SOME ASPECTS OF CARRIERS' LIABILITY

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The scientific and technological changes which have taken place and are still current in the field of transport have brought with them the prospects of great benefit to shipper and carrier both domestically and internationally. In the speedy, efficient and safe carriage of goods in particular it is thought by some that a welcome revolution is in progress.

Changing methods have themselves generated a number of problems, but equally as important they have brought to the fore-front long standing difficulties and uncertainties in domestic and international carriage which are much in need of attention. The solution of these can, we suggest, no longer be regarded as a matter of purely academic interest but is an urgent - indeed a pressingly urgent - need.

The use of containers, to take only one example, is becoming wide-spread and it would seem fundamental to any system based upon their employment that everything connected with it must be streamlined. Speed, simplicity, economy and certainty are obvious aims. In suggesting any legal reforms to coincide with these aims, the principal object must surely be to attain the elements of simplicity and certainty which will do most to avoid the frustration of ventures by the costs, delays and hazards of litigation.

We propose to examine a number, by no means all, of the problems which arise in relation to both goods and passengers and, on occasions, to suggest solutions or make recommendations which occur to us. In considering these it must always be remembered that we are dealing with practical problems and such changes in the law as may be required must be designed to be workable rather than ideally just. Losses will continue to occur and neither conventions nor legislation will prevent them. It is in the placing, establishment, limitation and adjustment of liability for these losses that doubts, inconsistencies and injustices exist at the present time and in respect of which simplicity and certainty are most desirable objects. Doubt as to the existence, nature or extent of liability is inherently undesirable but it is probably far more costly in time, litigation and insurance than is generally realised.

Carriers, who for present purposes we regard as persons who carry goods or passengers by land, sea or air, are generally divided into two classes - common carriers and private carriers, having significantly different obligations and liabilities. A common carrier is one who exercises the public employment of carrying and holds himself out as being ready to carry for any persons and not for particular persons only. It is often, however, extremely difficult in practice to determine whether in respect of any particular transaction a person is acting as a common carrier or not and, the question being essentially one of fact, is fruitful of litigation.

Whether ship owners as distinct from land carriers are strictly common carriers is even now doubtful. The better view is probably that the ship owner is not, but that so long as he carries for hire or reward as a public carrier he assumes the same kind of liability as a common carrier. At common law the distinction between common or public carriers of goods and private carriers was important. The liability of a private carrier if not defined specifically by contract was determined in accordance with the law of bailment. The common carrier on the other hand was regarded as being an insurer of the goods entrusted to his care. It is not clear precisely how this liability attached but the better view seems to be that it was the common or public nature of the occupation that imposed it. There may be something in the suggestion that the absolute liability of the common carrier was imposed because of an alleged propensity on the part of carriers to arrange with highwaymen to be robbed and then share with them in the spoils. Lord Holt, C.J., in Coggs v. Bernard (1703) 2 Lord Raym. 909, 918 said:

> The law charges this person thus entrusted to carry goods, against all events but acts of God, and of the enemies of the King.... and this is a politic establishment, contrived by the policy of the law, for the safety of all persons,...that they may be safe in the way of dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc, and yet doing it in such a clandestine manner, as would not be possible to be discovered.

By the end of the 18th Century it was clearly established that the liability of the common carrier was that of an insurer and this has remained the position at common law down to the present time subject only to exceptions when the loss arises from act of God or the Queen's enemies, fault of the consignor or inherent vice in the goods themselves. It is to be noted that this liability was not limited in amount.

Not surprisingly, the reaction of the carrier was to avoid or limit this liability by specific contract or, more usually, by notice displayed at his premises. An endeavour to counter this trend was made in respect of the land carriage of goods by the Imperial Carriers' Act of 1830. This Act, while preserving the right to make "special contracts", forbade a carrier by public notice or declaration to limit or affect his liability. It also provided that his liability should be limited in respect of certain classes of goods (exceeding £10 in value) unless at the time of their delivery to him there was a declaration of the nature and value of the article concerned. Although an unsatisfactory piece of legislation, this Act established the pattern followed by subsequent statutes and conventions of retaining the principal of absolute liability and restricting the right to contract out. In 1866 the New Zealand Carriers' Act was passed and the general effect of this was to limit the carrier's liability but at the same time to preclude his right to contract out except in the case of a special contract adjudged by the Court trying the dispute to be just and reasonable. It is to be noted also that the common law liability of a carrier for his own negligence remained alongside his liability as an insurer.

