The Grip Of The Midland Silicones Case

In 1970, Oliver Wendall Holmes wrote that “Law is not a science, but is essentially empirical.” It might be that in a perfect world all cargo claims would be contractual and brought on the bill of lading, and subject to the terms of the bill. But sometimes the contractual route does not work.

There are cases in which the contractual route is either not available because there is no relevant contract or is useless because the contracting carrier is insolvent. In those cases the tort route against someone other than the contracting carrier, offers the would-be claimant his only hope.

Two particular problems which are liable to stand in the way on the tort claim are title to sue and the impact of a Himalaya clause or covenant not to sue in the bill of lading.

Title To Sue In Tort

For a claim for cargo damage under English law, the claim will be formulated in negligence. In English law there is a distinction between claims in negligence for "pure economic loss" and those which are for property damage. If a motor car is damaged by a collision caused by negligence of the other driver, the owner of the damaged car can sue and so can the person in possession of it or a person who had an immediate right to possession. Say, however, the damaged car was the subject of a contract of sale with the purchaser having to pay for it regardless of any damage, and only becoming entitled to possession and ownership after payment of the price. The purchaser has suffered a loss but it is pure economic loss. He had risk in the car, has been disadvantaged by the damage to it, but it was not his property when the collision occurred.

In those circumstances Donoghue v Stevenson does not assist the purchaser. In Donoghue v Stevenson it was established that the manufacturer owed a duty to the ultimate consumer of his goods. Stevenson's duty was to take care not to cause physical injury to the lady who saw the snail in the bottle of Stevenson's ginger beer. The position of the purchaser of the car damaged in the collision is like that of a consumer who has bought a defective product. He has a product which is not worth what he paid for it because of the defect. The consumer's remedy is against the retailer alone, he cannot sue the manufacturer in tort for causing him what is pure economic loss.

With goods on a ship which are damaged by negligence of the carrier prior to transfer of title or possession to the purchaser, the cause of action to sue for negligent damage inflicted on the cargo vests in the seller. He can sue for the full diminution in value caused by the negligence, irrespective of his subsequent receipt of payment from his purchaser. That receipt is res inter aula acta or, in plain English, irrelevant in law. The cause of action in tort carries with it the right to full damages - there is no nominal damages for this cause of action - The Santix Acre.

In The Starnan, there was negligent stowage, the damage to the cargo started before transfer of title or the right to possession, and then it continued after transfer. Could the purchaser recover for the diminution in value flowing from the physical damage which occurred after title had been transferred, which was during the ocean transit? The point has been argued in the House of Lords and judgment is awaited.

The Court of Appeal, reversing Colman J held not, and it seems likely that they will be upheld. There is a statement by Lord Halsbury that if a man is bitten by a dog and then bitten again there are 2 causes of action. If the first bite were to go gangrenous the gangrene would be part of the first cause of action. The reason is that there is a single cause of action for the injury caused by the bite, and the gangrene is part of that injury. Similarly there is a single cause of action for the damage done to the cargo caused by the bad stowage. It vested in the seller because he had title when the damage first started. The cause of action carries with it the right to full damages for the diminution in value caused by the bad stowage.

There are three qualifications to be made to this analysis:

- First, if the carrier was negligent in not stopping during the ocean transit and remedying the problem, then there is a separate cause of action for that negligence and the buyer can sue based on that if he was the owner of it when physical damage first was caused to it by negligently not taking remedial action during the voyage.

- Secondly where goods are acquired by a buyer which are the subject of damage which no-one who had any interest in the goods knew about at the time of acquisition of title by the buyer, there may be a statutory right of action under the Latent Damage Act 1986. This carries with it the right to sue for the entire damage.

- The third qualification is that there can be circumstances in which pure economic loss is recoverable in English Law. The purchaser's loss is pure economic loss resulting from his taking up the documents and paying the price. But if it has been based on a bill of lading which ought to have been declined then he may be able to sue the issuer under the provision laid down in Mather Brown & Halley. The issuer has negligently misled him and it may be that economic loss is recoverable. So if a Master has signed the shipowner may be vicariously liable for the Master's negligence.

Himalaya Clause/ Covenant Not To Sue

A further problem which is likely to arise in a tort claim brought against the performing carrier is the effect of a Himalaya clause or covenant not to sue in the bill of lading. The story starts with Mrs Adler. She took a first class cabin on the cruise liner "Himalaya" and had an accident when the ship called at Trieste. Her ticket exempted P&O - so she sued the captain and the boatswain personally. They were not able to rely on the exemption clause in the ticket because they were not parties to the contract of carriage. Adler v Dickson paved the way to Scruttons v Midland Silicones, in which the House of Lords held that stevedores could not rely on the package limitation in the Hague Rules because of the English common law doctrine of privity of contract - the stevedores were not a party to the contract of carriage and could not benefit from it. There was no Himalaya clause or covenant not to sue in the bill of lading.

Another lady, Mrs Gore, sued a conductor for her injuries suffered on boarding a bus when he rang her bell - Gore v Van Der Lann. In that case although she won, the Court of Appeal considered when effect could be given to a covenant given by the customer to the carrier that the customer would not sue third parties - like the conductor or the driver of the bus, or in shipping cases, stevedores, terminal operators, or performing carriers.

