The American Maritime Law of Fire Damage to Cargo: An Auto-Da-Fe for a Few Heresies

Walter L. Williams Jr.
THE AMERICAN MARITIME LAW OF FIRE DAMAGE TO CARGO: AN AUTO-DA-FÉ FOR A FEW HERESIES

DR. WALTER L. WILLIAMS, JR.*

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*Professor of Law, Marshall-Wythe School of Law, College of William and Mary in Virginia; B.A., M.A., LL.B., University of Southern California; LL.M, J.S.D., Yale University.

This article is dedicated to the memory of John (Jack) B. King, a former member of the firm of Vandeventer, Black, Meredith and Martin, of Norfolk, Virginia, and adjunct instructor in Admiralty Law at the Marshall-Wythe School of Law for eight years. Jack recently passed away while in the prime of what promised to be an illustrative career. We have lost a dear friend, a valued colleague, and a worthy shipmate. Accipe, nunc, laudes nostros, frater, atque in perpetuum, ave atque vale.
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"A little fire is quickly trodden out,  
where being suffer'd, rivers cannot quench."1

I. INTRODUCTION

Early in the evening of January 13, 1840, the steamboat Lexington lay off the Huntington lighthouse on Long Island Sound, three hours out from New York City and bound for Stonington, Connecticut.2 Suddenly, the cry dreaded by mariners through the centuries rang out: "The ship's afire!" Within minutes, flames consumed the vessel. The lives of all the passengers and crew were lost; all property on board was destroyed. The ship carried among its cargo an unmarked crate containing eighteen thousand dollars in gold and silver coins belonging to William F Harnden. Harnden regularly shipped similar crates for businesses in New York and Boston. The contract of carriage provided that the crate was "at all times exclusively at the risk" of Mr. Harnden and that the carrier, the New Jersey Steam Navigation Company, would not, "in any event, be responsible, either to him [Mr. Harnden] or his employers for the loss of any money or property of any and every description, to be conveyed or transported by him in said crate."3

The ship's pilot report cataloged the crew's frantic efforts to extinguish the fire. When the crew sought fire buckets, "two or three only, in all could be found, and but one of them properly prepared and fitted with heaving lines; and, in the emergency, the specie boxes were emptied, and used to carry water."4 Despite the language of the contract, the United States Supreme Court held the carrier liable for the lost specie.5

Concurrent with the Lexington decision,6 the United States was

3. Id. at 345
4. Id. at 384.
5. Id. at 385.
6. For discussion on the impetus to secure protective legislation provided by the Lexington case and other similar decisions, see Thede, Statutory Limitations (Other Than Harter and COGSA) of Carrier's Liability to Cargo—Limitation of Liability and the Fire Statute, 45 Tul. L. Rev. 959 (1971).
trying to establish its Merchant Marine as a significant competitor of the British and other European shipping industries. American law of marine cargo damage retarded competitive growth because the American law unduly favored cargo interests.  

American courts used land-based common carrier law to hold that any contractual clause that excused or limited liability of the maritime common carrier for the negligent acts of its carrier, of its servants, or its agents was contrary to public policy. Regarding cargo damage from fire, the carrier was viewed as an “insurer” of the cargo, and could escape liability only in the event of an Act of God, acts of a public enemy, or an inherent defect of the cargo. Consistent with the general rule, any attempt of the carrier to escape liability for fire damage to cargo due to negligence either of the carrier or of the carrier’s servants or agents was invalid. Across the Atlantic, however, British courts used the freedom of contract doctrine routinely to uphold negligence clauses in maritime contracts for cargo carriage. Indeed, the English 1786 statute insulated the carrier from all liability for negligent fire damage to cargo. The burden of such cargo loss fell solely upon the cargo owner.

In 1851, three years after the Lexington disaster, the United States shipping interests sought legislative relief. Rather than seeking to overturn entrenched judicial policies, the shippers sought a limit on established liability. Shipowners achieved that aim in the passage of the Limitation of Shipowner’s Liability Act

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9. See Gilmore & Black, supra note 7, at 139-40; Benedict supra note 8, at 2-1.

10. See generally supra note 7.

11. English Act of 26 Geo. 3, ch. 86 (1786), cited in Gilmore & Black, supra note 7, at 819. Donovan, supra note 7, at 1008 n.68, quotes the then British “Fire Statute,” section 2 of the Act. The British statute then protected the shipowner from all negligence as to fire damage to cargo.
In general, the Limitation Act provides that if legal liability is established against a shipowner and if certain requirements are met, the shipowner can limit liability to the value of the owner's interest in the vessel and pending freight.\textsuperscript{13}

One section of the Limitation Act, commonly known as the "Fire Statute,"\textsuperscript{14} provides:

\begin{quote}
No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.
\end{quote}

The statute protects vessel owners and "bareboat" charterers,\textsuperscript{15} but not voyage or time charterers.

In 1936, Congress enacted as part of the Carriage of Goods by Sea Act\textsuperscript{16} ("COGSA") a second fire provision:

\begin{quote}
(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (b) Fire, unless caused by the actual fault or privity of the carrier.\textsuperscript{17}
\end{quote}

The COGSA Fire Provision applies to the "carrier." COGSA defines a carrier as the vessel owner or the charterer, including voyage or time charterers, who enters into a contract of carriage with a shipper, where the contract is covered by a bill of lading or some other similar document of title.\textsuperscript{18}

COGSA expressly states that it does not revoke or modify the Fire Statute. Thus, in various instances one or both statutory provisions may apply. While recognizing that the two provisions vary as to those eligible to benefit, this Article uses the term "carrier" for convenience when speaking of either provision. Also, the Article

\begin{thebibliography}{18}
\bibitem{12} For the current version, see 46 U.S.C. §§ 181-188 (1982).
\bibitem{13} \textit{See generally} 3 BENEDICT, supra note 8, chs. I-V; supra note 7; \textit{see also} Thede, supra note 6.
\bibitem{14} 46 U.S.C. § 182 (1982).
\bibitem{15} 46 U.S.C. § 186 (1982) (describing a bareboat charterer, treats such as an owner for the Limitation Act, of which the Fire Statute is a part).
\bibitem{17} 46 U.S.C. § 1304(2)(b) (1982).
\bibitem{18} 46 U.S.C. § 1301(a), (b) (1982).
\end{thebibliography}
refers to both provisions as the "Fire Provisions" because courts universally treat both provisions as having essentially the same meaning in determining carrier liability for fire damage to cargo.\textsuperscript{19} Finally, the term "cargo owner" refers to the party in interest claiming for damage to cargo.

This Article has several purposes. First, because the leading works in American maritime law are surprisingly "thin" in this area,\textsuperscript{20} this Article attempts to provide a comprehensive outline of modern American maritime law regarding fire damage to cargo. Second, because the purposes of and analytical frameworks for the Fire Provisions and the Limitation Act are distinct, this Article severs the Fire Provisions from the "dragging anchor" of the Limitation Act and contends that because of differing policies, courts should not shackle the Fire Provisions with the restrictive modern treatment of the Limitation Act. Finally, the Article analyzes judicial trends in the law of fire damage over the 130 year life of the Fire Provisions. Because several "heresies"\textsuperscript{21} currently threaten the established law of fire damage, this Article identifies those heresies and performs an auto-da-fé to reorient present treatment of the Fire Provisions with congressional intent and the long-established American maritime law of fire damage.

More specifically, Part II of the Article identifies the confusion of the Fire Provisions with the Limitation Act as the first heresy\textsuperscript{22} The Article contends that these statutory provisions are distinct

\textsuperscript{19} GILMORE & BLACK, supra note 7, at 161; see, e.g., In re Complaint of Ta Chi Navigation (Panama) Corp., S.A., 677 F.2d 225, 228-29, 1982 A.M.C. 1710, 1713-14 (2d Cir. 1982) (citing legislative history and court decisions).

\textsuperscript{20} See GILMORE & BLACK, supra note 7, at 161, 879-98. Most of the discussion is on limitation of liability cases even where the issues are the same for the Fire Provisions, and many Fire Provisions issues simply are not raised. See, e.g., 2A BENEDICT, supra note 8, at 14-1 to 14-38, 12-25 to 12-29; H. LONGLEY, supra note 7, ch. 15 (with exception of updating of citations, BENEDICT IS VIRTUALLY A VERBATIM RESTATEMENT OF LONGLEY'S WORK); W. TETLEY, MARINE CARGO CLAIMS ch. 15 (2d ed. 1978).

\textsuperscript{21} This Article uses the metaphor of heresy in a tongue-in-cheek fashion. New truth in any field of thought is by nature heretical, in the sense of challenging entrenched perspectives and standards. Therefore, "heresy" in the law is not only good; it is essential. All heresy, however, is not necessarily new truth. All heresy requires close examination. Heresy which advances on the sly feet of unexamined, inaccurate premises, of false analogies, or of other similar failures of thought or research, like those dealt with in this Article, merits a swift end. In the American maritime law of fire damage to cargo, the courts generally have avoided the confusion inherent in these heresies.

\textsuperscript{22} See infra notes 36-42 and accompanying text.
and the judicial hostility to the Limitation Act should not apply to the Fire Provisions. Part III of the Article examines the requisite qualifications for Fire Provision protection while Part IV analyzes the heart of the Fire Provisions, the substantive requirement that the carrier is not liable for damage unless the carrier's own personal negligence caused the fire.

The second heresy is the confusion of the maritime doctrine of unseaworthiness with the Fire Provisions. The third heresy is closely related: the application of the Canadian case, Maxine Footwear, Ltd. v. Canadian Government Merchant Marine, Ltd.\(^\text{23}\) and the Canadian COGSA to American law, allowing the doctrine of unseaworthiness to override the Fire Provisions. The effect of each of these heresies on their principal disciple, the United States Court of Appeals for the Ninth Circuit, is analyzed in the context of Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.\(^\text{24}\)

Part V of this Article analyzes the burdens of proof under the Fire Provisions. Part VI examines the judicial standards for showing personal negligence of the carrier. Part VII examines ways in which the carrier might lose the benefit of the Fire Provisions, waiver and deviation, and reveals the treatment of deviation as a tort to be the fourth heresy. The Article concludes that courts generally apply the Fire Provisions in a balanced, reasoned manner and, with the exception of these heresies, also maintain congressional policy for allocation of the risks of loss between the carrier and the cargo owner.

II. DISTINGUISHING THE FIRE PROVISIONS FROM THE LIMITATION ACT


In the specific case of cargo damage by fire, the Fire Statute eliminated the general maritime rule that the carrier was liable to the cargo owner for fire damage under nearly all circumstances. The Fire Statute removed strict liability in tort and restricted the ground for a negligence action to personal acts by the carrier.\(^\text{25}\)


\(^{24}\) 692 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980).

\(^{25}\) See Gilmore & Black, supra note 7, at 161; 2A Benedict, supra note 8, at 14-30; Thede, supra note 6, at 982, 984. A leading early case is Walker v. The Transportation Co.,
The Fire Statute is not a limitation of liability. The Fire Statute does not limit the extent of damages payable on a previously established liability; instead, the Fire Statute establishes that there is no right of action on the basis of vicarious liability. Thus, under the Fire Statute, the carrier commits no actionable wrong until negligent conduct directly attributable to the carrier occurs and causes fire damage to cargo. Once a cargo owner shows that the carrier's personal negligence is the cause of the fire damage to the cargo, the carrier is liable and the Fire Statute does not operate to limit that established liability.

American cases rarely discuss the policies underlying the Fire Statute. In a British case, *Louis Dreyfus & Co. v. Tempus Shipping Co.* however, the House of Lords discussed the current British counterpart of the American Fire Statute, section 502 of the British Merchant Shipping Act of 1894. In *Louis Dreyfus*, the fire was caused by unseaworthy coal bunkers and the carrier was held without "fault or privity." In the absence of personal negligence by the shipowner, the House of Lords stated that "there [was] no actionable wrong committed by the shipowner." Particularly, the House of Lords denied the cargo owner's claim that the statute exempted the shipowner from paying damages for what was still in legal doctrine an actionable wrong. Lord Dunedin dealt with the argument concisely: "I think that argument is the argument of a drowning man. An actionable wrong for which you can recover..."
nothing is a contradiction in terms." The House of Lords continued, "[A] statutory limitation of liability of course does not [have this effect]: it leaves the fault actionable ...."

The American Fire Statute is neither an "exemption" to nor an "immunity" from liability, although courts commonly use those terms to describe its effect. Both terms envision an underlying established liability arising on some basis of action that, but for the "exemption" or "immunity", would provide relief to the cargo owner. For example, the Harter Act and COGSA provide exemptions for damage to cargo caused by negligent navigation or management of the vessel. Those exemptions presuppose an action for negligence in navigation or in vessel management that has established owner liability. The Harter Act or COGSA then operate statutorily to provide an exemption from that established liability. Under the Fire Statute, however, the non-negligent shipowner simply has no liability from which to be exempted. Gilmore and Black best describe the Fire Statute's effect on vicarious liability for fire damage as "exoneration." The carrier is exonerated or "declared blameless" for nonpersonal negligence. Conversely, negligent conduct directly attributable to the carrier will give rise to liability, with no change whatsoever made by the Fire Statute, and with no suggestion of exemption for that liability.

The exceptionally grave risk posed by shipboard fire is one of the reasons for this special and, for American maritime law in 1851, extraordinary relief for carriers. "Fire is the peril most dreaded by all mariners, and a peril most difficult to combat in a fully laden ship." In the eighteenth and nineteenth centuries, vessels of oak and sail, using tons of pitch and other highly inflammable substances, were torches awaiting the match. Early steam-

29. Id. at 739.
30. Id. at 747.
33. GILMORE & BLACK, supra note 7, at 834, 877, 879.
34. "From earliest times fire has been one of the most terrifying perils of the sea which perhaps explains why a special exception has been made for it." W. TETLEY, supra note 20, at 183.
35. In re Liberty Shipping Corp., 509 F.2d 1249, 1250 (9th Cir. 1975).
ships were not markedly safer. The lack of adequate fire-fighting equipment virtually guaranteed catastrophe. Even today, despite steel ships and vastly improved fire-fighting equipment, fire continues to be a primary hazard because of volatile cargos and the large amount of inflammable substances used in vessel operations. Because the risk of fire remains almost unchanged since 1851, the congressional policy of the Fire Statute—allowing the carrier, in the absence of personal negligence, to allocate the burden of fire damage among the vessel, each shipper, and its cargo—likewise remains the appropriate allocation of risk.

B. The First Heresy: Confusing the Fire Provisions and the Limitation Act

Gilmore and Black, in their leading treatise, discuss the Fire Provisions almost entirely within the context of the Limitation Act. Because of their differing policies, appraisal of the Fire Provisions in the context of the Limitation Act is a warped focus for analysis that invites conceptual confusion and doctrinal error. This warped focus can result in an indiscriminate pour-over onto the Fire Provision of the law and policy analysis that properly pertains only to the Limitation Act. Because the Fire Provisions and the Limitation Act are separate legal entities with differing law and policies, this Article terms the confusion of the two as the first heresy. Gilmore and Black recognized that separate treatment of the statutes would be “handy” because “the Fire Provisions have a separate history in American Law.” They go on, however, to give the COGSA Fire Provision cursory treatment, and then, with a suggestion that whatever they say of the Fire Statute likewise applies to the COGSA provision, refer the reader to their Limitation Act coverage.

Another danger of this warped focus is that general hostility toward the Limitation Act will undeservedly restrain the Fire Provisions if the statutes are conceptually intertwined. In committing

36. See Gilmore & Black, supra note 7, at 877-98.
37. Gilmore & Black, supra note 7, at 161.
38. Id. The COGSA Fire Provision is considered on only one page, and part of that concerns the Fire Statute.
39. Id.
the first heresy, Gilmore and Black allow their hostility toward the Limitation Act to cloud their analysis of the Fire Provisions.\textsuperscript{40}

The Fire Statute and the Limitation Act share only two things. They were enacted at the same time and they both aid the carriage of goods by shifting liabilities to cargo owners. In the latter objective, they are joined by the Harter Act and COGSA. In more significant respects, the Fire Provisions and the Limitation Act are quite different. As discussed earlier, the Fire Provisions deal with a single risk, cargo damage by fire, and a single class of claimants, cargo owners for damage to property interest in cargo. Congress focused on the legal relationship between carrier and cargo owner and used the Fire Statute to allocate the risk of loss between these parties. Further, both parties involved generally are economically viable, well organized in associations, and sophisticated. These parties recognize the importance of determining in advance how best to allocate, by insurance or otherwise, the burden established by the legislative policy of the Fire Provisions. The statutes also differ in operation. From the outset, the Fire Provisions remove vicarious liability as a basis for a cause of action; they do not merely limit liability on the basis of vicarious liability. Alternatively, if a court finds an owner personally negligent, the owner is fully liable.

In contrast, under the general regime of the Limitation Act, if the cargo owner establishes the shipowner’s vicarious liability, the Act allows the shipowner, nevertheless, to limit his damages if the cargo owner’s loss was not the direct result of the shipowner’s negligence. Further, this opportunity to limit damages payable exists not merely for the carriage of goods, but also extends to a broad range of interests violated, such as personal injury, wrongful death, or property damage. The shipowner’s ability to limit payable damages is effective against a broad range of claimants, many of whom possess only a limited capacity to shoulder the financial burdens of their loss that result from the shipowner’s ability to limit his liability.

