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Connecting Carrier Conundrum:
Last Carrier Presumption and Limits of the Weight Limit Defence

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Introduction

Although a shipper may only want to ship goods from point A to point B, the carriage of the goods from one place to another often encompasses multiple connection points along the way and involves multiple carriers. The multiple legs of a trip and the multiple parties involved often make it difficult to figure out why goods that were in good condition at point A, arrive damaged at point B or did not arrive at point B at all. When this happens, the owner of the goods wants somebody to pay for the damaged or lost goods, and the carriers want to avoid having to pay. In this paper, we will discuss who will be held responsible for the loss or damage, and how they can control how much they may have to pay. More particularly, we will discuss how the Last Carrier Presumption operates to place responsibility for the loss or damage on the last carrier in a chain of carriers, as well as if and how the responsible carrier can limit its liability to potentially reduce how much it has to pay.

Who is Responsible? The Last Carrier Presumption

In situations where there are connecting carriers, the claimant will have a difficult time determining under whose care, custody and control, the damage to the cargo happened. This is particularly true as the claimant does not see the cargo as it passes from one carrier to another. In response to the difficulty that claimants face when trying to prove which carrier damaged the goods, the American jurisprudence developed a principle that shifts the onus of proof onto the carriers, starting with the last carrier, to prove that the damage did not occur during its leg of the trip.

The burden will be shifted to the carrier if the owner of the goods can prove delivery of the goods to the first carrier in good order and receipt of those goods in bad order at the end of the chain of successive carriers. If owner of goods can prove this, then there is a presumption that the loss or damage occurred in the hands of the last carrier. This principle is known as the "Last Carrier Presumption".

The Last Carrier Presumption was first introduced into Canada through the 1991 British Columbia case of *Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co. (The Sammi Crystal)*. In this case, 1130 pieces of 1288 pieces of pipe purchased from Korea arrived in Calgary, Alberta, damaged and unusable. The Plaintiffs brought their claim against the 5 connecting carriers. The issue was that the successive chain of carriers made it impossible for the Plaintiffs to prove who caused the damage to the pipe. In the face of this difficulty, the court acknowledged the principle of the Last Carrier Presumption as being applicable in Canada as it would bring matters into conformity with international commerce. Ultimately, however, the Court did not apply it because they were not convinced that the damaged pipe was actually the subject matter of the clean bill of lading from which the presumption was going to operate.

The principle was described as follows by the Court in *The Sammi Crysal* :

> In my view, the governing principle should be that where there is a successive chain of bailees and the owner of the goods has proven delivery of the goods to the first bailee in good order and the receipt of those goods in bad order at the end of the chain of successive carriers, there is a presumption that the loss occurred during the time the last custodian had control of the goods.

The justification of the principle is found in the fact that the carrier is in the best position to determine whether they are receiving the goods in good order. The Court in *The Sammi Crystal* relied on cases from the United States, including *Julius Klugman's Sons v. Oceanic Steam Navigation Co.*, where the Court said:

> It may also be said in support of the rule that the final custodian who has received the goods in apparent good order without noting any defect, should not complain if an unexplained loss is attributed to him rather than to prior custodians; in many cases a careful inspection by him at the time the goods were turned over to him would have revealed the defect, if any then existed, and would have saved him from liability.

We take this opportunity to note that the justification for the application of the Last Carrier Presumption leaves open the argument that the presumption should not apply in some cases. Since the justification centres around the carriers being in the best position to determine if the goods are in good order, there will be circumstances where it arguable that the carrier is not in best position to know what condition the goods were in when it received them. For example, a successive carrier may have no way of knowing the condition of goods which have been packaged and sealed in containers by the shipper as they cannot open the sealed container. In such a case, it is open to the carrier to lead evidence on their inability to inspect the goods upon receipt and argue that the presumption should not apply.

In any event, if the presumption does apply, then it is important to remember that the Last Carrier Presumption, is just that, a presumption. This means that it can be rebutted by leading evidence that shows what actually happened. The Court in *The Sammi Crystal* held:

> …where there is a successive chain of carriers and the goods were initially delivered for shipment in good order and condition but have arrived in a damaged condition, the last bailee in the chain has the burden of proof to show that it did not damage the goods and that it received the goods in a damaged condition, or that the damage, although while in its custody, occurred without negligence on its part.

