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ERROR IN NAVIGATION OR MANAGEMENT OF VESSELS: A DEFINITIONAL DILEMMA

Present statutory limits on liability for damage to cargo shipped under bills of lading in the United States maritime trade are set forth in the Harter Act of 1893[1] and the Carriage of Goods by Sea Act of 1936.[2] In these acts, carrier liability flows from the breach of positive duties established for the care and custody of cargo.[3] However, under these same Acts, the carrier may be held to be free from liability where cargo damage is causally related to an error in navigation or management of the vessel.[4] Thus, the major difficulty which courts encounter when asked to determine liability for cargo damage is the delineation between acts of negligence in navigation or management of the vessel and acts of negligence in the care and custody of the cargo.[5] Since all aspects of shipping are insured against loss, the practical result of making this determination fixes the loss upon either the carrier's or the shipper's insurance underwriter. Because of the immense volume of cargo that can be involved in any single contract of carriage, the dollar cost from cargo damage can be of great concern to the respective parties.

Prior to the enactment of any United States statute regulating the carriage of goods by sea, the carrier's responsibility to the shipper was that of an insurer of the cargo.[6] This situation prompted carriers to attempt contractually to limit liability for damage. While United States courts were willing to allow the carrier to shield himself from liability for cargo damage caused by events beyond his control, they voided clauses exempting carriers from liability for losses caused by

1. 46 U.S.C. §§ 190-96 (1970).

2. 46 U.S.C. §§ 1300-15 (1970) [hereinafter cited as COGSA].

3. 46 U.S.C. §§ 190-91 (1970); 46 U.S.C. §§ 1303(1), (2) (1970)

4. 46 U.S.C. § 192 (1970); 46 U.S.C. § 1304(2)(a) (1970).

5. *Compare* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 134-35 (1957), *with* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 399 (2d ed. 1969); A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 197 (4th ed. 1953); W POOR, AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING 174-75 (5th ed. 1968).

6. The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy

New Jersey Steam Navigation Co. v. Merchants Bank of Boston, 47 U.S. (6 How.) 343, 381 (1848). *Accord,* The Propellar Niagara v. Cordes, 62 U.S. (21 How.) 7, 22-23 (1858).

their negligence.[7] The English courts, on the other hand, honored such clauses exempting carrier negligence[8] and thus set the stage for Congressional intervention to shore up American shipping interests.[9]

Although Congress acted as early as 1851 to limit the liability of vessel owners,[10] it was not until 1893 that significant relief was afforded to the carrier in his contractual relationship with the shipper of goods. The Congress sought to achieve two major objectives in the passage of the Harter Act:[11] (1) to lessen the competitive disadvantage of American carriers vis-à-vis their English counterparts, and (2) to afford relief to the shipper who faced many carrier oriented exemptions from liability in bills of lading.[12] This Act established the minimum standards to which the carrier must conform and the exemptions from liability for which he might lawfully contract.[13]

The Harter Act became the model from which the International Law Association drafted the Hague Rules, which were later adopted in treaty form by the Brussels Convention of 1924.[14] The Hague Rules had as their objective the attainment of uniform provisions in bills of lading within the international community. The United States codified these Rules 12 years later in COGSA.[15]

The Statutes

Although the Harter Act and COGSA differ in a few significant areas,[16] in regard to carrier liability under bills of lading the two Acts

7. Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 381-84 (1873). *See* H. Baer, Admiralty Law of the Supreme Court 380-81 (2d ed. 1969) (a synopsis of the shipowner's liability at common law).

8. G. Gilmore & C. Black, The Law of Admiralty 122, and 122 n.10 (1957).

9. *Id.* at 122.

10. 46 U.S.C. §§ 181-89 (1970).

11. 46 U.S.C. §§ 190-96 (1970).

12. H. Baer, Admiralty Law of the Supreme Court 383-84 (2d ed. 1969). *See* A. Knauth, The American Law of Ocean Bills of Lading 115-31 (4th ed. 1953) (an historical statement of the ocean bill of lading incorporating the background to the Harter Act and COGSA).

13. 46 U.S.C. §§ 190-92 (1970).

14. *See* H.R. Rep. No. 2218, 74th Cong., 2d Sess. 3 (1936); A. Knauth, The American Law of Ocean Bills of Lading 118-32 (4th ed. 1953).