The litigation brought by Mrs Adler produced the "Himalaya" clause. That brought by Mrs Gore has brought about the proliferation in bills of lading of covenants not to sue third parties combined with circular indemnity clauses. These are different mechanisms designed to protect persons who are not the contracting carrier against suits for negligence. If those parties could be sued successfully for negligence without any protection from the bill of lading, this would enable the cargo interest to sue regardless of the carrier's protection under the Hague or Hague-Visby Rules. The allocation of risk laid down by those rules would be circumvented and third parties would have to take out liability cover the cost of which would
The ideal system is one in which claims are channelled through to a single party whose responsibility is governed by the terms of the contract of carriage, which can also provide before which court or tribunal claims must be brought. This is efficient and keeps claims costs to a minimum, which is good for both shipping lines and their clients. In contrast, the possibility of a cargo claimant suing third parties means that the same claim can be brought against different people, perhaps in different jurisdictions - more lawyers are involved, and litigation costs are increased. The allocation of risk made as between cargo interests and carrier under the bill may be by-passed. Increase in the cost of dealing with claims increases the costs of carriage - costs which have to be borne ultimately by the consumer. What is needed by the shipping market is an efficient and fair system, which respects the contractual allocation of risk and prohibits suits against different defendants for the same damage.

A Himalaya clause gives the third party the benefit of exemptions, limitations of liability and time bars. It operates whilst the third party is performing under the contract of carriage. It is like an umbrella. When the contract of carriage is being performed by the third party, and so the contracting carrier may be liable, the umbrella is up. When the third party is not performing under the contract of carriage, the umbrella is down.

A Himalaya clause can exempt a third party from liability provided that the requirements laid down in the dictum of Lord Reid in Scrutons Limited v Midland Silicones, and adopted by the Privy Council in The Fyruneden, can be satisfied. These requirements enable the third party to invoke the clause on the basis that he is a party to a contract containing the exemption made for him through the agency of the contracting carrier. The requirements are that:

- the clause shows that third party is intended to be protected;
- words of agency in the clause;
- authority from the third party to contract on his behalf or subsequent ratification by the third party;
- provision of consideration.

The Fyruneden recognised how desirable it was that third parties could be protected by appropriate terms in a bill of lading, and, through its somewhat technical requirements, provided a basis for upholding such terms notwithstanding the common law rules on privy of contract and the need for consideration. Following the coming into force of sections 1 and 6(5) of the Contracts (Rights of Third Parties) Act 1999 the benefit of a Himalaya clause can be conferred on a third party including the performing carrier notwithstanding the common law rules on privy of contract. The statute provides an additional route by which a Himalaya clause can be effective.

The covenant not to sue is given to the contracting carrier and forfeits suit against third parties. It may also be worded so as to extend its protection directly to the third party. If it does, the third party may be able to take the benefit of the covenant and rely upon it either through a Fyruneden type analysis or through the statute. If it does not then it will only be effective if the contracting carrier seeks to enforce it and has a financial interest in doing so (e.g. because otherwise he would be exposed to an indemnity claim by the third party).

Nowadays these clauses usually provide for the protection of everyone other than the contracting carrier. The extent of the protection depends on the width of the clauses. Sometimes there is a Himalaya clause which mirrors the protection available to the contracting carrier as well as a covenant not to sue in wide terms. The overall effect of many standard clauses when read together is to channel all cargo claims into the contracting carrier, and the contracting carrier alone, and to prevent suit being brought against the performing carrier or any other third party, or alternatively to exclude their liability.

In Paterson Zochonis & Co v Elder Dempster & Co, Scrutton LJ thought that the third party was protected by the protecting clauses in the contract of carriage because the third party was acting as the agent for the contracting carrier in performing the contract of carriage and should have the same protection. His opinion upholding vicarious immunity was cast aside as heresy. Lord Sumner in the same case found in favour of the performing carrier on the basis that the goods had been implicitly bailed to that carrier on the terms of the relevant bill of lading. In the subsequent case law the pendulum has swung from side to side about whether on particular facts a binding contract might be found so as to give the third party the benefit of the protection in the bill of lading. But it is through Himalaya clauses, covenants not to sue and more recently the 1999 Act that English commercial law has finally shaken itself free from the grip of Scrutons Limited v Midland Silicones. It is the function of commercial law to serve the commercial community. In this area, the logic of legal doctrines has not been allowed to triumph over the logic of realities.

With thanks to Steven Gee Q.C. of Stone Chambers, Gray’s Inn for preparing this article.

1. [1932] AC 562
3. [2001] 1 Lloyd’s Rep. 437
4. [1954] AC 465
5. [1955] 1 QB 158
6. [1962] AC 446
7. [1967] 1 QB 31
8. [1962] AC 446 at p.474
9. [1975] AC 154 at p.166
10. [1923] 1 KB 420 at p.441

The contractual aspects of the "Starship" decision - identity of carrier in bills of lading - have been addressed in Steamship Sea Venture articles. Click here to view.

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