In order to rebut the presumption, the carrier must lead evidence to show what actually occurred. Thus all carriers must keep careful records of the condition of the goods carried at the various stages of their voyage. As the Court stated in *The Sammi Crystal*, the key to this kind of case is documentation. The Plaintiff need only prove that the cargo was delivered to the first carrier in good condition and that it was received in damaged condition. It is then for the last carrier to shift responsibility for the damage to the other carriers. Each carrier must carefully document all damage as it receives the goods. Failure to do so will, prima facie, impose on it liability for damage that is noted by a subsequent carrier. The Defendant carrier may be unable to discharge its burden of proof if its documentation is inconclusive, contradictory or confused.

Documentation can take on many different forms, the most important of which is the Bill of Lading. We stress the importance of inspecting the cargo and marking down any observed deficiencies, including not only damage to the goods themselves, but also to their packaging. For example, if there are goods that are covered with a tarp and there is a tear or there is damage to the packing materials, then these thing should be noted. This kind of evidence can be used to demonstrate that the goods were received damaged. Another avenue to rebutting the presumption is showing that there was no negligence on the part of the carrier. Besides the carrier's verbal evidence, today's technology may provide assistance and useful documentation to demonstrate that

damage occurred without negligence. For example, GPS and satellite technology can provide data in real time respecting many factors such as the route taken, the speed of the vehicle, the application of breaks and the temperature of reefers.

The requirement for evidence to show that there has been no negligence by a carrier can be seen in the 1993 Manitoba case, *Myers v. Kingsway Transport Ltd.*, where the court applied the Last Carrier Presumption to find that the defendant, who was the last carrier, was liable for damage to an antique settee and chairs shipped from England to Winnipeg. The last carrier failed to give any evidence, and thus could not rebut the presumption. Notably, the court remarked that the presumption may be relatively easy to rebut in this case as proof that there was no negligence may be all that is required since the fragility of the caning gave rise to a real possibility that damage could occur without negligence. In this case the container in which the goods were sealed was not itself damaged. The court held:

> … it would have been reasonably simple for the defendant to have called its trucker to show that its handling of the crate was not negligent. The fragility of the caning gives rise to a very real possibility of damage being able to occur without negligence on the part of the carrier. Very little would have been required to rebut the presumption of negligence. Nothing was forthcoming. I therefore find the defendant to be liable for the damage.

Despite the remarks in *Myers*, that it would very little would be required to rebut the presumption of negligence, Courts have acknowledged the Last Carrier Presumption is an onerous one, but have applied it in any event. In the British Columbia case of *Imperial Granite Supply Ltd. v. Sea Pearl*, the Plaintiff sued for damage to granite slabs shipped aboard the Sea Pearl and unloaded by Fraser Surrey Docks Limited. The evidence respecting when the damage occurred, aboard the vessel or in the unloading, was inconclusive. The Court commented that The Sammi Crystal was an example of the very onerous nature of the presumption. However, the Court continued that the presumption has been employed in the resolution of claims for damage to cargo delivered to Canadian West Coast ports and had encouraged the proper documentation of carriage damage. The correction of the Last Carrier Presumption was not challenged in this case and was applied to the benefit of the Plaintiff. Fraser Surrey had been given a clean report indicating that the contained of granite was received in good order and condition. The presumption operated to found liability with Fraser Surrey, the last carrier.

If the last carrier is successful in rebutting the presumption that the loss or damage occurred while the goods were in its care, custody and control, then the presumption does not end there but moves on to the previous carrier in the succession. This was demonstrated in the 2003 British Columbia case, *Canadian Forest Products Ltd. v. B.C. Rail Ltd.*, where the Plaintiff pulp manufacturer had a contract to supply a Scottish company with pulp to be used for paper making. The pulp was shipped to Scotland using three carriers. When the pulp arrived in Scotland, it was discovered that it was contaminated by splinters. The Plaintiff attempted to rely on the Last Carrier Presumption. The Court held that the last carrier (the ocean carrier) and the second-to-last carrier (a marine terminal where the goods were stored prior to loading) successfully rebutted the presumption of liability. The Court found that the first carrier (the rail carrier) had not rebutted the presumption. The Court will consider all the evidence of the handling of the cargo at each stage of the voyage in determining whether or not each carrier has rebutted the presumption.