Ship owners similarly tended to limit their liability, but in this case by convention to which legislative effect was given in greater or less degree by various governments.

The main items of New Zealand legislation which affect the liability of the carrier in the various fields with which we are concerned are at the present time:

1. Carriage by Land

A. The Carriers' Act, 1948, which applies to common carriers generally, but is subject to other acts affecting them:

(a) Renders void any attempt to contract out of or limit the carrier's liability to passengers; and

(b) Limits the liability of a carrier of goods to $40 per package or unit except where a declaration of nature and value of the goods is made and a receipt in those terms given by the carrier. Varying amounts are provided for livestock. A special contract may be made limiting or excluding the carrier's liability but is binding only if the Court considers it just and reasonable.

B. The Government Railways Act, 1949:

(a) Imposes limits of liability in respect of goods similar to those in the Carriers' Act (with provision for increased liability upon declaration of nature and value and payment of insurance charges) and also confers on the Department the rights, liabilities and protections of a common carrier; but

(b) The Scale of Charges prescribed under the Act in fact contains provisions which purport to circumscribe the Department's apparent liability quite extensively.

2. Carriage by sea (Domestic)

A. The Sea Carriage of Goods Act, 1940, Part 1, in relation to the carriage of goods:

(a) Imposes a limitation on contracting out of liability in various cases unless the Court adjudges the contract to be just and reasonable;

(b) Exempts the ship owner from liability, provided he has exercised due diligence to make the ship seaworthy and properly equipped, for loss arising out of a number of events including dangers of the sea, acts of God and faulty navigation; and

(c) Limits the liability of the ship owner to $20 per cubic foot but in any case not exceeding $100 per package or unit unless a greater limit is agreed between the shipper and the carrier or there is a declaration of value on the face of the shipping documents.

B. The Shipping & Seaman Act, 1952, s. 460, limits the total liability of the ship owner in respect of occurences taking place without his actual fault or privity to a factor related to the tonnage of the ship. In the case of passengers between ports in New Zealand the total liability is limited (along with property damage) to $60 multiplied by the ship's tonnage. In the case of property damage including damage to cargo apart from loss of life it is limited to $14 multiplied by the ship's tonnage.

3. Carriage by sea (International)

The Sea Carriage of Goods Act, 1940, Part II, in relation to the overseas carriage of goods incorporates substantially the provisions of the Hague rules which provide for a limited liability of £100 per package or unit (£200 if the Gold Clause Agreement applies) unless the nature and value of the goods have been declared and inserted in the bill of lading.

4. Carriage by air (Domestic)

The Carriage by Air Act, 1957, Part II, provides for limits:

(a) In relation to liability to passengers of $42,000 per passenger with negligence presumed against the carrier; and

(b) In relation to goods including passengers' baggage $240 per consignor or passenger. It also provides in s.21 that save in certain circumstances all successive carriers are jointly and severally liable for damage or loss.

5. Carriage by air (International)

The Carriage by Air Act, 1957, Part I, gives legislative effect to the Warsaw convention and Hague protocol and the Guadalajara convention. There is a presumption of liability in favour of the passenger and a limit per passenger of 250,000 francs (approximately $12,000).

Notwithstanding the various statutory provisions, perhaps in part because of them, the field of carriers' liability is characterised by elements of inconsistency, uncertainty and archaism. As can readily be seen, there are substantially differing limits as between land, sea and air carriage and as between domestic and international carriage in relation to the carrier's liability for goods in his charge. It is our view that insofar as this can be achieved, the limits, if limits are to remain, should be uniform. Apart from other advantages, this would at least enable the owner or consignor to know what measure of risk he himself must actually bear and insure against.

Perhaps a preliminary question should be asked - namely whether there should remain in any field liability on the carrier of an absolute nature (even if limited in amount). The public nature of

the carriers' employment which in the 18th Century compelled the assumption of absolute liability would, in the present age, not even justify it. Indeed, the converse would almost seem to be the case. Also, the markedly changed pattern of economic and social conduct no longer contains the reasons which prompted those like Holt, C.J., to fear conspiracy with highwaymen and others as a probable if not inevitable consequence of any relaxation from a standard of absolute liability. It is probably true to say, therefore, that in modern times the reasons behind the imposition on the public carrier of an absolute liability for the safety of goods in his care no longer exist. There is good argument to be put forward in favour of a return to the existence of liability upon the same basis as any other bailee for reward. This in itself would substantially remove the need for artificial distinctions between private and common carriers which now pertain and, with the onus of proof imposed upon the carrier, would bring the rule into line with what appears to be the likely outcome of discussion in the field of international carriage of goods by container.

