

CARRIAGE OUTSIDE THE HAGUE VISBY RULES

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Introduction

In Canada, transport of a considerable proportion of cargo carried in Canadian internal and coastal trades, and all waterborne passengers and their luggage are governed by legal regimes outside the Hague Visby Rules. It is important for business advisers of carriers and cargo, those seeking legal remedies and those adjudicating claims to have a useful understanding of the common law of water carriage, the scope to which such common law obligations may be contractually modified and statutes applicable to carriage not covered by a bill of lading. While carriage under charter parties is vitally important to a major bulk commodity exporting country like Canada, this paper does not address this part of the law. A general review of carriage of goods under charter parties would require a day in itself. This paper reviews the common law of water carriage, a unique Canadian example of a contractually modified regime, the law of tug and tow and the carriage of passengers.

The Common Law of Water Carriage of Goods

The Hague Rules and their protocols have existed for so many decades that it is well to remember the underlying common law obligations of the ship operator as carrier and the cargo owner tendering goods for carriage. These common law obligations still arise in many day to day situations: a common thread is where arrangements are made informally or bills of lading are not issued.

Examples are:

- informal transport arrangements in small vessels such as work boats
- lighterage between larger cargo carrying vessels and shore
- carriage by barge

The liability of the water carrier at common law is an incident of status of the carrier as a common or private carrier.

In *Bomford Timber v. Jackson*¹ the plaintiff's manager spoke with the defendant to arrange carriage of logging equipment on a borrowed barge, which was lost after the barge sank during transit. The court made credibility findings that the individual defendant never referred to bills of lading during negotiations for the carriage, never referred to a company which he later asserted was the contractual carrier and never delivered a completed bill of lading at any time. The individual defendant was found directly responsible as a common carrier. The Hon. Mr. Justice Gibson neatly summarized the responsibility of the common carrier by water²:

¹ [1966] Ex. C.R. 485

² Ex, C.R. at para. 27, relying on the discussion of Wright LJ in *Paterson Steamships, Limited v. Canadian Co-Operative Wheat Producers, Limited* [1934] A.C. 538 (P.C. from Quebec)

The defendant, therefore, is absolutely responsible for delivering in like order and condition at the destination this equipment bailed to him at Camp O for carriage to Topaz Harbour, unless he can show either (i) that the loss was due to the act of God or the Queen's enemies or inevitable accident or (ii) unless that liability is cut down by special contract.

If the carrier does not hold itself out as being prepared to carry any goods which are proffered to it as long as it has the carrying capacity, but rather reserves to itself the decision whether to enter into arrangements for carriage³, then the common law characterizes it as a private carrier for reward with the responsibility of a bailee for reward. A bailee for reward has the onus of proof of demonstrating that any loss or damage to goods carried was not the result of the bailee's failure to use such care and diligence as a prudent person would exercise in relation to his or her own property.

Unlike a common carrier, a private carrier may contract to restrict or exclude its legal obligations, provided such exclusions are found to be part of the contract.

This characterization as a private carrier was applied by the Hon. Mr. Justice Verchere in *A.I.M. Steel v. Gulf of Georgia Towing Co.*⁴ The plaintiff's sales department telephoned the defendant's traffic department to ask the defendant to "carry" a shipment of steel from a named ship to the plaintiff's yard and the defendant responded they "would look after it". The judge found as a fact no further communication regarding transport arrangements took place and held that previous correspondence between the plaintiff and defendant referring to transport being undertaken subject to the then *Water Carriage of Goods Act*⁵ was not to be implied into the contractual arrangements at issue, because implying such terms was not necessary to give commercial efficacy to the contract.

On the other hand, in *Plumper Bay Sawmills Ltd. v. Jericho Towing Ltd.*⁶ the Hon. Mr. Justice Walsh found sufficient evidentiary basis that previous dealings between the parties sufficed to permit the carrier to rely on its standard trading terms with exclusionary clauses:

The question which causes me some concern is whether a verbal contract, made without reference to any limiting condition can be modified with retroactive effect to the contract itself by conditions contained on the invoice. If this is the first time that the Plaintiff had seen any such conditions on towage invoices it might well be able to claim that it never accepted them and they were not binding on it. However, there is a constant course of conduct by Plaintiff in its frequent dealings with towage companies and specifically in its dealings with its agent to accept without protest such clauses when paying the invoices and it would be unreasonable not to infer that subsequent contracts entered into verbally with the same company could be subject to the same conditions found on the previous invoices.

³ *Belfast Ropework Co. v. Bushell*, [1918] 1 K.B. 210.

⁴ (1964) 50 W.W.R. 476, 48 D.L.R. (2d) 549, 1964 Carswell BC 190

⁵ which would have permitted the carrier to invoke the error in navigation defense under the Hague Rules.

⁶ [1980] F.C.J. No. 406 (T.D.)

Mr. Justice Walsh also accepted evidence of invoices from other towing companies which contained similar clauses, and found that the defendant tug owner had established that such conditions were a custom of the trade.

The common law implies the following obligations on the water carrier⁷:

- to provide a seaworthy ship
- to receive the cargo
- to care for the cargo
- to proceed on the voyage without unjustifiable deviation
- to deliver the cargo without undue delay

These implied obligations arise from the status of the water carrier and are distinct from and in addition to, a duty of care in negligence. In *Canadian Pacific Forest Products Ltd. v. Belships (Far East) Shipping (Pte.)Ltd.*⁸ a deck cargo of lumber was lost overboard. The carrier sought to enforce bill of lading terms “Goods carried on deck shall be at all times and in every respect at the risk of the Shipper/Consignee. The Carrier shall in no circumstances whatsoever be under any liability for loss of or damage to deck cargo...” The trial court found the deck cargo had been loaded in a way that increased the ship’s rolling motion at sea, causing a failure of the stow. The Federal Court of Appeal concluded that because the implied obligations of the water carrier at common law were distinct from a duty of care and negligence, the exception clause wording for deck cargo was intended to apply only to those distinct common law obligations and did not extend to apply to negligence.

Another application of the implied duty of seaworthiness is found in *Griffith Steamship Co. v. Western Plywood Co.*⁹ Griffith Steamship supplied a barge for loading by Western Plywood. While awaiting re-stowage of its cargo at the request of an insurer’s marine surveyor, the barge listed and lost some of its log cargo overboard, which damaged the barge in the process. The court found the proximate cause the loss was not poor stowage, but an accumulation of water in the bilge tanks which existed before the barge had been delivered for loading. The barge owner’s claim for damage to its vessel was dismissed because the cargo owner was entitled to rely upon the barge owner’s implied warranty the barge was seaworthy in proceeding to load the barge.

In *Great West Steel Industries Ltd. v. Arrow Transfer Ltd.*¹⁰ the plaintiff contracted with the defendant to move steel from the ship’s side to a shore storage facility. The defendant subcontracted lighterage to McKenzie Barge & Marine Ways Ltd, which was made a third party to the action.

⁷ These common-law duties and supporting authorities were discussed by the Federal Court of Appeal in *Canadian Pacific Forest Products Ltd. v. Belships (Far East) Shipping (Pte.)Ltd.* at paras. 13, 14 See generally *Scrutton on Charterparties and Bills of Lading*, 20th ed 1996 Art. 105

⁸ [1999] 4 F.C. 320, 243 N.R. 287, 175 D.L.R. (4th) 449, 1999 CarswellNat 1073

⁹ [1953] 3 D.L.R. 29 , 1953 CarswellBC 187 (B.C.C.A.)