For these reasons, the breadth and severity of effects caused by risk allocation under the Limitation Act are far different from

\textsuperscript{40} See, Gilmore \& Black, supra note 7, at 877-98. The authors devote only a single page to specific comment on the COGSA Fire Provision. \textit{Id.} at 161 (commenting that what is said of the Fire Statute in context of the Limitation Act applies to the COGSA provision).
those of the Fire Statute. Whether one views the policies underlying the enactment of the Limitation Act as valid or, as do Gilmore and Black, as obsolescent, disfunctional, and inimical to values now granted increased priority, the point is that appraisal of the Fire Statute through the Limitation Act analysis is inappropriate. Ending such confusion alone would justify this Article.

The Article now scrutinizes judicial action in specific areas of the law and attempts to determine whether courts adopt a restrictive interpretation of the Fire Provisions and whether they confuse the Fire Provisions with the Limitation Act. First, the Article considers the factors a carrier must demonstrate to gain the protection of the Fire Provisions. Second, attention is focused on the two most important features of the Fire Provisions—personal negligence and burden of proof. Third, the Article analyzes court decisions to determine whether courts adopt a restrictive interpretation of the Fire Provisions. The Article concludes by addressing two ways an otherwise eligible carrier may lose the protection of the Fire Provisions—waiver and deviation.

III. QUALIFYING FOR THE BENEFIT OF THE FIRE PROVISIONS

A. The Beneficiaries of the Fire Provisions

Consistent with the legislative policy of limiting the benefit of the Fire Provisions to a discrete class of potential defendants, courts applying the Fire Provisions first must determine whether the defendant is a party protected by the statutes in a particular situation. Because courts that are predisposed to limit the application of the Fire Provisions are more likely to limit the class of beneficiaries, analysis of judicial identification of the beneficiary class provides insight into the attitude of the judiciary toward the Fire Provisions.

Shipowners are the express beneficiaries of the Fire Statute. Because the Fire Statute was enacted as a provision of the Limitation Act and because that Act provides that bareboat charterers are to

41. E.g., GILMORE & BLACK, supra note 7, at 822-23, 843, 878, 882.
42. On the issue of burden of proof as to "design or neglect" or "actual fault or privity," Gilmore and Black contend that "[t]here is no reason why the allocation of the burden of proof should be different in Fire Statute cases from the universally accepted allocation in Limitation Act cases." GILMORE & BLACK, supra note 7, at 896.
be treated as owners, bareboat charterers also may benefit from the Fire Statute.\textsuperscript{43} This result is supported by the traditional American maritime view that the bareboat charterer is treated as an owner \textit{pro hac vice} for many matters.\textsuperscript{44} The COGSA Fire Provision applies to anyone in a contractual relationship with a shipper pursuant to a contract of carriage that is covered by a bill of lading or some other similar document of title. A person in such a contractual relationship with a shipper is called a "carrier."\textsuperscript{45} Under COGSA, therefore, any type of charterer would be a "carrier," including a time or voyage charterer. Because both the Fire Statute and the COGSA Fire Provision are treated as equivalent, Fire Provision protection presently extends to ship owners, bareboat charterers, time charterers, and voyage charterers.

In contrast to their British counterpart,\textsuperscript{46} the American Fire Provisions may benefit foreign registered vessels. Courts might require such vessels to conform to United States safety requirements before securing this benefit. Indeed, customary international law recognizes the right of a State to condition access to its ports and laws on whatever reasonable conditions the State chooses to impose. Because Congress enacted the Fire Provisions to assist American shipping interests in competition with foreign shipping, requiring foreign vessels to satisfy United States safety requirements would both equalize costs and increase safety. The courts, however, have refused to set such conditions on the use of the Fire Provisions by foreign vessels. In \textit{Fidelity-Phoenix Fire Insurance Company of New York v. Flota Mercante del Estado (The Rio Gualaguay)},\textsuperscript{47} the United States Court of Appeals for the Fifth

\textsuperscript{43} 46 U.S.C. §§ 182, 186 (1982).
\textsuperscript{45} 46 U.S.C. §§ 1301(a), (b) (1982). Under COGSA, if the shipowner has not entered into contract directly with the cargo owner and has not authorized a charterer to sign on the owner's behalf when signing Bills of Lading, the owner will not be a "carrier" and will not have in personam liability under any Bill of Lading regarding the cargo owner. See Demsey & Assoc. v. S.S. Sea Star, 461 F.2d 1009, 1014 (2d Cir. 1972).
\textsuperscript{46} W. Tetley, supra note 20, at 190 (quoting the current British provision in The Merchant Shipping Act, 1894, part VIII, s. 502).
\textsuperscript{47} 205 F.2d 886, 1953 A.M.C. 1348 (5th Cir.), \textit{cert. denied}, 346 U.S. 415 (1953).
Circuit held that "the fire statute is not by its terms so conditioned." The Fifth Circuit relied on the United States Supreme Court's language in *Earle & Stoddart v. Ellerman's Wilson Line* to the effect that the only exception to immunity in the Fire Statute was for the "design or neglect" of the carrier.

Finally, under both Fire Provisions, the courts permit the statutes to be raised in both in personam actions and in rem actions against the vessel. Some earlier case law had held that, because the Fire Statute only refers to the owner having no liability under the theory of vicarious liability, the statute allowed an in rem action against the vessel. American admiralty tort law recognizes, generally, that the lack of an in personam remedy against an owner or charterer of a vessel does not terminate in rem liability of the vessel. Such a result would deny the owner a substantial portion of the Fire Statute's protection. The Supreme Court has held, however, that if the Fire Provisions apply in a case to prevent the carrier from having in personam liability, the statute similarly will bar in rem liability.

Courts, therefore, have not limited the coverage of the Fire Provisions by narrowly interpreting the beneficiary class. The courts clearly eschewed the opportunity to limit the beneficiary class regarding foreign vessels and in rem actions. The important principle derived from this observation is that the courts have not read limitations or exceptions into the Fire Provisions that would reduce the ambit of the benefit conferred under congressional policy.

**B. The Definition of "Fire"**

Because the benefit of the Fire Provisions is limited to cargo damage by fire, the second step of the judicial analysis is to determine whether a "fire" has occurred. This second threshold provides another opportunity to search for restrictive judicial interpretation of the statutes.

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Courts traditionally have adopted the general dictionary definition of fire. The Oxford English Dictionary, for example, defines the term as “the natural agency or active principle operative in combustion: popularly conceived of as a substance visible in the form of flame or of ruddy glow or incandescence.” In turn, Black's Law Dictionary defines “fire” as:

The effect of combustion. The judicial meaning of the word does not differ from the vernacular. The word ‘fire’ as used in insurance policies does not have the technical meaning developed from analysis of its nature, but more nearly the popular meaning, being an effect rather than an elementary principle, and is the effect of combustion, being equivalent to ignition or burning.

Heat damage alone does not constitute fire. In The Buckeye State, nearly 88,000 bushels of corn were damaged while in transit. The only possible source of the damage was the electric lights in the hold that were left on for some hours after the loading and, possibly, for the entire voyage. The carrier asserted that fire was the cause of the damage and claimed the benefit of the Fire Statute. The court, in discussing the meaning of “fire” in the Fire Statute, stated that, “fire is caused by ignition or combustion, and it includes the idea of visible heat or light, and this is also the popular meaning of the word.” The carrier could prove neither that a flame had damaged the corn nor that ash was present. Although the corn had been damaged, even charred, by the extreme heat in the hold, the heat never ignited the corn and therefore no fire had occurred within the meaning of the Fire Statute.

In a similar case, Cargo Carriers, Inc. v. Brown, the court held that heat rather than fire damaged a cargo of corn. A chemist testified that a fire is characterized by a flame or radiation of light. Because there was no evidence of flame or radiated light, the court found that the corn had been in a mere “distillation process” and

51. IV OXFORD ENGLISH DICTIONARY 238 (1961); see, e.g., Western Woolen Mill Co. v. Northern Assurance Co., 139 F 637, 639 (8th Cir.), cert. denied, 199 U.S. 608 (1905) (reflecting judicial adoption of dictionary definition of “fire”).
52. BLACK'S LAW DICTIONARY 570 (5th Ed. 1979).
53. 39 F Supp. 344, 1941 A.M.C. 1238 (W.D.N.Y. 1941).
54. Id. at 347.
held the Fire Statute inapplicable.

At first glance such distinctions appear unreasonable. Extreme heat damages a cargo as completely as fire. Conversely, heat damage, while potentially a grave risk, does not present the same danger as does fire. For example, generally the ship itself is not in substantial danger from heat, and one rationale for restricting carrier liability for cargo damage under the Fire Provisions is that the carrier already will have suffered major loss due to damage or destruction of the ship by the fire. Additionally, the slow procession of heat damage affords the carrier reasonable time to avoid damage by inspection. The decisions in Buckeye and Cargo Carriers therefore rest on sound policy principles.

What if heat damage results, but then a fire breaks out? In American Tobacco Co. v. Goulandris, high temperatures in the cargo hold led to heat damage and subsequent fire. The cargo owner contended that the carrier should be liable for the heat damage suffered by the cargo before the outbreak of the actual fire. The court reasoned that "spontaneous heat damage [to a cargo of tobacco] prior to the actual fire is all part and parcel of one continuous and uninterrupted process and is within the scope of the Fire Statute, once actual fire exists." The court applied the Fire

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56. See supra notes 34-35 and accompanying text.
58. American Tobacco, 173 F Supp. at 178; see 2A BENEDICT, supra note 8, at 14-5 to 14-8 (discussing this problem). For a case in which the court accepted arguendo that the master of the vessel had been negligent in the stowage of cargo, which led to heat damage and then, fire, but held the damages were merged rather than depriving the shipowner of the protection of the COGSA Fire Provision, see American Tobacco Co. v. The Katingo Hadjipatera, 81 F Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948), modified, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951), cert. denied, 343 U.S. 878 (1952). An explosion that may cause damage to cargo similarly raises this interesting problem. The cases involving explosion and fire do not appear to have distinguished the two events for purposes of applying the Fire Provisions. See, e.g., Republic of France v. United States, 290 F.2d 395 (5th Cir. 1961), cert. denied, 369 U.S. 804 (1962); Kokusai Kisen Kabushiki Kaisha v. Texas Gulf Sulphur Co., 33 F.2d 232 (5th Cir.), cert. denied, 280 U.S. 603 (1929). Recently, the Fifth Circuit held that where an explosion is accompanied almost simultaneously by "an immense wall of fire" the Fire Provisions apply. EAC Timberland v. Pisces Ltd., 580 F Supp. 99, 116 (D.P.R. 1983), aff'd, 745 F.2d 715 (1st Cir. 1984). When a fire causes an explosion which does damage to cargo, then certainly the Fire Provisions should apply. See Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania de Vapores, S.A., 388 F.2d 434, 436-38 (2d Cir.), cert. denied, 393 U.S. 828 (1968).
Statute and imposed no personal negligence on the carrier.

In general, the approach of American Tobacco seems reasonable. Because the owner normally could not distinguish heat damage from fire damage in a case where heat damage preceded the fire, a contrary approach would defeat the purpose of the Fire Statute in limiting the owner's liability to personal negligence. Under the Supreme Court's decision in Schnell v. The Vallescura, the general maritime rule is where damage to cargo is caused by two sources, for one of which the carrier has no liability, the carrier bears the often impossible burden of proving the extent of the damage caused by the source for which the carrier has no liability. Because the Fire Statute removed vicarious liability as a basis for action, a distinction between the negligence of the owner's servants and agents regarding heat damage versus their negligence regarding fire damage is inconsistent with that statute.

Because the fire and heat damage were substantially intertwined in the American Tobacco case, the policy of the Fire Statute appropriately was used to protect the owner. In American Tobacco, neither the fire nor the heat damage resulted from the carrier's negligence. A harder case is presented if the carrier is responsible for some ascertainable amount of heat damage and a fire for which he is not personally responsible subsequently destroys the remaining cargo. Was the fire an independent intervening force that breaks the chain of causation for the owner's negligent heat damage? The independent intervening force argument is stronger if most of the cargo is destroyed by the fire, but weakens if a significant portion of the heat damaged cargo survives the fire.

What result if the cargo was damaged by heat through no fault of the carrier, who then negligently started a fire that destroyed the cargo? The Fire Statute analysis should not apply because the carrier's personal negligence caused the fire. The rule of Schnell v. The Vallescura would require the carrier to prove the reduced value due to non-negligent heat damage or be liable for all damage. Therefore, if the carrier could prove the value of the cargo at the time of the fire, the carrier should be allowed to reduce his

59 293 U.S. 296, 1934 A.M.C. 1573 (1934).
60. See 2A BENEDICT, supra note 8, at 14-5 to 14-8 (discussing application of the rule of Schnell v. The Vallescura).
liability appropriately

Certainly, courts should not automatically merge heat damage with fire damage. While recognizing that merger benefits the owner that was not personally negligent, courts should consider general Fire Statute policies in cases regarding personally negligent owners. In those cases, if a carrier can reduce liability by distinguishing heat from fire damage, the distinction benefits the carrier and promotes the general goals of the Fire Statute.

C. The Location of the Fire

The Fire Provisions protect carriers from liability for fires that damage cargo while it is on the ship. The fire does not have to start on the ship. The fire might spread from a dock or another ship and damage cargo on the defendant carrier’s vessel. The carrier still would benefit from the Fire Provisions. In Anthony Gibbs & Co. v. Munson S.S. Line (The Munaries), cargo on a dock caught fire. The court held that the Fire Statute protected only fire damage to cargo on board the carrier’s vessel. The court determined, however, that the public policy evidenced in the Fire Statute would allow a carrier to contract for fire relief so long as the fire was not the result of the carrier’s personal negligence. Although the court was unable to determine the origin of the fire, the court gave effect to a bill of lading provision that stated: “The Carrier shall not be liable for any loss occasioned by any of the following Excepted Clauses: , by fire or explosion from any cause whatsoever occurring.” The court held the contract consistent with the Fire Statute policies so long as it did not protect a carrier against his own negligence. As with the Fire Statute, to defeat a contract provision, the cargo owner would have to show the cause of fire and carry the burden of proof as to personal negligence of the carrier.

The court in The Munaries easily could have decided for the cargo owner, maintaining that American maritime law prohibited carriers from escaping their negligence by contract. Further, this outcome could be supported by a literal reading of the Fire Statute’s requirement that the fire begin on board. The refusal to rely

62. Id. at 917 (emphasis in original).
on these theories suggests judicial attempts to implement congressional intent behind the Fire Provisions, rather than efforts to restrict it.

D. Time of Application of the Fire Provision

The Fire Statute has no restriction as to time. The COGSA Fire Provision, however, does. COGSA applies only to carriage of goods covered by a bill of lading or similar document of title. Second, COGSA applies only to carriage of goods in international trade to or from United States ports.63 The COGSA Fire Provision, therefore, would not apply to a shipment of goods from Kingston, Jamaica, to Buenos Aires, Argentina. Further, in carriage of goods in international trade to or from United States ports, COGSA applies only from “tackle to tackle”—from the time the goods are loaded aboard to the time they are discharged from the vessel that carried them on the ocean voyage.64

In Remington Rand, Inc. v. American Export Lines, Inc.,65 a ship carried some steel drums containing scrap movie film from New York to Bombay, India. The carriage was under COGSA. The drums were carried in an unventilated trunk hatch under high temperatures, and then, upon arrival in Bombay, the carrier placed them on the open deck for sixteen days with the drums exposed to high temperatures. One day after the carrier off-loaded the drums onto a lighter, time-chartered from a local owner in Bombay, the drums spontaneously exploded and burned.66 The cargo owner brought an action for fire damage and alleged negligent care of cargo. The carrier sought protection from the COGSA Fire Provision. The court held that COGSA and, thereby, the COGSA Fire Provision, ceased to apply when the film was loaded on to the lighter. COGSA Section 1301(e) provides that the term “carriage of goods” covers the period from the time the goods are loaded to the time they are discharged from the “ship.” “Ship” means the vessel used for carriage of goods by sea under COGSA Section 1301(d), and the sea voyage ended when the film was discharged onto the

64. 46 U.S.C. § 1301(e) (1982).
66. Id. at 132-36.
lighter.

By the bill of lading, the carrier and the cargo owner had contracted to have COGSA apply both from the time of the carrier's receipt of the goods to the time of loading, and from time of discharge to time of delivery to the consignee. Because the Harter Act automatically applied in that period, however, the COGSA provisions could not be extended to have controlling statutory effect by private contract. The inapplicability of COGSA while the Harter Act applied is also supported by the fact that the Harter Act would not relieve the carrier of vicarious liability while the Fire Provision would have done so. A decision to allow COGSA protection by contract would interfere substantially with the Harter Act scheme.

The carrier also sought protection from the Fire Statute. The Fire Statute applies only to the owner or bareboat charterer of a vessel on which the cargo suffers fire damage. Because the carrier in this case was a time charterer of the lighter where the fire damage occurred, the carrier could not qualify for protection under the Fire Statute.