On the other hand, problems of insurance would still exist, statutory restrictions on contracting out (and with them as a quid pro quo limits as to liability) would not be avoided and the need to establish fault would still be inclined to produce litigation. Even if the onus of proof were reversed the consignor, having as a rule no knowledge of the facts, is in a poor position to rebut whatever evidence may be adduced by the carrier to explain the loss or negative fault on his part. Further more, the modern trend in many fields seems to be to avoid litigation based upon the establishment of fault as a prerequisite to a right to compensation. There is now a multiplicity of statutory provisions and regulations governing our commercial and personal activities which provides evidence of this and it must be considered that advantages in certainty and avoidance of litigation are significant.

From a practical point of view, therefore, there are the two alternatives:

(a) Liability as a bailee for reward with the onus of proof on the carrier to establish that the loss was not occasioned by any want of care on his part (this is the approach which commended itself to those responsible for the Queensland Carriage of Goods by Land (Carriers' Liabilities) Act, 1967);

(b) A system of absolute liability.

On the whole, we think that a system of absolute liability is to be preferred with:

(a) A realistic limit on the quantum of liability. We consider the present limits absurdly low, and it may well be the case that limits of $500 or even $1000 would be more appropriate.

(b) A restriction on the right to contract out limited to cases where by reason of the nature of the goods or of the journey such a contract is adjudged to be fair and reasonable. Amid a plea for certainty, it comes hard to have to express such a view, but one could not prohibit contracting out entirely. There are occasions when a carrier should be able, with justification, to say "I don't like the job but will do it at your risk", but it is impossible to define them in advance. What we propose is far from ideal but a satisfactory alternative is hard to find.

Moreover, we consider that the absolute liability we propose should be the only liability upon the carrier as such - that is there will be no co-extensive liability based upon fault.

Assuming for the sake of further discussion that some system of absolute liability is likely to pertain, we turn to consider some facets of the carrier's liability which we think require attention.

(a) The distinction between private and common carriers.

The law relating to land carriers has lagged behind modern developments in the field of transportation of goods, and one of the

anachronisms is the common law distinction between common and private carriers. As we have seen, although the distinction was important two centuries ago - the common carrier being the insurer and the private carrier not - there seems little justification for its retention today. The distinction itself is vague, the difference confusing and productive of litigation. A public carrier may, on a particular occasion have the liabilities of a private carrier, and from a practical point of view it is often quite impossible to determine beforehand, at which time the necessary insurance must be arranged what his status is. Halsbury says, for example, "Furniture removers are not as a general rule common carriers ..." The only recent case in New Zealand on the point came to an opposite conclusion; Geering v. Stewart Transport Ltd., [1967] N.Z.L.R. 802. The position in New Zealand is, of course, not necessarily the same as in other countries. Here we have a system of transport licensing which creates a substantial monopoly in favour of the Government railways and imposes a system of licensing on all land and some sea carriers who conduct their business for reward whether or not they would be otherwise regarded as public or private carriers. It is provided by regulation (Regulation 23 of the Transport Licencing Regulations 1963) that it is a condition of every goods service licence that unless otherwise provided by the express terms of the licence (in practice unusual) the licensee shall upon request accept the transport as authorised by the licence of goods of all persons conveniently served by him without discrimination among the hirers or in the charges levied. This in itself goes a long way towards confirming the majority of land carriers in New Zealand as common carriers although, as the Court of Appeal considered in Geering's case, it is not necessarily conclusive. We think that the time has long since come for the distinction between common and private carriers to be abolished not only because most carriers are in any event common carriers but also because litigation and legalistic hair-splitting as was evidenced in the Geering case is still possible if the distinction is allowed to remain.

(b) The varying limits of liability.

A parcel consigned from Auckland could conceivably travel from factory to railway station by road carrier, thence to Wellington by rail, to Lyttelton by ship and from Christchurch to Dunedin by air. Apart from any special agreement, the various limitations of liability during the course of that journey would be:

(1) £20 for the road carrier;
(2) £20 but subject to the regulations peculiar to the Railway's Department for the rail journey;
(3) £50 for the journey by sea across Cook Strait; and
(4) £120 for the journey by air.

