C A R R I A G E O F

G O O D S

REPORT OF THE CONTRACTS AND COMMERCIAL LAW REFORM COMMITTEE OF NEW ZEALAND

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FIRST SCHEDULE

The Associate Chambers of Commerce (Inc.).

James Brown Ltd. of Wellington

Department of Civil Aviation

Department of Industries and Commerce

Department of Transport

National Forwarders Association

N.Z. Glass Paint and Wallpaper Merchants Federation

N.Z. Marine Underwriters Associations

N.Z. Manufacturers Federation (Inc.)

N.Z. National Airways

N.Z. Railways

N.Z. Road Carriers Association (Inc.)

P. & I. Services Ltd. on behalf of the companies it represents

REPORT OF THE CONTRACTS AND COMMERCIAL LAW REFORM COMMITTEE ON THE LAW GOVERNING THE CARRIAGE OF GOODS

To: The Honourable the Minister of Justice

Introductory

1. One of the first tasks allotted by the Law Revision Commission to this Committee on its establishment was to review and suggest reforms in the law governing the carriage of goods. It seemed to this Committee (which is a committee of lawyers) unwise to attempt this without first ascertaining the views of those most concerned and accordingly submissions were invited both directly from certain obviously interested parties and by public advertisement. Those from whom submissions were received (and to whom we are grateful) are listed in the First Schedule.

2. Before we were in a position to complete this report Cabinet referred to us for our consideration the Bill which became the Carriage by Air Act 1967. This statute deals with, among other things, the carriage of goods by air, and will now if this report is adopted need some amendment; but it seemed to us (as we made clear in our report on that Bill) better to leave the question of carriage of goods by air to be dealt with in this report as part of an overall survey of the law as to carriage of goods generally than to try and tinker at that stage with the relevant parts of that Bill which was plainly in relation to other matters affected thereby urgently necessary.

3. It became clear to us at an early stage that there was one topic which should be made the subject of legislation without delay and which could be satisfactorily dealt with separately from the matters covered in this main report. This was the question of the procedural difficulties facing those wishing to make claims against sea carriers. There has accordingly already been submitted by this Committee to the Minister of Justice a report recommending for the

reasons there stated that the Sea Carriage of Goods Act 1940 be amended:

(a) by amending s.11(2) to prescribe a period of one year for giving notice of a claim and instituting proceedings, and

(b) by introducing a provision analogous to the Australian Sea Carriage of Goods Act 1924 s.9.

4. The law on carriage of goods can conveniently be subdivided into:

(i) carriage by land;
(ii) domestic carriage by air;
(iii) international carriage by air;
(iv) carriage by coastal shipping; and
(v) sea carriage abroad.

Carriage abroad by air and sea is largely governed by international convention and for this reason we recommend no further changes in respect of international carriage beyond (a) the ones advocated in the interim report mentioned in the previous paragraph, and (b) recommendations we make in this report as to the Shipping and Seamen Act 1952 s.460. The bulk of this report will be concerned with that part of the law where reform is most called for, namely carriage by coastal shipping, carriage by land and domestic carriage by air.

(5) The international conventions governing carriage abroad by sea and air are of course from time to time reviewed. Particularly in the case of sea carriage it is important that at future international conferences New Zealand should be represented by a delegate who is well versed in the topics under discussion and who advocates a policy hammered out in advance after consultation with interested parties in this country. We recommend therefore that the Government at this stage take steps to consult the parties concerned and formulate the policy to be supported by this country at future conferences concerned with the rules governing international sea carriage. It is unfortunate that New Zealand was not represented at the recent Diplomatic Conference on Maritime Law which was concerned with the effect of containerization on the Hague Rules.

6. We recommend the enactment of a new Carriers Act laying down a common set of rules for all carriers by land be they common or private and including the Railways Department for coastal sea carriage and for domestic carriage by air, the definition of carrier in this statute to include forwarding agents. The statute should define contracts of carriage to include bailments incidental to contracts of carriage. We have in mind the situation where goods are stored before the commencement of, between various stages of, and at the end of their journey. As in the Queensland Carriage of Goods by Land (Carriers' Liabilities) Act 1967 the definition of carrier should also (in this respect declaring the law) include a person who, whether for reward or not, carries luggage as incidental to his carriage of a passenger for reward.

Common and Private Carriers

7. The existing law distinguishes between common and private carriers by land. A common carrier is one who undertakes to carry for anyone who asks him, a private carrier is one who carries for particular persons only. There is a common law obligation on a common carrier (based it would appear on the fear that carriers might otherwise exploit monopoly situations) to carry goods of the description of which he professes to be a carrier for all comers, without picking and choosing, and at a reasonable charge.