Therefore, as long as the owner of the goods can prove that they were delivered to the first carrier in good order and were received at the end of the succession of carriers in bad order, then the

presumption will be that the loss or damage occurred in the care, custody and control of the last carrier. If the last carrier provides evidence and the presumption is rebutted, then the presumption continues backwards along the line of carriers until one fails to rebut the presumption, at which point that carrier will be liable.

We suggest that carriers and underwriters keep the following in mind:

- The Last Carrier Presumption exists, and whoever is the last carrier has an increased risk.

- As it is a presumption, it can be rebutted but evidence is key.

- It is extremely important to identify any deficiencies and note them on the Bill of Lading. This is true for all carriers along the line because a subsequent carrier may be able to rebut the presumption, and you may find yourself needing this evidence as the presumption continues backwards along the line.

- If the damaged goods are packaged in a sealed container, it is arguable that the presumption should not apply because the carrier was not in the best position to determine if the goods were received by them in good order. However, we note that identifying and noting the deficiencies of the container itself is important in case the presumption applies.

- Finally, evidence that a carrier was not negligent in its handling of the goods may save a carrier from the presumption. GPS and satellite technology may provide useful evidence in this regard.

How much does the liable carrier have to pay? The Limits of the Weight Limit Defence.

The carrier who fails to rebut the Last Carrier Presumption, will be faced with liability that practically amounts to the liability of an insurer. Essentially, where goods are held to be damaged in a carrier's care, custody and control, the carrier will be liable for that damage notwithstanding that there may have been no negligence on their part. Although there is an apparent discrepancy between rebutting the Last Carrier Presumption by leading evidence that there was no negligence and the liability of carriers despite lack of negligence, we note that evidence of lack of negligence is only good so far as rebutting the presumption. If the Plaintiff can actually prove which carrier damaged the goods, then the lack of negligence will unlikely assist that carrier.

There are only a few defences at common law to the onerous liability, which are acts of God or the Queen's enemies, riots, strikes, defects or inherent vice in the goods or acts of default of the shipper or owner (such as improper instructions respecting pick up or delivery or improper packing or securing on the shipper's part). However, in an attempt to encourage trade by easing the onerous liability of a common carrier, the provinces of Canada have enacted conditions of carriage, virtually uniform throughout all 10 provinces, which are meant to define the contract of carriage between a carrier and shipper or owner of goods. These "Uniform Conditions" are meant to be incorporated into the bill of lading, a document which identifies the parties and subject matter of the contract of carriage and evidences the terms of that contract.

The Uniform Conditions provide a number of protections to the carrier in the event of cargo damage. This paper will focus on one of the most significant issues which is a provision allowing

the carrier to limit its liability to $2.00 per pound based on the weight of the cargo unless the shipper of the goods declares a different value (in which case the shipper will likely be charged a premium for the extra risk the carrier is assuming). Essentially, if a carrier is the only carrier or is unable to rebut the Last Carrier Presumption, then it may be able to limit its liability under the Uniform Conditions to $2.00 per pound, under the "maximum liability" provisions of the Uniform Conditions. This is known as the "Weight Limit Defence". This paper will address that defence as well as some of the limits and misunderstandings respecting its use.

In British Columbia, the Uniform Conditions are found in the *Motor Vehicle Act Regulations*, BC Reg 26/58, s. 37.39. The conditions are called the "Specified Conditions of Carriage". Clauses 9 and 10 of the standard Specified Conditions deal with the valuation of cargo, and read as follows:

> Article 9: Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not such loss or damage results from negligence, is to be computed on the basis of the value of the goods at the place and time of the shipment (including the freight and other charges if paid and the duty if paid or payable and not refundable) unless a lower value has been represented in writing by the consignor or has been agreed on between the parties to this bill of lading, or is determined by the classification or tariff on which the rate is based, in any of which events such lower value is the amount that governs the computation of the maximum liability of the carrier.
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> Article 10: The amount of any loss or damage computed under Article 9 must not exceed $2 per pound ($4.41 per kilogram), computed on the total weight of the shipment, unless a higher value is declared on the face of the bill of lading by the consignor.