What logical reasons exist for the preservation of these differences in amount are not readily apparent to us.

The limit of liability is almost universally expressed to be in relation to a "package or unit", and quite apart from the variations that exist in the amount of liability as between the different carriers the sums themselves may well be considered somewhat inadequate. In New Zealand a valuable bull-dozer was damaged by the negligence of the carrier, but it was held that the machine was a unit within the meaning of the relevant legislation (The Carriers' Act, 1948) and the owner could recover only £20. In the United States of America a locomotive was lost and similarly this was held to be a unit within the provisions of the United States Carriage of Goods by Sea Act, 1936. Assuming that the owner himself insured the goods one can imagine some difficulties on the part of the insurer in calculating a premium in view of his differing chances of recovery under his rights of subrogation; the suspicion must exist that the tendency will be to take the worst side of the picture and charge a premium accordingly.

It is true that in some cases declarations of the nature and value of the goods may be made and the liability of the carrier

thereby increased, but who in practice would think in delivering a piano to a carrier to declare the nature and value of the goods and obtain a receipt in those terms. Most would be pardoned for thinking that the nature of the goods would be perfectly obvious to the carrier as indeed would a fairly close idea of the value. It seems to be the position, however, that unless he declares the obvious the owner may recover in case of loss or damage only the sum of £20.

(c) The Position of the Railways Department

Assisted in some measure by the monopoly it enjoys, the Railways Department is involved for at least part of the journey in the carriage of a high proportion of the goods conveyed by land (and to a less degree by sea) within New Zealand. We think it important that although carried on by a Government Department, the Railways should be in no different position so far as conditions and liabilities of carriage are concerned than any other carrier. The scale of charges published as a supplement to the New Zealand Gazette is, perhaps, a surprising place to find a large number of exclusions and limitations of the Department's liability. It may be the case that a few of these should be applied to all carriers, but we do not consider that any should be peculiar to the Department.

(d) The position of forwarding agents.

There are a number of forwarding agents in New Zealand operating door-to-door delivery services, usually under bulk tonnage contracts with the New Zealand Railways Department or other carriers. They may or may not in fact be carriers themselves but the public has come to regard them as such and there would seem to be good reason why they should be so treated. It is doubtful whether the 1962 Amendment of The Carriers' Act, 1948, envisaged them and the position should perhaps be clarified.

(e) Some problems associated with container carriage.

We have seen that in most cases the liability of a carrier for loss of or damage to goods is expressed as so much per "package or unit" and have also observed that the interpretation of these terms has given rise to some surprising results. The increasing practice of packing goods often of quite different natures in containers or on pallets immediately prompts the question as to whether the pallet or containers becomes itself a package or unit. It is already common practice for a consignor to deliver often to a forwarding agent a package and for this along with a number of others to be placed in a container or on a pallet; or it may be the case that the consignor himself does this. If the pallet or container is delivered to say a ship owner is he, in the event of damage to or loss of the goods entitled to claim that the container or pallet itself comprised a single freight unit and so limit his liability perhaps to £50 or £100 only? At the present time there is no authoritative ruling on a matter of fundamental importance and it may well be the case that the answer is dependent upon the precise wording of the shipping document.

The point was recently considered by a United States Court of Appeal in a question arising under the United States Sea Carriage of Goods Act, 1936, in which the limitation figure is "$500 per package ...or in the case of goods not shipped in packages per customary freight unit." In the case in question the consignor claimed in respect of the non-delivery of seven out of nine pallets each containing six cartons of television tuners. The cartons were held in place on the pallet by straps and their number and nature were readily visible. The consignor's principal contention was that the pallet was merely a mechanical device used in conjunction with a fork-lift or other machinery in order to facilitate loading and that through the use of it certain benefits indeed accrued to the carrier, particularly as a result of a decrease in the individual handling required for items of lesser size. He also suggested that since such a radical change in the optimum size of a shipping unit could not reasonably have been foreseen when the original limitation provision was drafted, this added further support to his contention that the pallet was simply a mechanical device. These arguments,

however, did not find favour with the majority of the Court of Appeals which held that the pallet itself was to be regarded as the package or unit. In the majority judgment some importance was placed upon the fact that it was the shipper and not the carrier who had made up the pallets. We do not pretend that the reasoning in the decision strikes us as entirely satisfactory and it is likely that this is not the last word on the subject. Nonetheless, the practical result was that the shipper, by combining his cartons on a pallet and thus making in effect the carrier's job easier, was able to recover only a fraction of what he might have recovered had he delivered the cartons individually.

