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Charting the Limits of the Nautical Fault Exemption
The Tasman Pioneer

The *Tasman Pioneer* was carrying cargo to Busan from Auckland via Yokohama. The master, who was under pressure to make up time to arrive at the Kanmon Straits, decided not to follow the normal route around the western coast of Shikoku. Instead he took a shortcut through a narrow passage and grounded the vessel on the island of Biro Shima, causing the vessel to list and to take on water, which had to be pumped. Rather than alerting the Japanese coastguard or the owners, he continued to steam at full speed in gale force winds for two and a half hours, with the vessel on an increasing list, before finally anchoring near the intersection of his normal route and advising the owners of the incident. He instructed the crew to lie about the vessel's course and how the incident occurred, and ordered the second mate to falsify the ship's charts. The ship was subsequently salved, but the plaintiffs' deck cargo had already been damaged.[1]

The main issue facing the New Zealand High Court and Court of Appeal was whether the master's conduct came within the "nautical fault" exemption in Art 4.2(a) of the Hague-Visby 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". Both Courts accepted that the master's initial decision to navigate the vessel through the narrow passage was covered by the nautical fault exemption. The carrier was therefore exempt from liability for damage arising from the grounding itself.[2] However, both Courts found that the master's post-grounding conduct had contributed to the cargo damage. If the master had reported the incident immediately, salvors would have reached the vessel before the deck sunk below sea level and their additional pumping capacity would have saved the cargo.[3] Williams J in the High Court and a majority of the Court of Appeal concluded that the master's post-grounding conduct did not satisfy the nautical fault exemption, and that the carrier was accordingly liable. The carrier has been granted leave to appeal to the New Zealand Supreme Court.

In the High Court Williams J held that the master's post-grounding conduct amounted to a mixture of failures in navigation and management of the ship affecting both the vessel and its cargo. The carrier was therefore *prima facie* protected by the nautical fault exemption.[4] However, he went on to hold that the exemption did not extend to conduct that was not *bona*

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1 For a detailed discussion of the facts and evidence, see *New Zealand China Clays Ltd* v. *Tasman Orient Line CV* (31 August 2007) CIV-2002-404-3216; CIV-2002-404-3217; CIV-2002-404-3218; CIV-2002-404-3215 (HC Auckland) at paras [17-125]: http://www.maritimelaw.org.nz/0907.html; and *Tasman Orient Line CV* v. *New Zealand China Clays Ltd* [2009] NZCA 135 (CA) at paras [4-16]: http://www.maritimelaw.org.nz/0209.html.

2 HC at paras [236-237]; CA at paras [57-58].

3 HC at paras [181-214]; CA at para [17].

4 HC at paras [215-226].

fide. After traversing the *travaux préparatoires*[5] and dicta in authorities referring to good faith,[6] he concluded:[7]

> There would seem to be every reason to read a good faith requirement into the Rule to entitle the carrier to qualify for the immunity from responsibility the Rule provides. That is the case irrespective of whether a lack of bona fides is seen as underpinning entitlement to the exemptions provided by the Rules or whether "navigation" or "management" which is not conducted bona fide in accordance with the master and crew's paramount obligation to care for the ship, cargo and crew safely is so antithetical to that paramount obligation and proper seafaring practice as not to be regarded as qualifying or amounting to "navigation" or "management" under the Rules.

As the master's post-grounding actions were not *bona fide*, but were designed "to absolve himself from responsibility or blame for the grounding and lend a veneer of plausibility to his falsehood", the carrier had failed to demonstrate its entitlement to the nautical fault exemption.[8]

A majority of the Court of Appeal (Baragwanath and Chambers JJ) reached the same conclusion via a different route. Baragwanath J characterized the master's post-grounding conduct as "outrageous" and "carried out for the selfish purposes of the master", and refused to recognize it as falling within the nautical fault exemption at all. On a purposive interpretation of Art 4.2(a), the master's post-grounding actions did not amount to acts "in the navigation or in the management of the ship".[9] Baragwanath J formulated the general test as being whether the master's "conduct takes the carrier outside the terms of its statutory and contractual obligations". On this approach, a lack of *bona fides* is a relevant factor in the characterization of the master's motives for his conduct, rather than a breach of an implied obligation of good faith in Art 4.2(a).[10] Baragwanath J regarded this conclusion as being consistent with earlier decisions holding that theft of ship equipment[11] and a master's deliberate delay in calling on assistance to avoid salvage costs[12] did not constitute acts in navigation or management under Art 4.2(a).[13]

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5 Although he did not find them particularly useful: HC at para [229].