IV The Heart of the Fire Provisions—The Requirement of Personal Negligence of the Carrier

Under the Fire Statute, the carrier incurs no liability to a cargo owner for fire damage to cargo unless the carrier's own negligence caused the fire. The Fire Statute eliminates vicarious liability for the negligent acts of servants or agents, including unseaworthiness of the vessel caused by a lack of due diligence by employees or independent contractors. By treating "privity or knowledge" in the Limitation Act and "design or neglect" in the Fire Statute as synonymous, Gilmore and Black would have the benefit of the Fire Provisions, along with that of the Limitation Act, conditioned on the carrier or shipowner having to show due diligence as to seaworthiness, if the cargo owner proves an unseaworthy condition caused

67. Id. at 138.
68. See supra note 15.
fire damage to cargo.\textsuperscript{70} The Supreme Court, in the leading case of \textit{Earle \& Stoddart v. Ellerman's Wilson Line},\textsuperscript{71} explicitly rejected the theory that the duty as to seaworthiness should take precedence over the statutory protection of the Fire Provisions. If unseaworthiness of the vessel caused the fire which damaged cargo, only the carrier's personal lack of due diligence as to that unseaworthiness would result in carrier liability.

Unseaworthiness is not an absolute, but rather a relative term.\textsuperscript{72} Seaworthiness must be considered in relation to the particular voyage, crew, cargo, and stowage.\textsuperscript{73} The Supreme Court has defined unseaworthiness as failure of a vessel to be "so tight, staunch, and strong, as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo."\textsuperscript{74} However, "the standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea."\textsuperscript{75} Most bills of lading, as well as COGSA, reduce the warranty of absolute seaworthiness, which is implied under general admiralty law, to an obligation to exercise due diligence to make the vessel seaworthy.\textsuperscript{76} Due diligence, in turn, is that degree of care to be expected of a reasonably prudent shipowner.\textsuperscript{77}

Under the principle of nondelegable duty, the negligence standard applies vicariously to all of the carrier's employees or independent contractors hired by the carrier,\textsuperscript{78} and the duty cannot be delegated regardless of the reputation or expertise of the delegee.\textsuperscript{79} "Due diligence to make the vessel seaworthy must in fact have been exercised. It is not sufficient for a shipowner to show that he

\begin{enumerate}
\item[70.] See Gilmore \& Black, supra note 7, at 879, 886.
\item[71.] 287 U.S. 420, 1933 A.M.C. 1 (1932).
\item[72.] See 2A Benedict, supra note 8, at § 7-2.
\item[73.] Id.; see The Southwark, 191 U.S. 1 (1903). For emphasis on the specific circumstances, see The Sagamore, 300 F 701, 1924 A.M.C. 961 (2d Cir.), cert. denied, 266 U.S. 612 (1924). See also Benedict, supra note 8, ch. VIII.
\item[74.] Dupont v. Vance, 60 U.S. (19 How.) 162, 167 (1856).
\item[75.] Id.
\item[76.] See 2A Benedict, supra note 8, at 8-1.
\item[77.] Id. at 8-2; The Southwark, 191 U.S. at 15-16.
\item[78.] See 2A Benedict, supra note 8, at 8-3.
\item[79.] Id. at 8-3 to 8-5.
\end{enumerate}
employed competent men to do the work, but he is held responsible for the failure of the men he employed." Normally, the carrier owes the duty of due diligence as to seaworthiness only until the carrying vessel commences its voyage carrying that cargo owner’s shipment. Once the voyage has begun, subsequent unseaworthiness that is due to lack of due diligence and that causes damage to that cargo will not give rise to carrier’s liability, at least not for violation of the duty of due diligence as to seaworthiness.

After passage of the Fire Statute, Congress enacted the Harter Act in 1893, requiring carriers to exercise due diligence in providing a seaworthy carrying vessel. Carriers could not avoid that duty by contract. Faced with inconsistency between the Harter Act and the Fire Statute, the United States Supreme Court in Earle & Stoddart, Inc. v. Ellerman’s Wilson Line, unanimously rejected any dominance of the Harter Act. In Earle & Stoddart, the steamship Galileo, after bunkering in New York, departed with a full cargo. Shortly thereafter, the crew discovered that the coal in a temporary bunker had caught fire through spontaneous combustion due to negligent loading. The crew unsuccessfully fought the fire and the Galileo sank, with virtually total loss of cargo. The fire caused the loss, and the condition of the coal, when the voyage commenced, caused the fire. This was a condition of unseaworthiness caused by the gross negligence of the Galileo’s chief engineer in putting a new supply of coal on top of coal known to be heated. This condition of unseaworthiness was avoidable by “due diligence” before the voyage, within the meaning of that term under the Harter Act.

The cargo owners explicitly posed the issue of dominance of the duty of due diligence as to seaworthiness over the Fire Statute:

[T]he cargo owners concede that ordinarily the phrase in the fire statute ‘neglect of such owner’ means personal negligence of the owner, or, in case of a corporate owner, negligence of its managing officers or agents; and that the negligence of the master, chief engineer or other ship’s officers does not deprive the owner

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80. The Leerdan, 17 F.2d 586, 587, 1927 A.M.C. 509, 510 (5th Cir. 1927).
82. 287 U.S. 420, 1933 A.M.C. 1 (1932).
83. Id. at 424-25.
The contention is that the statute does not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care;

The Supreme Court held that owner neglect, in relation to the Fire Statute, and lack of due diligence for seaworthiness are different terms. A "failure to exercise due diligence" indeed may arise from negligence directly attributable to the carrier, but also may arise from imputation to the owner of the negligence of employee or independent contractors. Thus, a failure to exercise due diligence does not equate to direct owner neglect under the Fire Statute. The Supreme Court refused to grant dominance to the duty of due diligence as to seaworthiness. First, the court pointed out that other than the one exception for the shipowner's "design or neglect," "the statute makes no other exception from the complete immunity granted." The Supreme Court refused to read into the Fire Statute an exception that Congress had not placed there. Second, in response to the argument of primacy of the duty of due diligence in the Harter Act, the Supreme Court pointed out that the Harter Act expressly stated that nothing in the Act was intended to "modify or repeal" the Fire Statute. The Supreme Court then noted that, "in all the cases when immunity from liability for damage by fire was held to be lost," the finding of neglect of the owner was based "on the action of the owner or managing agent." Furthermore, "[t]he courts have been careful not to thwart the purpose of the Fire Statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty"

Earle & Stoddart effectively settled the issue of conflict of due diligence for seaworthiness with the Fire Statute, and the cases

84. Id.
85. Id. at 425.
86. Id. at 427; see also 46 U.S.C. § 196 (1982).
87. Id. at 427 n.3.
88. Id. at 427-28.
following the enactment of COGSA, with its Fire Provision, transferred the reasoning of Earle & Stoddart to the new legislation. In a COGSA Fire Provision case, *A/S Ludwig Mowinckels Rederi v. Accinanto (The Ocean Liberty)*, the United States Court of Appeals for the Second Circuit stated that the "exemption of the fire statute is admittedly the same as that provided by the carriage of Goods at Sea Act" and then reiterated the rule of Earle & Stoddart:

We do not think that the carrier can be held liable on the theory that the stowage of cargo was a non-delegable duty negligence in performance of which should be imputed to the carrier in determining whether it had exercised due care to make the vessel seaworthy.91

In another COGSA Fire Provision case, *Petition of Skibs A/S Jolland (The Black Gull)*, the United States Court of Appeals for the Second Circuit found evidence of unseaworthiness and remanded the case to the district court, but also stated that, "of course to charge [the carrier] with negligence sufficient to establish liability, it must appear that the negligence was within 'actual fault or privity of the carrier.'"93

Concurrently, the courts in cases not involving the seaworthiness issue continued to maintain the general principle that, regardless of context, a carrier could not be vicariously liable under the Fire Provisions. In *American Tobacco Co. v. The Katungo Hadjipatera*, the ship, loaded with tobacco, was forced to detour around Africa, due to the outbreak of World War II. The long, hot voyage led to damage, including a spontaneous fire. Because the defendants were voyage charterers, the case involved only the COGSA Fire Provision. The court, however, viewed the two statutory provisions as having the same meaning and applied Fire Statute case law. In interpreting the COGSA Fire Provision, the court held that:

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91. *Id.* at 143.
92. 250 F.2d 777 (2d Cir. 1957).
93. *Id.* at 784. The court did not even use the term "due diligence as to seaworthiness."
Under both the Fire Statute and the Carriage of Goods by Sea Act the shipowner and carrier are not liable for fire damage, unless caused by the owner’s design or neglect or carrier’s fault of privity. That the master may have been personally at fault in [respect to loading] does not impose liability on the shipowners, for his neglect is not their neglect within the Fire Statute.95

The strong policy of statutory construction also announced in Earle & Stoddart advising that the courts should not condition the benefit of the Fire Statute (and by extension, the COGSA Fire Provision) on compliance with other statutory provisions likewise continues to receive support. In Automobile Insurance Co. v. United Fruit Co. (The Shell Bar),96 the United States Court of Appeals for the Second Circuit refused to apply the “statutory fault” rule to aid the cargo owner in establishing the cause of the fire by use of a presumption of causation. The court was adamant in its condemnation of any judicial effort to erode the protection of the Fire Provision:

The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with other statutes. There are no exceptions other than those expressed in the statute itself. We are not justified to engraft on the Fire Statute the conditions of compliance with requirements found elsewhere, whether by statute or regulation. Since 1851 there has been no indication of congressional intent to relieve cargo interests. The exemption provided by [COGSA] was the same as that provided by the Fire Statute.97

On the strength of Earle & Stoddart, American courts for over forty years did not question seriously the rule that the Fire Provisions did not presuppose due diligence for seaworthiness. In 1959, international unanimity was disrupted when the British Privy Council decided Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine, Ltd. (The Maurienne).98 In Maxine Footwear, ice blocked three scupper pipes on board the ship which was

95. Id. at 445-46.
97. Id. at 75.
loading cargo. The master instructed one of the ship’s officers to thaw out the pipes and that officer hired an independent contractor to use an acetylene torch to melt the ice. The scupper pipes, however, had cork insulation which caught fire and spread undetected throughout the inside of the ship’s pipes. The master was forced to scuttle the ship and cargo was lost. In Maxine Footwear, the fire itself was the unseaworthy condition, because the cargo was loaded after the fire started, but before it was discovered. The trial court found the ship’s officer to be negligent.99 Under the Canadian COGSA Fire Provision, similar to ours, the carrier was liable only for his own negligence in causing a fire. Because the ship’s officer was not a managing agent (and certainly the independent contractor torch operator was not), his negligence would not be imputed to the carrier.

The British Privy Council overruled the Canadian trial court, holding that the due diligence as to seaworthiness provision of the Canadian Carriage of Goods Act was controlling as to the Act’s Fire Provision. The Privy Council based its opinion primarily on the view that the Canadian COGSA balanced the interests of carrier and cargo and chose to demand due diligence as to seaworthiness in any conflict with the Fire Provisions. Further, the Canadian COGSA has introductory language to its provision on the duty of care of cargo that correctly suggests that duty is subject to the listed exceptions from liability, including the COGSA Fire Provision. The due diligence as to seaworthiness provision, however, does not contain such language. The Privy Council took this distinction as a statutory message of the primacy of the seaworthiness provision. As a result of Maxine Footwear, if a carrier’s servant or other agent in Canada causes the carrying vessel to be unseaworthy due to lack of due diligence, and if that unseaworthy condition causes a fire, the carrier will be vicariously liable for that conduct. If the fire occurs in any other way, such as negligent care of cargo, the Fire Provision would operate as in the past.

The Privy Council’s decision in Maxine Footwear contradicts the decision in the Earle & Stoddart case, long accepted as the rule for our COGSA Fire Provision. The American COGSA and the Canadian COGSA contain the same provisions on seaworthiness

99. Id. at 601, 2 Lloyd’s List L.R. at 112.
and fire; the two COGSA's were enacted in the same year and they both closely track the language of the "Hague Rules" of 1924, the provisions of which are embodied in the *International Convention for the Unification of Certain Rules Relating to Bills of Lading*.

The United States signed that Convention in 1925 and ratified it in 1937, but only after enacting COGSA, with few changes, as national legislation.

This 1959 holding on Canadian law, however, should not be a persuasive authority to suggest a ground for judicial reversal of the American rule. American law contains one factor not present in the Canadian situation; we have the Fire statute, which preceded enactment of the United States COGSA by eighty-five years. Our statute established specific and early congressional policy concerning negligent fire damage in carriage of cargo relations. At the time of the enactment of the Harter Act, that Act specifically stated that the Harter Act was not meant to modify or repeal the Fire Statute. Our Supreme Court, in *Earle & Stoddart*, rendered a definitive decision opposing any primacy or dominance of the Harter Act, not because the Fire Statute stood outside the Harter Act, but rather because Congress had made clear that the Harter Act was not to affect the Fire Statute. The United States COGSA Fire Provision expressly states that the Act "shall not affect the rights and obligations of the carrier under [the Fire Statute]."

Indeed, because in international maritime carriage, COGSA with its Fire Provision applies only "tackle to tackle," COGSA does not apply from receipt in carrier custody to loading on the carrying vessel for the international voyage or from discharge for carrying

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100. 51 Stat 233, T.S. No. 931, 120 L.N.T.S. 155.
102. The Ninth Circuit found the *Maxine Footwear* case "highly persuasive" in their decision to move to a "half-way house" by requiring carriers, in cases of fire damage to cargo resulting from alleged lack of due diligence to seaworthiness, to bear the burden of proof that there was no personal lack of due diligence by the carrier. Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd., 603 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979).
vessel to delivery to consignee.\textsuperscript{107} The Fire Statute applies exclusively either to lighterage or other vessel carriage in those periods or to coastal and interstate cargo carriage. Congress could not have intended the same result for our COGSA Fire Provision as the \textit{Maxine Footwear} decision achieved for the Canadian Fire Provision—or indeed, any significant change in the application of the COGSA Fire Provision—while choosing expressly to have the Fire Statute remain unaffected by such a major change. For nearly fifty years, courts have repeated that the two United States Fire Provisions have the same meaning.\textsuperscript{108} Finally, the Fire Statute has ordered carriage of cargo relations regarding negligent fire damage for over one hundred and thirty years; the COGSA Fire Provision has functioned for nearly fifty years, both without apparent difficulties or efforts to modify their operation.

\textbf{A. The Second Heresy: Confusion of the Doctrine of Unseaworthiness With the Fire Provisions}

In 1973, in \textit{Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et Cyprian Fabre (The Marquette)},\textsuperscript{109} the United States Court of Appeals for the Second Circuit, although agreeing with precedent, introduced substantial terminology from the unseaworthiness doctrine into the Fire Provision analysis. As a result, the opinion invites confusion. The holding in \textit{Asbestos Corp.} is not especially novel. The district court found no personal negligence of the carrier for causing the fire. The district court did find, however, personal neglect by the owner in failing to provide adequate firefighting equipment.

The district court in \textit{Asbestos Corp.} followed the normal legal analysis of the Fire Provisions. The district court pointed out that the "design or neglect” must be personal to the shipowner, and that negligence of the master, crew, or agents is not imputed to the owner.\textsuperscript{110} Citing the \textit{Earle & Stoddert} case, the district court recognized that even for lack of due diligence as to seaworthiness, the

\textsuperscript{108} See supra note 19; notes 90-97 and accompanying text.
\textsuperscript{109} 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973).
\textsuperscript{110} \textit{Asbestos Corp.}, 345 F. Supp. at 820.
Fire Provisions require conduct directly attributable to the carrier. The court noted the rule that the burden to establish "design or neglect" or "actual fault or privity" of the carrier is on the cargo owner. The court then discussed case authority showing clearly that the court was finding neglect of the carrier and not of its servants.\textsuperscript{111} Whenever the district court used the terminology of seaworthiness and due diligence in the process of correctly applying the law of the Fire Provisions, the court was careful to emphasize that it was considering the carrier's conduct rather than the conduct of the officer and crew.

The structure of the Second Circuit decision in Asbestos Corp. is somewhat confusing. Instead of starting with a discussion of the Fire Provisions, as did the district court, and keeping discussion of seaworthiness terminology in the context of the Fire Provisions, the appellate court split the two topics. The Second Circuit first considered the district court findings on unseaworthiness due to personal lack of due diligence by the carrier and upheld those findings. The Second Circuit then discussed the analysis under the Fire Provisions and used the correct approach, deciding that even if the carrier was not negligent in causing the fire, the carrier still would be liable for damage caused by his own negligence in not providing the proper equipment and ability to use the equipment to extinguish the fire. The circuit court, however, carried over its earlier conclusions on lack of due diligence regarding seaworthiness and inserted that terminology in the Fire Provisions analysis. The court did not emphasize, however, that its decision relied on a lack of due diligence directly attributable to the carrier rather than on vicarious liability for conduct of the carrier's servants. Thus, the opinion contains such potentially misleading statements as: "[The trial judge] held that an inexcusable condition of unseaworthiness of a vessel, which in fact \textit{causes the damage}—either by starting a fire, or by preventing its extinguishment—will exclude the shipowner from the exemption of the Fire Statute and COGSA. We agree."\textsuperscript{112}

Near the end of its opinion, the appellate court did state, in the text and in a footnote, such basic propositions under the Fire Pro-

\textsuperscript{111} Id. at 821-22 (discussing The Virginia, 264 F 986, 996 (D.C. Md. 1920)).
\textsuperscript{112} Asbestos Corp., 480 F.2d at 672 (emphasis in original).
visions as the requirement of personal negligence of the carrier, and that the burden of proof as to negligence of the carrier is on the cargo owner. In Asbestos Corp., the second circuit committed the second heresy by confusing the distinct doctrine of unseaworthiness with the Fire Provisions. Although the confusion did not operate in the actual application of the Fire Provisions, the confusion in the language of the appellate court’s opinion is misleading and improper for two reasons. First, the confusion of unseaworthiness with the Fire Provisions was inconsistent with over 130 years of American law. Second, if the decision was influenced by Maxine Footwear, the differences between the American and Canadian contexts of law and history prevent this application of the law of the Canadian COGSA to our COGSA. The Maxine Footwear precedent is, therefore, inapplicable to American maritime law.