Thus, a carrier's liability is limited as follows:

a) If the shipper has declared the value, no more than that declared value;

b) If the shipper has not declared the value, no more than $4.41 per kilogram ($2.00 per pound); and

c) In any event, no more than the actual value at the time and place of shipment.

These clauses are broad, and with the exception of willful misfeasance, protect a carrier from liability for all loss or damage to the cargo it is carrying, even in the event of negligence on the part of the carrier or theft by the carrier's employees or by strangers.

Despite the broad limitation of liability found in the Uniform Conditions, they are sometimes thought to be broader than they actually are and a carrier may find itself not to be protected as it anticipated. Some issues that result in protection not being as encompassing as may be thought are: (1) the type of damages sustained; (2) whether the goods are in transit; (3) the opportunity provided to the shipper to opt into more coverage; (4) whether there is a partial loss; and (5) the law that governs the contract of carriage.

The Type of damages Sustained:

With respect to the types of damages sustained, the limitation of liability is geared towards physical injury or loss to the goods, and not to consequential losses from that physical loss. In this vein, the types of losses that are not subject to the limitation of liability are losses due to delay of delivery of cargo, losses due to non-delivery of cargo and consequential business losses:

- The defence does not cover lost profits due to non-delivery of cargo. For example, in the Ontario Court of Appeal case of Cathcart Inspection Services Ltd. v. Purolator Courier Ltd. (1982), it was held that the maximum liability provisions of the contract for carriage did not protect the carrier from the shipper's lost profits due to non-delivery of what would have been a successful tender. It is important to note that this limitation of the defence applies to consequential profits lost rather than to the value of the cargo itself.

- The weight limit defence does not cover damages due to delay in the delivery of cargo. The Ontario Supreme Court case of Cornwall Gravel Co. v. Purolator Courier Ltd. (1978), also a tender case, held that a carrier could not avail itself of the weight limit provision when it delivered a tender past the delivery deadline, causing business losses for the shipper. The decision was ultimately affirmed by the Supreme Court of Canada.

- The defence does not cover consequential business loss due to cargo damage, unless that limitation is specified. See, for example, the Ontario Court of Appeal case of Monta Arbre Farms Inc. v. Inter-Traffic (1983) Ltd. (1990), in which damages were awarded for lost profits due to destruction of cargo intended for resale.

Therefore, if the claimant is successful in making a claim for these consequential losses, then the carrier will not be able to limit them using the Weight Limit Defence, and may be liable for the entire amount. This can have devastating consequences.

For example, if the damaged cargo is a generator that was meant to power a mill, then damage to the generator could result in the mill being shut down for months on end. In such a case, even if there is a limitation of liability that covers the entire cost of repairing the generator, that limitation of liability will not serve to limit the carriers liability with respect to the loss of business while the mill is shut down and these consequential damages could be in the millions of dollars. We further note, that a carrier could also find itself uninsured for these consequential losses as some insurance policies also limit coverage to direct physical loss or damage.

Whether the Goods Are In Transit

With respect whether the goods are in transit, the courts may look to the transaction objectively to determine whether bailment after the transit is over is part of the contract entered into. In some cases, lengthy bailment after transit has been found not to attract the operation of the "maximum liability provisions", whereas bailment of a limited duration was. On the same note, in contracts that combine storage and carriage, the onus is on the carrier to establish that loss or damage was occasioned during the carriage portion of the contract in order to take advantage of the "maximum liability" provisions.

The Opportunity Provided to the Shipper to Opt into More Coverage

With respect to whether an opportunity was provided to the shipper to opt into more coverage where the value of the cargo would exceed the maximum allowed by the weight limitation, American jurisprudence suggests that in order to take advantage of the maximum liability, it is incumbent upon the carrier to notify the shipper of the availability of additional freight cost, and to provide the shipper the opportunity to pay a higher rate. If the shipper then declines to pay the additional cost, the shipper will likely be precluded from collecting more than the weight limit amount.