If this basis of limitation is to apply it would appear inevitable that the ship owner will reap substantial benefit and the owner will have to look in other directions to obtain proper recompense for damage to or loss of goods. This does not in one sense appear entirely just.

Unsatisfactory as the terms package or unit are, it is difficult to find a more efficient basis upon which to determine liability; and the problem is to relate this fairly to the carriage by containers. One partial solution is to issue to the original consignor a through bill of lading but this itself has problems and is not always done. It might well be that a provision should be enacted to provide that where a container or pallet is shipped and the shipper states to the carrier the number of packages or units held in or on it then the carrier should be liable in respect of each such package or unit.

The extent of the various liabilities has, of course, a direct repercussion on the insurance aspects from both carriers' and shippers' points of view. If, as we suggest, the liability of the various forms of carriage should be uniform throughout a journey and that liability is unaffected by the placing of the goods in a container or pallet then some measure of certainty in this field is achieved.

A further problem which must be faced is the fixing of liability in respect of the successive carriers. Particularly if he delivers an article to the forwarding agent, the owner is generally not unduly concerned with how, as distinct from how quickly, it reaches its destination and whether in a container or otherwise. If the goods suffer loss or damage it is our view that so far as the owner is concerned he should not have to undertake the burden of establishing in whose hands the loss occurred and we see considerable merit in following the precedent set in s.21 of the Carriage by Air Act, 1957, in certain circumstances and making the successive carriers jointly and severally liable.

In the field of domestic carriage, legislative action can, of course, bring the liabilities of the various carriers into line. For international transport, however, the difficulties are greater. The through nature of container transport may involve the laws of several countries governing the different modes of transport by land, sea or air. It also makes the investigation of the cause of any loss or damage difficult and expensive and thus diminishes the prospects of recovery. It seems to be generally recognised that an international convention on container traffic is of urgent need and that it must have as its principal object the attainment of simplicity, certainty and the avoidance of litigation. In 1964 a common liability convention for through transport was drafted by the International Institute for Unification of Private Law and the draft provides that the convention would apply to international transport where at least two modes of transport were used and the contract was made with what is termed the principal carrier. It is his function to perform the various sections of transport either directly or by means of subcontract, responsibility for all sections of the carriage is directed at him and he is the person to whom all claims are to be made regardless of where the damage occurred. It seems to be the intention that if the place or cause of damage is unknown, then the principal carrier will be liable up to certain prescribed limits unless he can prove not only the cause of the damage but also the absence of fault

or want of care on his own part. If the place where the damage occurred is known then the principal carrier will be liable in accordance with the rules that otherwise govern that particular section of carriage e.g. the Hagus Rules for sea transit. The convention does not contain any rules for the division of liability between principal carrier and sub-contractors.

The draft prepared by the Institute has been considered by the International Container Bureau in Paris as a suitable basis for a container convention and the Comité Maritime Internationale has undertaken the task of preparing a draft international convention governing the through carriage of goods in containers as such.

A further draft convention known as the Oxford Draft seems to be more stringent and appears to restrict the operators immunities to:

1. The wrongful act or neglect of a Claimant;
2. Loss from inherent vice or similar nature; and
3. Act of war but no other force majeure or act of God.

While a convention must define as clearly as possible the rights and immunities of those concerned with container carriage, it is readily apparent that the manner in which this is done will have considerable influence on the type of insurance protection required on the one hand by the owner and on the other by the shipper. If a convention such as the Oxford Draft were adopted, it would be clear that the shipper or consignee would have virtually immediate recourse against the operator for any loss or damage to goods whether they were insured or not. In consequence, the operators' liability would have to be rated for insurance purposes accordingly and freight rates would be directly affected.

Many additional problems of course arise, some of which can perhaps be solved by amending existing international conventions such as the Hague Rules, others perhaps only effectively by a new convention. Whether, for example, a carrier should be able to obtain exemption from liability when a container is carried on deck (for which many are suitable) as he may at present under the Hague Rules; what the effect of a carrier's receipt "in good order and condition" shall be when all he sees is an apparently undamaged container; what efficacy will be given by a Bank to a through bill of lading issued by some unknown inland forwarding agent (as distinct from the shipping company itself); and many others.