B. The Third Heresy: American Reliance on Maxine Footwear

In 1979, the United States Court of Appeals for the Ninth Circuit committed rank heresy in deciding Sunkist Growers, Inc. v. Adelaide Shipping Lines. In Sunkist, a fire broke out in the engine room of a general cargo vessel carrying over 58,000 crates of fresh lemons. A low pressure fuel line parted, spraying fuel on the hot surfaces of two generators. What followed, in the court’s words, “might well be described as a shakespearean comedy of errors, with a result akin to one of his tragedies.” The engineers, responding to the fire alarm, understood neither the ship’s equipment nor its firefighting procedures. In the resulting chaos, the chief engineer was killed, the ship burned for three days, the master died of a heart attack, and the entire shipment of lemons was lost.

The Ninth Circuit, in reversing the district court on its finding of fact, held that the uncorrected use of an improper fitting in the fuel line and the failure to provide a crew competent in firefighting procedures, violated the duties of the carrier’s managing agents and, therefore, was an act of neglect directly attributable to the

113. 603 F.2d 1327, 1979 A.M.C. 2787 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980).
114. Id. at 1329.
115. Id. at 1330.
carrier. The Ninth Circuit began by stating the rule that the carrier is liable only for its own negligent conduct in fire damage to cargo. The decision broke with precedent on the issue of the locus of the burden of proof when unseaworthiness of the vessel is alleged by the cargo owner as the cause of the fire. Specifically, the court maintained that:

We adopt, as the law of our Circuit, the construction placed in the Hague Rules by their Lordships in [The Maurienne, the Canadian Maxine Footwear case], and hold that the provisions of Section 3, Paragraph 1, COGSA [section 1303(1)], create an overriding obligation and if that obligation is not fulfilled and the nonfulfillment causes the damage, the fire immunity of Section 4, Paragraph 2(b) [section 1304(2)(b), the COGSA Fire Provision], cannot be relied upon by appellee. The overriding obligation to exercise due diligence [as to seaworthiness] applies to the master and those in the management of the ship, as well as to the owners or charterers personally, or those who act for the owners in a managerial capacity.

Our analysis of the record convinces us that the appellee also failed to carry their burden of proof on the issue of exercising due diligence to make the ship seaworthy as required by [section 1304(1)].

Such ambiguous language might mean either that the duty of due diligence as to seaworthiness always takes precedence in cargo fire damage cases or that, although the carrier has the burden of proof to show due diligence, it only has to prove personal due diligence. The Sunkist decision relied on the rule of the Canadian case of Maxine Footwear, which had held that in a fire damage case, where the fire is caused by a lack of personal or vicarious due diligence as to seaworthiness, the due diligence duty is “an overriding obligation.” In Maxine Footwear, the ship’s officer failed to be diligent. The court found that the officer was not a “managing agent” of the carrier. Indeed, the court, in applying the unseaworthiness doctrine, stated that the carrier would have had a “very

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116. Id. at 1334-35.
117. Id. at 1341.
strong case" under the Canadian COGSA Provision. Thus, Maxine Footwear does more than shift the burden of proof as to the personal negligence of the carrier. The express rule of that case is that the duty of due diligence as to seaworthiness is preeminent. If personal or vicarious lack of diligence results in unseaworthiness leading to a fire, the carrier loses any protection he otherwise would have had under the COGSA Fire Provision. If the cargo owner demonstrates that unseaworthiness existed and caused the fire, the carrier then has the burden under the Canadian COGSA to prove that it exercised due diligence, including the due diligence of its servants or agents.

The Ninth Circuit in Sunkist, however, concentrated on the personal diligence of the carrier without distinguishing between liability for the carrier's own conduct and vicarious liability for conduct of such servants as the master, ship's officer, and crew. For example, the opinion rejected the district court's finding of no personal negligence: "[H]ere the design or neglect was that of managing officers or supervisory employees, not that of the master or crew or subordinate employees." A later Ninth Circuit case also supports the view that Sunkist requires the carrier to assume the burden of proof regarding due diligence under COGSA Section 1304(1) only to the extent of proving no personal lack of due diligence. In the case of Hasbro Industries, Inc. v. M/S St. Constantine, the shipper contended that time charterers of the ship were vicariously liable for fire damage caused by unseaworthiness due to the lack of due diligence by the shipowner. The Ninth Circuit stated that, "since liability for loss by fire may be imposed only where there is 'actual fault' [citing the COGSA Fire Provision], a breach is necessarily personal to the 'carrier' that is responsible for the harm." The court went on to say that Sunkist recognized in fire damage cases that liability is based on the carrier's personal, not vicarious, lack of due diligence: "[T]he Sunkist case deals primarily with the allocation of the burden of proof in COGSA cases, and with the trial court's error on shifting the burden to the cargo claimants

119. Id. at 602, [1959] 2 Lloyd's List L.R. at 107.
120. 603 F.2d at 1336.
121. 705 F.2d 339 (9th Cir.) cert. denied, 104 S. Ct. 537 (1983).
122. Id. at 342.
once the carrier had made an initial showing.” The Ninth Circuit in Hasbro concurred with the district court opinion in that case that the time charterers had “sustained their burden of proof.”

Thus, Sunkist followed the rule that even in the case of unseaworthiness due to lack of due diligence causing fire damage to cargo, the carrier is liable only for negligent conduct directly attributable to it through conduct of its managerial level personnel. At least for the COGSA Fire Provision, some of the arguments advanced by the Sunkist decision might equally extend to a contention that the carrier should be vicariously liable for unseaworthiness due to lack of due diligence by servants or agents under the concept of nondelegable duty.

Despite the heresies not only of confusing the unseaworthiness doctrine with the Fire Provisions, but also, of relying on the Maxine Footwear reasoning, the current trend of judicial decisions continues to be that the Fire Provisions have eliminated vicarious responsibility as a ground for liability of carriers in cases of fire damage to cargo. Regardless of the duty involved, only the carrier’s own conduct, which for the corporate carrier is the conduct of its managing officer or higher level supervisory personnel, will constitute “design or neglect” or “actual fault or privity” of the carrier under the Fire Provisions. The duty of due diligence as to seaworthiness does not outweigh the Fire Provisions. Even in the Ninth Circuit, with its recent Sunkist and Hasbro decisions placing the burden of proof as to lack of personal due diligence on the carrier, the basic rule that only lack of personal due diligence will give rise to liability still continues. This trend of legal decisions and the general absence of negative judicial commentary on this requirement of the Fire Provisions, suggest the continued support of the courts to give effect to the congressional policy expressed in the Fire Provisions.


Under the traditional, majority rule, the burdens of proof under

123. Id.
124. Id.
the Fire Provisions are as follows:

1. The cargo owner must establish a prima facie case for recovery. To do that the cargo owner must show receipt of cargo by carrier in undamaged condition and failure of carrier to deliver the cargo in undamaged condition. Such proof usually presents little difficulty.

2. The carrier then must establish that fire caused the damage to cargo. Although often easy, in cases of total destruction of the ship by sudden explosion or disappearance without report, this may be an impossible hurdle. Also, cases arise in which heat damage occurs, but the carrier cannot prove that fire also occurred.

3. The cargo owner then must prove the entire cause of action against the carrier based on a showing that the cause of the fire that damaged the cargo was the personal negligent conduct of the carrier (for a corporate carrier, conduct by a managing agent of sufficient authority). The cargo owner then must show a sufficient nexus between the negligent conduct and the specific event causing the fire to say that the carrier’s negligence caused the fire, i.e., the “design or neglect” or “actual fault or privity” of the carrier. Any one of these elements may be quite difficult for the shipper.

Until recently, the prevailing case law has made the cargo owner

125. Westinghouse Elec. Corp. v. M/V Leslie Lykes, 734 F.2d 199, 206 (5th Cir. 1984); Terman Foods, Inc. v. Omega Lines, 707 F.2d 1225, 1227 (11th Cir. 1983).
126. 2A BENEDICT, supra note 8, at 14-3; Westinghouse Elec. Corp. v. M/V Leslie Lykes, 734 F.2d 199, 206 (5th Cir. 1984).
127. See, e.g., In re Marine Sulphur Queen, 460 F.2d 89, 19 A.M.C. 1122 (2d Cir. 1972), cert. denied, 409 U.S. 982 (1982). The court presumed unseaworthiness from an unexplained loss of a vessel which recently had departed from port. The carrier would have no proof if a fire had occurred. An inexplicable loss of vessel, therefore, may result in both loss of use of Fire Provisions, and a basis of presumption for liability.
128. 2A BENEDICT, supra note 8, at 14-3; supra notes 53-55 and accompanying text.
shoulder the burden of proof in each instance.\textsuperscript{130} One commentator has traced the rule back to the early case of \textit{Keene v. The Whistler}\textsuperscript{131} and its language that "[t]he burden of proof is on the libellant to show that such fire was caused by the design or neglect of the owner of the vessel."\textsuperscript{132} Gilmore and Black, again improperly viewing the Fire Provisions in the context of the Limitation Act,\textsuperscript{133} maintain that in the "privity and knowledge" cases under section 183 of the Act, wherein the shipowner seeks to qualify for limitation of liability, two problems are involved:

first, \textit{the establishment of liability to shipowner to the claimant}, as to which the claimant (or libellant) bears the burden; second, the burden of establishing privity or knowledge or their absence. It seems reasonable that the shipowner who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge this allocation has been universally accepted.

There is no reason why the allocation of the burden of proof should be different in Fire Statute cases from the universally accepted allocation in Limitation Act cases.\textsuperscript{134}

The Limitation Act thus provides a two-step analysis. To establish basic liability, including vicarious liability, the claimant (e.g., a

\begin{itemize}
\item \textsuperscript{130} \textit{See}, \textit{e.g.}, 2A \textsc{Benedict}, \textit{supra} note 8, at 14-9.
\item \textsuperscript{131} 14 \textsc{F} Cas. 208 (D.C.D. Cal. 1873) (No. 7,645). \textit{See} \textit{Thede}, \textit{supra} note 6, at 985 n.178 (citing \textit{Keene} and discussing cases supporting the rule that cargo owner bears the burden for all elements of action for personal negligence of carrier); \textit{see} \textsc{Gilmore & Black}, \textit{supra} note 7, at 896 (criticizing the rule). Recent cases following the rule include Westinghouse Elec. Corp. \textit{v. M/V Leslie Lykes}, 734 F.2d 199, 206 (5th Cir. 1984); \textit{In re Ta Chi Navigation (Panama)} Corp., 677 F.2d 225, 229 (2d Cir. 1982); Asbestos Corp. \textit{v. Compagnie de Navigation Frassinet et Cyprien Fabre}, 480 F.2d, 669, 672-73, 1973 A.M.C. 1683, 1687 (2d Cir. 1973). \textit{Contra} Hasbro Industries \textit{v. M/S St. Constantine}, 705 F.2d 339, 341, 1980 A.M.C. 1425, 1442 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 537 (1983)(burden of proof as to personal negligence shifts to carrier if cargo owner proves that unseaworthiness caused the fire); Sunkist Grower's Inc. \textit{v. Adelaide Shipping Lines, Ltd.}, 603 F.2d 1327 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 1012 (1980); \textit{see also} \textit{Comment, Burden of Proof in Marine Fire Damage Cases}, \textit{supra} note 129 (extensively researches the historical background and the case law on this burden of proof).
\item \textsuperscript{132} 14 \textsc{F} at 208.
\item \textsuperscript{133} \textit{See} \textit{supra} notes 36-41 and accompanying text; \textit{Comment, Burden of Proof in Marine Fire Damage Cases}, \textit{supra} note 129, at 1146, 1156-57, 1162-63 (showing the influence of Gilmore and Black's focus on this question).
\item \textsuperscript{134} \textsc{Gilmore & Black}, \textit{supra} note 7, at 895-96 (emphasis added).
\end{itemize}
cargo owner) must show a good cause of action in law. The claimant, therefore, bears the initial burden of proof. Once liability is established, the Limitation Act provides an opportunity for the shipowner to limit that liability by proving no personal fault or no wrongful conduct directly attributable to the shipowner. Because the shipowner is the party seeking relief under the Act from established liability, the shipowner has the burden of proof.

Under the Fire Provisions, however, Congress eliminated vicarious liability as a ground for liability of the carrier for fire damage to cargo. To establish liability of the carrier, a cargo owner in a case concerning fire damage to cargo must show personal negligence on the part of the carrier. Because a carrier has no established liability from which to escape, the relief granted by Congress to carriers in fire damage cases is more profound than that granted under the Limitation Act. Either the carrier has no liability, or it does because of personal negligence, and the Fire Provisions do not purport to limit liability in the latter case. The statutory relief of the Fire Provisions, however, is limited to fire risk, to property damage, and to the carrier-cargo owner relationship.

Because Gilmore and Black's discussion of the Fire Provisions is intertwined with the law and policy of the Limitation Act, they state that the many cases opposing their view require the cargo claimants "not only to prove negligence or fault but also to prove that the fire was, in the words of the Fire Statute, 'caused by the design or neglect of such owner.'" Such close identification of the Fire Statute with the Limitation Act obscures the fact that, under the Fire Statute, until the cargo owner proves personal negligence of the carrier, the cargo owner has proved no negligence or fault chargeable to the carrier. In effect, what Gilmore and Black seek is amendment of the Fire Provisions, not a balanced application of congressional policy evidenced by the statutes.

What is the significance of the burden of proof in these cases? In those instances where the cargo owner has sufficient evidence of a carrier's personal negligence, the burden of proof means little. The cargo owner establishes its case anyway. For the cargo owner to

135. 46 U.S.C. §§ 181-189 (1982); see supra notes 36-41 and accompanying text (criticizing this structure of analysis); GILMORE & BLACK, supra note 7, at 877-98.
136. GILMORE & BLACK, supra note 7, at 896 (emphasis added).
win in any other situation, however, one of two events has to occur. Either the cargo owner will establish a valid claim on the basis of vicarious liability or the cargo owner will attempt to take advantage of a presumption of negligent conduct by the carrier or the carrier’s servants or agents. In passing the Fire Statute, however, Congress clearly did not want vicarious liability to continue to operate and surely Congress did not enact the carrier-protective Fire Statute in order to grant cargo owners a presumption of carrier negligence. Even if the decisions have not clearly enunciated the fact, courts for over one hundred years have responded to the internal logic of Congress’ policy objectives by restricting the cargo owner’s basis of action against the carrier in cases of fire damage.

Contentions that the carrier should bear the general burden of proof in showing an absence of personal neglect have received virtually no acceptance by the courts. In Verbeeck v. Black Diamond Steamship Corp., the United States Court of Appeals for the Second Circuit adopted the position of Gilmore and Black almost verbatim, including their confusion with the Limitation Act. The court cited Gilmore and Black and two Limitation Act cases. While it is unclear whether Verbeeck explictly was reversed, the Second Circuit subsequently corrected its analysis by vacating and withdrawing the Verbeeck decision. The Second Circuit now adheres to the established rule.

In 1972, the United States District Court for the Eastern District of Pennsylvania, in Complaint of G.D.R.M.S. Caldas, similarly followed the approach of Gilmore and Black, citing the Verbeeck opinion (despite its having been vacated and withdrawn) and one of the Limitation Act cases relied on in Verbeeck. Further, although Gilmore and Black state the Caldas case “held” that the burden of proof to show absence of personal negligence was on the carrier, the Caldas case expressly held that the cargo owner had

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137. 269 F.2d 68 (2d Cir.), vacated on other grounds, 273 F.2d 61 (2d Cir. 1959).
138. Id. at 71.
139. See Gilmore & Black, supra note 7, at 896-97 n.106c; Thede, supra note 13, at 986.
140. 273 F.2d 61 (2d Cir. 1959).
141. E.g., In re Ta Chn Navigation (Panama) Corp., 677 F.2d 225 (2d Cir. 1982).
143. Gilmore & Black, supra note 7, at 897.
been unable to show the cause of the fire.\textsuperscript{144} Thus, the \textit{Caldas} comments on carrier's burden of proof are dictum because after the carrier has proved that fire damaged the cargo, the cargo owner must establish the cause of the fire to have any basis for an action against the carrier.