¹⁰ (1977) 75 D.L.R. (3d) 424, 1977 CarswellBC 514

McKenzie Barge contracted on the basis of a modified London Lighterage Clause, which included the wording: “Provided always that the foregoing exemption excluding us from any liability arising from unseaworthiness of a vessel shall not apply unless are able to establish that we have not knowingly and recklessly supplied an unseaworthy vessel for the service.”

The attending tugs’ captains recorded in their log that the loaded scow first began to settle by the stern, that an attempt to plug a standpipe was unsuccessful, and that pumping did not correct the list. Various pier operators refused to let the tug bring the foundering scow alongside and it was eventually beached after dumping part of its cargo.

The Hon. Mr. Justice Gould commented “McKenzie supplied and continued to supply, knowingly, an unseaworthy vessel, for the ensuing 17 hours, up to the moment of loss. To this Court nothing could be more definitively reckless than deliberately to have run that risk for 17 hours, which McKenzie did, and which culminated in the disaster.” The third party claim succeeded.

The cargo owner also has implied obligations¹¹

- to have cargo available for loading
- to warn the carrier of any unusual or dangerous characteristics of the cargo
- to pay freight
- to take delivery of the cargo upon discharge

The right of a private carrier to contractually exclude or limit its implied obligations is still permitted where arrangements for water carriage of goods are not subject to The Hague Visby Rules. Reference therefore needs to be had to the numerous authorities whether actual or effective notice was given to contractual exclusion or limitation clauses.

A 2005 report prepared for the Government of Nunavut analysed publicity information then made available by private carriers performing the annual Arctic resupply and commented¹²:

The private carriers’ contract terms are difficult to access on their websites. In all cases, website users have to “drill down” through numerous links to find references to full contract terms. This is in marked contrast with websites typical of international ocean, rail and air carriers, in which their tariff terms are either accessible directly from homepages or more easily indexed on site maps.

All businesses must strike a balance between marketing and risk management. However, obscure references in most of the carriers’ websites and booking documents works to the disadvantage of both carrier and customer. Courts are less likely to give effect to obscure references, resulting in the carrier losing its contract protection.

¹¹ See generally Gold, Chircop and Kindred *Canadian Maritime Law* pp 360-378, generally *Scrutton on Charterparties and Bills of Lading*, 20th ed 1996 Art. 53.

¹² *Annual Resupply Evaluation Summary Report*, The Department of Community and Government Services, Government of Nunavut 2005, p 35 - tabled in legislature

Article VI of the Hague Visby rules provides:

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement on any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect.

While Article VI conceptually permits freedom of contract as long as a bill of lading is not issued, the rules of most protection and indemnity clubs prevent their insured ship operator members from contractually waiving defences otherwise available under the Hague Visby rules or other compulsorily applicable cargo carriage laws, without the insurers' prior consent.

An example of carriage in Canada outside the Hague Visby rules is the conditions of carriage used in the annual resupply of Arctic communities. The Government of Nunavut has tendered proposals for annual resupply on terms that the successful bidders agree to service specified communities under conditions of carriage applicable to all cargo owners, whether public or private, booking cargoes for such agreed scheduled voyages. These conditions of carriage have significant differences to bill of lading terms commonly found on international ocean trades and are intended to meet specific requirements for Arctic transportation. These Arctic resupply terms are an example how contractual clauses can be crafted to meet the needs of particular trades.

These conditions of carriage begin:

GENERAL CONDITIONS OF CARRIAGE

This contract gives you rights and responsibilities. This contract limits the legal responsibility of the carrier. Please read it carefully.

The Hague Visby Rules on the water carriage of goods do not apply to this contract.

This contract is not covered by any bill of lading.

Unlike the concise references to cargo owners' responsibilities at Article III.6, and Article IV.2 I and IV.6 of the Hague Visby Rules, these terms include 17 clauses detailing cargo owners' responsibilities in providing the carrier with cargo information, in booking cargo, properly preparing it for ocean transportation and receiving it at discharge. To balance the challenges to carriers of transiting ice-covered waters while still meeting Nunavut communities' needs to have cargo delivered during the short navigation season, the contract includes specific ice clauses which alter the common law carrier's obligation not to deviate:

23. The Carrier agrees to take reasonable steps to follow the scheduled order of ports. The Carrier has the right to transship the Cargo. The Carrier has the choice to change port rotations, discharge a part Cargo and return to the same port to complete discharge or change the order of discharge of Cargo during any one voyage if reasonably necessary to avoid being trapped in ice, to use the whole cargo space efficiently or for the safety of the carrying ship.

25. If the Carrier foresees that an intended discharge port will be icebound beyond the ship's ice capacity or ice or weather conditions will prevent the safe completion of a voyage to any intended to discharge port, the Carrier will give notice to the Government of Nunavut and to the chief municipal officer or administrative officer at the intended discharge port. These parties will consult with a view to agreeing on an alternate way to transport the Cargo by water to the intended discharge port or to an alternate discharge port. The carrying ship may sail to a convenient open place to await the Government of Nunavut's instructions. Instructions will be provided by the Government of Nunavut within two days of the Carrier giving notice under this clause. By this contract, the Shipper gives the Government of Nunavut the power to agree on the Shipper's behalf for delivery to an alternate discharge port. If this type of agreement is made, delivery to an alternate discharge port of all Cargo in an undamaged condition is complete performance of the Carrier's responsibility to deliver to the originally planned discharge port on that voyage. The consultation is to avoid the Cargo being returned to the loading port or being shut out of the Arctic for the season. The Carrier will give notice to Shippers about the location of the alternate discharge port.

The contract terms include many of the carrier's defences under the Hague Visby Rules, but with modifications to meet particular requirements of the resupply program. Much of the general cargo consigned to Arctic communities is booked in less than container load quantities. The individual packages are then consolidated or stuffed into containers by the carriers at marine terminals in southern Canada. Because there are no permanent wharves at Canadian Arctic communities, all goods must be transhipped by lighter between ship and beach. This particular community supply contract includes general cargo but not goods carried in bulk without intermediate packaging.

To reflect these operational realities, the carrier's responsibility does not begin at ship's tackle, but rather when the cargo is received at the carrier's southern marine terminal. The carrier's responsibility does not end at the ships' tackle, but rather extends through lighterage operations until the cargo is discharged above the high water mark. The terms apply to both below deck and on deck carriage. Unlike the Hague Visby Rules, there is no general limitation of liability based on cargo weight (which is appropriate for bulk cargoes), but rather a \$2500 limitation of liability per package or unit, and for motor vehicles, \$3.50 per kilogram of any motor vehicle lost or damaged up to the lesser of the amount of damage, the value of the motor vehicle or \$70,000.

Because much of Arctic resupply cargo is booked by individuals or small businesses who may be unable to pay for cargo insurance, these contract terms preclude carriers from demanding general average security from shippers or commencing in rem actions against cargo for General Average until the carriers and the Government of Nunavut agree on a procedure for funding General Average security. Claims are handled through the Sealift Claims Handling Rules providing for streamlined ADR processes for claims under \$ 2,500 not involving a General Average loss. Claims of higher value may be heard either in the Nunavut Supreme Court or the Federal Court.

The Law of Tug and Tow

Some of the cases discussed in this section arise from towing operation claims not involving damage claims for carriage of cargo. The principles are applicable also to tug operators in cargo carriage.

The statement in Halsbury's 3rd as to the common law obligations of a tug operator has been adopted by the Supreme Court of Canada¹³:

In an ordinary contract of towage the owner of the tug contracts that the tug shall be efficient for the purpose for which she is employed, and that her crew, tackle and equipment shall be equal to the work to be accomplished, in the weather and under the circumstances reasonably to be expected. There is a warranty implied in such a contract that at the outset the crew, tackle and equipment are equal to the work to be accomplished in circumstances reasonably to be expected, and there is an implied obligation that thereafter competence skill and best endeavours shall be used in doing the work.