15. 46 U.S.C. 1300-15 (1970). *See* A. Knauth, The American Law of Ocean Bills of Lading 128-31 (4th ed. 1953) (an account of the legislative history preceding enactment of COGSA).

16. The principal difference in terms of liability is that the Harter Act requires the carrier to exercise due diligence to make the vessel seaworthy in all respects as a condition precedent to the enjoyment of liability exemptions while in COGSA the due diligence requirement may come into play only where unseaworthiness is causally

are similar. For this reason, the case law is generally interchangeable regardless of which Act was applied. Because of this similarity between the Acts and because COGSA may be incorporated by reference into bills of lading in the domestic trade, primary reference in the examination of case law will be to cases decided under COGSA.

Section 2 of COGSA provides that the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of goods under a contract of carriage by sea is subject to the responsibilities and liabilities and is entitled to the rights and immunities prescribed in sections 3 and 14.[17] Section 3[18] establishes the responsibilities and liabilities of the carrier and incorporates many of the common law obligations of carriers. Section 4[19] provides exceptions to these obligations of the type formerly contained in pre-COGSA bills of lading.

Specifically section 3(1) prescribes the duty of due diligence in establishing the seaworthiness of the ship, its personnel, equipment, and supplies. Section 3(1) also requires the carrier to make the cargo space safe for the reception, carriage, and preservation of goods to be transported therein.[20] Section 4(1) relieves the carrier of the liability imposed under section 3(1) if he has conformed to the obligations prescribed by section 3(1).[21] Since seaworthiness under these sections is conclusively established at the time of departure,[22] it becomes a factor in establishing liability for cargo damage only where a causal relationship can be traced to a predeparture act of omission. In the event of a negligent act or omission occurring at any time after departure, the carrier's liability for cargo damage must arise or be exempted under sections 3(2) and 4(2) respectively.[23]

Section 3(2) requires the carrier to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." [24] Section 4(2)(a) frees the carrier from liability for loss or damage which arises or results from "[a]ct, neglect, or default of the master, mariner,

related to the cargo damage. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 124-34 (1957).

17. 46 U.S.C. § 1302 (1970).

18. 46 U.S.C. § 1303 (1970).

19. 46 U.S.C. § 1304 (1970).

20. 46 U.S.C. § 1303(1) (1970).

21. 46 U.S.C. § 1304(1) (1970).

22. The Steel Navigator, 23 F.2d 590 (2d Cir. 1928).

23. *See* 46 U.S.C. §§ 1303(2), 1304(2). Section 1304(2)(q) makes it clear that the carrier will not be held liable for any cause arising without the actual fault and privity of the carrier, his agents or servants. 46 U.S.C. § 1304(2)(q) (1970).

24. 46 U.S.C. § 1303(2) (1970).

pilot, or the servants of the carrier in the navigation or in the management of the ship . . . ." [25] Sections 4(2)(b) through 4(2)(q) delineate the remaining carrier exemptions from liability for cargo damage. These exemptions mostly arise from conditions beyond the carrier's control.[26] When sections 3(2) and 4(2)(a) are read together, the focal point of liability becomes the determination of whether the act or omission causing cargo damage was the product of negligence in the navigation or management of the vessel, or negligence directly relating to care of the cargo. In other words, when is the negligent act in question one of navigation or management of the vessel so as to relieve the carrier of liability and when is the negligent act or omission related to the care of the cargo so as to establish carrier liability?

It becomes apparent that in drafting the Harter Act and COGSA, Congress has attempted to distribute the ultimate loss for damage to goods shipped by sea between the shipper and the carrier.[27] The carrier is held liable for the acts of his employees when they relate to the "care and custody of the cargo" but he will escape responsibility when the acts can be classified as those pertaining to the "navigation and management of the vessel." [28]

In giving meaning to these statutory concepts, the courts have been faced with the task of categorizing acts for the purpose of allocating loss. One author has depicted the courts' dilemma in the following manner:

> The difficulty in drawing the line arises from the fact that, read naturally, the two clauses overlap, for many actions which might be spoken of as faults or errors in management or even in navigation might equally well be viewed as failures in the duty to use

25. 46 U.S.C. § 1304(2)(a) (1970).