Finally, by the time of the \textit{Sunkist} decision in 1979,\textsuperscript{146} the United States Court of Appeals for the Ninth Circuit effected the first significant departure from the burden of proof rule concerning personal neglect of the carrier. \textit{Sunkist} held that where the claim is that unseaworthiness due to lack of due diligence causes fire damage to cargo, the seaworthiness provisions prevail. At least to the extent that after the cargo owner shows unseaworthiness has caused the fire, the carrier has the burden of showing no personal lack of due diligence. For any other cause of a fire, \textit{Sunkist} specifically maintains the traditional rule that the burden of proof for personal negligence rests on the cargo owner.

Other commentators correctly have criticized the legal analysis and reasoning of the \textit{Sunkist} court.\textsuperscript{146} Perhaps the United States Solicitor General's comments strike the correct diplomatic note: "There are observations in the opinion of the court of appeals that, if taken out of context, could serve as the basis for novel admiralty doctrine."\textsuperscript{147} Four aspects of \textit{Sunkist} deserve comment: (1) the court's reliance on the \textit{Asbestos} case; (2) the court's reliance on its own past cases; (3) the court's reliance on \textit{Maxine Footwear} and the Canadian COGSA and (4) the court's interpretation of the COGSA statutory scheme without reference to its historical context.

\textbf{A. The Asbestos Corp. Case}

In \textit{Sunkist}, the Ninth Circuit found the Second Circuit case of \textit{Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et
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Cyprien Fabre,148 "closely in point and misread by the District Court."149 The Court of Appeals in Sunkist sought to use Asbestos Corp. as authority for the proposition that the appropriate procedure in a case involving possible lack of due diligence for seaworthiness and fire damage to cargo is to decide the issue under COGSA Sections 1303(1) and 1304(1), thus placing the burden of proof for lack of due diligence on the carrier.150 As the Article has shown, however, both the trial and appellate opinions in Asbestos Corp. correctly applied the traditional procedural and substantive aspects of the Fire Provisions. The problem with Asbestos Corp. was the confusing language of the appellate opinion, not the actual application of the Fire Provisions.151

The District Court opinion in Asbestos Corp. shows that the court moved step by step through the procedural stages of the Fire Provisions and applied them as the controlling law for determining carrier liability in a case involving fire damage to cargo. At the appellate level, the Second Circuit's somewhat confusing discussion first examining the findings on unseaworthiness due to lack of due diligence, and then examining the application of the Fire Provisions, appears to have contributed to the Sunkist court's mistaken belief that this meant that Asbestos Corp. had appraised the unseaworthiness claim under sections 1303(1) and 1304(1) without considering the Fire Provisions. With that perspective, the Ninth Circuit then contended that it was careless dictum by the appellate court in Asbestos Corp. to comment that the burden of proof of carrier's negligence under the Fire Provision shifts to the cargo owner once the carrier shows fire caused the damage. Thus, Sunkist says of the Asbestos Corp. appellate court that there was "casual treatment" of the burden of proof and that the author of the Asbestos Corp. opinion "completely overlooks"152 the allocation of the burden of proof in sections 1303(1) and 1304(1), and that burden must be borne by the carrier under all circumstances in due

148. 480 F.2d 669 (2d Cir. 1973).
149. 603 F.2d at 1335.
150. See supra notes 113-23 and accompanying text for discussion of Sunkist's use of the Asbestos Corp. decision. See supra notes 109-12 and accompanying text for appraisal of the Asbestos Corp. decision.
151. 603 F.2d at 1335.
152. Id. at 1335-36.
diligence as to seaworthiness claims. The Ninth Circuit’s analysis of Asbestos was incorrect because, despite the Second Circuit’s separate discussion of the issues of unseaworthiness and personal neglect, that court did not adopt the concept of dominancy of the COGSA seaworthiness provisions over either of the Fire Provisions.\(^{153}\)

B. The Albina, Liberty Shipping and Waterman Ninth Circuit Cases

_Sunkist_ relied on three of the Ninth Circuit’s earlier appellate decisions, Albina Engine & Machine Workers v. Hershey Chocolate Corp.,\(^ {154}\) New York Co. v. Liberty Shipping Corp.,\(^ {155}\) and Waterman Steamship Corp. v. Gay Cottons.\(^ {156}\) Both Albina and Liberty Shipping claim to use the analytical structure of the Fire Provisions to find conduct of the carriers that, as personal lack of due diligence, was personal “neglect” or “fault” under the Fire Provisions.\(^ {157}\) Regarding the burden of proof as to carrier’s negligence, the district court in Albina contradicts _Sunkist_, stating that the cargo owner must prove “that the cause of the fire was due to design or neglect of the owner.”\(^ {158}\) The _Sunkist_ court used the Liberty Shipping case for authority that the burden is on the carrier, because the case did not explicitly place the burden of proof on the cargo owner. Liberty Shipping did not consider that issue. Adequate proof of carrier neglect was present to satisfy the appellate court on review. Liberty Shipping concluded that substantively the deficiencies showed unseaworthiness due to personal lack of due diligence of the carrier.\(^ {159}\) _Sunkist_ read that as meaning that Liberty Shipping implied that the procedure of section 1304(1), with its burden of proof on the carrier, was also to apply in fire cases, rather than the approach followed in the Fire Provisions.

Finally, Waterman was a limitation of liability case in which the

\(^{153}\) _In re Ta Chi Navigation (Panama)_ Corp., 677 F.2d 225, 229 (2d Cir. 1982); see _supra_ notes 109-12.

\(^{154}\) 184 F Supp. 134 (D. Or. 1960), aff’d, 295 F.2d 619 (9th Cir. 1961).

\(^{155}\) 509 F.2d 1249 (9th Cir. 1975).

\(^{156}\) 414 F.2d 724 (9th Cir. 1969).

\(^{157}\) See Liberty Shipping, 509 F.2d at 1251-52; Albina, 295 F.2d at 621-22.

\(^{158}\) 184 F Supp. at 139.

\(^{159}\) 509 F.2d at 1250-52.
court did not even mention the Fire Provisions. The court referred to COGSA section 1304, the due diligence as to seaworthiness provision, with its basis of vicarious liability. The court then immediately concluded that the Limitation Act language of "privity or knowledge" required a showing of personal lack of due diligence. In the setting of these two references, the court said that the standards under the Limitation Act are different from those of COGSA.\footnote{Waterman, however, was referring only to COGSA section 1304 rather than all of COGSA, which includes the Fire Provision. The Ninth Circuit in Sunkist, however, was convinced that Waterman "by implication" held that the same standard of conduct would not apply to any of COGSA.\footnote{Waterman did not even suggest that it had the COGSA Fire Provision in mind regarding the standard of liability under that provision, regarding the relation of the Fire Provisions to section 1304(1), or most especially regarding any shifting of the burden of proof. All that can be said from Sunkist's discussion of Waterman is the truism that the carrier will have liability for personal negligence and will not receive any relief from the Fire Provision for that negligence, once established. The justification for the Ninth Circuit's view regarding appropriate locus of the burden of proof in conflicts between the Fire Provisions and COGSA section 1304(1) is lost in the gossamer syntax of the Sunkist opinion.}} Waterman, however, was referring only to COGSA section 1304 rather than all of COGSA, which includes the Fire Provision. The Ninth Circuit in Sunkist, however, was convinced that Waterman "by implication" held that the same standard of conduct would not apply to any of COGSA.\footnote{Waterman did not even suggest that it had the COGSA Fire Provision in mind regarding the standard of liability under that provision, regarding the relation of the Fire Provisions to section 1304(1), or most especially regarding any shifting of the burden of proof. All that can be said from Sunkist's discussion of Waterman is the truism that the carrier will have liability for personal negligence and will not receive any relief from the Fire Provision for that negligence, once established. The justification for the Ninth Circuit's view regarding appropriate locus of the burden of proof in conflicts between the Fire Provisions and COGSA section 1304(1) is lost in the gossamer syntax of the Sunkist opinion.}

The standard of "personal negligence only," as a basis for qualification under the Limitation Act, obviously differs from a standard of liability based on either personal negligence or negligent conduct of servants and agents under COGSA section 1304(1). The issue arose in Waterman in a context indicating that a carrier could be vicariously liable under 1304(1) and still be able to limit liability under the Limitation Act (by showing a lack of personal neglect).\footnote{Waterman did not even suggest that it had the COGSA Fire Provision in mind regarding the standard of liability under that provision, regarding the relation of the Fire Provisions to section 1304(1), or most especially regarding any shifting of the burden of proof. All that can be said from Sunkist's discussion of Waterman is the truism that the carrier will have liability for personal negligence and will not receive any relief from the Fire Provision for that negligence, once established. The justification for the Ninth Circuit's view regarding appropriate locus of the burden of proof in conflicts between the Fire Provisions and COGSA section 1304(1) is lost in the gossamer syntax of the Sunkist opinion.} Waterman did not even suggest that it had the COGSA Fire Provision in mind regarding the standard of liability under that provision, regarding the relation of the Fire Provisions to section 1304(1), or most especially regarding any shifting of the burden of proof. All that can be said from Sunkist's discussion of Waterman is the truism that the carrier will have liability for personal negligence and will not receive any relief from the Fire Provision for that negligence, once established. The justification for the Ninth Circuit's view regarding appropriate locus of the burden of proof in conflicts between the Fire Provisions and COGSA section 1304(1) is lost in the gossamer syntax of the Sunkist opinion.

C. The Maxine Footwear Case and the Canadian COGSA

which considered the Canadian COGSA Fire Provision, a statute identical to our COGSA Fire Provision. *Maxine Footwear* held that under the Canadian COGSA, the due diligence as to seaworthiness provision dominated the Fire Provision. Thus, unseaworthiness due to lack of due diligence claims in cases of fire damage had to be determined by the Canadian counterpart to our sections 1303(1) and 1304(1), with the possibility of vicarious liability and with the burden on the carrier to prove neither personal lack of due diligence nor vicarious liability under the concept of nondelegable duty.

The *Sunkist* reliance on *Maxine Footwear* and the Canadian COGSA was misplaced. The principal points that the *Sunkist* court makes about *Maxine* being persuasive authority are (1) that the Canadian and the United States COGSA both are derived from the same international agreement, although both were enacted as national statutes; 164 (2) that, unless American law is to the contrary, American courts should strive for consistency with foreign court decisions; 165 and, (3) that the Canadian authorities on the Hague Rules should be followed to promote uniformity 166 American law and congressional intent, however, are contrary to the *Sunkist* holding for several reasons: (1) the legal history of the Fire Statute since 1851 that holds otherwise; 167 (2) the Fire Statute’s continuation as expressly unaffected by the Harter Act; (3) the Supreme Court case of *Earle & Stoddert*, upholding the primacy of the Fire Statute’s elimination of vicarious liability when in conflict with the duty of due diligence as to seaworthiness; (4) the Fire Statute’s continuation as expressly unmodified by COGSA, (5) the judicial infusion of Fire Statute law into the COGSA Fire Provision for nearly fifty years; (6) the virtually unanimous rule since 1936 that the Fire Provisions have the same meaning and operation; 168 and (7) nearly fifty years of congressional and maritime in-

164. 603 F.2d at 1336.

165. Id. at 1338.

166. Id.


168. *Gilmore & Black*, supra note 7, at 161 (“It has been assumed that ‘actual fault or privity’ have the same meaning as ‘design or neglect’ and no case proceeds on any other
dustry experience with the Fire Provisions, with no efforts at amendment.

As a result, courts have read the entire body of Fire Statute law since 1851 into the COGSA Fire Provision and the Fire Provisions have exactly the opposite operation from Sunkist. Further, the adoption of Maxine Footwear applies only for the COGSA Fire Provision, and COGSA expressly leaves the Fire Statute unmodified. All the Sunkist court could do with this was to cast aside the COGSA provision expressly stating that the Fire Statute continues unmodified and to insist that the Fire Statute "must" be read in light of COGSA. The Sunkist court maintains that to do otherwise would "nullify" the COGSA's provisions regarding due diligence and burden of proof as to due diligence. In a particular situation involving fire damage to cargo, a conflict may well exist between the Fire Provisions and the due diligence as to seaworthiness provision. The issue, however, is which one Congress wished to give way. The existence for over one hundred thirty years of the Fire Statute as the specific expression of congressional policy regarding fire damage, its dominant position in court decisions prior to COGSA's enactment, and the statute's continuation under COGSA with its accumulated law read into the COGSA Fire Provision give what seems a clear answer as to interpretation of COGSA—the Sunkist decision is wrong.

Sunkist's discrepancies extend beyond those discussed in this Article. Discussion on Sunkist, however, cannot be closed without pointing out that the Supreme Court case of Earle & Stoddart, a leading case in the field of fire damage to cargo, is not, as stated in Sunkist, another "stowage case," that is, a case involving negligent stowage of cargo. Sunkist insists that this class of cases is irrelevant because it deals with the negligent care of cargo, not

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170. 603 F.2d at 1339.

171. See Calamari, supra note 146 (rejection of Sunkist).

172. 603 F.2d at 1340.
with lack of due diligence as to seaworthiness. Still, in *Earle & Stoddert*, the ship’s chief engineer piled new coal on smoldering coal in a coal bunker,\(^{173}\) creating an unseaworthy condition. Under COGSA section 1303(3), a vital part of the carrier’s duty of seaworthiness is to “properly man, equip and supply the ship.” No seaman would think an unseaworthy condition in a ship’s fuel supply constitutes a cargo storage case.

\[D\] Efforts to Correct Sunkist

The Second Circuit has attempted to correct the Ninth Circuit’s mistaken reading of the *Asbestos* case. In *In re Complaint of Ta Chi Navigation Corp., S. A.*,\(^{174}\) the appellate court reversed a district court decision that had followed *Sunkist*. The court emphasized its adherence to the well-established law of the Fire Provisions and especially the rule that the cargo owner bears the burden to establish the “design or neglect” or “actual fault or privity” of the carrier.\(^{175}\) In a strong rebuke of the Ninth Circuit, the Second Circuit stated:

Unfortunately, the district court patterned its holding upon that of the Ninth Circuit in *Sunkist*. In *Sunkist*, the Ninth Circuit held that the burden of proof is on the carrier to show that it exercised due diligence to provide a seaworthy ship in order to invoke the provisions of either section 1304(2)(b) or the Fire Statute commenting on this court’s holding in *Asbestos Corp.* that the shipper must prove that the carrier’s negligence caused the fire damage, the Ninth Circuit stated that the ‘use of this language was entirely unnecessary’ and constituted a ‘casual treatment of the burden of proof by the author of the appellate court opinion.’ We disagree not only with *Sunkist’s* unflattering characterization of Judge Timbers’ opinion in *Asbestos*, an opinion that was concurred in by Judges Smith and Hayes, but also with the Ninth Circuit’s interpretation of the interrelation between the Fire Statute and COGSA, an interpretation that is concurred in by no other Circuit.\(^{176}\)

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\(^{173}\) 287 U.S. 420, 424 (1932).
\(^{174}\) 677 F.2d 225 (2d Cir. 1982).
\(^{175}\) Id. at 229.
\(^{176}\) Id.
The court then went on to reiterate:

When Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so. See 46 U.S.C. § 1304(2)(q). The *Sunkist* court would read the language of subsection (q) into subsection (b) [the Fire Provision], 'although Congress did not put it there.' This Court has not put it there either.\(^{177}\)

The Second Circuit rendered the *Ta Chi* decision prior to the Ninth Circuit's decision in *Hasbro Industries v. M/S St. Constantine*.\(^{178}\) That may explain in part the reason for the *Hasbro* decision's clarification of the *Sunkist* case and its emphasis that the Ninth Circuit had stopped at the "half-way house" in applying the COGSA section 1304(1) duty of due diligence as to seaworthiness in fire damage to cargo cases. *Sunkist* and *Hasbro* require the carrier to carry the burden of proof of lack of personal neglect, once the cargo owner has proved an unseaworthy condition and that the unseaworthiness has caused the fire or has prevented timely extinguishment of the fire, thus causing fire damage to cargo. The carrier will still have no liability based on vicarious liability. One problem with *Sunkist* and *Hasbro* is that the cases start from the premise that Congress in enacting COGSA meant for the due diligence as to seaworthiness duty to be "overriding," but then ignore the solution of the *Maxine Footwear* case, so heavily relied upon in *Sunkist*. *Maxine Footwear* treated the seaworthiness provision as completely overriding and controlling, so that where it applied, the carrier would simply lose all benefit of the COGSA Fire Provision and be liable on the basis of vicarious liability for conduct of all servants and agents.

A recent comment on this issue of burden of proof in case of conflict of the COGSA duty of due diligence as to seaworthiness and the Fire Provision suggests that historical legal research shows that Congress simply had no intent concerning the dominance of one provision over the other.\(^{179}\) The contention is that courts might best deal with the tension between the statutory provisions by following the approach of *Hasbro* and shifting the burden of proof of

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177. *Id.*
lack of personal due diligence from the cargo owner to the carrier.180 While far more lucid than the Sunkist analysis, the comment still does not avoid the fact that the Fire Statute was expressly retained and unmodified by COGSA, that the courts had interpreted the Fire Statute in unseaworthiness cases to require the cargo owner to show the carrier's personal lack of due diligence, and that the express understanding of Congress, and the courts since then, was that the two Fire Provisions were to have the same meaning.