6 HC at para [233], referring to *The Star of Hope* v. *Annan* (1870) 76 US 638, 646: "honest intent to do his duty"; *Boudoin* v. *J Ray McDermott & Co* 281 F 2d 81, 85 (5th Cir, 1960): "good faith judgment"; *Phelps, James & Co* v. *Hill* [1891] 1 QB 605, 611 (CA): master "acting bona fide"; and *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [1999] 2 Lloyd's Rep 209, 211 *per* Potter LJ (CA): master's "duty to reach a bona fide decision".

7 HC at para [234].

8 HC at paras [240-242].

9 CA at paras [59-60].

10 CA at para [63].

11 *Brown & Co Ltd* v. *T & J Harrison* (1927) 27 Ll L Rep 415; *Leesh River Tea Co Ltd* v. *British India Steam Navigation Co Ltd (The Chyebassa)* [1966] 1 Ll L Rep 450.

12 *The Lucile Bloomfield and Ronda*, Cour d'Appel, Rouen, 26 May 1970, discussed in W Tetley, *Marine Cargo Claims*, 4th edn (Cowansville, 2008) 959. See also *The Quo Vadis*, Hof, s'-Gravenhage, 13 March 2001, discussed in M L Hendrikse *et al* (eds), *Aspects of Maritime Law: Claims under Bills of Lading* (Alphen aan den Rijn, 2008) 126, where the Court noted that fault verging on wilful misconduct ("aan opzet grenzende schuld") would not come within the Art 4.2(a) exemption.

13 Although stating that it was unnecessary to decide the case, Baragwanath J at paras [41] and [62] called into question the correctness of cases such as *Marriott* v. *Yeoward* [1909] 2 KB 987 and *Bulgaris* v. *Bunge & Co Ltd* [1933] 45 Lloyd's Rep 74, 81, which suggest that the exemption covers reckless or wilful misconduct, and the leading commentaries relying on them.

By contrast, in his dissenting judgment Fogarty J adopted a literal interpretation of the words of Art 4.2(a), focusing on the phrase "act, neglect or default of the master", which he held to include reckless and intentional acts. Whilst accepting that the master's act was required to be "in the navigation or in the management of the ship", he concluded that the master's motive was irrelevant, and that the word "act" should be interpreted broadly, as it was "neutral as to quality and so applies independently of culpability".[14] Fogarty J supported this interpretation by reference to the historical context in which the Rules were negotiated and drafted, and in particular that Art 4.2(a) was modeled on the wording of English bills of lading of the time, and that common law cases had interpreted similar exemption clauses broadly.[15]

Fogarty J's appeal to historical precedents and continuity with the common law stands in sharp contrast to the majority's approach to interpreting the Rules. Baragwanath J insisted that the Rules should be construed as a "comprehensive international convention, unfettered by any antecedent domestic law" and decried "the practice of text writers and some judges to heark back to the old English common law".[16] Chambers J went even further, saying that it was misguided to place any reliance on the *travaux préparatoires* as a guide to interpretation of the Rules, on the rather peculiar reasoning that parties subsequently signing up to the Rules had not "committed in any way" to the *travaux*,[17] and that carriage of goods by sea had changed a great deal in the past century.

Although this construction debate is interesting, and holds significant broader implications for the role of historical, preparatory and contextual sources in interpreting the Rules and other international Conventions, it ultimately fails to elucidate the meaning of Art 4.2(a). The *travaux* do not assist here. And, despite hinting that the nautical fault exemption has its limits, modern dicta remain decidedly Delphic. We are, therefore, largely forced back onto the text of Art 4.2(a).