26. 46 U.S.C. § 1304(2)(b) (1970).

27. W. POOR, AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING 145 (5th ed. 1968).

28. This statement does not take into account the effect of a finding of absence of due diligence in establishing a seaworthy ship and the requisite causal link to cargo damage. Where negligent acts in navigation or management of the vessel bring into play an unseaworthy condition, such acts should not excuse the carrier from liability. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 151 (1957). *See* Middle East Agency v. The John B. Waterman, 86 F. Supp. 487 (S.D.N.Y. 1949); Spencer Kellogg & Sons v. Great Lakes Transit Corp., 32 F. Supp. 520 (E.D. Mich. 1940).

Where an exempted act concurs in damage to cargo with a negligent act or condition of unseaworthiness otherwise resulting in carrier liability, the carrier assumes the burden of showing what part of the damage is attributable to the exempted act of peril or be held liable for the whole. Schnell v. The Vallescura, 293 U.S. 296, 306 (1934).

> due care with respect to the cargo. Few clearcut concepts have appeared for dealing with the problem; the feel of it can only be acquired by reading cases.[29]

DEVELOPMENT OF A TEST

In *The Germanic*,[30] a case decided under the Harter Act in 1906, the Supreme Court enunciated a test which focused upon the primary purpose of the act directly causing the damage. This "primary purpose test" has been followed in cases arising under either the Harter Act or COGSA. The Germanic had arrived in port heavily laden with ice and snow. In this unstable condition, the ship commenced a hurried discharge of her cargo which further added to the condition of instability. While the cargo was being discharged, coaling operations through open coal ports on the vessel's side were begun. Despite erratic listing of the vessel, discharge of cargo continued until a sudden heel to port put the open coal ports beneath the water line, thereby flooding and sinking the vessel.[31] The Court held the sinking, and thus the damage to the undischarged cargo, to have been caused by negligent discharge of cargo rather than negligent management of the vessel. The Court said:

> If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if . . . the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not [control] . . . . [T]he question . . . must be determined by the primary nature of the acts which cause the loss.[32]

The Court, in *The Germanic*, fashioned its test partly in reliance on *Knott v. Botany Worsted Mills*.[33] In *Knott*, bales of wool had been properly stowed forward of a temporary non-watertight wooden bulkhead, and the vessel had departed port somewhat down in the stern. Thereafter wet sugar, from which heavy drainage could be expected, was loaded aft of the wooden bulkhead. Drainage facilities were adequate only so long as the vessel was on an even keel or trimmed by the stern. However, subsequent loading of cargo caused a trim by the

29. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 135 (1957). *See* A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 197 (4th ed. 1953); W. POOR, AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING 174 (5th ed. 1968).

30. 196 U.S. 589 (1905).

31. *Id.* at 597-98.

32. *Id.* at 594-95.

33. 179 U.S. 69 (1900).

head and the sugar drainage penetrated the wooden bulkhead and damaged the wool.[34] The Court, in holding against the carrier, approved the following language of the district court:

> The *primary cause* of the damage was negligence and inattention in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward . . . . The negligence consisted in stowing the wool far forward, without taking care subsequently that changes of loading should not bring the ship down by the head . . . . Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the *primary cause*, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section.[35] [Emphasis supplied].

In applying the statutes and the primary purpose test the courts have found it helpful to categorize the various fact situations for the purpose of determining liability. Although all acts or omissions cannot be clearly categorized and frequently involve collateral issues, such as due diligence to establish unseaworthiness and peril of the sea, categorization has proved helpful in consistency of decision.

MAJOR AREAS OF CARRIER FAULT[36]

Navigation

Errors on the part of the carrier resulting in collisions, groundings, or violent contact with other perils of the sea are generally classified as errors of navigation or management.[37] Unless these errors are com-

34. *Id.* at 70-71.

35. *Id.* at 73-74.

36. Although a number of text sources enumerate cases reflecting major categories of carrier fault, A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 196-208 (4th ed. 1953) contains a collection of cases by category to 1953. Other useful sources are H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 399-404 (2d ed. 1969); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 137 n.54 (1957); N. HEALY & B. CURRIE, CASES ON ADMIRALTY 560 (1965); W. POOR, AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING 173-79 (5th ed. 1968).