The implied rule in a general contract of towage that the tug supplied should be sufficient in seaworthiness, equipment and power to perform the service undertaken in reasonably expected weather conditions, does not apply if the contract is to supply a particular named tug¹⁴.

A tug operator has an obligation to inspect the suitability of the vessel to be towed and whether there are adequate clearances for the voyage to be safely undertaken. Tug operators have been held liable for failing to have management and operations systems to ensure that towed crane cargoes can safely pass under bridges¹⁵.

A useful summary of the relative responsibilities of tug and tow is found in the reasons for judgement of the Hon. Mr. Justice Nadon in *Hamilton Marine & Engineering Ltd. v. CSL Group Inc.*¹⁶ While the general presumption is that the tug is under the control of the tow and the tow therefore is responsible for the negligent acts of the tug, the finding of which vessel is actually in control is a question of fact to be determined in every case¹⁷. The controlled vessel must obey the instructions of the controlling vessel¹⁸. Both tug and tow must act to avoid creating unnecessary risks to the other, or increasing any risk

¹³ *Wire Rope Industries v. BC Marine*, [1981] S.C.R. 363 at 392.

¹⁴ "*M. F. Whalen*" (*The*) *v. Point Anne Quarries Ltd.*, [1923] 1 D.L.R. 45 (P.C.) (Canada).

¹⁵ *Continental Bank of Canada v. Riedel International Inc.* 40 F.T.R. 240, 121 N.R. 311, 78 D.L.R. (4th) 232, 1991 CarswellNat 341, (F.C.A.), *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* 92 F.T.R. 26, 1995 CarswellNat 1056.

¹⁶ 95 F.T.R. 161, 1995 CarswellNat 196. In this case, the tugowners sought damages against the owners of a ship under power it was assisting to leave a drydock. The tug was girded by the towline and capsized. Nadon, J. held on the evidence the tugowner had not met the burden of proof upon it that the loss was caused by the negligence of the tow.

¹⁷ *SS Devonshire v. Barge Leslie*, [1912] A.C. 634, 107 L.T. 179.

¹⁸ *Canada Steamship Lines v. Montreal Trust Company*, [1940] Ex. C.R. 220.

incidental to the services provided¹⁹.

The tug industry typically has acted to alter its common law obligations through standard towage terms. Internationally, the Baltic International Maritime Consultative Organization (BIMCO) has prepared a lump sum International Ocean Towage Agreement referred to as Towcon 2008. Under these terms “The Tugowner agrees to exercise due diligence to tender the tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied.²⁰” By contrast, the Hirer contracts to exercise due diligence to provide a Tow “in all respects fit to be towed from the place of departure to the place of destination”, properly equipped and certificated by a recognized marine surveyor as tow- worthy²¹. The Tugowner agrees to absorb the risks of any loss or damage sustained by the Tug or by third parties as a result of activities of the Tug, but in turn the Hirer agrees to absorb the risks of any loss or damage sustained by the Tow or by third parties as a result of contact with the Tow or obstruction created by the presence of the Tow²².

The most commonly used towage terms in Canadian trades are the Eastern Canadian Tug Owners’ Association Standard Towing Conditions, published by the Shipping Federation of Canada. These are reproduced in the appendix. The key contractual term is that the tug becomes servant of the tow in that:

2. Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug company is done at the sole risk of such vessel or craft and of the owners, charters operators thereof, and that the Master and crew of such tug or tugs used in the said services and the tugs themselves together with the Tug company become the servants of and identified with such vessel or craft and their owners, and that the Tug company undertakes only to provide motive power.

These terms, however wide, were not construed to extend to services provided outside towage operations. In *Engine & Leasing Co. v. Atlantic Towing Ltd.*²³ a head contractor agreed to tow a barge laden with scrap steel from Michigan to Florida. The leg from Nova Scotia was subcontracted to Atlantic Towing Ltd. under the Eastern Canadian Standard Towing Conditions. At the intermediate port of Canso, the barge was observed to be down by the head and Atlantic Towing Ltd. volunteered to repair a leaking compartment. The barge capsized suddenly after departure from Canso. The Hon. Mr. Justice Walsh concluded at trial the most probable cause of the barge’s loss was inadequate repairs to the barge made at Canso for which Atlantic Towing Ltd. was responsible in contract and negligence. The Federal Court of Appeal was not prepared to vary this finding of fact and commented “It would be an untenable, and unjust, proposition of law to suggest that exculpatory clauses in favour of one party which were agreed upon by the other party while setting the terms of the offering of a specific service, in this case towage, apply to services not even contemplated at the time by the parties.”

¹⁹ *McCormick Lumber Co. v. Sincennes-McNaughton Line Ltd.* (1918), 18 Ex. C.R. 357.

²⁰ Clause 19

²¹ Clause 18

²² Clause 25

²³ Aff. 157 N.R. 292, 1992 CarswellNat 1291.

In *Meeker Log & Timber Ltd. V. "Sea Imp VIII"*²⁴ the Hon. Mr. Justice Lowry was faced with the parties' concession they had done business for years on the basis of the following standard terms:

All contracts and services, including towage, charter, carriage, moorage and storage, are contingent upon accidents to vessels, machinery, equipment and personnel, labour disputes or other conditions beyond our reasonable control and are at shipper's, consignee's, charterer's and/or owner's risk. Master and crew of the tug shall be the servants of the owner of the tow and in any event, providing the towboat owner uses due diligence to make and keep the tugboat seaworthy, the tugboat owner, its servants, agents or subcontractors are not liable for loss, damage or delay to the tow or its contents, howsoever caused. We, our servants, agents and subcontractors shall not be liable for any loss, damage or expense sustained or incurred by the shipper, consignee, charterer or owner by reason of loss, damage or delay of any nature, howsoever caused, including gross negligence of us, our servants, agents, and subcontractors. We shall be entitled to the benefit of all privileges, rights and immunities granted a carrier by the Water Carriage of Goods Act, as if the same were herein specifically set out. For the purposes of these conditions we are or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all who are or might be our servants, agents or subcontractors and all such shall to this extent be deemed to be parties to all towage, charter, carriage, moorage and storage contracts. All actions for loss, damage or injury from any cause whatsoever shall be commenced within 30 days after the time when the same is sustained.

Lowry, J. cited *Nelson Line (Liverpool) Ltd. v. Nelson & Sons Ltd.*²⁵

The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of their duties, but unless they prove such a contract the duties remain; and such contract is not proved by producing language which may mean that and may mean something different.

Despite the parties' evidentiary concession, the Lowry, J. refused to enforce the clause, commenting:

In my view, the inherent frailty in the clause lies in the apparent attempt to employ wording to serve a variety of service contracts: towage, charter, carriage, moorage and storage. The second part may be appropriate for contract of towage (referring to the owner of the tug and the tow); one or other of the third and fourth parts may be suitable for contract of carriage (referencing shippers, consignees and the Act governing the carriage of goods). It is the combination of the four parts, which individually might well stand alone, that has worked the inconsistency that renders the one clause in which they have been collected invalid. I conclude that neither the owner nor the master can rely on the exempting clause to avoid liability for the damages suffered as a result of the holing of the barge²⁶.

This finding was upheld by the British Columbia Court of Appeal²⁷.

²⁴ 1 B.C.L.R. (3d) 320, 1994 Carswell BC 56.

