

CARRIAGE OF GOODS

The Carriage of Goods Act 1979.

1.0 Introduction

- 1.1 The broad heading of this seminar topic has justified many text books. It is necessary therefore to consider an aspect of the law relating to Carriage of Goods which is relevant to the New Zealand context. For that reason I have chosen to discuss some issues under the Carriage of Goods Act 1979 which have recently arisen.
- 1.2 For over 20 years, domestic carriage in New Zealand has been regulated by the Carriage of Goods Act 1979 ("The Act"). Thousands of claims a year are settled under its provisions. To date there have been very few cases before the Courts. Many of the cases that have been decided are at District Court level.
- 1.3 This record is some testimony to the effectiveness of the Act. Its underlying philosophy and aim is to provide a code of liability which will enable insurers, carriers and shippers to understand their rights and obligations without necessarily incurring the expense of litigation. The fact that the Act is working is to all parties' advantage.
- 1.4 However, from time to time, cases have occurred which either challenge commonly held understandings, or explore new areas not previously dealt with by the Courts.

2.0 The Act

- 2.1 Parliament intended the Act to be the first and last word on carriers' liability in respect of all domestic carriage in New Zealand. Consistent with this philosophy, the Act establishes a standard liability regime, which does not require any formal steps by the parties to contracts of carriage (ie consignee/carrier/ subsequent carriers). The Act terms this liability regime carriage as "*limited carrier's risk*". There are three other

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options under the Act. However, the formal requirements are so strict that these other options are rarely used.

- 2.2 In most cases, carriage at limited carrier's risk takes all the guessing out of cargo claim recovery. It is straightforward to identify the carrier, the person entitled to claim, and usually the application of the package limit under the Act. Fundamental to this approach, is the strict liability imposed on carriers and successive carriers. Contracting carriers are liable where goods are damaged. Actual carriers are liable to contracting carriers where goods are damaged whilst their responsibility.
- 2.3 The approach of the Courts in interpreting the Act in relation to coverage is summarised in *Fletcher Panel Industries v The Ports of Auckland* [1992] 2 NZLR 231. Justice Hillyer considered that the Act had wide application to the carriage of goods in New Zealand. Effectively, Parliament intended that the Act should be a code with limited right to contract out. This is exemplified by S.6 which is an effective ouster of other causes of action including tort. Justice Hillyer summarised the position at pg. 233 where he stated:

"The Act creates an overall framework for liability for all those who are involved in the carriage of goods within New Zealand. It creates strict liability for carriers with certain limited defences and limitation of liability for carriers according to the "unit" of goods carried".

- 2.4 The cases which are reviewed below reflect all of the elements referred to by Justice Hillyer.

3.0 "Fats" and the Grand Piano

- 3.1 The wide application of the Act was recently illustrated by decision of Judge Joyce QC in *Victory Christian Church v Peter Fatialofa & Anor* (NP 844/98 District Court at Auckland).

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- 3.2 In that case, the Victory Christian Church ("VCC") claimed against Peter Fatialofa ("Fats") for extensive damage caused to its grand piano. VCC had hired its hall to the Auckland Post Primary Principals Association (APPA) for an inter-school event. The hire of the hall included the grand piano. The APPA required the piano to be shifted from the stage to the floor of the hall. VCC insisted that the piano be moved by specialist movers.
- 3.3 Enter Peter Fatialofa (Fats). He contracted with APPA to move the piano at an appointed time and date.
- 3.4 On Monday, 10 November 1987, two movers employed by Fats arrived (late) at the hall to shift the piano. There ought to have been a third mover, however, he did not report for work. By this stage, the organisers were under time pressure, and the two movers reluctantly agreed to shift the piano with the promised assistance of APPA representatives who were present. The movers successfully shifted the piano to the floor of the hall. However, while positioning it, they capsized the piano breaking its sound board. As a result, it was not repairable. State Insurance accepted that the piano was a total loss. Its replacement cost \$172,812.49.
- 3.5 After settling the claim, State Insurance in its subrogated capacity brought proceedings against Fats for recovery. Fats through his insurance broker asserted that he was subject to the Carriage of Goods Act 1979 and offered to settle the claim for \$1,500. This was rejected.
- 3.6 Fats had earlier arranged carriers liability cover through his broker. However, his policy only covered him for limited carrier's risk. Accordingly, the insurers maximum liability under the policy was \$1,500, which they gladly paid without delay!
- 3.7 In the subsequent proceedings brought by State Insurance/VCC, Fats relied on the Carriage of Goods Act 1979, pleading in his defence that the carriage was at limited carrier's risk. He also joined his insurance broker as a third party, alleging that the