(f) Claims by New Zealand Importers against foreign ships:

At present if a New Zealand importer wishes to claim against a foreign ship for damage to goods received he must either:

(1) Give notice of claim to the ship's agents within 14 days under s.11 of the Sea Carriage of Goods Act 1940; or

(2) Issue proceedings in Admiralty against the ship itself. This is, of course, only possible when the ship is in territorial waters; or

(3) Issue proceedings in the Supreme Court and obtain leave to serve these out of New Zealand. This latter course is frequently rendered nugatory because of a condition in the bill of lading requiring claims against the carrier to be determined by a Court in the carrier's country of origin.

We understand that a problem has arisen not in respect of Commonwealth vessels but with some European and Japanese shipping lines. The consequent cost of proceedings in a non-Commonwealth jurisdiction can be prohibitive. We understand that this problem has received very full consideration from the Contracts and Commercial Law Committee of the Law Revision Commission and we merely endorse its recommendations that the Act be amended to:

(i) Prescribe a period of one year from the giving of notice of claim to and instituting proceedings against the ship's agents in New Zealand

(ii) Add a provision analogous to s. 9 of the Australian Sea Carriage of Goods Act which in effect makes illegal, stipulations in bills of lading giving exclusive jurisdiction to foreign Courts to decide on claims for loss of or damage to cargo.

(g. Overall Exemption of Sea Carriers:

As mentioned earlier the sea carrier in respect of cargo claims has an overall limitation under s.460 of the Shipping and Seamen Act of $16 per registered ton. If the uniform code of carriers' liability is established we see no justification for retaining this anomaly. This provision may have been justified in the past but we can see no justification for retention in present day conditions.

Our principal suggestions in relation to carriage of goods are:

1. The distinction between common and private carriers should be removed.
2. The only liability of any land, sea or air carrier for loss of or damage to goods should be absolute but limited in amount. Liability on the basis of fault should be abolished.
3. The limits of liability for all carriers of goods (including the Railways Department) should be brought into uniformity and be substantially increased. The distinctions in respect of livestock should be abolished.
4. The liability of a forwarding agent should be the same as a carrier.
5. Section 11 of the Sea Carriage of Goods Act 1940 should be amended :
   (a) To increase the time for notice of claim to be given to the ship's agent to 12 months; and
   (b) To insert an analogous provision to s.9 of the Australian Act.
6. Consequent upon an increase in limits of liability the overall limitation in s.460 of the Shipping and Seamen Act 1952 relating to cargo should be removed.
7. Where goods are carried in containers or on pallets and provided the number of packages or units so packed is stated to him, the carrier should be liable up to the limit fixed for each such package or unit.
8. Successive carriers of goods (inlcuding the forwarding agent) should be jointly and severally liable in a manner analogous to s.21 of the Carriage by Air Act 1967.
9. The carrier should enjoy exemption from liability for loss or damage to goods resulting from inherent vice or defective packaging.
10. The carrier should be indemnified against false particulars i.e. the consignor should be made liable to pay the carrier all additional expenses incurred by the carrier by reason of false or incorrect particulars furnished by the consignor as in s.8 of the Queensland Act.
11. The limitation should be clearly expressed to protect servants and sub-contractors of the carrier as well as the carrier himself, as in s.10 of the Queensland Act.
12. There should be a time limit for bringing claims against the carriers which should be fixed at 12 months from the date of delivery of the goods or the date when the goods should have been delivered; Article III 6 of the Hague Rules provides an analogy.
13. There should be provisions entitling carriers to enforce possessory liens and dispose of perishable goods. We have in mind for the former something analogous to s.46 of the Wages Protection and Contractors' Liens Act 1939 or ss.17 - 18 of the Government Railways Act 1949 and for the latter s.42 of the Carriage by Air Act 1967.
14. That the right to contract out of the liabilities proposed be limited to cases where by reason of the nature of the goods or of the journey undertaken the Court adjudges the contract to have been reasonable and just.

We now wish to discuss several matters in the law of carriage of passengers which we feel should be brought to the notice of this Symposium.

