also not clearly explained. The Supreme Court’s concern seems to be that most of the cases referred to by the High Court involved different fact patterns, or only referred to good faith in obiter dicta. That fact, however, was fully acknowledged by Hugh Williams J, who noted that the paucity of authorities presumably derived from the fact that challenges to the bona fides of those responsible for the ship are relatively uncommon. Further, at least two of the cases relied upon by Hugh Williams J would appear, even by the Supreme Court’s own summary, to be directly relevant to the case at hand, in that they “required consideration of whether illicit acts of the crew ... were in the navigation or management of the ship”.<sup>21</sup>

The Supreme Court dwelled a little longer on the Court of Appeal’s approach, but was ultimately equally dismissive of it. The Supreme Court would not accept that the intention behind the Hague Rules was to change the English common law on the carrier’s exclusion of liability. On the contrary, the Rules “reaffirmed that (in the absence of barratry) the owners’ exemption from liability at common law remained”. Those common law cases that allowed the carrier a broad exclusion of liability therefore remained authoritative. A purposive interpretation of the nautical fault exemption, such as that advocated by the majority in the Court of Appeal, was unnecessary because a “literal interpretation” of the opening words of the paragraph was entirely consistent with the purpose of the Rules, which was “to make carriers responsible for loss or damage caused by matters within their direct control, but not otherwise”.<sup>22</sup>

There are a number of difficulties with the Supreme Court’s reasoning. Although the Hague Rules were drafted using common law terminology and concepts, and pre-Rules cases may therefore be of some relevance or assistance, they must be treated with caution. To suggest that the Rules simply mirror English

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<sup>18</sup> At [3].

<sup>19</sup> Wilson J at [20] refers to Fogarty J’s approach as giving “full effect ... to the ordinary meaning of the words of that paragraph”. This is, of course, a highly loaded description, given that Fogarty J’s approach focuses only on the first part of the paragraph, and gives little or no meaning to the words “in the navigation or in the management of the ship”.

<sup>20</sup> At [21]-[22].

<sup>21</sup> At [22], referring to *Leesh River Tea Co Ltd v. British India Steam Navigation Co Ltd (The Chyebassa)* [1967] 2 QB 250 (CA); *The Bulknes* [1979] 2 Lloyd’s Rep 39.

<sup>22</sup> At [23]-[30].

common law is both parochial and ahistorical. It was precisely the lack of any uniform approach in domestic legal systems to exclusion clauses in bills of lading that precipitated the international compromise represented by the Hague Rules.<sup>23</sup> To mechanically apply pre-Rules cases to interpret the Rules is to fail to appreciate the status of the Rules as an international treaty, and to forget the wise counsel of Lord Macmillan in *Stag Line Ltd v. Foscolo, Mango & Co Ltd*:<sup>24</sup>

It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.

The Supreme Court's citation of cases and academic commentary is, with respect, somewhat selective and one-sided. While pre-Rules cases such as *Marriott v. Yeoward Brothers*,<sup>25</sup> which advocate a broad interpretation of precisely the sort of generic bill of lading exclusion clauses that the Rules were drafted to regulate, and academic commentary clearly based on these pre-Rules cases<sup>26</sup> are treated as axiomatic, cases which go the other way are glossed over or ignored.<sup>27</sup> The Court's interpretation of the *travaux préparatoires* is also more than a little strained: to conclude from Sir Norman Hill's preference of the traditional wording "act, neglect, or default" over "faults or errors" that there was thus an international consensus in 1921 (still less in 2010) that the nautical fault exemption should be interpreted on the basis of cases such as *Marriott v. Yeoward Brothers*, is to draw a very long bow indeed.<sup>28</sup>

Despite approving of Fogarty J's broad interpretation of "act, neglect or default" as potentially encompassing all acts or omissions by the master or crew, the Supreme Court nonetheless, rather surprisingly, concluded that barratry by the master or crew was excluded by implication from the nautical fault exemption in the Hague Rules. Leaving aside the obvious irony that the Supreme Court thereby engaged in precisely the same process of "reading into the paragraph ... words which do not appear in it" for which it had previously criticized Hugh Williams J, this conclusion is not supported by the text of the Rules or the *travaux*,<sup>29</sup> and arguably undermines the *raison d'être* of the Court's adoption of a broad "literal interpretation" of the nautical fault exemption — to provide a certain, simple and predictable allocation of risk between carrier and cargo interests.