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cover offered by his carriers liability policy was not suitable for his needs. The proceedings were ultimately set down for trial. Prior to the trial, the parties agreed that the issue of whether the Carriage of Goods Act covered these circumstances should be dealt with by way of preliminary issue.

3.8 The issue was subsequently argued in the District Court on 19 October 2000. The parties asked the Court to decide whether the movement of the piano within the Church by Fats' employees amounted to "carriage" under the Act. Judge Joyce QC delivered his decision on 26 October 2000. He held that the movement of the piano within the hall amounted to "carriage" and therefore was a contract of carriage at limited carriers risk under the Act. Fats' liability was effectively limited to \$1,500.

3.9 This outcome may at first view seem surprising. VCC had strongly argued that movement within a premises could never amount to carriage under the Act. It argued that "carriage" would always involve the movement of goods from one place to another. It referred to other decisions involving the word "transit" where New Zealand Courts had held that transit ends when goods are delivered to a premises as distinct from any subsequent positioning in the premises. Judge Joyce rejected these submissions and decided that the Act covered Fats on the following basis:

- (1) The Act was intended by Parliament to be a code, and therefore should have wide application where possible;
- (2) Fats was undeniably (and by agreement between the parties) a "carrier" within the definition of the Act;
- (3) The service performed by Fats was in the nature of carriage. Here, the Court relied on the Court of Appeal decision in *Securitas v Cadbury Schweppes Hudson Ltd* [1988] NZLR 340.

Comment

3.10 This decision illustrates the willingness of the Courts to apply the Act where possible. The outcome provides a measure of certainty to insurers, carriers and cargo interests in establishing liability under the Act. It remains to be seen whether State Insurance/VCC will appeal.

4.0 Statutory Defences

4.1 The Act only provides for limited statutory defences in s.17 & 14. However, establishing these defences places a heavy onus on the carrier.

4.2 In the recent decision in *Peter Baker Transport v Pacifica Shipping (1985) Ltd*, the District Court at Christchurch considered the application of the statutory defences, and the liability of clean up costs after chemical spills. This was a claim for recovery by PBT, against its subcontractor, Pacifica Shipping. Pacifica unsuccessfully relied upon the statutory defences. The case highlights the heavy onus which the Court imposes on carriers attempting to rely upon these defences.

4.3 PBT as contracting carrier agreed to transport goods from Auckland and Wellington to the South Island. It had one trailer from Auckland. There were two trailers from Wellington. PBT subcontracted with Pacifica Shipping to carry the three trailers on a sailing of the "Spirit of Competition" from Wellington to Lyttelton. PBT would then arrange for the trailers to be carried to its Christchurch depot. From there, it intended to distribute the goods throughout the South Island.

4.4 The "Spirit of Competition" left Wellington at approximately 6.15pm on 5 April 1995. It ran into heavy seas down the Kaikoura Coast. At around 5.45am on 6 April, it suffered a severe roll to starboard.