A. International Air Carriage:

From early times in aviation, International air carriage has been regulated by treaty. The original Warsaw Convention was opened for signature in 1929 - it was followed by the 1955 Hague Protocol and the 1961 Guadalajara Convention. These International documents have found legislative expression in our Carriage by Air Acts of 1940 and 1962 and Part I of the Carriage by Air Act 1967. Broadly speaking the Warsaw Convention provides for a presumption of liability against an airline in favour of a killed or injured passenger but with limitation of liability of about $12,000 per passenger (i.e. at pre-devaluation prices). The airline is given a number of defences proof of any of which rests on the airline.

There is provision in the Convention for the airline and the passenger to agree on a higher limit of liability. 54 airlines have agreed amongst themselves through the medium of the International Air Transport Association (IATA) that, by means of special contracts made with passengers at the time of ticket purchases, on flights to or from the United States or which have an agreed stopping place there, the limit of liability should be $US58,000 plus legal costs per passenger or $US75,000 inclusive of costs. This agreement was apparently entered into by the airlines because the United States Government, disturbed at the failure of an effort in early 1966 to raise the limit under the treaty, threatened to withdraw from the Warsaw Convention.

Air New Zealand is a party to the above IATA Agreement. The practical effect of this is that if one flies with Air New Zealand to Honolulu or Los Angeles but the aircraft has an accident en route then the most one (or one's dependants in case of one's death) can recover from the airline is $US58,000 inclusive of costs. One concedes that although many of the class who fly could after a motor accident substantiate a greater claim, in return for a presumption of liability, against the airline such an upper limit of quantum is quite reasonable.

How different is the picture if one takes the same plane to Australia, Fiji, Singapore, Hongkong or Noumea. If a disaster were to happen the airline's maximum liability would then be only about $12,000 per passenger. To consider how many younger men on good incomes, but with heavy commitments and young families, are flying the Tasman is to see the anomaly and injustice of such a provision.

Most suggestions for law reform in International air carriage are fairly unlikely to succeed because of the difficulty of altering terms of a treaty. However, in underlining the anomaly just referred to we make bold to suggest that our national airline should be requested by the Government to have the same limits for all its services as it has for its United States service. The machinery for sepcially contracting with the passenger is in the Warsaw Convention and we see no reason, in principle, why some similar arrangement could not be made, not only by Air New Zealand but also by all other International air carriers serving New Zealand.

The anomaly is heightened by the recent increase in the liability of internal air carriers. If you crash with a domestic carrier, be it N.A.C. from Wellington or an aero-club charter flight your dependants can recover up to $42,000, but if it is a Sydney flight then $6,000 is the limit. Surely both state-owned airlines should be in step. We recommend urgent action since as with other anomalies mentioned in this paper, it should not need a tragedy to bring about law reform.

B. Road Carriers - Compulsory Passenger cover:

It is outside the scope of this paper to enter into any discussion on Absolute Liability for personal injury suffered in road accidents or the recommendations in the Woodhouse Report. Our task is merely to spotlight areas of reform within the existing legal framework.

Our system of compulsory third-party insurance is admirable and

comprehensive. We wish, however, to point out a weakness.

The liability of public carriers of passengers (i.e. taxi and bus proprietors) is unlimited for death or personal injury caused to all or any of their passengers. However, the compulsory insurance provided under the Transport Act 1962 extends to only $15,000 per passenger. The bus or taxi operator is personally liable for any claim in excess of the above amount unless he has taken out additional insurance cover. In a bus disaster some passengers could receive serious injuries, compensation for which could easily exceed $15,000. If the bus were owned by a local body then it would be a hardship on the ratepayers to have to provide the additional compensation out of local body funds. If the bus were, however, owned by a man in a small way of business then such a disaster could easily bankrupt him and give deserving claimants only limited compensation. In fact the two fatal bus disasters in recent years have occurred with buses owned by small operators. Moreover, such operators cannot be expected to possess the same facilities for inspection and maintenance of vehicles - always a pregnant factor in any post-disaster inquiry - as a large municipally-owned organisation. The argument for increased cover for taxis differs only in degree.

We, therefore, suggest that the relevant portions of the Transport Act 1962 be amended to remove the limitation of $15,000 per passenger on the compulsory insurance cover of public carriers of passengers.

No doubt premiums will have to be increased but this factor is surely not an argument against achieving the result urged. In fact, now that compulsory insurance against passengers' claims up to $10,000 has been in force for private vehicles for almost 3 years, consideration should be given to doubling the amount of that cover.