²⁵ [1908] A.C. 16 (H.L.) as quoted by the Supreme Court of Canada in *Vipond v. Furness, Withy & Co* (1916) 54 S.C.R. 521, 35 D.L.R. 278, 1916 CarswellQue 18.

²⁶ at 1994 CarswellBC 56 para. 15.

²⁷ 21 B.C.L.R. (3d) 101, 1996 Carswell BC 1465.

In *Primex Forest Products Ltd. v. Harken Towing Co*²⁸, the Hon. Madam Justice Saunders followed the reasoning in the *Sea Imp VIII* in declining to enforce a tug operator's similar combined exclusion of liability clause. She did, however, rely on *Ailsa Craig Fishing Co. v. Malvern Fishing Co*²⁹ stating that the rules for construction of limitation clauses were not as exacting as those applying to the construction of exclusion of liability clauses. The judge permitted the tug operator to enforce a \$ 500 limitation of liability provision.

Tug operators' risk management through benefit of insurance and waiver of subrogation clauses have found more favour with courts.

In *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*³⁰, the plaintiff contracted for the tow of its cement barge. The defendant tug operator sent a copy of its standard towing conditions to St. Lawrence Cement, whose assistant manager crossed out several references exclusions and limitations of liability before returning it. However, wording in the accompanying correspondence that St. Lawrence Cement was to be responsible for insurance on its barge and the cargo carried was found to have been agreed by both parties. During the voyage, the tow line parted in heavy weather and the barge and its contents eventually grounded and were lost.

The trial judge found the tug operator to have been negligent in failing to inspect the tow line, in its attempts to reconnect the tow and in failing to stand by the anchored barge. He interpreted the insurance clause as not precluding subrogated claim in negligence.

The Chief Justice of Ontario, writing for the Court of Appeal, reversed this interpretation, stating³¹:

In my opinion, the respondent's agreement to be responsible for insuring the "Robert Koch" and its cargo could have no purpose other than to relieve the appellant from liability for losses caused by its negligence. Because of the towing agreement, the only way in which the appellant could be liable to the respondent was by way of negligence. The insurance must be taken to address that contingency. The agreement to be responsible for insurance would, as it is said, "otherwise lack subject-matter"

In *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.*³² the plaintiff contracted for barge carriage of deck cargos of logs by the defendant. Another water carrier with whom Timberwest had done business explicitly required a waiver of subrogation clause in its favour. Unknown to Pacific Link, the plaintiff arranged for a cargo policy with a waiver of subrogation clause in favour of both carrying companies as named entities. During one voyage contracted with Pacific Link, most of the cargo was lost overboard. The defendant contractual carrier's standard trading terms referred to a Bill of lading, but none was actually issued for the carriage. The plaintiff brought an action not only against the contractual

²⁸ 1997 CanLII 4161 (B.C.S.C.).

²⁹ [1983] 1 All E.R. 101 (H.L.).

³⁰ (1995), 26 O.R. (3d) 321, 23 B.L.R.(2d) 1, 1995 CarswellOnt 1198.

³¹ at CarswellOnt para. 22.

³² 2008 FC 801, [2009] 2 F.C.R. 496, 330 F.T.R. 272, 65 C.C.L.I. (4th) 195, 2008 CarswellNat 2048, affirmed 2009 FCA 119, 388 N.R. 189, 73 C.C.L.I. (4th) 46.

carrier, Pacific Link, but also against the chartered tug operator performing the carriage and several individual employees.

The Hon. Mr. Justice Harrington found that as deck cargo is excluded from the application of the Hague-Visby Rules³³, and the barge could only have carried logs as deck cargo, the fact that a bill of lading was not issued did not preclude the argument that Article III.8 of those Rules nullifying benefit of insurance clauses did not apply.

By the time of this case, the Supreme Court of Canada already had pronounced its judgments in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*³⁴ that employees of a contracting party are entitled to the benefits of its contractual limitation and exclusion clauses, and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*³⁵ that contracting parties may extend a contractual provision for the benefit of a non-contracting party, enforceable for the benefit of such non-contracting party if such intent is clearly expressed for a reasonable commercial purpose and the beneficiary is within the scope and class of persons intended to be benefited.

Harrington, J held³⁶:

Pacific Link was performing the very services provided for the contract of carriage when the loss occurred. Consequently, it is clearly a third-party beneficiary and is entitled to enforce the waiver insurance clause in its own right as per *London Drugs* and *Fraser River*, notwithstanding that it had not required Timberwest to have such a clause inserted and notwithstanding that it knew nothing of the insurance policy until after the loss.

Pacific Link's standard terms had a very inclusive definition of carrier as including chartered vessels and a very broad Himalaya clause extending the benefit of contractual limitations to contractors as well as employees. In this context, the judge also held the waiver of subrogation clause in conjunction with other policy terms was intended to apply to all carriers with whom Timberwest may have contracted, that the performing tug operator and all named individual employee defendants would also have the advantage of the waiver of subrogation clause³⁷.

³³ Article 1c) excludes "cargo which by the contract of carriage is stated as being carried on deck and is so carried"

³⁴ [1992] 3 S.C.R. 299.

³⁵ [1999] 3 S.C.R. 108.

³⁶ at CarswellNat para. 50.

³⁷ at CarswellNat para. 64.

The Common Law of Passenger Carriage

Unlike the legal matrix of liability for the common carrier of goods as an incident of status, the common law legal responsibility of a passenger carrier sounds in negligence.

At common law, the passenger carrier has a duty to provide a seaworthy vessel and exercise skill in its navigation. Passengers must be provided with accommodation, food and baggage stowage suitable for the intended voyage³⁸. Nowadays, these implied duties are largely overlain by detailed regulatory requirements for the construction, crewing and operation of passenger vessels. High-profile incidents investigated by the Transportation Safety Board of Canada in recent decades³⁹ have assisted in driving the extension of regulatory standards to cover all commercial passenger vessels⁴⁰. While in the absence of legislative intent to enact a statutory cause of action, the breach of a regulation may not of itself create liability, breach of a statute or regulation causative of the loss is certainly a criterion for a finding of negligence⁴¹.

In *MacDonald v. Saint John (City)*⁴² an eager passenger tried to step ashore after the ferry crew had let down a guard chain but before the vessel was secured. The passenger fell between the ferry and the landing stage and became a plaintiff. The New Brunswick Supreme Court on appeal held whether or not the passenger was being carried for reward under a contract of carriage⁴³, the City as holder of a grant of ferry had a duty of care in negligence. The removal of the guard chain without a safety warning was an intimation the passengers were free to disembark.

In *Lafleur v. Cambridge*⁴⁴, an automobile being directed onto a township cable ferry by the ferry operator was unable to stop and the occupants drowned. Mr. Justice Urquhart concluded:

...it is a case of alleged negligent operation of an enterprise which the municipality took it upon itself to conduct. The municipality having undertaken to establish and operate a ferry, it must do so without negligence and is responsible for the results of its own negligence and/or that of its servants.

³⁸ Gold, Chircop and Kindred *Canadian Maritime Law* pp 480-482.

³⁹ The amphibious excursion boat *Lady Duck* sank within sight of the Parliament buildings - Transportation Safety Board of Canada Marine Reports - 2002 - M02C0030.

⁴⁰ the recently gazetted *Small Vessel Regulations*, SOR/2010-91 include extensive provisions respecting the construction of small commercial vessels and passenger safety briefings. Parts 1 and 2 of the *Marine Personnel Regulations*, SOR/2007-115 require certification for Masters of all commercial passenger vessels and Marine Emergency Duties training for all commercial passenger vessel crew.

⁴¹ *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513, [1999] 6 W.W.R. 61, 59 B.C.L.R. (3d) 81.