Today in New Zealand the public interest in the matter of the availability of carriers is sufficiently protected by the control exercised by Licensing Authorities over the holders of goods service licences. They have power to impose conditions on the grant of goods service licences: Transport Act 1962, s.127. The Transport Licensing Regulations 1963 (S.R. 1963/58) R.23 provide:

> "Subject to the provisions of regulation 24 hereof it shall be a condition of every goods-service licence (whether inserted therein or not) that, unless otherwise provided by the express terms of the licence, the licensee shall upon request accept for transport, as authorised by the licence, the goods of all persons conveniently served by him without discrimination among the hirers or in the charges levied."

The principal reason therefore why the common law created this special class of common carriers now no longer exists. The distinction between common and private carriers leads, because of their differing obligations, to litigation and legalistic hairsplitting. Geering v. Stewart Transport Ltd. [1967] N.Z.L.R. 802 is an example of this class of case. Our recommendation is that the distinction between common and private carriers should be abolished.

Forwarding Agents etc.

8. There are many persons for example forwarding agents and freight consolidators to whom goods are delivered for carriage but who do not themselves carry. Forwarding agents procure for reward contracts of carriage. Some operate a door to door delivery service throughout New Zealand principally in connection with New Zealand Railways under bulk tonnage contracts. The National Forwarders Association wishes forwarders to have the same rights and liabilities as carriers and this seems sensible in particular having regard to the claims procedure we later recommend. The Queensland Carriage of Goods by Land (Carriers' Liabilities) Act of 1967 seems to include forwarding agents in its definition of carrier. The proposed statute should so define carrier as to include one who contracts to procure contracts of carriage although not necessarily carrying himself.

The Position of the Railways Department

9. The Railways Department as an agent of the Crown has at present the liabilities, obligations, rights and protections of a common carrier, subject to the limitations and provisions of the Government Railways Act 1949, s.23(d). Section 23(b) limits the amount that can be recovered for loss of or damage to any goods, and s.32 empowers the Minister of Railways to fix scales of charges subject to such terms and conditions as he thinks fit,

including terms and conditions on and subject to which goods will be carried. Under this power the Minister has fixed an extremely short period for giving notice of claims. The Department disclaims all responsibility for loss of or damage or delay to goods unless a claim for the loss or damage is lodged in writing with the Department within seven days of delivery, or in the case of non-delivery within 14 days after the date the goods were handed to the Department. The Department claims that it relies upon a failure to comply with these requirements only if it has been materially prejudiced thereby. Nevertheless it is the department which judges whether it is or is not prejudiced and decides whether it will take advantage of its rights.

We can see no reason why the Railways Department should enjoy special privileges in respect of terms and conditions of contracts of carriage, and several reasons why it should not. In our view the law should be the same for all who contract to carry goods, whether they are agents of the Crown or private companies or individuals, and we so recommend. We do not intend this recommendation to apply to the Post Office since special considerations may apply here and we have not examined the matter closely.

In modern times the trend of policy and legislation has been towards removing special privileges which the Crown formerly enjoyed at law in its dealings with the ordinary citizen. We refer to Acts such as the Crown Proceedings Act 1950 and the Limitation Amendment Act 1962, the latter being peculiarly apposite in the present context. Where the Crown agency is a trading department it is, we think, plainly desirable that it should stand on the same footing as other traders. It is anomalous that if for instance two similar parcels are carried from the same starting point to the same destination, one on a Railways Department bus and the other on a privately owned service, the extent of liability and the claims procedure should be different.

In many circumstances the Railways Department has a monopoly of carriage by land. In a memorandum to the Minister of Justice dated 1 October 1965 the then Minister of Railways contended that his Department did not impose a special protection unilaterally. The customer it was claimed agrees to accept the Department's conditions of carriage when he requests that his goods be carried by rail. This reasoning appears to us specious. The fact is that the customer often has no alternative. He must send his goods by rail if he sends them at all. In doing so he must accept whatever terms the Department chooses to impose, and he cannot in the normal case bargain or negotiate.

This is a classic standard contract situation and it is appropriate that the law should lay down rules to govern it in the interests of fairness to those whose goods are carried by rail. The rules that we propose are those that will apply to all carriers, so that our recommendations will at the same time achieve the goals of fairness, open regulation and uniformity.