The comment does challenge the Ta Chi argument that Congress intended no change in the Fire Provisions's burden of proof as to carrier's personal negligence.181 The Ta Chi argument is that Congress showed this implicitly when Congress expressly stated that the carrier had the burden of proof as to lack of negligence in COGSA section 1304(2)(q)—the catch-all section for "any other cause" for which the carrier might seek exemption.182 Silence as to the Fire Provisions meant, therefore, that the burden of proof was to remain on the cargo owner. The comment employs legislative history in arguing that the wording of section 1304(2)(q) fails to show that Congress consciously opposed any changes in other burdens of proof.183

Whatever the merits of the comment's section 1304(2)(q) argument, Congress certainly had the importance of burdens of proof in mind when enacting COGSA. For examples of congressional intent, note the express burden of proof on the carrier in the seaworthiness provision and the burden of proof in section 1304(2)(q). COGSA recognizes the importance of allocating burdens of proof as to lack of due diligence or neglect, and the drafters of the statute were fully aware of the law on the burden of proof in the Fire Statute. In leaving the Fire Statute unamended when drafting the Harter Act, Congress implied that the Fire Statute was dominant over the duty of due diligence as to seaworthiness.184 Ultimately,
the problem for the writers is the same as for the Ninth Circuit in *Sunkist*; the Fire Statute will not silently slip away in the analysis. Unlike *Sunkist*, the comment at least faces the issue and argues for a new interpretation of the Fire Statute that would bring it into conformity with the burden of proof in the Limitation Act.185

Other courts either have concluded that the facts of a particular case did not require a decision on the validity of the *Sunkist* approach,186 or have simply rejected that approach. The United States Court of Appeals for the Fifth Circuit, in *Westinghouse Electric Corp. v. M/V Leslie Lykes*,187 rejected the decision of the district court that accepted the *Sunkist* holding because it considered *Sunkist* as directly contrary both to the Supreme Court decision in *Earle & Stoddart* and to the “time honored approach” with which the Fire Provisions had been handled.188 In a well-researched opinion, the Fifth Circuit found the Second Circuit’s rejection of *Sunkist* in *Ta Chi* compelling and emphasized the importance of the courts’ conforming to congressional policy in applying the Fire Provisions:

> Both Congress and the Supreme Court have made it clear that the Fire Statue is to be applied broadly, and the exception to the defense for fires ‘caused by the design or neglect of such owner’ must be viewed narrowly.” [quoting the Supreme Court that the Fire Statute is not to be administered “with a tight and grudging hand.”]189

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185. Comment, *Burden of Proof in Marine Fire Damage Cases*, supra note 129, at 1162-63, 1156-57. Under the Limitation Act, the carrier has the burden of proving lack of personal negligence to secure the liability limitation. See supra note 134 and accompanying text.

186. EAC Timberlane v. Pisces, Ltd., 580 F Supp. 99, 115-16 (D.P.R. 1983), aff’d, 745 F.2d 715 (1st Cir. 1984). The district court noted the Second Circuit-Ninth Circuit split on the burden of proof issue in a due diligence as to seaworthiness question, but said this was not an issue raised in the case at hand, because the carrier had chosen to prove affirmatively that the fire had occurred without any fault of the carrier, and had done so. In Ionmar Compania Naviera, S.A. v. Central of Ga. Ry., 471 F Supp. 942, 954 (S.D. Ga. 1979), vacated, 666 F.2d 897 (5th Cir. 1982), the district court stated the general rule, noted the *Sunkist* decision, and then held that under either approach no personal negligence of the carrier had been established. On appeal, the Fifth Circuit vacated and remanded for other reasons.

187. 734 F.2d 199 (5th Cir. 1984).

188. Id. at 206-07.

189. Id. at 208.
With the exception of the Ninth Circuit, and then only in the case of alleged cause of fire damage to cargo by unseaworthiness resulting from lack of due diligence, courts overwhelmingly have supported the rule that the cargo owner must carry the burden of proof to establish not only the cause of the fire, but also the personal negligence of the carrier and the nexus between the carrier's negligence and the event causing the fire. The cargo owner must prove its cause of action against the carrier. The continued support for this rule, in the face of attacks that confuse the Fire Provisions with the Limitation Act, again suggests that courts prefer a liberal interpretation of the Fire Provisions.


The United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules") is an international agreement drawn up in 1978, following a conference sponsored by the United Nations on revising the law on the carriage of goods. Article 5(4) of the Hamburg Rules would, if the United States became a party to the agreement, replace the current Fire Provision with a significantly different provision. Under the Hamburg Rules, carriers would have liability for "loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents." A corresponding provision on fault or neglect requires the carrier to take all measures reasonably required to put out the fire and to avoid or mitigate its consequences. Thus, the Hamburg Rules would end the statutory elimination in the United States of vicarious liability in fire damage to cargo. The cargo owner would still bear the burden of proof as to negligence, but vicarious liability would be available as a basis for carrier liability.

Interestingly, the Hamburg Rules express the general policy that the carrier should be liable for damage to cargo unless the carrier

190. See supra notes 113-24, 145-70 and accompanying text.
191. 6 BENEDICT, supra note 8, at 1-32.2.
193. 6 BENEDICT, supra note 8, at 1-32.2, 1-35 (emphasis added).
194. Id.
can prove the absence of any negligence by the carrier, its servants, or agents. Elsewhere, then, the burden of proving absence of negligence is on the carrier. Even under the Hamburg Rules, however, the burden of proof as to negligence in fire damage rests on the cargo owner, and thus, the carrier still would have greater protection against fire risk than other causes of cargo damage. Even so, the Hamburg Rules would alter drastically the Fire Provisions' allocation of risk between carrier and cargo. For that reason, such a change is a matter for Congress, based on the weighing of American shipping and cargo interests.

VI. THE JUDICIAL STANDARDS FOR FINDING ACTIONABLE "DESIGN OR NEGLECT" OR "ACTUAL FAULT OR PRIVITY" UNDER THE FIRE PROVISIONS

The Fire Provisions provide that the carrier is liable for cargo damages by fire only if negligent conduct directly attributable to the carrier has caused the fire. Further, the cargo owner bears the burden of proof once the carrier establishes the applicability of the Fire Provisions by proving that the cargo was damaged by fire. Ultimately, in order to succeed, the cargo owner must prove; (1) the cause of the fire, (2) negligent conduct of the carrier, and (3) a sufficient nexus between that negligent conduct and the causative event to say that the carrier's negligence caused the fire. Such burdens are weighty. The fire may have damaged or destroyed the vessel and cargo. Much time may have passed. Many of the details, if known at all, may be known only by reticent master, officers, and crew.

In light of such difficulties, do courts employ an impartial judi-

195. See Developments, supra note 192, at 571.
196. Id. at 575-76. That conclusions on alterations in the balance of carrier and cargo interests established by the Fire Provisions require vigorous assessment by experts knowledgeable of the economics of the international maritime carriage trade is evident. For illustrative questions, see, Comment, Burden of Proof in Marine Fire Damage Cases, supra note 129.
198. 2A BENEDICT, supra note 8, at 14-9; GILMORE & BLACK supra note 7, at 896.
cial approach in requiring the cargo owner to prove its case, or do they try to aid the cargo owner? Courts might help cargo owners in many ways. For example, they could require only minimal evidence to support findings favorable to the cargo owner, or they could apply various presumptions to ease the cargo owner’s burden of proof. Also, since carriers are usually corporations, requiring a cargo owner to show negligent conduct by an official with sufficient authority to be a “managing” official, courts might stretch that concept to apply vicarious liability under the facade of finding direct, negligent conduct of the carrier.

These questions are important to both practitioners and scholars. If courts favor the cargo owner, they undermine the Fire Provisions and the congressional intent by shifting burdens of proof to create exceptions to the rule prohibiting vicarious liability. Modern Fire Provision cases illustrate that courts are balanced and fair-minded in carrying out the congressional intent behind the Fire Provisions.

A. The Judicial Standard for Proof of Cause of the Fire

Courts generally refuse to accept speculation about the cause of the fire as proof. In *Connell Brothers Co. v. Seavenseas Trading & Steamship Co.*, for example, a fire broke out on a foreign vessel between two boilers only twenty-four hours after crewmen rebricked them. As a result, the ship sank. The cargo owner claimed the rebricking was negligent. Although the cargo owner showed that the fire generated heavy black smoke, suggesting an oil fire, and that an oil line running over the boilers could have burst, causing the fire, the court denied the proof as speculative. It stated that the cargo owner must prove the cause of the fire, the existence of design or neglect, and that such “design or neglect” was that of the owner himself or of his managing agent. To produce a plausible theory of the fire’s origin without positive evi-

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200. Thede, supra note 6, at 982. For an extensive annotation of cases on the application of the Fire Statute, see 25 A.L.R. Fed. 287-324 (1975).
202. Id. at 230.
203. Id. at 229.
dence from which one could infer the fire's origin and negate other possible causes was insufficient proof.\textsuperscript{204}

In \textit{Anthony Gibbs & Co. v. Munson S.S. Line (The Munares)},\textsuperscript{205} a sudden dockside fire of unknown origin destroyed the vessel with its cargo. The cargo owner alleged that the carrier was personally negligent in allowing trash to accumulate beneath the area of the dock that the carrier used, in failing to prohibit smoking in and around the dock, in storing flammable materials on the dock, in failing to move the vessel before the fire reached it, in failing to move the cargo on the dock to safety, and in failing to give a prompt alarm.\textsuperscript{206} The evidence showed public traffic behind and on the dock was heavy

Considering proof of cause of the fire, the court stated:

\[\text{T}he \text{most that can be said is that the record discloses a number of purely speculative suggestions as to the possible causes of the fire. No one knows the exact point of its origin and what the material was which first ignited it. The most that can be said is that the fire may have resulted from any one of several causes, for some of which the respondents were responsible and for some of which they are not. That is not enough [to hold for the cargo owner], as the evidence here does not lead me to believe that the probabilities are that the fire resulted from the respondents' negligence.}\textsuperscript{207}

The court in \textit{The Munares} further found no proof that a quicker alarm could have reduced the damage, no proof that the owner could have moved the cargo in time and no proof that the ship's crew had the capability to move the vessel in time to escape the fire. "Sufficient be it to say that in my judgment the entire matter rests in the realm of speculation."\textsuperscript{208}

In \textit{Complaint of G.D.R.M.S. Caldas},\textsuperscript{209} a fire of unknown origin broke out in a cabin where the master had confined a depressed, suicidal seaman. The seaman may have had matches and he disap-
peared during the fire. A physician had diagnosed the seaman as suicidal and had recommended that any items he might use to commit suicide be removed from his person. The court found the cause of the fire speculative, noting that the only fact proved was that the fire originated in the seaman's cabin. 210

Two final cases illustrate the point that the cargo owner must do more than establish "equality of possibility" as to the cause of the fire. In Hoskyn & Co. v. Silver Line, Ltd., 211 the cargo owner showed that the fire could have been caused by poor timing on the carrying vessel's diesel engine, a problem known to the carrier. The court allowed protection under the Fire Statute, because the carrier had offered an equally plausible cause for the fire and all other evidence had been destroyed in the fire. 212 In Rockwood & Co. v. American President Lines (The President Jackson), 213 fire broke out near a welding operation four and one-half hours after completion of the work. A burned out light fixture with a scorched area around it also was nearby. Without examining the question of personal negligence under the Fire Statute, the court found no proof that the welding caused the fire and held for the carrier. 214

Courts also have recognized that the burden of proof rests with the cargo owner and have refused to indulge in presumptions merely to ease the cargo owner's burden. Gilmore and Black 215 suggest that if the carrier has violated statute or regulation, the statutory fault rule of the Pennsylvania 216 should apply to boost the cargo owner over the hurdle of establishing causation of the fire. The Pennsylvania Rule maintains that if a vessel is guilty of a statutory fault prior to collision, then a presumption arises that the fault contributed to the collision. Further, the vessel at fault has the burden of establishing that the statutory fault could not possibly have contributed to the collision. The effect of the Pennsylvania Rule often is harsh. Under general tort law, a statutory

210. Id. at 573, 576.
211. 143 F.2d 462, 1944 A.M.C. 895 (2d Cir. 1944).
212. Id. at 464-65.
214. Id at 227.
215. GILMORE & BLACK, supra note 7, at 898 n.106h.
216. 86 U.S. (19 Wall.) 125, 136 (1874). For discussion of the Pennsylvania Rule, see GILMORE & BLACK, supra note 7, at 494.
violation is used only to establish the elements of duty and breach of duty in a negligence action. The plaintiff still is required to prove causation. Under the Pennsylvania Rule, even causation is presumed.

The statutory fault rule has been applied in cargo damage cases not involving fire to defeat a shipowner's claim to limitation of liability under the Limitation Act.\footnote{217} Gilmore and Black, reasoning from their erroneous interweaving of the Fire Statute with the Limitation Act, state that "[t]here seems to be no reason to distinguish between the two statutes, with respect to applicability of the 'statutory fault' rule."\footnote{218} If the courts were prepared to apply the statutory fault rule in Fire Provisions cases, then the cargo owner would receive substantial aid in establishing its case when the carrier had committed any statutory violation that could lead to a fire. This presumption of causation would both establish the violation and the negligence as cause of the fire. Contrary to Gilmore and Black, however, courts have refrained from using the Pennsylvania Rule in Fire Provisions cases.

In \textit{Automobile Insurance Co. v. United Fruit Company},\footnote{219} the United States Court of Appeals for the Second Circuit, in refusing to apply the Pennsylvania Rule in a Fire Statute case, stated:

\begin{quote}
The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with other statutes, or with Coast Guard Regulations. There are no exceptions other than those expressed in the statute itself, viz., 'unless such fire is caused by the design or neglect of such owner.' We are not justified, in applying the doctrine of statutory fault, to engraft on the Fire Statute the condition of compliance with requirements found elsewhere, whether by statute or regulation. To allow the application of the doctrine of statutory fault to supply the necessary evidence to ratify the cargo interest's burden of proof of establishing that the fire was caused by the design or neglect of
\end{quote}

\footnote{217} See, \textit{e.g.}, Waterman S.S. Corp. v. Gay Cottons (The Chickasaw), 414 F.2d 724, 1969 A.M.C. 1682 (9th Cir. 1969).

\footnote{218} GILMOR\& BLACK, \textit{supra} note 7, at 898 n.106h. The authors state there that "[t]here have been suggestions in some cases that the 'statutory fault' rule does not apply to Fire Statute cases." \textit{Id.} Rather than "suggestions," the language of fire damage to cargo cases vigorously rejects the use of the statutory fault rule.

\footnote{219} 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955).
the owner would serve to emasculate the Fire Statute by diluting the owner's immunity from fire loss liability.

[Regarding the burden of proof], since 1851 there has been no indication of congressional intent to relieve cargo interests of that burden. [The rule is the same for the COGSA Fire Provision.] We think it significant that no court has applied the doctrine of statutory fault [to the Fire Provision]. We are unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for proof of cause required by the statute. To do so would at times result in shifting the burden of proof to the owner of a vessel by requiring him to show freedom from fault. Thus we believe would undermine the very purpose of [the Fire Provisions].

B. The Judicial Standard for Proof of Negligent Conduct of the Carrier

The question of carrier negligence has two parts: (1) whose negligent conduct, for a corporate carrier, constitutes negligence attributable to the corporation; and (2) what conduct will constitute negligence.

1. The Judicial Standard for Proof of Who is a Managing Agent of the Carrier

A carrier, under the Fire Provisions, is not liable for the negligent acts of its servants. However, a corporation must act through persons, and the long-standing rule is that, under the Fire Provisions, negligent conduct of a corporation's "managing or supervisory officials" or "shore managing representatives" constitutes negligent conduct of the corporation. Principal executive officers clearly are such managing agents, but courts have adopted a much broader reading. Conversely, the master, ship's officers, and crew are clearly excluded. Liability for their acts would be the classic example of vicarious liability.

In defining "managing agents," commentators often rely on cases

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220. Id. at 75.
221. 2A BENEDICT, supra note 8, at 14-30; GILMORE & BLACK, supra note 7, at 161.
222. 2A BENEDICT, supra note 8, at 14-30.
223. See id. at 14-31.
arising under the Limitation Act. Because the Limitation Act and the Fire Provisions are distinct statutory regimes that are supported by differing policies, reliance on Limitation Act cases is suspect in the Fire Provisions context. Such reliance also poses dangers. Some commentators suggest that modern courts have taken a restrictive approach to granting shipowners the benefit of limitation under the Act. If such hostility exists, unwarranted confusion of Limitation Act precedent in a Fire Provision case could unjustifiably deny the benefit of the provision to an owner through improper definition of his employees as "managing agents." If unchecked, such improper identification could impair substantially the benefit Congress intended the Fire Provisions to provide.