⁴² (1885), 25 N.B.R. 318, affirmed (1886) 14 S.C.R. 1.

⁴³ the reasons for judgment do not refer to the presence of any exclusion or limitation terms on the railway ticket which the passenger used to board the ferry.

⁴⁴[1945] O.W.N. 893 (H.C.J.).

The judge declined, in the absence of any statutory provision deeming a cable ferry to be part of a highway, to apply the short limitation period otherwise applicable for claims arising from alleged non-repair of roads. He treated the ferry operation as a distinct activity and not part of the road system.

Operators of marine passenger terminals also have a duty to exercise reasonable care for passengers' safety. In *Green v. Saint John*⁴⁵, a ferry coming to berth dislodged a piling which fell upon and injured a passenger on board. Similarly to the Ontario court 75 years later, the New Brunswick Supreme Court held "when [the City] did establish a ferry, and kept it running for the use of the public, it was their duty to take care that the boats, landings and all the necessary approaches, were in such a condition as to not to endanger the lives or property of the persons using it. "

Before Part 4 of the *Marine Liability Act* came into force, passenger carriers in Canada typically sought to limit or exclude their common law obligations through contract. In enforcing limitation or exclusion clauses "the burden is on the [carrier] to show that it has done all that could reasonably be required to bring the limitative conditions to the [passenger's] notice"⁴⁶ What is reasonable is a matter of fact. Such risk management flexibility is now constrained by Article 18 of the Athens Convention.

Marine Liability Act Part 4 The Athens Convention and its Domestic Extension

Application of the Convention

Part 4 of the *Marine Liability Act* applies articles 1 to 22 of the 1974 Athens Convention and its 1990 Protocol⁴⁷ to passenger carriage throughout Canada and to noncontractual carriage with an exclusion for waterborne adventure tourism.

Article 2.1 applies the Athens Convention to international carriage if:

- a) the ship is flying the flag of or is registered in a State Party to this Convention, or
- b) the contract of carriage has been made in a State Party to this Convention, or
- c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

Section 27 of the *Marine Liability Act* provides for purposes of the application of the Convention, Canada is a State Party to the Convention.

⁴⁵ (1869), 12 N.B.R. 531.

⁴⁶ *Grand Trunk Pacific Coast Steamship Company v. Simpson*, 63 S.C.R. 361, [1922] 2 W.W.R. 320 at S.C.R. 378, *Union Steamships Limited v. Barnes*. [1956] S.C.R. 842, 5 D.L.R (2d) 535.

⁴⁷ Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, concluded at Athens on December 13, 1974 and the Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, concluded at London on March 29, 1990.

English courts have held that the applicability of the Athens Convention does not depend upon inclusion of its provisions by reference in contracts of passenger carriage, but rather by operation of law⁴⁸.

The Adventure Tourism Exemption

As a result of amendments recommended by the Senate, the *Marine Liability Act* includes provision in section 39 not found in the 1974 Athens Convention or its 1990 Protocol, authorizing the Governor in Council to require insurance or other financial security to be maintained for the types of carriage and limits of liability prescribed by Part 4. After enactment, as a result of regulatory analysis on implementation of compulsory insurance and vigorous representations by the Canadian adventure tourism industry that liability insurance for Athens Convention risks and liability limits would be commercially unavailable⁴⁹, the Marine Liability Act was amended to exclude adventure tourism from the application of Part 4.

The new section 37.1 provides:

- 37.1 (1) this part does not apply to an adventure tourism activity that meets the following conditions:
- a) it exposes participants to an aquatic environment;
 - b) it normally requires safety equipment and procedures beyond those normally used in the carriage of passengers;
 - c) participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers;
 - d) its risks have been presented to the participants and they have accepted in writing to be exposed to them; and
 - e) any condition prescribed under paragraph 39 (c)⁵⁰

Concerns have been expressed by the Canadian Maritime Law Association as to the workability in practice of these functional criteria for the adventure tourism exemption. The key triggering factor for entitlement to the exemption is the requirement for prior written acceptance by participants of voluntary acceptance of risk.

As this paper is written, Transport Canada is engaging in consultations with insurers and passenger carriers with a view to the Government of Canada implementing regulations for a system of compulsory insurance for passenger carriage other than adventure tourism activities.

⁴⁸ *The 'Lion'*, [1990] 2 Lloyd's Rep. 144, per Hobhouse J. at p. 153.

⁴⁹ *Recommendations on Compulsory Passenger Insurance Pursuant to Marine Liability Act (Part 4, Section 39)* Prepared by The Mariport Group Ltd. for Transport Canada Marine Policy Final Report November 2002 http://www.tc.gc.ca/media/documents/policy/marine_e.pdf.

⁵⁰ Which is to say carriage of a sail trainee or another class of persons participating in waterborne activities who is included by regulation to the application of the section 39.1 exemption.

General Application and Extension to Noncontractual Carriage

Article 1.4 provides:

- “Passenger” means any person carried in a ship,
- a) under a contract of carriage, or
 - b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by this convention;

Ship is defined in Article 1 to exclude air cushion vehicles. *Marine Liability Act* s. 36 extends the application of the Convention to any vessel designed used or capable of being designed or used solely or partly for navigation whether seagoing or not, but not including a vessel propelled manually by paddles or oars. For example, in Canada an amphibious sightseeing vessel would be subject to the Athens Convention, but an unmotorized whitewater raft would not.

Marine Liability Act subsection 37 (2) provides:

- (2) Articles 1 to 22 of the Convention also apply in respect of
 - a) the carriage by water, under a contract of carriage, of passengers or of passengers and their luggage from one place in Canada to the same or another place in Canada either directly or by way of a place outside Canada; and
 - b) the carriage by water, otherwise than under a contract of carriage, of persons or of persons and their luggage, excluding
 - i) the master of the ship, a member of the ship’s crew or any other person employed or engaged in any capacity on board a ship on the business of the ship,
 - ii) a person carried on board a ship other than a ship operated for a commercial or public purpose,
 - iii) a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason of any circumstances that neither the master nor the owner could have prevented, and
 - iv) a stowaway, a trespasser or any other person who boards a ship without the consent or knowledge of the master or the owner.

Pleasure Craft Provided Commercially

Legal authorities differ whether deaths of injuries from accidents on pleasure craft provided as part of vacation packages fall within the scope of the Athens Convention.

In 2005 the BC Supreme Court was called upon to decide whether the appropriate monetary limitation in respect of injuries sustained while using craft provided by a fishing lodge was governed by Part 3 (the general monetary limitation provisions) or Part 4 of the *Marine Liability Act*⁵¹. The Hon. Mr. Justice Brown concluded⁵²:

⁵¹ *Cuppen v. Queen Charlotte Lodge Ltd.*, 2005 CarswellBC 1414.

⁵² at 2005 Carswell BC 1414, para. 89.

Part 4 clearly applies to the normal contract of carriage i.e. that of one who is carried from one point to another by a carrier. The lodge provided him with a boat, so that he could fish while he was a guest at the lodge. Thus, the appropriate limitation is not \$350,000 pursuant to Part 4, but is \$1 million pursuant to Part 3.

In his 2007 decision *Frugoli v. Services Aériens des cantons de L'Est Inc.*⁵³ the Québec Superior Court held that boating transportation from a hunting lodge to a hunting site on Lake Louis in northern Quebec where the only means of access were by air or water, was part and parcel of a contracted for hunting trip and therefore *Marine Liability Act* subparagraph 37(2) (a) applied. The issue in that case was not which monetary limitation of liability regime applied, but rather whether this action arising out of boat occupants' drowning was subject to the two-year prescription under the *Marine Liability Act*⁵⁴ or the three-year prescription under the *Québec Civil Code*. Because the general wrongful death provisions in Part 2 of the *Marine Liability Act* (which applies to pleasure craft accidents) and Article 16 of the Athens Convention each prescribe two-year time limitations, the characterization of that boating voyage as contractual was not necessary to decide the monetary limitation issue.