37. *E.g.*, The Isis, 290 U.S. 333 (1933); The Del Sud, 270 F.2d 345 (5th Cir. 1959); Hanson v. Haywood Bros. & Wakefield Co., 152 F. 401 (7th Cir. 1907); Insurance Co. of North America v. S.S. Flying Trader, 306 F. Supp. 221 (S.D.N.Y. 1969); The President of India v. West Coast S.S. Co., 213 F. Supp. 352 (D. Ore. 1962); Andros Shipping Co. v. Panama Canal Co., 184 F. Supp. 246 (D.C.Z. 1960); Hershey Chocolate Corp. v. The Mars, 172 F. Supp. 321 (E.D. Pa. 1959); Daisy Philippine Underwear

bined with a failure to exercise due diligence in establishing seaworthiness of the vessel, the carrier will escape liability. Illustrative of this category of cases is *Hanson v. Haywood Bros. & Wakefield Co.*[38] In this case, the vessel sustained damage to deck cargo as a result of severe weather at sea. The master, in the face of adverse weather reports, had proceeded to sea and, as a consequence, subsequently sustained the damage. The court, while recognizing the master's duty to both ship and cargo, found this negligent act of untimely departure to be solely due to error in navigation or management.[39] By application of the primary purpose test, the result might as easily have gone the other way. Obviously, departure under such adverse weather conditions was in furtherance of the entire maritime venture but it seems clear that the act was in derogation of COGSA duties under section 3(2), care and custody of the cargo.

A similar result was reached in *Hershey Chocolate v. The Mars.*[40] There a decision to maintain a course through a storm prevented necessary ventilation of cocoa beans and resulted in sweat damage. The court held the error to be one of management and thus the carrier was exonerated from liability. In *The Del Sud*,[41] the vessel collided with a pier while departing, the cargo was exposed to sea water, and was damaged. After resolving that the voyage had commenced, overriding the allegation of unseaworthiness,[42] the court held the negligence resulting in collision and subsequent cargo damage to be an act of navigation and again, a carrier avoided liability.

Ventilation—Sweat Damage

Short of a situation like that encountered in *Hershey Chocolate*, sweat damage is considered to be a peril of the sea only when all available and reasonable precautions have been taken to avoid this type of damage.[43] Failure to take such precautions will be considered an error in

Co. v. United States Steel Prods. Co., 11 F. Supp. 175 (S.D.N.Y. 1935); The Harry Luckenbach, 8 F. Supp. 507 (S.D.N.Y. 1934); The Oritani, 40 F.2d 522 (E.D. Pa. 1929).

38. 152 F. 401 (7th Cir. 1907).

39. *Id.* at 402.

40. 172 F. Supp. 321 (E.D. Pa. 1959).

41. 270 F.2d 345 (5th Cir. 1959).

42. *See* Spencer Kellogg & Sons v. Great Lakes Transit Corp., 32 F. Supp. 520 (E.D. Mich. 1940) (unseaworthiness prevailed to negate an alleged act of negligence in the management of the vessel).

43. California Packing Corp. v. The S.S.P. & T. Voyager, 180 F. Supp. 108, 111 (N.D. Cal. 1960).

the care and custody of the cargo.[44] In *California Packing Corp. v. The S.S.P. & T. Voyager*, sweat damage resulted from failure to prevent warm humid tropical air from entering the holds of a ship during an intercoastal winter passage. Negligence in ventilation was held to constitute an error in the care of cargo and therefore resulted in carrier liability. Failure to ventilate when appropriate in good weather is similarly held to be error in the care of the cargo.[45]

Under the primary purpose test, injury resulting from a want of ventilation is generally held to constitute negligence in the care of cargo. However, in extraordinary circumstances, failure to ventilate may be characterized as relating to the management of the vessel. In *Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp.*,[46] the vessel's dynamos were shut down in order to comply with a wartime blackout requirement. Applying the primary purpose test, the court held the master's action in shutting down the dynamos to be related to the management of the vessel, thus allowing the carrier to escape damage resulting from improper ventilation. However, it appears that the blackout could have been achieved by alternate means without impairing ventilation of the cargo. The master's course of action was clearly negligent in respect to adequate cargo care but was intentionally decided upon to preserve the ship from drastic threats of destruction of the vessel for failure to comply. Correctly applying the test, the court held the master's primary purpose was the preservation of the vessel from threatened danger and thus an act of management.