The leading case arose under the Limitation Act, Coryell v. Phipps (The Seminole). In that case, the Supreme Court interpreted a shipowner’s neglect to require, in the case of an individual, "some personal participation" in the negligent conduct that caused the loss or injury and in the case of a corporate shipowner, negligence on the part of some "executive officer, manager or superintendent whose scope of authority includes supervision over the phase of business out of which the loss or injury occurred." Courts apparently do not strain to define lower level corporate employees as managing agents of the carrier. Cases on the Fire Provisions hold that the negligence of a vessel's master, officers, and crew, or of lower level shore-based employees, or of independent contractors is not imputed to the carrier under the Fire Provisions. If the carrier places the direction of a significant part of

224. See, e.g., GILMORE & BLACK, supra note 7, at 884; Thede, supra note 6, at 984.
225. See supra notes 25-41 and accompanying text.
226. See GILMORE & BLACK, supra note 7, at 821-23; Donovan, supra note 5, at 1034-37.
227. Thede, supra note 6, at 971 touches on this briefly.
229. Id. at 410.
230. See 2A BENEDICT, supra note 8, at 14-30.
231. Id. at 14-32ff. A leading case is Consumers Import Co. v. Kawasaki Kiser Kabushiki Kaisha (The Venice Maru), 133 F.2d 781, 785, 1943 A.M.C. 277, 281 (2d Cir. 1943), aff’d, 320 U.S. 249, 1943 A.M.C. 1209 (1943); see also, Albina Eng. & Mach. Works v. Hershey Chocolate Corp., 295 F.2d 619, 621-22, 1961 A.M.C. 2215 (9th Cir. 1961); The Older, 65 F.2d 359, 360, 1933 A.M.C. 936 (2d Cir. 1933); 2A BENEDICT, supra note 8, at 14-32 ("If a vessel owner delegates to an independent agency of good repute the duty of laying out and supervising the stowage of a vessel or making her seaworthy; and the negligence of those
its business operations under the control of an independent contractor, however, courts may find that the contractor is in effect a managing agent. For example, in Petition of Skibs A/S Jolund, the United States Court of Appeals for the Second Circuit held that an independent contractor to whom the carrier had delegated complete management authority over the vessel was to be treated as a managing agent. In contrast, the carrier in Consumers Import Co. v. Kawasaki Kabushiki Kaisha (The Venice Maru) retained an independent contractor, a marine surveyor, to develop and carry out a stowage plan for fishmeal cargo. Although the marine surveyor had not supervised the stowage of fishmeal before, he had extensive maritime experience, had served as an officer aboard a vessel carrying fishmeal, and according to the court, was the best man for the job. The court refused to impute the marine surveyor's negligence to the carrier. The court noted that the marine surveyor's duties were limited to the stowage of cargo and that he had no power to control the movement of the carrier's vessels or the activities of their crews, or to bind the owner to a contract.

In A/S J Ludwig Mowinckels Rederi v. Accinanto, Ltd. (The Ocean Liberty), the court stated that it would not treat the negligence of a stevedore as that of the carrier when the carrier exercised no control over the loading.

Frequently, opinions do not discuss the specific person or corporation that the court would view as possessing sufficient management or supervisory authority to act on behalf of the corporation's carrier. However, certain titles suggest authority in the maritime industry. In addition to executive officers, those who are general agents, port captains, port engineers, general superintendents, and marine superintendents have been held to have sufficient authority to say that their conduct was that of the carrier.

The Fire Statute case of Hershey Chocolate Corp. v. The S.S.

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[delegatees] is the proximate cause of subsequent fire loss of cargo, that negligence does not of itself defeat the owner's right to the exemption of the Fire Statute.

233. Id.
235. Id. at 785.
236. 199 F.2d 134, 142 (4th Cir. 1952).
237. See 2A BENEDICT, supra note 8, at 14-31; Thede, supra note 6, at 984 n.170.
Robert Luckenbach\textsuperscript{238} suggests the Courts’ reasonable approach. In Hershey, negligent welding by the employee of an independent contractor started a fire below decks while the carrier’s Marine Superintendent was aboard. The district court held that, in general, negligence by this official would be that of the carrier. Because his duties were unrelated to repair work and he acted immediately to put out the fire, however, the court refused to attribute to the carrier any knowledge of the repair operation possessed by the Marine Superintendent.\textsuperscript{239} The United States Court of Appeals for the Second Circuit, in affirming, held that the Marine Superintendent lacked sufficient authority to be viewed as a managing agent.\textsuperscript{240} In both decisions, the courts were careful not to find carrier action or knowledge merely because of the presence of the Marine Superintendent in the vicinity of the fire. Those decisions reflect the guidance of the Supreme Court in the Coryell case calling for a focus on the specific scope of authority of the corporate employee.


If the courts wished to restrict the benefit of the Fire Provisions, a simple tactic would be to require only minimal evidence to support a finding that a carrier’s personal conduct, or the conduct directly attributed to a corporate carrier by its managing agents, was negligent.\textsuperscript{241} Indeed, Gilmore and Black virtually invite the courts to abandon concern for precedent or congressional authority in determining whether a carrier has been negligent under the Limitation Act or the Fire Provisions:

‘Privity or knowledge’ and ‘design or neglect’ are phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will. The statutes might

\textsuperscript{239} Id. at 139-40.
\textsuperscript{240} 295 F.2d at 622.
\textsuperscript{241} See Donovan, supra note 7, at 1036 (quoting a report of the Maritime Law Association of the United States based on an analysis of limitation cases for the period 1952-1976, to the effect that the courts have become more reluctant to grant limitation and that the courts have “especially seized upon the ‘privity or knowledge’ language of the act as the point of their attack”).
quite as well say that the owner is entitled to exoneration from liability or to limitation of liability if, on all the equities of the case, the court feels that the result is desirable; [N]o judge with the slightest flair for the lawyer's craft of distinguishing cases need ever be bound by precedent

In the context of their criticism of the Limitation Act and their approval and appreciation of a restrictive interpretation, Gilmore and Black plainly are calling for the courts to scuttle the Fire Provisions along with the Limitation Act. Confusing the Fire Provisions with the Limitation Act prompts this incorrect suggestion.

The terms "privity or knowledge" and "design or neglect" are no more "empty containers" than the myriad of concepts that a court must "fill" with content. For example, such elements of a negligence cause of action as duty, breach of duty, and proximate cause all necessarily call for judicial activity to give them content for application. Thus, the courts are often in a sense "free" in many areas of the law to exercise discretion. Ultimately, the vital question remains whether courts will seek to be guided in substantial part by precedent in making and applying standards, or whether they will decide each case on its face, without regard to precedent. Reasonable discretion is not unbridled discretion. In their rush to destroy the Limitation Act, Gilmore and Black's proposal strikes at the core of our system of judicial decision, both in terms of respect of courts for their own precedent and of respect for the authority of Congress under the concept of separation of powers.

Gilmore and Black notwithstanding, most courts appear impartially to apply normal standards of negligence, suggesting again, that courts are not rushing to restrict the benefits of the Fire Provisions. In Hanson & Orth Inc. v. M/V Jalatarang,243 negligent unloading by a stevedore crew started a fire in a cargo of burlap and jute. The vessel's crew unsuccessfully fought the fire and the fire department for the Georgia Port Authority finally extinguished it. The court ruled that any negligent fire fighting by the crew would not be attributable to the carrier, but that a failure properly to train and equip the crew could constitute personal negligence of the carrier under the Fire Provisions. The evidence in Hanson con-
flicted as to whether the crew attacked the fire quickly enough following the alarm, whether the fire hose was long enough, and whether the hose had a nozzle. The master testified that crewmen were not permitted to stand near unloading operations, that the crew responded within two minutes of the alarm, that the hose used was long enough to reach the fire in the lower hold, and that the hose had a nozzle. The court, in finding the carrier not personally negligent under the Fire Provisions, noted that the rapid spread of the fire made it unlikely that the crew could have extinguished it under any circumstances.\textsuperscript{244}

In \textit{Consumers Import Co. v. Kawasaki Kabushiki Kaisha (The Venice Maru)},\textsuperscript{245} a stowage plan developed by an independent contractor led to the spontaneous combustion of fish meal that led to a fire.\textsuperscript{246} The court found that the carrier was not negligent in failing to inform the surveyor about the recurring problem with spontaneous combustion in fish meal cargo, because the problem was well known and pervasive in the industry, and there was no showing that the surveyor did not in fact discuss the problem with the charterer's masters.\textsuperscript{247}

In \textit{Hershey Chocolate Corp. v. S.S. Robert Luckenback},\textsuperscript{248} negligent welding by a repair crew started a cargo fire in the hold. Because the repairs required the removal of a portion of the vessel's fire lines, the carrier's port engineer directed the vessel's chief engineer to run an alternate line. The chief engineer failed to run the line due to neglect and the port engineer failed to follow up his directive.\textsuperscript{249} The court allowed exoneration under the Fire Statute, implicitly finding that the port engineer's failure to follow up his directive for the alternate fire line did not constitute personal neg-

\begin{itemize}
\item \textsuperscript{244} \textit{Id.} at 540, 543.
\item \textsuperscript{245} 133 F.2d 781, 1943 A.M.C. 277 (2d Cir.), \textit{aff'd}, 320 U.S. 249, 1943 A.M.C. 1209 (1943).
\item \textsuperscript{246} 133 F.2d at 784.
\item \textsuperscript{247} 39 F Supp. 349, 353, 1941 A.M.C. 640, 642 (S.D.N.Y. 1941) (For the charterer to assume that the surveyor knew of the problem was reasonable, because the problem was a pervasive one in the industry.); \textit{see also} 133 F.2d at 781, 785 (The surveyor had ample notice of the problem and the charterer was reasonable in relying upon surveyor to investigate the problem with the masters.).
\item \textsuperscript{249} 184 F Supp. at 136-37.
\end{itemize}
ligence of the vessel owner. The failure of the assistant engineer, a crewmember, to carry out the order clearly was not attributable to the owner. Further, although the carrier's Marine Superintendent was aboard when the fire broke out, his duties were unrelated to repair, he did not know of the situation until after the fire broke out, and he did all he could to put out the fire.

Appellate courts also appear impartial in treating these negligent cases. In Accinanto, Ltd. v. Cosmopolitan Shipping Co. (The Ocean Liberty), a cargo of ammonium nitrate exploded two months after a similar explosion had resulted in disaster. The United States District Court for the District of Maryland held the carrier personally negligent for inadequate stowage and denied exoneration under the Fire Provisions, finding that the carriage of such gas was an ultrahazardous activity and that the earlier explosion had put the carrier on notice. The district court also found that the stowage, conducted under the guidance of the United States Coast Guard, the Baltimore Fire Department and the New York Board of Underwriters, was insufficient because the carrier and the stevedore had a duty to seek independent scientific advice. The United States Court of Appeals for the Fourth Circuit reversed, ruling that the carrier had no control over the conduct of the stowage such that the negligence of the stevedore would be imputed to the carrier and that the stowage under expert government and industry guidance was not negligent, because the carrier was not under a duty to seek independent scientific advice.

Where courts have found a carrier negligent they have had sufficient reason for doing so. The most obvious breach of duty would be a managing agent's affirmative act that was unreasonable, given what the agent knew or should have known. More frequent examples include instances of omission, a failure of a managing

250. Id. at 138-40.
253. 199 F.2d at 138-43.
agent to act properly under the circumstances. In both situations, the failure to exercise reasonable care to learn important information upon which to base responsible action on behalf of the carrier often leads to liability. The more common duties of a carrier include the duty to remedy practices or stowage conditions that are significant fire risks; to hire a competent master, ship's officers, and crew; to retain competent independent contractors; to provide appropriate instructions and appropriate supervision to ensure those instructions are carried out in any operation with fire risks; to provide and maintain a master, ship's officers, and crew adequately trained in fire fighting; and to provide sufficient firefighting equipment appropriately located on the vessel.

For each of the above duties, the courts generally find carrier negligence only upon a substantial showing of unreasonable conduct under the circumstances. In short, the careful review and weighing of the evidence, the lack of judicial criticism of the benefit conferred by the Fire Provisions, and the emphasis of the courts on the burden of proof that the cargo owner must bear all suggest conscientious, fair-minded application of the negligence standard.

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255. "The measure in such cases is not what the owner knows, but what he is charged with finding out." Great Atl. & Pac. Tea Co. v. Lloyd Brasileiro, 159 F.2d 661, 665 (2d Cir.), cert. denied, 331 U.S. 836 (1947).

256. See The Doris Kellogg, 18 F Supp. 159, 166, 168 (S.D.N.Y. 1937), aff'd, 94 F.2d 1015 (2d Cir. 1938).

257. United States v. Charbonner (The Pinellas), 45 F.2d 174, 176-78 (4th Cir. 1930).

258. 2A BENEDICT, supra note 8, at 14-32.


261. See Asbestos Corp. v. Compagnie de Navigation Frassinet et Cyprien Fabre, 480 F.2d 669, 672 (2d Cir. 1973).

262. A reading of the cases in an extensive annotation on the Fire Statute at 25 A.L.R. FED. 287 (1975), indicates the care of the courts in finding personal negligence of the carrier.

263. See supra note 254.
VII. CARRIER CONDUCT BARRING APPLICATION OF THE FIRE PROVISIONS

A. Waiver

A carrier clearly may waive its benefit under the Fire Provisions. Courts do not readily find waiver, however. For example, failing to refer to the Fire Statute in the bill of lading does not constitute waiver. In order to find a contractual waiver, in fact, courts have required clear language. "The intention to contract as against benefits conferred by the fire statute must be plain and explicit." Courts first look to the bill of lading for evidence of waiver. With the passage of the COGSA Fire Provision in 1936, the statutory rule for both Fire Provisions may be that the only means of waiver is by clear language in the bill of lading that covers a contract of carriage. Section 1305 of COGSA provides that

[a] carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

Two cases illustrate implementation of these waiver principles. In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line,* the Supreme Court considered whether the carrier implicitly had waived the benefit of the Fire Statute by accepting what the cargo owner

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264. "Undoubtedly, the benefits of the statute may be waived." Porter v. Bank Line (The Poleric), 17 F.2d 513, 515 (E.D. Va. 1927), aff'd, 25 F.2d 843 (4th Cir.), cert. denied, 278 U.S. 623 (1928); 2A BENEDICT, supra note 8, at 14-38 (if the contract of carriage contains provisions inconsistent with statutory fire exemptions, the carrier may lose the benefit of the fire exemptions). See, regarding the COGSA Fire Provision, 46 U.S.C. § 1305 (1982) (recognizing freedom of carrier's to surrender any right or immunity established under COGSA).


268. See supra notes 265-66.


270. 287 U.S. 420, 1933 A.M.C. 1 (1932).
contended was a warranty of seaworthiness in the bill of lading.\textsuperscript{271} The provision disavowed any liability for unseaworthiness, provided the carrier had exercised due diligence to make the vessel seaworthy. The Supreme Court chose to view the clause as a statement of the general rule of liability for unseaworthiness rather than as an express warranty for liability\textsuperscript{272} Indeed, the carrier's incorporation of the Fire Statute into the bill of lading suggested it did not intend to contract away its benefit by agreeing to be strictly liable for damage caused by unseaworthiness, including fire damage.\textsuperscript{273} In \textit{Earle & Stoddart}, the carrier retained the protection of the Fire Statute because the acts were those of his servants. Had the carrier agreed by contract to strict liability for unseaworthiness, however, it would have been liable and would have, in effect, waived the benefit of the Fire Statute.\textsuperscript{274}

By contrast, in \textit{Porter v. Bank Line (The Polertc)}\textsuperscript{275} the bill of lading listed specific exceptions, including, "the steamer is not liable for, fire on board, in hulk or craft," but then stated at the end of the list that "all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage."\textsuperscript{276} The court found that the carrier had expressly contracted that it would be liable for cargo loss by fire if the vessel was unseaworthy\textsuperscript{277} Thus, the carrier had contracted to be liable for cargo loss by fire even if not caused by the carrier's negligence and thus had waived the benefit of the Fire Statute.

The cases on waiver do not disclose a restrictive judicial approach designed to find waiver by the carrier with little evidence of intent. Instead, courts try to estimate fairly the parties' intentions and will not easily find a waiver of such important rights. An explicit statement that the carrier waives its rights under the Fire Provisions, however, is not necessary so long as the contractual language clearly shows that intent.

\textsuperscript{271} \textit{Id.} at 428.
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} "In no bill of lading is there an express warranty of seaworthiness." \textit{Id.}
\textsuperscript{276} 17 F.2d at 514.
\textsuperscript{277} \textit{Id.}
B. Deviation

A carrier also may lose the benefit of the Fire Provisions through deviation. Under the general maritime law, deviation can drastically affect the carrier's rights in a carriage of goods relationship. Because judicial interpretation can influence the breadth of the doctrine of deviation, this section analyzes the treatment of deviation in the Fire Provision context.

1. The Fourth Heresy: Deviation Is Not a Tort

The Supreme Court has defined a deviation to be "a voluntary departure, without necessity or reasonable cause, from the regular and usual course of a voyage." Another court spoke of "a departure from the course of a voyage designated in the contract of carriage." General maritime law holds the carrier absolutely liable for any loss sustained to the cargo that it would not have sustained but for the deviation. Thus, if during the deviation the cargo is damaged by some cause totally outside the carrier's control, such as a lightning bolt, the carrier nevertheless is liable. The carrier's only means of avoiding liability is to show that the same damage would have occurred even if the vessel had not deviated. The reason for this rule is linked to early maritime insurance contracts in which insurance coverage terminated upon deviation because the cargo might encounter perils unanticipated in the contracted course. Because the carrier controlled the deviating vessel, the appropriate policy was for the carrier to bear the risks of cargo damage that would not have resulted but for the deviation.