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- 4.5 The vessel was mainly carrying trailer units which included lashed cargoes covered by tarpaulins, curtainsiders, and units carrying containers. The severe roll caused many of these loads to shift.
- 4.6 PBT's Auckland trailer, no. R1258, toppled over spilling a significant part of its load. This trailer was also carrying cyanide and sulphuric acid – both classed as dangerous chemicals. In addition, there was printers ink, which can be highly inflammable. PBT was subject to significant claims arising from the capsizing of this trailer.
- 4.7 PBT's other two trailers were also affected to a lesser extent. These were trailers 20NYA and 10NCQ. These trailers did not capsize but the severe roll displaced their loads.
- 4.8 The crew investigated the aftermath of the roll over. Before the vessel reached Lyttelton, crew members realised that there was a strong smell of chemicals around trailer R1258. They attempted to relash the cargo as well as they could, but after consulting the manifest and realising that there was cyanide and sulphuric acid together on the trailer, they alerted Pacifica's head office in Christchurch. In turn, Pacifica alerted emergency services and local authorities.
- 4.9 The clean up operation on board the vessel took almost three days. During this period, the other berths around the vessel could not be used by ships at Lyttelton. Some people were evacuated from their homes as a precaution. The clearing of cargoes from trailer R1258 took almost one day. Emergency services and Pacifica would not carry out any other work until this task was completed.
- 4.10 Pacifica's ship was held up. It claimed \$30,000 in respect of its losses. In addition, it claimed \$62,060.87 for the costs of clean up.
- 4.11 PBT and its insurers settled with the various cargo claimants. This took some time due to the number of consignors involved. The claim was considerably reduced by

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the operation of the package limit under the Act, and successful salvage. Ultimately, PBT settled all claims for \$53,028.82.

- 4.12 PBT ultimately brought a cargo claim against Pacifica for the amount of its settlement with claimants. Pacifica brought a claim for \$130,000 in respect of its consequential losses and the clean up costs.

The Issues

- 4.13 The contract between PBT and Pacifica was at limited carrier's risk. So Pacifica was strictly liable for PBT's losses, unless it could establish a defence under ss.17 & 14 of the Act.

- 4.14 Pacifica alleged that:

- (1) PBT had not properly packed and lashed the goods on any of its trailers;
- (2) The fixing eye on trailer R1258 was inadequate and defective. As a result of the fixing eye's failure the trailer capsized. Pacifica argued that this amounted to:
- (3) PBT breached an implied condition of carriage that the goods were fit to be carried as tendered by PBT for carriage (s.17(1)(a)); and/or
- (4) The failure of the fixing eye amounted to damage caused by "*inherent vice*", for which it was not responsible (s.14(a)).

- 4.15 Pacifica also brought a counterclaim. It argued that:

- (1) PBT was liable under s.26 for the costs of the clean up and disposal of the dangerous goods on trailer R1258;

- (2) That PBT had been negligent, and therefore was responsible for the clean up costs, and Pacifica's consequential losses.

Statutory Defences

4.16 Pacifica relied on s.17(1)(a) which provides:

“17. Contracting party to warrant condition of goods, etc –

(1) In every contract of carriage there shall be implied on the part of the contracting party a term –

(a) That, except as disclosed in accordance with subsection (2) of this section, the goods are fit to be carried and stored in accordance with the contract in the condition and packed in the manner in which they are tendered for carriage.”

4.17 However, the remedy for breach of this implied term is set out in s.14 which provides:

“14. Carrier not liable in certain circumstances – Notwithstanding any of the other provisions of this Act, a carrier is not liable as such for the loss of or damage to goods occurring while he is responsible for them under a contract of carriage to the extent that he proves that the loss or damage resulted directly and without fault on his part from –

(a) Inherent vice; or

(b) Breach of either of the terms implied in the contract by s.17 of this Act; or ...”

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4.18 Section 17 appears on the surface quite straightforward. However, there are several important aspects which need to be noted in respect of s.14 as follows:

- (1) The onus of proof is at all times on the carrier;
- (2) The carrier must prove:
 - (a) That the loss or damage resulted directly from the breach; and
 - (b) That there was no fault on the part of the carrier;

Trailer R1258

4.19 Most of Peter Baker's claim related to this trailer (\$45,950.98). It was also the trailer on which Pacifica based its counterclaim.