In the 2011 decision of *Buhlman v. Buckley*⁵⁵ The Hon. Madam Justice Heneghan, in an action for a declaration of limitation of liability, was called upon to determine whether a collision between two pleasure craft each provided by and being used as part of the amenities of a vacation lodge, was governed by Part 3 or Part 4 of the *Marine Liability Act*. She concluded the parties “were not under a contract of carriage for the purpose of being “carried from one point to another by a carrier” so Part 4 does not apply.”⁵⁶ Unlike *Frugoli v. Services Aériens des cantons de L'Est Inc.* where the boat was being operated by an employee or agent of the hunting lodge, only the guests of the vacation lodge were operating the boats involved.

Gratuitous Passengers

In *Gunderson v. Finn Marine Ltd*⁵⁷, the plaintiff, a friend of the master and not a paying passenger, was badly injured when the operator of a water taxi fell asleep and the vessel grounded at speed.

The Hon. Mr. Justice Davies was faced with a choice between two potentially applicable monetary limitation amounts. As the vessel was commercial, the \$1 million monetary liability limit prescribed by section 29 of the *Marine Liability Act* for operation of pleasure craft did not apply. Therefore the judge was faced with a choice between the general limitation of liability regime in Part 3 of the Act and the Athens Convention liability regime.

Counsel for the plaintiff contended the defendant could limit its liability only to 2 million SDRs under the Part 3 liability regime, because section 37 of the Act did not extend the Athens Convention liability regime to non-paying occupants of a vessel travelling from one place in Canada to another.

⁵³ 2007 QCCS 6203, 2007 CarswellQue 12351.

⁵⁴ s. 14 in respect of actions for personal injury or death.

⁵⁵ 2011 FC 73.

⁵⁶ 2001 FC 73, para. 14.

⁵⁷ 89 B.C.L.R. (4th) 266, 302 D.L.R. (4th) 266, [2009]W.W.R. 151, 2008 Carswell BC 2638.

29. (1) the maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to passengers of a ship for which a Canadian maritime document is required under Part 4 of the *Canada Shipping Act, 2001* is the greater of
- (a) 2,000,000 units of account⁵⁸, and
 - (b) the number of units of account calculated by multiplying 175,000 units of account by the number of passengers on board the ship.

Counsel for the defendant submitted that Parliament had intended to extend the scope of the Athens Convention by defining the term “person” to include those aboard a vessel being operated for a commercial purpose” other than under a contract of carriage” while excluding the vessel’s master, crew and employees of the ship owner from such inclusion. Therefore the ship operator was entitled to limit its liability to 175,000 SDR’s under Article 7 of the Athens Convention, as applied by section 37 of the Marine Liability Act. The judge agreed with the defendant’s submissions, concluding⁵⁹:

I am also satisfied that s. 37(2)(a) and 37(2) (b) of 4 of the Act should be read harmoniously so that domestic gratuitous passengers on vessel operated for a commercial purpose are subject to the same limitations of liability that apply to domestic paying passengers under a “contract of carriage”.

To read the provisions as providing a higher limit of liability to gratuitous passengers could result in the wholly anomalous result that a guest on a vessel operated for commercial purpose that is involved in an injury causing event would be less limited in his or her recovery than would any paying passengers on the same vessel. Such an interpretation would, in my view, be untenable and contrary to Parliament’s intention in enacting comprehensive legislation to domesticate an international maritime convention.

The Liability Regime

The Athens Convention does not operate to supersede all contractual provisions by prescribed rules. Rather, Article 18 provides:

Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8⁶⁰, and any such provision purporting shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17⁶¹, shall be null and void, but the

⁵⁸ defined by subparagraph 29(5) as International Monetary Fund special drawing rights (SDRs).

⁵⁹ at 2008 Carswell 2638, subparas. 33 (7) -(8).

⁶⁰ which permits a deductible not exceeding 300 SDRs for damage to a vehicle and not exceeding 150 SDRs per passenger for damage to other types of luggage.

⁶¹ which lists a range of locations of jurisdictions in which actions under the Convention may be brought

nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention.

Articles 3.1 and 3.2 of the Athens Convention continue the general common-law negligence principles that a passenger carrier is liable for damage suffered as a result of death or personal injury to a passenger or the loss or damage to luggage if the incident was due to the fault or neglect of the carrier or of its servants or agents within the scope of its employment and the common law principle that the burden of proving that the incident which caused the loss occurred in the course of carriage and the extent of damage lies with the claimant. Article 3.3 creates a reverse onus in favour of the claimant for certain causes of loss:

Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases the burden of proving fault or neglect shall lie with the claimant.

Monetary Limitation of Liability

Article 7.1 caps the liability of the carrier for death or personal injury to a passenger 275,000 SDR's or the equivalent capital value of damages awarded as periodical income payments. Article 7.2 permits any State Party to fix a higher limit for citizens of that state. Article 8 fixes limits of 1800 SDRs for cabin luggage loss or damage, per passenger per carriage, 10,000 SDRs per vehicle per carriage (including vehicle contents) and 2700 SDRs for luggage other than cabin luggage or vehicles and their contents. The carrier may contract with the passenger for deductibles of 300 SDR for vehicle damage and 135 SDRs per passenger for luggage other than vehicles. Article 10.1 permits the carrier and passenger to agree on higher limits. Article 10.2 clarifies that legal costs and interest on damages shall not be included in the limitation amounts.

The effect of *Marine Liability Act* section 37 in extending the Athens Convention to noncontractual carriage within Canada and section 28 in prescribing a personal injury or death liability limit of the greater of 2 million SDRs and 175,000 SDRs per passenger for ships less than 300 GRT, is to make a greater fund available for compensation if the number of occupants of a small commercial passenger vessel suffering damages is less than 11 at the time of the accident or the vessel is certificated to carry less than 11 passengers.

Limitation Periods

Article 15 requires the passenger to give written notice of damage to vehicles or non-cabin luggage at the time of its redelivery by the carrier or for cabin luggage at the time the disembarkation. If damage is not apparent or luggage is lost, notice is required to be given within 15 days from the date of disembarkation or redelivery or from the time when redelivery should have taken place. If such written notice is not given, the passenger has the onus of proving the luggage was received damaged.

Article 16 provides for a general time-bar of two years for personal injury or death, or loss of or damage to luggage. If personal injury occurs during carriage resulting in the death of the passenger after disembarkation, the two-year time limit runs from the date of death, but no later than three years from the date of disembarkation.

Places Where Action May Brought

Under Athens Convention Article 17, an action may be brought in a court of one of the States Parties to which one of the following criteria apply:

- a) the place of permanent residence or principal place of business of the defendant,
- b) the place of departure or that of the destination according the contract of carriage,
- c) a place which is both the domicile of the claimant and a place of business to which the defendant carrier is subject to jurisdiction
- d) the place where the contract of carriage was made if the defendant carrier has a place of business there and is subject to the jurisdiction of that state

In *Princess Cruises v. Nicolazzo*⁶² the respondents, residents of Canada, booked a cruise on Princess Cruise Lines Ltd. a California corporation, from Italy to England through a travel agent in Ontario. They commenced an action in Ontario claiming theft of money during the cruise from their stateroom safe. The trial judge through his own research found that Princess Cruise Lines Ltd. was owned by Carnival Corporation, which did have places of business in Canada. The Divisional Court on appeal found that the trial judge erred in relying on independent research without advising counsel and inviting submissions and also in finding Princess Cruises was a cruise brand of Carnival Corporation. The Divisional Court dismissed the action for want of jurisdiction.