C. Sea Carriage of Passengers:

Although most of this paper is concerned with reform of the law relating to the carriage of goods we consider our most important recommendation to relate to the sea carriage of passengers.

Section 460 of the Shipping & Seamen Act 1952 in effect provides that the liability of a shipowner for all personal injury claims arising out of any one mishap is limited as follows:

(a) Where the shipowner is a common carrier and the persons killed or injured are carried under a contract entered into in New Zealand for the carriage of those persons from one part of New Zealand to another, then the shipowner's liability is £30 ($60) for each ton of the ship's registered tonnage.

(b) The liability in other cases is £15 ($30) per registered ton. These 'other cases' could include picnic charters of ferries or claims by seamen injured at work.

The net tonnage is ascertained by a formula laid down in the Act. The limitation can be overcome only upon proof by a claimant that the mishap was caused through 'the actual fault or privity' of the owner. In practice this is very difficult to prove and does not cover the usual situation of negligent navigation by a servant of the shipowner.

This limitation applies alike to the Cook Strait ferries, the Harbour ferries and hydrofoil, passenger-carrying launches in any harbour, New Zealand registered coasters, colliers, fishing boats, tugs and barges. To take an extreme example - if a Cook Strait ferry laden with Picton-bound day-trippers were to strike a rock due to negligent navigation by the Master with grave loss of life and serious injury to survivors the overall liability of the Crown, as owner, for claims arising out of death or personal injury, would not exceed 30 times the net tonnage of the vessel. All claimants would share pro rata in the available fund and there would have to be litigation to ascertain the proportion of the fund payable to each separate claimant.

We are not particularly interested in the historical reasons behind this law or the cries of increased cost of insurance which will greet our recommendation. We see the provision as an anachronism in need of urgent reform. We see no reason why domestic carriers by sea should not be put in the same position as domestic carriers by land.

We do not want a sea disaster comparable to the Kaimai Air Disaster to activate the legislative conscience in this regard. Already the provision has worked or could easily have worked injustice in the following actual examples:

(i) A seaman was seriously injured whilst working on a barge on the Auckland waterfront. In his subsequent claim for damages heard last year (ref. Donoghue v. Parry Bros. Ltd., Supreme Court, Auckland Registry A47/66) the jury assessed his damages at £3,843. The jury found negligence on the part of his fellow workers but 'no actual fault or privity' on the part of the owner. Because of the limitation, however, the Judge had no option but to enter judgment for a mere £2,233, being the maximum amount under the limitation. This man was thus deprived of his full award because of an arbitrary formula the variable in which being the registered tonnage of the vessel on which he was working. Had he been working on a heavier vessel then he would have got more. Surely such capriciousness brings the law into disrepute.

(ii) A nasty accident occurred in February 1966 when a ferry laden with picnickers crashed into the wharf at Devonport. By a mercy only a very few people were injured, only two seriously. Because of the low registered tonnage of a vessel such as a ferry boat the total fund available to all claimants could not have exceeded about $12,000. If a smaller vessel such as a large launch had been involved the amount available would have been much less.

We sincerely hope that this Symposium will urge upon Government prompt legislative action to remedy what we consider an anomalous and unjust state of affairs quite at variance with the situation in all other forms of transport and out of sympathy with current legal thought.

To summarise our recommendations as to the liability of passenger carriers:

(a) The limit of liability of International air carriers to or from New Zealand should be increased to either that of domestic air carriers under the Carriage by Air Act 1967, Part II or that of air lines flying to and from the United States. Such limit can be increased not by alteration to the Warsaw Convention but by means of special contracts with passengers as is done in the case of the flights to the United States.

(b) The compulsory insurance cover under the Transport Act 1962 should be unlimited in respect of claims by passengers in public transport vehicles such as taxis and buses.

(c) Section 460 of the Shipping and Seamen Act 1952 and its ancilliary legislation should be repealed to put sea carriers in the same position as carriers by road in respect of claims by passengers.

CONCLUSIONS

We do not anticipate that all our recommendations will find universal favour. We put them forward as our own considered views in the hope that fruitful discussion and legislative action, long overdue in some instances, should follow. The writers were co-opted to a sub-committee of the Contracts and Commercial Law Committee of the Law Revision Commission which is currently studying the problems of law relating to carriers. Many of our suggestions emanate from the discussions of that sub-committee and we record our thanks to our fellow members.

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