There are two additional reasons for recommending that any new legislation should apply without qualification to carriage on the Government Railways. The first is that there is much to be said for the view that greater protection tends to carelessness or indifference. There is proportionately less incentive to efficiency. The second and the more important is that uniform liability among all domestic carriers, whether by land, water or air, is essential to the working of the claims procedure we recommend in paragraph 20 of this report. Liability should not depend on the chance whether the loss or damage occurred while the goods were in the custody of the Railways Department as one carrier in a chain.

Basis of Carriers' Liability

10. At common law common carriers are liabile for any loss of or damage to the goods entrusted to them except where such loss or damage is caused by an Act of God, the Queen's enemies, inherent vice or the fault of the consignor. Holmes has suggested that this and allied rules of law had their origin in a readiness by the upper classes (from whom the judges were drawn) to impose heavy obligations on the tradesmen and artisans who served them. Lord Holt justified the rule in 1703 in Coggs v. Bernard (1703) 2 Ld. Raym. 909, 92 E.R. 107 in these words:

> "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."

Carriers were at this time popularly supposed to indulge in the practice of conspiring with highwaymen to fake robberies in the proceeds of which they shared. Whatever the reason for the rule, which later commentators claim not to be warranted by the earlier authorities relied on, it has clearly been the law at least since Forward v. Pittard (1785) 1 Term Rep. 27, 99 E.R. 953.

The natural reaction of carriers was to endeavour to contract out of such absolute liability. Contracting out was forbidden by the Carriers Act 1830 with a saving which will have to be later considered of "special contracts". There were provisions limiting the amount of liability. This legislative pattern was adopted in New Zealand in 1866 and has remained the basis of subsequent legislation up to and including the current statute, the Carriers Act 1948.

11. On what basis should carriers as defined in the new statute we propose be liable? The alternative to their being liable on the existing common law basis would be their being liable as bailees, with the onus on them to

disprove that the loss or damage to the goods resulted from their negligent or wilful acts but with exemption from liability if they succeeded in so doing. This seems to be the basis of liability under the Queensland Act referred to.

We have approached this question in the knowledge that every carriage of goods involves the risk of loss of, or damage to, the goods carried and that, in part at least, our function is to recommend where that risk should lie in any given case.

The common law allocated the risk of such loss on the basis partly of fault and partly of strict liability. Whatever its justification in the past, the use of the fault principle for this purpose has, we believe, serious disadvantages. It encourages unnecessary litigation, it leads to difficulties of proof and it is uncertain in its application. We would prefer that in a commercial transaction like the carriage of goods, the risk should lie where the balance of convenience places it. Since the risk of loss or damage is readily insurable, the question becomes one of which party should be expected to effect insurance.

Once this approach is accepted several consequences follow. Within certain limits, it is more convenient that the carrier shoulder the risk but, for insurance purposes, it is necessary that absolute upward limits should be placed on his liability. Equally, it is desirable that those upward limits be placed at a point beyond which it is reasonable to expect the goods owner to take out insurance cover for himself. By the same reasoning, the carrier's liability should be absolute up to the given limit (which means an end to the old distinction between common and private carriers) but should cut out completely beyond it. Similarly, where goods for carriage may be accumulated in cargo containers, it is necessary for the goods owner to know beforehand whether he must insure or not.

Finally, convenience requires that a new claims procedure be adopted, and acceptance of the insurance principle makes this easier to achieve.

It follows that the proposals we make hereunder need to be considered as a whole rather than in isolation. Adoption of some but not others of the recommendations could give rise to serious anomalies.

12. We therefore recommend that a carrier defined as suggested be liabile for all loss of or damage to goods entrusted to him under a contract of carriage defined as suggested except where the carrier establishes that the loss or damage resulted directly and without fault of the carrier from:

(a) inherent vice;
(b) insufficient packaging;
(c) other fault of the consignor;
(d) the consignee's failure to take delivery within the time specified by the contract or if no time is specified within a reasonable time.

The right of action against the carrier shall vest in whoever as between the consignor and consignee is at risk notwithstanding that there is no privity of contract between such party and the carrier.

13. To what extent should the carrier be entitled to contract out of this extended liability? There are situations where such a right is essential. A carrier may be willing to have a go at carrying an unusually bulky or awkward item only if the consignor agrees that the carrier is not liable if he fails in the attempt. On the other hand contracting out must not be allowed to become a matter of course. The solution to this problem adopted by the Carriers Act 1948 ss. 4 and 5 has been to permit special contracts in writing limiting the carrier's liability to the extent that such special contracts are adjudged by

the Court to be fair and reasonable. The United Kingdom Act of 1830 had as we have seen preserved the carrier's right to make special contracts, but this was so abused that the Railway and Canal Traffic Act 1854 s.7 contained a provision for judicial review that was the forerunner of ss. 4 and 5 of our Act of 1948.