In other instances, misapplication of the primary purpose test has resulted in carrier liability. Illustrative of these cases is *W.T. Lockett Co. v. Cunard S.S. Co.*,[47] where cargo was damaged when a defective hose burst over an open ventilator. The court found that the equipment was defective when the ship left port so that the carrier was liable for failure to provide a seaworthy vessel. The court supported its holding by noting that leaving the vent lid open was an act of negligence

44. *E.g.*, Schnell v. The Vallescura, 293 U.S. 296 (1934); The Daido Line v. Thomas P. Gonzales Corp., 299 F.2d 669 (9th Cir. 1962); Hellenic Lines v. Brown & Williamson Tobacco Corp., 277 F.2d 9 (4th Cir. 1960); California Packing Corp. v. States Marine Corp. of Delaware, 187 F. Supp. 540 (N.D. Cal. 1960); California Packing Corp. v. S.S.P. & T. Voyager, 180 F. Supp. 108 (N.D. Cal. 1960); General Foods Corp. v. United States, 104 F. Supp. 629 (S.D.N.Y. 1952); W. T. Lockett Co. v. Cunard S.S. Co., 21 F.2d 191 (E.D.N.Y. 1927).

45. *See, e.g.*, Schnell v. The Vallescura, 293 U.S. 296 (1934).

46. 277 F.2d 9 (4th Cir. 1960).

47. 21 F.2d 191 (E.D.N.Y. 1927).

in the care and custody of the cargo.[48] Although *The Germanic* was cited to support the holding, the *W.T. Lockett* fact situation was more analogous to the open port cases dealt with below.[49] In those situations, a crew's knowledge of the open condition of a port has been held to constitute an act of negligence in the management of the vessel.[50] Thus, the *W.T. Lockett* holding appears suspect.

In *Schnell v. The Vallescura*,[51] the carrier was held liable for cargo damage resulting from improper ventilation. Although heavy weather —a peril of the sea which normally excuses carrier liability—was in part responsible for the failure to ventilate, the carrier was held liable because it failed to take advantage of good weather and because of its further inability to establish the percentage of damage attributable to the bad weather.[52] Since it could not apportion the damage, the carrier was liable for the entire loss.

Temperature Control of Special Cargo Spaces

Negligence in heating or cooling of cargo which is required for its preservation is held to constitute error in custody and care of cargo.[53] The general rule is that a ship should not accept perishables unless sufficiently equipped to carry them safely.[54] In *Barr v. International Mercantile Marine Co.*,[55] the court relied upon *Knott v. Botany Worsted Mills* and *The Germanic* in holding a carrier liable for failure to drain moisture from the coolant used in the refrigeration system.[56] This negligence, which resulted in higher temperatures, was categorized as error in care and custody of the cargo. The same result was reached in *The Samland*[57] where the carrier was negligent in allowing the temperature to fall below an acceptable level, thus causing damage to the cargo. In *Cia De Navegacion Fruco v. M/S Heinz Horn*,[58] the ship's officers

48. *Id.* at 194.
49. *See* notes 72-75 *infra* and accompanying text.
50. *See, e.g.*, The Silvia, 64 F. 607 (S.D.N.Y. 1894).
51. 293 U.S. 296 (1934).
52. *Id.* at 306.
53. *E.g.*, The Southwark, 191 U.S. 1 (1903); Edmund Weil v. American West African Line, 147 F.2d 363 (2d Cir. 1945); Barr v. International Mercantile Marine Co., 29 F.2d 26 (2d Cir. 1928); John Penny & Sons v. M/V Swivel, 266 F. Supp. 302 (D. Mass. 1967); Cia De Navegacion Fruco v. M/S Heinz Horn, 233 F. Supp. 637 (S.D. Ala. 1964).
54. A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 201 (4th ed. 1953).
55. 29 F.2d 26 (2d Cir. 1928).
56. *Id.* at 29.
57. 7 F.2d 155 (1925).
58. 233 F. Supp. 637 (S.D. Ala. 1964).