Notably, in subrogated actions, American courts have precluded insurers (stepping into the shoes of shippers) to argue that they were not given a fair opportunity to opt for higher coverage by virtue of the fact that the shipper paid a premium to insure the goods through its own insurer, and it does not make sense that it would pay a second premium to the carrier to obtain extra coverage beyond the maximum liability.

Whether there is a Partial Loss

If only part of the goods are lost or damaged, a carrier may wish to use the weight of the lost or damaged goods in order to calculate the maximum liability, whereas the shipper would wish to use the weight of the entire shipment. Although there are proponents and support for both views, on a balance, it would seem that the maximum liability with respect to the Uniform Conditions will be calculated based on the entire weight of the shipment.

This conclusion is based, in part, on the wording of Article 10, which specifically says that computation will be based on the "total weight of the shipment." Canadian case law, including Quebec, appears to support this interpretation, and distinguishes American and English case law on the basis that some of their limitation of liability clauses do not refer to what the weight relates to. For example, it may simply say that liability is limited to "x" amount per kilogram, leaving open the question of what is being weighed.

The Law that Governs the Contract of Carriage

Although all of the Provinces have the Uniform Conditions, the incorporation of the Conditions into the contract of carriage, can differ between Provinces. In most of the Provinces, the Uniform Conditions apply as a matter of law; however, some Provinces, of which British Columbia is one, requires that the Uniform Conditions are expressly incorporated into the bill of lading and that the bill of lading must be properly issued. Failure to comply may result in the carrier not being able to take advantage of the limitations of liability in the Uniform Conditions, and thus the result may be that the carrier cannot limit its liability to $2.00/pound.

It is noteworthy, though beyond the scope of this paper, that although some Provinces will not allow a motor carrier to rely on the statutory limits of liability unless it has issued its own bill of lading, a motor carrier may still limit its liability pursuant to the limits prescribed in the original bill of lading in cases where there are successive carriers and a through bill of lading. Essentially, where the contract of carriage between the shipper and the original carrier contemplates others actually performing the carriage, it may be possible through express language and an analysis of the reasonable expectations of the parties to extend the original bill of lading's limitation of liability clauses to third parties. This feature of the through bill of lading is known as the so-called "Himalaya Clause." Further, it is noteworthy that the common law has also seen a relaxation of the privity

doctrine under certain limited circumstances. The privity doctrine essentially says that only parties to a contract can have rights or obligations under it.

Therefore, although the Weight Limitation Defence is often invoked by liable carriers based on the maximum liability provisions found in the Uniform Conditions, the defence has its limits. We suggest that carriers and underwriters keep the following in mind:

- The Weight Limit Defence only applies to physical damage or loss.

- If there is business loss damages that may result if the goods are damaged, delayed or lost, then update your standard contracts and bills of lading to make explicit provisions for consequential loss. Also, review insurance policies to determine what type of losses are covered.

- In contracts of combined carriage and storage, either clearly delineate between the carriage and storage portions of the contract or also put in place provisions to limit liability for storage of cargo.

- If additional freight costs are available for higher valued items, ensure that the shipper has been notified of the availability of these additional freight costs and has been given the opportunity to select whether it wishes to pay this extra amount. It may also be worthwhile to ask the shipper about what insurance they carry on the cargo.

- Incorporate the Uniform Conditions into your Bill of Lading and ensure that it is properly issued.

Conclusion

In sum, if in order to ship goods from point A to point B, connecting carriers must be used, a carrier may find that they face liability solely because they were the last carrier. In essence, a shipper need only prove that the goods were delivered to the first carrier in good order and received from the last carrier in bad order, in order to invoke the Last Carrier Presumption and lay liability at the feet of the last carrier. It is then incumbent on the last carrier to rebut the presumption through evidence. The carrier who fails to rebut the presumption will be faced with liability akin to an insurer.

The Weight Limit Defence in typical in cargo transport contracts will then potentially offer the liable carrier valuable protection to limit its risk for lost or damaged cargo. However, such protection is often misconceived as being broader than its actual scope. This can lead to risks that may not become apparent until the carrier is faced with an unexpected loss.

We hope that the information above will serve to make the industry better aware of the risks faced in a contract of carriage, and will provide some means of mitigating those risks.

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