Barratry is a bit of a moveable feast. The Supreme Court defined the concept fairly narrowly and technically as "an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result",<sup>30</sup> and concluded that the cargo interests had not

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<sup>23</sup> As Wilson J himself points out at [23] n 27, a different domestic legal position on carriers' exclusion of liability pertained in the US in the nineteenth century. For a more accurate and detailed historical summary, see the Court of Appeal judgment at [34] per Baragwanath J. See also David C Frederick, "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules" (1991) 22 *Journal of Maritime Law & Commerce* 81, 83-84.

<sup>24</sup> [1932] AC 328, 350.

<sup>25</sup> [1909] 2 KB 987, cited at [23] n 27.

<sup>26</sup> Stewart C Boyd (ed), *Scrutton on Charterparties and Bills of Lading*, 21st ed (2008), 218; Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* 2nd ed (2005), [9-211].

<sup>27</sup> See eg Greer LJ's dissenting judgment in *Gosse Millard Ltd v. Canadian Government Merchant Marine Ltd* [1928] 1 KB 717 (CA) at 743-744, confirmed on appeal in [1929] AC 223 (HL); *Foreman & Ellams Ltd v. Federal Steam Navigation Co Ltd* [1928] 2 KB 424, 439.

<sup>28</sup> At [25].

<sup>29</sup> There is no mention of barratry in the *travaux*. While the model bill of lading adopted by the International Law Association's Affreightment and International Bill of Lading Committee at the Hamburg Conference in 1885 provided that the shipowner "shall ... be responsible for the barratry, faults and negligence, but not for errors in judgment, of the master, officers and crew", this wording was expressly rescinded at the London Conference of 1887, and appears not to have been revisited by delegates to the subsequent diplomatic conferences.

<sup>30</sup> At [13], with reference to Arts 4.5(e) and 4bis.4 of the Hague-Visby Rules, inserted in 1968. These provisions are, of course, not about barratry, and would hardly have been in the minds of the drafters of the Hague Rules in 1921.

pleaded the requisite intention to cause damage on the part of the master. However, the standard statutory and policy definition of barratry is broader than that: it includes “every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer”. This broader definition would seem to cover amply the master’s deliberate series of actions to deceive the owners about the route taken and the circumstances and location of the grounding, thereby prejudicially exposing the owners to potential civil or criminal liability, regardless of whether these actions were primarily motivated by a desire to save the master’s own skin. As Lord Ellenborough CJ points out in *Earle v. Rowcroft*,<sup>31</sup> “with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, *induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master’s duty to obey*, and which (or it would not be barratry) his owners relied upon his observing”.

A more fundamental conceptual difficulty with the Supreme Court’s shoe-horning of barratry into the nautical fault exemption, however, is that barratry has long been held to be committed only in cases where the master or crew breach their duties towards the owner, or a charterer standing in for the owner.<sup>32</sup> Barratry is therefore concerned with a fraudulent breach of the internal duties owed between the parties that own, manage and navigate the ship, rather than the demarcation of rights and liabilities between the ship and cargo interests.

Thus, rather than drawing the bright line rule that the Supreme Court was aiming for in this case, its conclusion on barratry may have clouded matters even more. Although the Court emphatically rejected both the implication of a direct duty of good faith by the master towards cargo interests and the examination of a master’s egregious conduct through the lens of ship navigation or management standards as being too uncertain, it appears still to be countenancing an indirect examination of these issues through the *camera obscura* of barratry.

The sympathetic approach to carrier limitation of liability demonstrated by the Supreme Court in these two judgments will no doubt be pleasing to carriers, port companies and their insurers, as well as to readers who set store by easily invoked shibboleths of simplicity, clarity, certainty and predictability in commercial law. Readers who are concerned about close, careful and contextual statutory and treaty interpretation, and who regard the moral principles of full compensation and accountability as going to the very heart of the private law of obligations, however, may have more pause for thought. This reader, at any rate, was reminded of H.L. Mencken’s famous observation that “there is always a well-known solution to every human problem — neat, plausible, and wrong”.<sup>33</sup>

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<sup>31</sup> (1806) 8 East 126, 139; 103 ER 292, 297 (emphasis added).

<sup>32</sup> See eg *Shell International Petroleum Co Ltd v. Gibbs (The Salem)* [1983] 2 AC 375, 378-379 per Lord Roskill.

<sup>33</sup> *Prejudices: Second Series* (1920), 158.

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