Fogarty J's interpretation of Art 4.2(a) certainly offers a superficially attractive simplicity and certainty, but this is due to the fact that his version of the nautical fault exemption is virtually limitless, save only that the master's physical acts must relate to the navigation or management of the ship. On this construction, a master's conduct would only ever fall outside the exemption if it was wholly unrelated to the ship, or perhaps did not amount to a voluntary act in the legal sense.

There are three fundamental difficulties with Fogarty J's approach. First, it is overly simplistic and mechanical. It fails to recognize that the concept of "navigation" is almost always defined in maritime law by reference to more than just the physical movement of the vessel, but

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[14] CA at paras [117-123].

[15] CA at paras [124-134], citing *Marriott* v. *Yeoward* [1909] 2 KB 987; *Bulgaris* v. *Bunge & Co Ltd* [1933] 45 Lloyd's Rep 74.

[16] CA at para [31], endorsing the majority approach of the High Court of Australia in *Great China Metal Industries Co Ltd* v. *Malaysian International Shipping Corp Bhd (The Bunga Seroja)* (1998) 196 CLR 161, 168.

[17] CA at para [69]; but *cf* Baragwanath J's reference to Art 32 of the Vienna Convention on the Law of Treaties 1969 at para [48].

also to the planning, purpose, intent and ability of the navigator.[18] Second, it is inconsistent with the case law distinguishing between the nautical fault exemption and other provisions in the Rules, which does focus on the relevant parties' underlying intent and purpose as well as the physical acts involved.[19] Third, it stretches and distorts the historical rationale for Art 4.2(b), which was to provide a compromise, albeit one-sided, between competing carrier and cargo interests — owners should not be held accountable for unwise navigation or management decisions made by their masters while on long voyages, because ship-to-shore communication was impossible.[20] However, the exemption was never intended to hand owners a *carte blanche* to write off their masters' malicious, vengeful, reckless or wilful misconduct.

The approach of the majority of the Court of Appeal is to be preferred. The main concern with the High Court judgment — that the implication of a potentially nebulous good faith obligation into Art 4.2(a) would generate undue uncertainty — has largely been assuaged by Baragwanath J's delimitation of the exemption, which involves a more concrete assessment of the master's conduct. Courts are perfectly well-equipped to draw practical, common-sense distinctions between instances of merely incompetent navigation and malicious, reckless or wilful misconduct; or between a master's panicked response to an incident and a pattern of deliberate subterfuge and deception. The majority approach is also much more in tune with the twenty-first century. The nautical fault exemption is an unprincipled anachronism on the verge of extinction.[21] There are no good reasons for sustaining, let alone expanding it.

Paul Myburgh[*]

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[18] See eg *Polpen Shipping Co* v. *Commercial Union Assurance Co Ltd* [1943] KB 161, 167; *Steedman* v. *Scofield* [1992] 2 Lloyd's Rep 163, 166; *R* v. *Goodwin* [2005] EWCA Crim 3184, [2006] 1 Lloyd's Rep 432; *Elbe Shipping South Australia* v. *The Ship "Global Peace"* 2006 FCA 954.

[19] See eg *Brown & Co Ltd* v. *Harrison* [1927] All ER 195 (CA); *N M Paterson & Sons Ltd* v. *Robin Hood Flour Mills Ltd* [1968] 1 Ex CR 175; *The Patraikos 2* [2002] 4 SLR 232.

[20] S Girvin, *Carriage of Goods by Sea* (Oxford, 2007) 365.

[21] The drafters of the Rotterdam Rules (United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (not yet in force)) have jettisoned the exemption. Art 18 of the Rotterdam Rules clearly provides that the carrier is liable for the breach of its Convention obligations caused by the acts or omissions of the master or crew of the ship: see F Berlingieri, "Basis of Liability and Exclusions of Liability" [2002] LMCLQ 336, 342; S Girvin, "Exclusions and Limitation of Liability" (2008) 14 JIML 524, 525-526.

[*] Associate Professor of Law, The University of Auckland.