Although some sort of general guidance was given by the House of Lords in Peek v. North Staffordshire Rlwy Co. (1863) 10 H.L. 473; 11 E.R. 1109, the provisions of s.7 of the Act of 1854 did not escape criticism from the Victorian judges who had to apply it:

> ".... here is a contract made by a fishmonger and a carrier of fish who know their business",

complained Lord Bramwell in one case,

> "and whether it is just and reasonable is to be settled by me who is neither fishmonger nor carrier, nor with any knowledge of their business... It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not."

(Manchester Sheffield & Lincolnshire Railway v. Brown (1883) L.R. 8 App. Cas. 703, 716 ff.)

A discussion in general terms of the advantages and disadvantages of the statutory conferment of judicial discretion would be out of place here. On the one hand such provisions can be justly criticised as leading to uncertainty and as a plumping by the law reformer for an easy way out of his difficulties; on the other hand New Zealand judges are today more used to having such problems thrust upon them than their English counterparts of a century ago, and, most importantly of all, in the present case there seems no middle way between absolute prohibition of contracting out (which for the reasons we have indicated seems to us impractical) and the provision for some sort of judicial discretion. We recommend the re-enactment of ss. 4 and 5, but with the addition of the express provision that an

exclusion by the carrier of liability shall be regarded as just and reasonable only to the extent that it is warranted by the special circumstances of the case, such circumstances to be recited in the writing comprising the special contract and to be limited to the nature of the goods and the nature of the journey. It follows from this that a mere provision of alternative rates should not be regarded as a special circumstance.

Limitation of Liability

14. The various statutes at present governing the types of carriage which we are considering limit the carrier's liability to a certain amount per package, unit or head of stock. Difficulties in practice occur in determining what is a package or unit for the purposes of such rules. Drinkrow v. Hammond & McIntyre Ltd. [1954] N.Z.L.R. 45 is an example of this class of litigation. The questions to be considered in this context are whether there should be any limitation of carriers' liability, whether it should be on a unit basis, how such units should be defined, what the amount of such limitation should be and whether in any circumstances the limitation amount should be exceeded.

15. We think that clearly there should be some limitation of a carrier's liability. Carriers do not always know what they are carrying and there must be a limitation to make it practical for carriers to obtain insurance cover. We can suggest no more efficient system than fixing the limitation on a package or unit basis. Where items are placed in a container (including in this term a pallet) a question arises in practice as to what is the unit. There is no complete answer to this problem but in our view it should be provided by statute that where a carrier supplies or packs the container each item packed in it should be treated as a unit; where the owner supplies the container unless the carrier packs it the container and its contents should be treated as the unit.

16. The amount of the limitation figure is one on which carriers and their customers hold opposing views. In our view the question should not be looked at on the basis of the present equivalent having regard to changes in currency values of the old limitation amounts. Rather the issue should in our view turn on the answer to this question - in respect of units of what value is it reasonable that the consignor should effect his own insurance rather than rely on the carrier's liability? The correct answer to this question is not one on which views are likely to be unanimous but in our view the limitation amount should be $1,000.00 with the distinction between stock of various kinds and other types of freight unit abolished. We believe that where the unit is of a lesser value than $1,000 it is reasonable for the consignor to look to the carrier for compensation not exceeding that sum. But if a unit is worth over $1,000 then we believe that the liability of the carrier should be limited to that sum. If the owner desires to cover risks exceeding that sum then of course he may arrange his own insurance. The provision for declaring value should (consistently with this approach) not be continued. Informal enquiries of under-writers indicate that this increased level of liability would not prevent carriers readily obtaining insurance cover at reasonable rates.

17. We have considered whether the limitation should apply in the case of wilful acts of the carrier, e.g. theft by an officer of the carrier or a servant of the carrier in the course of his employment. In our view there should in the interests of certainty be no exception to the limitation amounts if set at the figure we recommend. The limitation should continue to be expressed to protect servants and sub-contractors of the carrier as well as the carrier himself. Campbell v. Russell [1962] N.Z.L.R. 407 points the need for this.

18. Having regard in particular to the increase in limitation amount we are of the view that there should be a time limit for bringing claims against carriers and that this

should be twelve months from the delivery of the goods or the date when the goods should have been delivered. Article III 6 of the Hague Rules provides an analogy.