4.20 After considering PBT's evidence, and the limited evidence presented by Pacifica, the Judge concluded that PBT had properly stowed and lashed the cargo on its trailer. So Pacifica did not succeed on this ground.

4.21 However, the issues arising from Pacifica's allegations in respect of the adequacy of the fixing/lashing eye in respect of this trailer were more difficult. The Judge decided that:

- (1) Pacifica had not satisfied him that the fixing eye was in fact inadequate;
- (2) On that basis there was no "*inherent vice*" (s.14);
- (3) The trailer had six fixing eyes. Pacifica had elected to only use four (on each corner). The Court held, following evidence presented by PBT, that the use of

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six fixing eyes would have avoided the capsizing. Accordingly, the Court decided that Pacifica had failed to prove that it “*was not without fault*”.

4.22 Accordingly, Pacifica had not proved any of its allegations in respect of breaches of s.17.

Trailers 20NYA and 10NCQ

4.23 Pacifica failed to bring any evidence in respect of trailer 10NCQ.

4.24 In respect of 20NYA, Pacifica alleged that its cargo had not been properly lashed. PBT’s manager confirmed that it had relied on the strength of the curtainside, rather than specific lashing. The Court held that under the circumstances the stowage was inadequate.

4.25 However, the evidence before the Court established that many trailers on the “Spirit of Competition” shifted. The Judge held that there was evidence of widespread failure by Pacifica to properly lash the cargo. Accordingly he was not prepared to find that Pacifica had proved absence of fault on its part.

Pacifica’s Counterclaims**Section 26**

4.26 Pacifica argued that the dangerous chemicals on trailer R1258 had or were about to enter a dangerous state. Therefore, Pacifica was justified in disposing of the chemicals. It then claimed under s.26(2), that it was entitled to recover reasonable expenses.

4.27 In this respect, Pacifica claimed for the entire clean up operation. This amounted to \$62,060.87.

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- 4.28 PBT argued that s.26 does not apply as between contracting and actual carriers. The section only allowed the carrier responsible at the time that the chemicals went into a dangerous state to destroy them and recover costs directly from the contracting party. Pacifica attempted to argue that for the purposes of s.26, PBT was a contracting party. The Court accepted PBT's submission that the contracting party was clearly the owner of the goods. Accordingly, Pacifica was not entitled to rely on s.26 to recover the clean up costs.
- 4.29 Pacifica claimed for emergency services callouts, ambulance/Red Cross and many other miscellaneous costs it had been put to. PBT also questioned whether these extensive costs claimed by Pacifica were contemplated by the terms "*destroying or otherwise disposing*" used in s.26(2). The Court agreed. The Judge considered that had he held that Pacifica was entitled to claim under s.26, then its claim would have been greatly reduced.

Duty of Care

- 4.30 Pacifica claimed that PBT was negligent in presenting trailer R1258 for carriage without proper lashing and adequate fixing eyes. It relied on this allegation to argue that it was entitled to claim for the entire clean up costs and the loss of profits through delayed sailing.
- 4.31 The Judge rejected Pacifica's allegations. As set out above he considered that Pacifica had not established the inadequacy of the lashing or the defect in the towing eye. He held that the cause of the capsizing was Pacifica's failure to properly lash the trailer to the vessel's deck.

Comment

- 4.32 These issues have never before been considered by the Courts in New Zealand. That is to some extent testimony to the effectiveness of the Act – most claims are simply settled between insurers.
- 4.33 This case highlights the heavy onus which carriers are under to establish lack of fault on their part. In many cases, the causes of loss are not necessarily identified. Under those circumstances, carriers will find it difficult to exercise the onus of proof.
- 4.34 Otherwise, the case has clarified to some extent carriers' rights and obligations under s.26 where there are spillages or other problems with dangerous goods.

Postscript

- 4.35 Pacifica subsequently unsuccessfully appealed to the High Court.

5.0 Carton Or Container?

- 5.1 The recent District Court case of *Yellow Fin Holdings Ltd v Cook Islands National Line Agency* (14 July 1999) considered the liability of a carrier for damage to goods carried by container.