While ferry operators and some cruise lines engage in direct marketing, a considerable proportion of waterborne passenger carriage is booked through travel agents. Close analysis of both the ticket terms and the agency contract between the cruise line and local Canadian agents may be necessary to determine whether the cruise line does business in Canada or whether the contract was made in Canada within the meaning of Article 17. Claimants may also use in aid Rule 135 of the *Federal Courts Rules*.

Heads of Damages Recoverable

Similarly to the exclusive remedies clause of the Montréal Convention on carriage by air, Article 14 of the Athens Convention provides:

No action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention.

The Athens Convention does not define the ambit of “damages”. Canadian courts interpreting the range of claimable remedies have had regard to the considerable body of carriage by air case law where the Montréal Convention explicitly restricts claims to compensatory damages and provisions in predecessor treaties providing for recovery of damages have been interpreted to restrict claims to compensatory

⁶² 2009 CanLii 28217 (Ont. Div. Ct.).

damages⁶³.

After the BC Ferries *Queen of the North's* sinking, relatives of deceased passengers brought claims against the defendant ship and certain crew members, in which the plaintiffs additionally sought punitive and aggravated damages. The parties brought a motion for the determination of the legal issue whether such heads of damages were recoverable under the Athens Convention⁶⁴. Counsel for the plaintiffs submitted that as the *Marine Liability Act* was silent on point, the court could avail itself of the analysis in *Orden v. Grail* to develop the common law of damages in light of current social expectations. The Hon. Mr. Justice Joyce interpreted Article 14 of the Athens Convention as precluding resort to such analysis and adopted the comments of the Hon. Madam Justice Southin in *Capilano Fishing Ltd. v. Qualicum Producer*⁶⁵

As to punitive damages, one of their purposes is to discourage wrongdoers. The conclusion that the roe-herring fishery is an essentially a reckless maritime adventure in which an owner cannot limit his liability should itself discourage wrongdoing and nothing more is necessary. I add also that no case was cited to us in which punitive damages were awarded for the negligent navigation of a vessel, whether against a ship, the master or the owner, and it is not for this Court to introduce into maritime law a concept unknown to it.

It is important to understand that at the time of the British Columbia Court of Appeal's decision in the *Qualicum Producer*, the applicable Canadian statutory criterion for breaking shipowner's limitation of liability was the former "actual fault and privity" test⁶⁶. Once the court found that participation in the competitive BC herring roe fishery, with its very brief quota openings, was a voluntary risk assumption of probable damage to vessels and nets, no participating shipowner could be found not in actual fault and privity. By contrast, all of the presently applicable limitation liability regimes under the *Marine Liability Act* including the Athens Convention⁶⁷, have a higher threshold for breaking limitation of both reckless or intentional conduct and knowledge on the part of the carrier that such loss would probably result. The possibility of being able to break limitation as a substitute for the ability to claim heads of punitive or aggravated damages, which was the rationale for denying recovery of such heads of damages in the *Qualicum Producer*, is less likely to be available to passenger claimants today.

Therefore the decision in *McDonald v. Queen of the North* may have limited precedential value as to whether aggravated damages are recoverable under the Athens Convention.

⁶³ *Carriage by Air Act*, R.S.C. 1985 c. C-26 as amended, Montreal Convention Article 29 For a discussion of the cases, see *Naval-Torres v. Northwest Airlines Inc.*, [1998] O.J. No. 1717, 159 D.L.R. (4th) 67 (Gen. Div.).

⁶⁴ *McDonald v. Queen of the North (Ship)*, 2008 BCSC 1777.

⁶⁵ 2001 BCCA 244 (CanLII), 198 D.L.R. (4th) 267 at para 49.

⁶⁶ *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 575.

⁶⁷ Article 13.1 The carrier shall not be entitled to the benefits of the limits of liability prescribed... if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Mr. Justice Joyce was then called upon to determine psychological injury claims in a class action brought on behalf of *Queen of the North* passengers⁶⁸. The reasons for judgement are a thorough and useful overview of present Canadian law on recoverability of damages for psychological injury. BC Ferries had abandoned its position that the Athens Convention precludes recovery for psychological damages and “accepts that damages will be recoverable for personal injury in accordance with provincial law”. With respect, the constitutionality of applying provincial law to determine damages arising out of the sinking of a passenger ferry is doubtful.

It is by no means certain that this position was based only on juridical grounds. The law for air passenger injury claims under the Montreal Convention is clear that only such psychological damages as are associated with a physiological condition caused or exacerbated by an accident occurring between embarkation and disembarkation are recoverable⁶⁹. This would not include damages for post-traumatic stress disorder as were awarded some passengers in *Kotai v. Queen of the North*. In *Lee v. Airtours*⁷⁰, the claimants sought and were awarded damages for psychological injury sustained as they watched from lifeboats a cruiseship burn at sea. However, the basis for recovery was under the *Package Travel Regulations 1992*, The English court held these regulations, giving effect to European Law, supplemented the United Kingdom domestic law giving effect to the Athens Convention. By contrast, in *Norfolk v. My Travel*⁷¹ a passenger brought an action for slip and fall injuries sustained the board a cruise ship outside the Athens Convention two-year limitation but inside the three year limitation applicable to claims under the *Package Travel Regulations, 1992*. That court held that the Athens Convention was the sole basis for the claim and therefore the claim was time barred.

In Canada, at least, it remains open to argue that Article 14 of the Athens Convention should exclude any other legal basis for damages arising from passenger and luggage carriage than recoverable under the Convention.

Vehicles as Luggage under the Athens Convention

Articles 1.5 and 1.6 of the Athens Convention define the two types of luggage.

1.5 “Luggage” means any article *or vehicle* carried by the carrier under a contract of carriage excluding:

- a) articles and vehicles carried under a charter party, Bill of lading or other contract primarily concerned with the carriage of goods, and
- b) live animals

1.6 “cabin luggage” means luggage which the passenger has in his cabin or is otherwise in his possession, custody or control. Except for the application of paragraph 8 of this Article and Article 8, cabin luggage includes luggage which the passenger has in or on his vehicle;

⁶⁸ *Kotai v. “Queen of the North” (The)*, 2009 BCSC 1405, 2009 CarswellBC 2708.

⁶⁹ See authorities reviewed in *Chau v. Delta Airlines* (2003) 67 O.R. (3d) 108 (S.C.).

⁷⁰ [2004] 1 Lloyd’s Rep. 683.

⁷¹ [2004] 1 Lloyds Rep. 106.

Article 1.8 of the Athens Convention has specific rules for its scope of application to luggage:

“Carriage” covers the following periods:

- a) with regard to ... cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier...
- b) with regard to cabin luggage, also the period during which the passenger is in the marine terminal or station or on a quay or in or on any other port installation if the luggage has been taken over by the carrier or his servant or agent and has not been re-delivered to the passenger;
- c) with regard to other luggage which is not cabin luggage, the period from the time of its taking over by the carrier or his servant or agent on shore or on board until the time of its redelivery by the carrier or his servant or agent;

The diplomatic negotiators of the Athens Convention may not have contemplated its statutory application to short voyage ferry carriage where passengers remain with their vehicles. This raises the interpretive issue whether the marshalling by ships crew on board a ferry of a vehicle driven aboard by a passenger is a sufficient “taking over” by the carrier of the vehicle as luggage so as to bring such occupied vehicle within the ambit of the Athens Convention regime.