improperly supervised stowage and failed to reduce the air temperature in preparation for the perishable cargo. Subsequent damage to bananas was viewed to be the product of an error in care and custory of cargo. The same rules apply to errors in the handling of cargo which requires heating.[59]

Improper Handling and Stowage

Damage to cargo resulting from improper handling or stowage, without more, will be attributed to error in care and custody of the cargo.[60] The decisions in *The Germanic* and *Knott v. Botany Worsted Mills* illustrate this rule. The primary purpose test is of particular assistance in the resolution of carrier liability for damage occurring aboard the vessel. However, it has no application to damage occurring to cargo ashore after receipt by the carrier and before delivery.[61] In *The Mormacmar*,[62] cargo placed ashore to facilitate dry dock repairs was destroyed by fire. The carrier, having failed to insure the cargo against such foreseeable injury, was held liable for error in care and custody of cargo.

Unseaworthiness—Fault in Management

Unseaworthiness of the vessel in respect to carrier liability is treated differently under the Harter Act than under COGSA. Under the Harter Act, the carrier must exercise due diligence to provide a seaworthy vessel as a condition precedent to enjoying the advantages of the exemption from liability for errors in navigation and management.[63] Thus, in *Alaska Native Industries Cooperative Association v. United States*,[64] where the damage to cargo was partially attributable to errors of navigation or management, a finding of unseaworthiness precluded the carrier from availing itself of the exemption. This result was reached despite the finding that the unseaworthy condition was not a cause of

59. *Cf.* Edmund Weil v. American West African Line, 147 F.2d 363 (2d Cir. 1945).

60. The Germanic, 196 U.S. 589 (1905); Knott v. Botany Worsted Mills, 179 U.S. 69 (1898); Armco Int'l Corp. v. Rederi A/B Disa, 151 F.2d 5 (2d Cir. 1945); The Joseph J. Rock, 70 F.2d 259 (2d Cir. 1934); New Rotterdam Ins. Co. v. S.S. Loppersum, 215 F. Supp. 563 (S.D.N.Y. 1963); Mackey *et al* v. United States, 83 F. Supp. 14 (S.D.N.Y. 1948); The Mormacmar, 75 F. Supp. 520 (S.D.N.Y. 1947).

61. *Cf.* The Mormacmar, 75 F. Supp. 520 (S.D.N.Y. 1947).

62. *Id.*

63. The Isis, 290 U.S. 333 (1933).

64. 206 F. Supp. 767 (W.D. Wash. 1962).

the damage.[65] Under COGSA, it is clear that a different result obtains where the condition of unseaworthiness has no causal relationship to the damage. Under section 3(1), due diligence is a duty of the carrier but is not a condition precedent to the application of section 4 exemptions.[66]

When a breach of the duty of seaworthiness combines with an act of negligence in the navigation or management of the vessel to cause cargo damage, the result is the same under both the Harter Act and COGSA: The carrier will not be exempted from liability for negligent acts in the management of the vessel.[67] In *Spencer Kellogg & Sons v. Great Lakes Transit Corp.*,[68] the district court stated the rule under the Harter Act to be:

> [W]here both unseaworthiness of the vessel and fault in the management of the ship are present, the carrier is liable for the loss, *i.e.* fault in the management of the ship does not operate under such circumstances to relieve the carrier from liability.[69]

The same result was reached under COGSA in *Middle East Agency v. The John B. Waterman.*[70] Heavy seas caused the lid on the port deeptank to be lifted by a surge of water in the tank, thereby flooding the hold and causing extensive damage to the cargo. Although the failure to secure the deeptank could be considered an error in the management of the vessel, the concurrence of the unseaworthy condition operated to nullify the carrier's exemption.[71]

Open Port Holes—Manholes

In 1898, the Supreme Court stated that where a carrier knowingly leaves an accessible port open, any resulting cargo damage will be attributed to an error in management.[72] In a similar decision, *The Steel Navigator*,[73] after-peak manholes had been opened to prepare the tank for a liquid cargo consignment which was subsequently canceled. Thereafter, in an effort to trim the vessel by the stern, ballast water was