19. It is implicit in our recommendations that the Shipping and Seamen Act 1952 s.460 should cease to apply to the carriage of goods by coastal shipping.

So far as the application of the section to carriage of goods abroad is concerned the position is that the section as it stands provides a limitation of shipowners' liability for loss of or damage to property of £8 for each ton of the ship's tonnage. By the Brussels Convention of 1957 an increase to 1000 gold francs (in 1963 approximately £24) per ton with a minimum of 300,000 gold francs was agreed upon. Part II of the Shipping and Seamen Amendment Bill of 1963 was introduced to bring the law of New Zealand into line with the provisions of the Brussels Convention in this and other respects but this part of this Bill was not proceeded with, not as we understand it because of widespread opposition to any of the limitations proposed but because the shipowners sought limitation of their unlimited liability for the removal of wrecks and for damage to harbour works under the Harbours Act 1950 ss. 208 and 209 and the Shipping and Seamen Act 1952 s.353. In our view clauses 32, 33 and 34 of the 1963 Bill (which deal with personal injury as well as property claims and are to this extent outside our terms of reference) should be enacted into law with the proviso already indicated that the limitations should not apply to carriage of goods by coastal shipping.

Claims Procedure

20. Where goods are transported from say a factory in Auckland to a retailer in Invercargill they are likely to be handled by a number of carriers. A goods service operator may take them to the nearest railhead, they may be carried by rail to Wellington, transhipped to a coastal vessel, unloaded in a South Island port on to a rail wagon, carried by rail to Invercargill and by road from the Invercargill railway station to the ultimate destination.

If the goods arrive damaged as often as not it is impossible for the consignor to know from whom in this chain of carriers to claim. The solution to this type of problem in the analagous case of checked baggage adopted by the Carriage by Air Act 1967, s.21 is to make jointly and severally liable for damage or loss all successive carriers other than a successive carrier who proves that the loss or damage did not occur while the baggage or cargo was in his charge. In our view this provision should be extended to all carriage by land, domestic air carriage and coastal carriage by sea. This makes it essential that the provisions as to liability should be the same in all these types of carriage (including carriage by rail). Increased containerization and use of "roll-on roll-off" shipping services makes such a provision particularly desirable. It will be necessary for the statute specifically to provide that where all the successive carriers are not joined in as defendants those who are not may be joined in the action by those who are and that those successive carriers who are liable shall as among themselves be liable to contribute equally.

Unclaimed Goods

21. There should be provision entitling carriers to enforce possessory liens one month after a written demand for the charges due is made (in the case where the person liable is known) or one month after the public notification (if the owner is unknown) by public auction in broadly the same manner as is provided by the Wages Protection and Contractors' Liens Act 1939 s.46 in the case of worker's liens. The Government Railways Act ss. 17 and 18 provides an analogy.

Summary

22. In summary we recommend that the Carriers Act 1948 and the appropriate portions of the Carriage by Air Act 1967, the Sea Carriage of Goods Act 1940, and the Government Railways Act 1949 be repealed and have substituted therefor a new statute containing the provisions which

we have hereinbefore recommended. In addition the Shipping and Seamen Act 1952 ss. 458 and 460 should be replaced by clauses 32 to 34 of the 1963 Amendment Bill.

23. Our terms of reference did not include the law as to carriage of passengers but we would observe that in our view the various provisions limiting the amount of claims in respect of death or injury to passengers (other than those relating to domestic air carriage which have been recently greatly improved by the Carriage by Air Act 1967) are in need of review. There is no point in delaying reform until some tragedy - say the sinking of a crowded ferry boat - points the need.*

Acknowledgement

24. The first drafts of this report were prepared by a subcommittee comprising the Auckland members of this Committee and Messrs. R.I. Barker, R.J. Craddock, and W.F. Jordan, all barristers and solicitors of Auckland. To the three gentlemen named (who are in no way responsible for changes made by this Committee to the draft produced by their subcommittee) this Committee is properly grateful.

Final Note

Our chairman, Mr E.S. Bowie Q.C., is not a party to this report since he was absent from our later discussions through illness. He had however expressed his general approval of its tenor.

For the Committee

Deputy Chairman

DATED at Wellington 26th April 1968

* (We wrote this before the Wahine disaster.)

Members

Mr E.S. Bowie Q.C. (Chairman)

Mr C.I. Patterson (Deputy Chairman)

Mr B.J. Cameron

Mr M.F. Chilwell Q.C.

Professor B. Coote

Mr D.F. Dugdale

Professor E.P. Ellinger

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