Both Marine Atlantic and BC Ferries endeavour to risk manage their responsibility for vehicles by contract. BC Ferries’ Conditions of Carriage seek to clarify when the “taking over” is operative⁷². The Marine Atlantic Contract of Carriage provides that carriage of vehicles shall not be construed as delivery to the carrier and that the owner or operator of the vehicle is “deemed to be in control of the vehicle at all times” and shall be fully responsible for operating and parking the vehicle on the vessel⁷³. It is questionable, particularly in the context of the carrier’s safety requirement that passengers leave their vehicles during the voyage, whether such a deeming provision may be operative to exclude all liability in the face of Article 1.8 c) of the Athens Convention.

⁷² Clause 8

⁷³ Clause 6

Has the Common Law of Passenger Carriage Been Statutorily Superseded?

Subparagraphs a) and b) of Article 1.8 of the Athens Convention provide:

“Carriage” covers the following periods:

- a) with regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on the quay or in or on any other port installation;

Reading the Athens Convention definitions relating to the spatial scope of carriage, it will be seen that the Convention liability regime does not extend to passenger activities in marine terminals or port areas, and may not extend to vehicles which remain under the control of their drivers while on board. For safety reasons, Canadian coastal ferry operators require passengers to leave their vehicles after embarkation until shortly before disembarkation. However, passengers generally remain with their vehicles when using highway or municipal ferries. Since Athens Convention Article 1.8 extends the application of the convention to passengers “on board”, the passenger is still subject to the Athens Convention liability regime whether or not he or she remains in a vehicle.

The explicit exception in Athens Convention Article 1.8 of marine terminal or port area passenger movements from the activities of embarkation or disembarkation contrasts with judicial interpretation of the unqualified use of the same embarkation and disembarkation wording for international passenger carriage by air found in the Montréal Convention⁷⁴. As airport security impels more and more control over air passenger movements at airports, courts have adopted a functional test whether the degree of air carrier control over passenger movements results in a passenger being “in the course of embarkation or disembarkation” even if an accident befalls a passenger well within airport buildings⁷⁵.

Regulations under the *Marine Transportation Security Act*⁷⁶ and the requirements of the International Ship and Port Security Code impel greater security controls over marine passenger movements, both on some domestic⁷⁷ and international⁷⁸ voyages. However, the explicit spatial and functional exceptions to application of the Athens Convention arguably preclude interpretive extension of the Convention landward into port areas and passenger terminals. The Federal Court has jurisdiction over accidents associated with water transportation occurring in port areas and marine terminals through the functional

⁷⁴ *Carriage By Air Act* R, S.C. 1985 c. C-26 as amended Sch. VI Montreal Convention Art. 17(1).

⁷⁵ see discussion in *Halsbury's Laws of Canada* Aviation and Space sec. HAV-176.

⁷⁶ S.C. 1994 c. 40 as amended.

⁷⁷ *Domestic Ferries Security Regulations* SOR 2009-321 Schedule 1.

⁷⁸ requirements for passenger facilities in *Marine Transportation Security Regulations* SOR 2004-144.

test for maritime obligations as set out by the Supreme Court of Canada⁷⁹.

Therefore the legal responsibilities of owners and operators for death or personal injury in marine terminals or port areas used by passengers continue to be governed by the general Canadian Maritime Law of negligence. This means there is still scope for application of case law on passenger ticket exclusion terms which predates the *Marine Liability Act*, at least to the extent such terms may apply to the use by passengers of port areas and marine terminals.

Some Canadian ferry operators' contractual terms do provide for control of passengers and terminal areas. For example, BC Ferries' Conditions of Carriage provide:

6. For good order and security, passengers agree to follow the directions of any employee of the Carrier in respect of the use or operation of the terminal or vessel. When, requested by any employee, passengers will provide proof of identification satisfactory to the Carrier and will answer any inquiry and produce any documents requested by the employee in respect to any luggage, vehicle or its contents. Persons who refuse to provide information or documentation as required: who refuse to follow directions of any employee, sign or device in any terminal or on board the vessel; who interfere with or molest other passengers; who interfere with the operation of a terminal or vessel; or who interfere with any employee of the Carrier, may be refused passage, ordered off the vessel and evicted from terminal.

The Right of General Limitation

With the exception of carriage of persistent petroleum cargoes in bulk, which has its own limitation of liability regime⁸⁰, carriers of goods and passengers in Canada exposed to high-value claims are entitled to invoke the 1976 Limitation Convention and its 1996 Protocol⁸¹, ratified by Canada and enacted in Part 3 of the *Marine Liability Act*⁸². The limitation amount for personal injury not related to passenger carriage and cargo loss is calculated on a sliding scale based on the ship's gross register tonnage⁸³. The limitation amount for passenger carriage, including persons accompanying vehicles carried under a contract of carriage or live animals is 175,000 SDRs times the number of passengers the ship is certificated to carry⁸⁴.

⁷⁹ The latest significant authority on point being *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86.

⁸⁰ See Part 6 of the *Marine Liability Act*.

⁸¹ Convention on Limitation of Liability for Maritime Claims 1976, concluded at London on November 19, 1976 and the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976, concluded at London on May 2, 1996.

⁸² Articles 1 to 15 of the Convention, as amended by the protocol, are reproduced as Schedule 1 to the *Marine Liability Act*.

⁸³ Article 6

⁸⁴ Article 7

The right of limitation includes owners, charterers, managers and operators of seagoing ships⁸⁵. Article 15.2 permits state parties enact national laws to regulate limitation of liability for ships intended for inland operation and those under 300 tons. As discussed above, Canada has done so for small commercial and passenger vessels as well as for pleasure craft⁸⁶.

Among the types of claims which are subject to limitation of liability under Article 2, the following are most relevant to the carriage of passengers or cargo:

- 2.1 a) claims in respect of loss of life or personal injury or loss of or damage to property... occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- b) claims in respect of loss resulting from the delay in the carriage by sea of cargo, passengers or their luggage;...
- e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- f) claims of a person other than the person liable in respect to measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures

An addition to the per passenger and per vehicle limitation provisions in the Athens Convention, a carrier of passengers by water may also invoke the general limitation provisions of Part 3. There is a potential for inconsistencies in the application of the Athens Convention and the Limitation Convention in cases where more than one accident may occur during a voyage or the number of passengers actually on board is less than the number of passengers the vessel is certificated to carry⁸⁷.

⁸⁵ Article 1.2

⁸⁶ See *Marine Liability Act*, ss, 28, 29 and 37.

⁸⁷ Gold, Chircop and Kindred *Canadian Maritime Law* p. 489.

Conclusion - Looking to the Future

Canadian Maritime Law gives marine carriers and their users ample opportunity to negotiate and allocate risks for carriage of goods as long as a bill of lading is not issued. This flexibility will increase markedly if the international community adopts the Rotterdam Rules and if their application is extended to domestic marine carriage in Canada. Marine passenger carriers and their passengers are more constrained by the Athens Convention as to how risk may be allocated contractually. I foresee the following issues may well arise for courts' consideration:

- the application and development of common law obligations to informal cargo carriage ventures whose participants did not put their mind to risk allocation beforehand
- the evolution of exemption clauses and benefit of insurance terms in written contracts of cargo carriage
- the penumbra between adventure tourism activities and regular waterborne passenger carriage
- the carriage of passengers above water in air cushion vehicles
- the interstices between application of the Athens Convention and other elements of Canadian Maritime Law in quasi commercial passenger carriage
- the heads of damages recoverable under the Athens Convention
- the continuing challenge of rapidly evolving transportation technologies and business methods getting ahead of the law