65. *Id.* at 771-72. *See* 290 U.S. at 343-44, 354.
66. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 134 (1957).
67. *See* Spencer Kellogg & Sons v. Great Lakes Transit Corp., 32 F. Supp. 520, 531-32 (E.D. Mich. 1940).
68. 32 F. Supp. 520 (E.D. Mich. 1940).
69. *Id.* at 531-32.
70. 86 F. Supp. 487 (S.D.N.Y. 1949).
71. *Id.* at 488-89.
72. The Silvia, 171 U.S. 462 (1898).
73. 23 F.2d 590 (2d Cir. 1928).

pumped into the tank without replacing the covers and flooding of cargo spaces resulted. Failure to replace the covers was held to constitute an error in management. However, three years later in *The Elkton*,[74] which presented a related fact situation to the same court, Judge Learned Hand affirmed a decree for the shipper. A careful application of the primary purpose test would seem to support the holding in *The Elkton* rather than that in *The Steel Navigator*. In both instances the negligent acts, although directly related to the management of the vessel, in the particular circumstances caused damage to the cargo placed in the respective compartments. These acts then should be construed as negligence in the care and custody of the cargo. If resolved in terms of concurring errors of management and unseaworthiness, the result in the above two cases should logically favor the shipper.[75]

Failure to Pump Bilges—Sounding Pipes

Errors in failure to take sufficient soundings or to pump the bilges, with or without knowledge of water accumulation, has consistently been held to be error in management of the vessel.[76] *The Sandfield*[77] and *The British King*[78] are leading authority for this proposition. In the former, the carrier negligently failed to detect water accumulation in the bilges. In the latter, soundings revealed water accumulation at a rapid rate but the ship failed to take additional soundings or to pump bilges; flooding followed with consequent cargo damage. Similarly in the *Newport News*,[79] the court found a negligent failure to inspect

74. 49 F.2d 700 (2d Cir. 1931).

75. *Cf.* Leon Bernstein Co. v. Wilhelmsen, 232 F.2d 771 (5th Cir. 1956). A manhole cover in the top of a deeptank located in the same hold as the cargo was opened to enable the ship's chief officer to check the water level in the deeptank. The manhole was negligently left uncovered and water from the deeptank damaged the cargo. The court correctly held the negligent act to be error in navigation and managment of the vessel. The real and underlying cause of the damage was the negligent act in ballasting to trim the vessel for anticipated heavy weather. The court cautioned against an artificial application of the test in *The Germanic* in deciding that the protection of the cargo in removing the manhole was incidental only. *Cf.* The Wildcroft, 201 U.S. 378 (1906); American Sugar Refining Co. v. Rickinson Sons & Co., 124 F. 188 (2d Cir. 1903).

76. *E.g.*, The Merida, 107 F. 146 (2d Cir. 1901); The Carisbrook, 247 F. 583 (D. Mass. 1917); The Newport News, 199 F. 968 (S.D.N.Y. 1912); The Ontario, 106 F. 324 (S.D.N.Y. 1900); The British King, 89 F. 872 (S.D.N.Y. 1898); The Sandfield, 79 F. 371 (S.D.N.Y. 1897).

77. 79 F. 371 (S.D.N.Y. 1897).

78. 89 F. 872 (S.D.N.Y. 1898).

79. 199 F. 968 (S.D.N.Y. 1912).

sounding pipes; the plugs on the pipes had worked loose allowing sea water to enter with resulting cargo damage. This was held to be error in the management of the vessel.

When viewed in light of the primary purpose test, these decisions are at best colorably justifiable. The particular acts in question are performed routinely for the detection and removal of accumulated bilge water, a threat to both cargo and vessel. The primary purpose of the act cannot clearly be determined to be that of vessel management.

Miscellaneous

Certain decisions not easily categorized are still susceptible to resolution under the primary purpose test.[80] In *Ravenscoft v. United States*,[81] a broken steam line beneath the deck plate created the appearance of a fire in the inaccessible cargo spaces. Steam, injected into the hold to control the supposed fire, damaged a cargo of cotton. This damage was held to stem from an error in management. The court interpreted the primary objective to be the safety of the vessel rather than the preservation of the cotton.[82]

In *The Indrani*,[83] flooding of the fore-peak tank, in which cargo had been stowed, occurred when the vessel was tipped forward to facilitate examination of the propellar. The water entered the tank through engine room piping which had been cracked by heavy seas. After dismissing the allegation of unseaworthiness, the court held the tipping of the vessel to be an act of management. In *J. L. Luckenbach*,[84] negligence in the clearing of a clogged soil pipe resulted in the flooding of cargo space traversed by the pipe. Since the prime concern was repair of the ship's sanitation facilities and not care of the cargo, the court ruled for the carrier on the basis of error in management.

