Dangerous Goods - Is The Charterer Liable When He Is Not The Shipper?

A shipper must not load dangerous cargo that may damage the ship, without the carrier's knowledge or consent. All contracts of carriage between a shipper and carrier contain this duty either as an express or implied term, and sometimes both. The most common example is Article IV Rule 6 of the Hague and Hague-Visby Rules. This Rule only encompasses physical damage to the ship. In contrast, the implied duty under English common law extends to unseaworthy cargo that is likely to subject the ship to unusual delay due to arrest or detention (Mitchell Cotts v Steel\(^1\)). The express and implied duties may therefore co-exist within the same contract of carriage.

A number of charterparty forms contain express clauses dealing with dangerous cargo. Two examples are Lines 21-22 of the Baltic form and Clause 4 of the NYPE '93 form. Charterers will be in breach if they load cargo falling within such clauses or if they fail to treat it before shipment in the manner stipulated by the contract. If the Master consents to the cargo knowing it is dangerous, owners will not be bound by his consent unless they also consent. The position is different under the Hague Rules. If they are incorporated into the charterparty, the Master has implied authority to bind owners by his consent to the cargo, if charterers are in breach, owners may be entitled either to reject the cargo or terminate the contract (unless they have affirmed the contract by consensual words or conduct).

The implied duty under English common law requires the shipper not to load dangerous cargo that is likely to cause damage without first giving notice to the carrier. The purpose of this article is to assess whether such a duty is capable of being implied into a voyage charter in circumstances where the charterer is not the shipper and has no knowledge of the cargo's characteristics prior to shipment. Must he still give notice to the owner as carrier? The duty requires that the carrier is given sufficient information enabling him to appreciate the risks in the carriage of the particular cargo and guard against them. However, if the specific cargo in question is more dangerous than usual goods of this type, the carrier must be given special notice of the risk. A classic example is coal that emits more than usual quantities of methane gas (The "Athenasia Comminos\(^2\)). The implied duty is absolute. It applies whether or not the shipper is aware of the dangerous nature of the cargo or any peculiar characteristics (The "Giannis NK\(^3\)). The ramifications of the implied duty are consequently vital in the context of a voyage charterer's liability insurance.

The leading textbooks assert unanimously that the implied duty applies to charterers even where they are not the actual shippers of the cargo. Some commentators are more trenchant than others but the assumption appears to be, at the very least, that a charterer is bound by the implied duty in appropriate circumstances even in the absence of an express clause in the charterparty.

Nevertheless, the position is complicated by the fact that there appears to be no English Court decision stating definitively that all charterers are subject to the implied duty. In the two cases where the implied duty was purported to apply to a charterer, the charterer was also the actual shipper of the cargo (Mitchell Cotts v Steel; The "Atlantic Duchess\(^4\)). The most recent case dealing with dangerous cargo (The "Giannis NK" - see footnote 3) in the House of Lords did not involve a claim against charterers.

Given the assumption by commentators that the duty applies to charterers, it is important to analyse whether there are any grounds for this belief. The most compelling argument against it is that (unlike shippers) the intermediate f.o.b buyer chartering the ship is unlikely to know the precise characteristics of the cargo and may not have an opportunity to inspect it prior to shipment. In contrast, the seller does have an opportunity. Since he is the party that usually enters into a contract of carriage with the carrier by procuring a bill of lading, it (so the argument runs) is logical for the implied duty to bind him. Applying the same logic, the charterer who also ships the cargo (as a c.i.f seller) should also be bound; but if he does not, he should not be subject to the duty.

This argument is not bullet-proof. It rests on a fallacy; that the party identified as the shipper on the bill of lading is the party that actually ships the cargo. This is far from always the case. The "shipper" may be an intermediary purchasing the cargo from the producer who actually ships the cargo but is not identified as such on the bill for commercial reasons. Indeed, this is generally the case where "switch" bills are issued. In such circumstances, the "shipper" is no more knowledgeable than the charterer. Nevertheless, English law still makes him liable under the implied duty.

Moreover, English law implies the duty as a means of risk allocation between shipper and carrier. Neither party may in fact be aware of any general or special characteristics rendering the cargo dangerous. The fact that the shipper had no opportunity to inspect the cargo is irrelevant. His duty under English law is strict and absolute. The same logic applies to the relationship between charterer and owner, with the former probably bearing the risk.

It is difficult to ascertain whether a distinction should be drawn in principle between time and voyage charters in this respect. Broadly, a time charter will have express liberty to ship from a range of cargoes. In contrast, voyage charters often specify the cargo. However, this distinction does not always apply. The point is better approached from a different angle. Assuming that the implied duty universally applies to all charterers, the more information contained in the charterparty or instructions given to the owner, the greater the notice he may be deemed to have regarding the cargo.