The Facts

- 5.2 The plaintiff company delivered 956 boxes of fish fillets in a refrigerated truck to a port at the Chatham Islands. The plaintiff's employees then packed the boxes into the defendant carrier's container and the container was placed on the carrier's ship for carriage to Napier. The fish arrived in Napier in a thawed condition. The plaintiff was therefore not paid by the consignee and sued the carrier for the value of the fish less salvage (\$51,832). The judge accepted that the fish was delivered frozen to the

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carrier in the Chatham Islands and thawed en route to Napier because of a malfunction of the refrigeration unit of the container. The carrier was therefore responsible for the deterioration of the fish.

The Carriers Liability

- 5.3 The issue was the extent of the carrier's liability. Under s.15 of the Carriage of Goods Act 1979, a carrier's liability to the contracting party is limited to \$1,500 for each unit of goods lost or damaged. The relevant parts of s.3 of the Act define a "unit of goods":

"Unit of goods" ... (b) in relation to goods contained in a container means the container load of goods; and includes, where the container is provided by the contracting party [i.e. the consignor or consignee], the container; and ...

(e) in relation to goods contained in a package that is not contained in a larger package or in a container, nor loaded on a pallet, means the package of goods ..."

- 5.4 The carrier argued that its liability was \$1,500 because there was one "unit of goods", namely the container (paragraph (b)). The plaintiff argued that the carrier's liability was the full \$51,832 because each package of fish fillets was a "unit of goods" (paragraph (e)).

The Decision

- 5.5 In the Judge's opinion, the critical issue in determining the "unit of goods" was the physical form in which the consignor presented the goods to the carrier for carriage. The plaintiff's goods were presented to the carrier as individual packages which were then loaded into the carrier's container. The repackaging into the carrier's container at the wharf did not alter the fact that the goods had been presented as individual

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packages. It followed that each package of fillets was a “*unit of goods*” (paragraph (e)) and the carrier was liable for the full loss of \$51,832.

Comment

- 5.6 The result in the *Yellow Fin* case is usefully compared to the case of *Columbia Exports Ltd v Sofrana Unilines (NZ) Ltd* [1996] DCR 137. In that case, the consignor’s goods were packed into the carrier’s container at a third party’s warehouse. The container was then delivered to the carrier at the wharf. The Judge decided that the “*unit of goods*” was the container and the carrier’s liability was limited to \$1,500. The two cases therefore exemplify that the “*unit of goods*” is established by the form in which the goods are presented to the carrier:
- 5.7 Where goods are presented to the carrier in individual packages and are repacked into a container at the carrier’s premises the “*unit of goods*” is the individual package. By contrast, where goods are presented to the carrier already packed in a container the “*unit of goods*” is the container.
- 5.8 It is essential in determining a carrier’s liability to determine the circumstances and physical form in which the goods were delivered to the carrier.

Postscript

- 5.9 CINL subsequently appealed on a number of issues. Justice Potter sent the case back to the District Court for further consideration of issues relating to Yellow Fin’s ownership of the fish. But the Court agreed with the District Court’s finding on the package limit. However, Justice Potter relied more heavily on the bill of lading issued by CINL, which enumerated the cartons of fish, rather than entirely accepting the emphasis which the District Court had placed on physical acceptance of the cargo.

6.0 Conclusion

- 6.1 These cases review some of the more important issues which have been before the Courts recently on the application of the Act. In each case, the Courts have attempted to instil some certainty into the application of the Act. This can only be to the advantage of insurers, as the New Zealand industry provides coverage for both carriers and cargo interests. Clarification of the limited grey areas in the Act assist the efficacy of the liability regime and will potentially avoid the cost of legal proceedings.
- 6.2 There is a significant movement of goods throughout New Zealand on any given day. Accordingly, claims are inevitable. Marine insurers will realise, that their profitability can be seriously affected by the ability to make economic recovery. The Carriage of Goods Act has been of great assistance to the industry over the years.

Philip Rzepecky
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