Conclusion

The definitional dilemma facing the courts has, since the passage of the Harter Act, been resolved in a piecemeal fashion. Stare decisis

80. *E.g.*, Ravenscroft v. United States, 88 F.2d 418 (2d Cir. 1937); The Milwaukee Bridge, 26 F.2d 327 (2d Cir. 1928); The Indrani, 177 F. 914 (2d Cir. 1910); The J. L. Luckenbach, 1 F. Supp. 692 (S.D.N.Y. 1932).

81. 88 F.2d 418 (2d Cir. 1937).

82. *Id.* at 419.

83. 177 F. 914 (2d Cir. 1910).

84. 1 F. Supp. 692 (S.D.N.Y. 1932).

plays an important part in the present-day court determination as the older cases continue to dominate by virtue of the area categorizations. The primary purpose test of *The Germanic* is repeated endlessly as justification for results born of policy decision which rest as much on fortuity as on foreseeability.

Permeating most cargo damage situations is the issue of seaworthiness of the vessel—a requirement of both the Harter Act and COGSA. The burden of demonstrating due diligence in the preparation of the vessel for cargo carriage is difficult for the carrier to bear. The shipper, having no control over the means of carriage, establishes a prima facie case against the carrier simply by alleging that the cargo was delivered to the carrier in good condition and received from him in a damaged condition. Where a condition of unseaworthiness concurs with a negligent act of the carrier, the carrier must show due diligence in respect to the causal relationship under COGSA, or in all respects under the Harter Act, in order to avoid liability. If due diligence cannot be established, the carrier will be held liable at least to the extent that unseaworthiness has contributed to the loss. If unable to establish the relative contribution of the unseaworthy condition, the carrier is liable for the entire loss.

It is only when the degree of contribution of an unseaworthy condition has been shown, or when unseaworthiness is not a factor causing the loss, that the carrier may look to its section 4(2) exemptions. Negligence in the care and custody of the cargo or in the navigation or management of the vessel is the next issue to be resolved when a negligent act or omission of the carrier concurs in or is the sole cause of the cargo loss. While the carrier may foresee that his failure to exercise due diligence in providing a seaworthy ship will result in liability for causally related cargo damage, he does not realize that same predictability in respect to acts of negligence on the part of the crew once the voyage has begun. He bears the burden of proving an exempted act of navigation or management and must seek out the appropriate factual category or utilize the primary purpose test in a unique situation not easily categorized nor previously litigated.

The primary purpose test, under normal shipping conditions, justifies a finding of liability in one set of circumstances or a finding of no liability in another only in the context of the policy considerations prevailing when the Harter Act was passed; within this statutory context, the test is generally adequate. But, because carrier negligence sometimes paradoxically results in no liability, complexity and duplication of marine insurance coverage must accompany every voyage in

the carriage of goods at sea. This situation embroils carrier and shipper in costly litigation and compels the courts to find appropriate and convenient categories within which they may assign liability on their findings of negligence and causation.

The problem of distributing costs of operation in the maritime industry initially sought resolution in the arena of international shipping competition and necessarily any further attempts to increase predictability, now encumbered by the definitional dilemma, must also be resolved in an international setting. The leadership exercised by the United States in the passage of the Harter Act, which so heavily influenced the adoption of the Hague Rules, brought the shipping world out of the confusion and inequities of the unregulated common law rules regarding ocean bills of lading, but the capitulation to the navigation or management of the vessel exception to carrier liability presently codified in COGSA resulted in the present difficulty of predictability. A return to the common law standards of carrier insurer liability under the precedent of federal regulation of bills of lading might presently be in order. Such a course of action could well alleviate the problem but would necessitate exhaustive analysis of present costs of carriage in the context of international insurance requirements.

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