This "insurance risk" analysis shows that deviation clearly is a contract concept rather than a tort concept. In The Indrapura

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278. See generally 2A BENEDICT, supra note 8, at 12-3 to 12-32 (general explanation of deviation); GILMORE & BLACK, supra note 7, at 176-83 (effect of deviation).
283. See GILMORE & BLACK, supra note 7, at 176-77.
284. 171 F 929 (D. Or. 1909).
the court said that deviation "is a breach of the contract of freightment" and discussed deviation throughout in contract terms. Because many expectations as to risk are based on the route of the voyage, the chosen route is a key section of a contract for carriage of goods. Further, the use of the words "customary" and "usual" to describe the standards for appraisal of claims of deviation suggests an attempt to define the expectations of parties as to risks contemplated when signing a bill of lading or a charter party.

Recent extensions of the doctrine of deviation further support the notion that deviation should be considered a breach of contract. In the United States, for example, the stowage of cargo on deck is considered to be a deviation when stowage below deck is called for by custom or contract. Under the American law, deviation no longer is limited to a physical departure from the contracted voyage, but includes any action leading to a significant new risk not contemplated by the contracting parties for which the cargo owner might have chosen to avoid or to plan for had it been anticipated. Liability for deviation is strict. So great is the importance to the cargo that there be no deviation, the carrier's implied promise not to deviate is treated as tantamount to an implied warranty.

This maritime doctrine of deviation and the absolute liability that flows from it is much more comprehensible in contract than in tort. Liability for deviation is unconcerned with whether the deviation occurred intentionally or through neglect. Whether, in terms of reasonable foreseeability, the deviation was even safer for the cargo is likewise irrelevant. Finally, COGSA speaks of deviation as

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285. Id. at 931.
286. Hostetter v. Park, 137 U.S. 30, 38 (1890); The Delaware, 81 U.S. (14 Wall.) 579 (1872); see 2A BENEDICT, supra note 8, at 12-4.
288. See The Pelotas, 43 F.2d 571, 579 (E.D. La. 1930), aff'd, 66 F.2d 75, 1933 A.M.C. 1188 (5th Cir. 1933) (stating that "every bill of lading in default of special provision contains on implied warranty that the voyage will be prosecuted without unnecessary delay of deviation, and that if the vessel does unjustifiably deviate from her direct course the carrier from the moment becomes the insurer of goods") Id., see also GILMORE & BLACK, supra note 7, at 66. "Similar in operation to the seaworthiness warranty, though taking effect later in the cause of the voyage, is the doctrine of 'deviation.'" Id.
a "breach of the contract of carriage," rather than as a violation of maritime tort law. The COGSA deviation provision reduces damages for an "unreasonable deviation," one that is the special type of breach of contract we have described, to the measure that "results from," that proximately flows from the deviation itself.


The Fire Provisions are statutory restrictions on negligence actions against a carrier for fire damage to cargo. The Fire Provisions eliminate vicarious liability, leaving as the only basis of liability conduct directly attributable to the carrier. "Design or neglect" are terms of intent or negligence, again suggesting tort causes of action. COGSA's fire provisions speak of "fault or privity" Fault, like design or neglect, is a tort concept. Privity brings to mind contractual theory, suggesting a difference in bases of liability between the Fire Statute and COGSA. By its own terms, however, COGSA does not alter the carrier's rights and obligations under the Fire Statute, and the legislative history of COGSA expressly disaffirms any intent to alter the Fire Statute's meaning of "design" or "neglect." Furthermore, courts consistently have held the terms to have identical meanings. Because the history of the two Fire Provisions is bound up in the problem of allocating the burden of risk for negligent fire damage to cargo, both provisions are tort-related regimes.

Neither of the Fire Provisions deal with contract claims for liability due to fire damage. Because the Fire Provisions are partial exonerations from tort liability, they are inapplicable to breach of contract actions. In the absence of personal neglect a carrier is not liable for fire damage in tort; however, if the carrier expressly con-
tracts to protect cargo from the damage, the carrier can be sued on its contract. The Fire Provisions leave the carrier free to contract and the Provisions in no way affect liability under that contract.

Because deviation is a breach of contract, any action based on deviation falls outside the reach of the Fire Provisions. In the case of fire damage in the course of deviation, where COGSA is inapplicable, the only issue would be whether "but for" the deviation the fire damage would not have occurred. If the COGSA deviation provision applies, instead of the general maritime doctrine, then the causation question becomes the usual one: did the deviation itself cause the fire damage? Under COGSA, if found to be reasonable, a deviation must have been within the contemplation of the parties and thus was not a breach. If the cargo owner has no other contract action, then its only relief is in tort, and the Fire Provisions then apply. If the cargo owner proves unreasonable deviation, however, he has established a breach of contract. Under COGSA, the nonbreaching party has the burden of proving that the damages resulted from the breach. The normal contract rules for damages resulting from breach apply.

A second question posed under the COGSA deviation provision is whether COGSA's section 1304(5) limitation-of-liability provision will apply and thus limit cargo owners to recovery of five hundred dollars per "package" or freight unit. Prior to COGSA, deviation, as a fundamental breach of the carriage contract, deprived the carrier of any contractual limitation of liability and of the benefit of the Limitation Act. Under COGSA, in the Second and Ninth Circuits the benefit of Section 1304(5) is lost. In the Seventh Circuit, the provision still applies. If COGSA does not app-


296. See 2A Benedict, supra note 8, at 12-30. This is so, at least where the shipowner orders or knowingly permits the deviation. See also The Pelotas, 43 F.2d 571, 579-80 (E.D. La. 1930), aff'd, 66 F.2d 75 (5th Cir. 1933).


ply, not only will the easier rule as to causation apply, but also there is no limitation on liability

In *The Indrapura*, the carrier placed the carrying vessel in dry dock in Hong Kong for maintenance after the ship took on a load of general cargo consigned from Hong Kong to Portland, Oregon. A fire broke out on the ship while in dry dock and damaged the cargo. The court found that the fire resulted from the negligence of the officers and crew. The cargo owner sued for damages, claiming deviation due to the delay and detour involved in sending the ship into dry dock. The carrier raised the Fire Statute as a defense and claimed no liability because the deviation had not caused the fire. The court found that sending the ship into dry dock was a deviation and rejected the application of the Fire Statute to the situation. The court pointed out that a suit based on deviation is a suit for breach of contract. Placing the ship in dry dock for general maintenance for the owner's convenience "was an act beyond question not contemplated by the shipper, and was assuredly a breach of the implied contract that the ship should remain upon the water and proceed with all practicable dispatch to destination."

The court further pointed out that the established law for damages for deviation went beyond the normal "reasonable foreseeability" rule for damages for breach of contract. For deviation, the carrier is liable for any damage to cargo occurring from any cause, regardless of foreseeability, that the cargo would not have sustained had it not been for the deviation. In *The Indrapura*, the fire most likely would not have happened had the ship made the voyage. The court's reasoning as to the different rule for deviation suggests that the justification for the difference in doctrine as to damages was that normal breaches of contract, such as unreasonable delay in speed during the voyage, are anticipated risks, while a deviation exposes cargo to new risks.

The court went on to discuss the application of the Fire Statute

299. 171 F 929, 930-31 (D. Or. 1909). We refer to "carrier" in the text for convenience. The Indrapura was under charter at the time, so charterer was the carrier. The owner placed the vessel in the dry dock, with the consent of the carrier. On the relation of deviation and the Fire Provisions, see 2A BENEDICT, supra note 8, at 12-25 to 12-29.

300. 171 F at 933.
301. Id. at 938.
302. Id. at 938-39.
and limitation of liability under the Limitation Act. The court rejected as unreasonable any application of the Fire Statute. The deviation, the breach of contract, already had occurred and the normal legal consequences of the breach would apply. The Fire Statute, protecting the carrier from liability for "loss by fire where it is not attributable to the carrier's personal negligence," was irrelevant. Therefore, the fact that the Fire Statute is read into all contracts of carriage adds nothing, and the effect of breach of contract by deviation is to bar use of all contract exemptions favoring carrier. "There was a deviation, and while the respondent was purposely at fault the fire occurred. If it can be shown that the fire would have occurred notwithstanding the deviation, this would be a defense. But the burden is cast upon the respondent to maintain that defense.

In summary, the court in *The Indrapura* clearly viewed deviation as a breach of contract. The fact that fire was the event that caused the cargo damage after the carrier had breached the contract of carriage by deviation was unimportant. The carrier was liable on the basis of contract law for all damage occurring after the vessel had deviated unless the carrier could prove conclusively that the fire would have occurred and would have damaged the cargo without the deviation. *The Indrapura* is clear authority that deviation doctrine and the Fire Provisions operate in two separate fields of liability; deviation in contract and the Fire Provisions in tort, to restrict carrier liability for negligent cargo damage to conduct directly attributable to the carrier.

In *The Ida*, a general cargo vessel loaded bags of nitrate soda in Hopewell, Virginia for carriage to Alexandria, Egypt. Rather than proceeding directly to Egypt, at the direction of the carrier, the ship called at ports in the Gulf of Mexico and along the Italian coast. After the Ida finally arrived at Alexandria, approximately two months after leaving Hopewell, and while she was discharging

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303. *Id.* at 939.
304. *Id.*
305. *Id.* The court cited an American and British Encyclopedia of law that stated that in deviation cases, a presumption arises that the loss was caused by the deviation, and the carrier has to show that the loss not only might have happened, but must have happened even if the deviation had not occurred. *Id.*
306. 75 F.2d 278, 1935 A.M.C. 302 (2d Cir. 1935).
the nitrate, a fire of unknown origin broke out in a hold containing some of the nitrate. The nitrate remaining on board was damaged by the fire and water.\(^\text{307}\) The cause of the fire was unknown. The Second Circuit Court stated that exoneration under the Fire Statute is absolute unless the owner’s neglect caused the fire:

> The language of the statute is very broad. No owner of a vessel is liable to cargo for fire damage “unless such fire is caused by the design or neglect of such owner.” Except as limited by the clause just quoted, the immunity is complete. There is no claim that the fire was caused by the design of the respondent.\(^\text{308}\)

Assuming that a breach of contract by deviation might be termed “neglect” to perform it, the court stated that the cargo owner had shown no causal connection between the deviation and the fire, and therefore no liability existed:

> In a vague way a breach by failure to perform a contract may be a “neglect” to perform it. Perhaps that depends upon whether the breach is intentional or inadvertent. But we need not indulge in any such nice distinctions now. [D]eviation was a “neglect” within the meaning of the word as used in the fire statute [T]he neglect which will deprive a shipowner of the protection is a neglect which caused the fire.\(^\text{309}\)

The court in *The Ida* did not believe its decision was contrary to *The Indrapura*. “It was recognized in that case that the fire statute applied notwithstanding a deviation which had no causal relation to the fire.”\(^\text{310}\) The court also relied heavily on the then recent Supreme Court case of *Earle & Stoddart v. Ellerman’s Wilson Line*.\(^\text{311}\)

One finds difficulty in making sense of *The Ida’s* characterization of *The Indrapura*. *The Indrapura* held the Fire Statute not to apply if there was a good cause of action seeking damages for deviation. There can only be a good cause of action seeking damage for deviation if there is at least a “but for” relationship of the

\(^\text{307}\) Id. at 278.

\(^\text{308}\) Id. at 279.

\(^\text{309}\) Id. (emphasis added).

\(^\text{310}\) Id. at 280.

\(^\text{311}\) Id. at 279 (citing *Earle & Stoddart*, 287 U.S. at 420, 1933 A.M.C. at 1).
deviation to the damage suffered. If there is no causal relation to the damage, as when the damage would have occurred if there had been no deviation, then there is no action for deviation. For example, if a vessel deviates and a fire begins at that time, there is no causal relation between the deviation and the fire. If the vessel had stayed on its proper course the fire would have started, the cargo still would have been on board, and the cargo would have burned. Further, as shown in *The Indrapura*, the test in deviation law is not whether there is any causal relation to the risk, that which causes the damage, but only to damage sustained. Thus, although a crucial issue under the Fire Provisions is whether the carrier caused the fire which damaged cargo, under deviation law, the issue is not whether the deviation caused the fire. The very phrasing of the problem in that fashion commits the heresy of confusing the contract basis of the deviation doctrine with the tort basis of the Fire Provisions.

The major problem in *The Ida* decision, however, is that the court misunderstood or ignored the conceptual framework applied by the court in *The Indrapura*. If the carrier has deviated, the carrier has fundamentally breached its contract. That contractual wrong, under the general maritime law of deviation, strips the carrier of all protection as to cargo damage occurring while in deviation. The only remaining issue is the "but for" connection for damages suffered, with the heavy burden on the carrier to overcome the presumption of causation. In that analysis, the Fire Statute is irrelevant because the Fire Statute says there is no actionable wrong of the carrier for fire damage until the cargo owner establishes directly negligent conduct of the carrier that caused the fire. The deviation analysis in breach of contract says that any negligence by the carrier as to the fire risk is irrelevant to the question of whether the carrier has deviated in violation of the contract. Because negligence is not the basis for actionable deviation, neither reasonable foreseeability of risk of harm nor the question of whether the conduct breached a duty of reasonable care matter in the law of deviation.

To insert the Fire Statute into a deviation analysis often could destroy the general action for maritime deviation. Even if mere deviation was an acceptable substitute for a showing of intent or negligence as to fire, which the court in *The Ida* assumed, the
cargo owner would have to show (1) that it was the carrier personally who deviated, and (2) that the carrier personally caused the fire. The COGSA deviation action calls for the damage to result from the deviation, requiring the normal proximate-cause test. Even under that restricted statutory basis for deviation damages, however, the COGSA Fire Provision, if applied in fire damage cases, likewise would defeat many deviation actions. For example, if a ship carries cargo beyond the port of delivery to another port, that is a clear case of deviation. If a fire breaks out on the ship and spreads to that cargo, damage has resulted from the deviation under the COGSA deviation provision. The deviation, however, did not cause the fire.

In terms of doctrine, The Ida court took a contract action, the deviation action, and forced it into a statutory framework concerned with allocating the burden of loss from negligent cargo damage by fire. Confusion inevitably resulted. The Fire Provisions were enacted to deal with cases of tortious damage to cargo by fire. The court in The Ida recognized that if the carrier had a specific contractual obligation regarding fire, the Fire Statute would not apply to the contract action because the carrier is bound to its contract. An express warranty of seaworthiness provision in the bill of lading waives protection of the Fire Provisions, because the carrier agrees to be strictly liable for damages from unseaworthiness, however caused. In that situation, whether the carrier was personally negligent is irrelevant for the contract action, and the Supreme Court in Earle & Stoddart noted that regardless of whether the Fire Statute prevented tort liability, contractual liability for fire damage could exist under an express warranty of seaworthiness (while finding none in that case). The Ida, however, confused the Earle & Stoddart discussion on the alternative theory of liability with that case’s principal discussion on the Fire Statute’s relationship to the duty of due diligence as to seaworthiness.

The court in The Ida failed to focus on the contractual nature of deviation, with its special features, and the tort-oriented nature of

313. Id. at 428.
314. 75 F.2d at 279.
the Fire Statute. Thus, the court confused a contract action with a statute providing partial exoneration for tort liability. The decision in The Ida provides greater effect to the Fire Provisions than is required to satisfy congressional policy. Certainly, no judicial hostility to the Fire Provisions is evidenced by the approach.

In Globe & Rutgers Fire Ins. Co. v. United States (The Zaca),\(^{315}\) the United States Court of Appeals for the Second Circuit followed its decision in The Ida.\(^{316}\) In that case, the court held there was no voluntary deviation in any event.\(^{317}\) In Hoskyn v. Silver Line, Ltd. (The Silver Cypress),\(^{318}\) the ship negligently carried cargo to Ilo Ilo in the Philippines, beyond the cargo’s destination in Manila. A fire broke out in Ilo Ilo and destroyed the cargo. The court refused to apply The Ida on the ground that the facts were different. In this case, the cargo was at the wrong port, Ilo Ilo, because of the deviation at the time of the fire, while in The Ida, the cargo was where it was supposed to be at the time of the fire, but arrived later than it should have. The alleged deviation in The Ida was a wrongful detour to other ports before arrival at the port of destination. The court did not discuss the doctrine, but stated that, had there been no fire, the cargo owners conceivably would have had a cause of action. Therefore, “it is not logical to say that by reason of the failure to discharge its obligation to make delivery at Manila, the [carrier] is entitled to the same protection under the Fire Statute as it successfully asserted with respect to cargo intended for, but not yet discharged at Ilo Ilo.”\(^{319}\) Upon appeal the United States Court of Appeals for the Second Circuit affirmed without discussing this issue.

The Hoskyn case is contrary to the holding in The Ida. The Ida says that if fire causes the damage, the cargo owner has to meet the requirements of the Fire Statute. The Ida required a showing of a “causal connection” between the deviation and the fire. Although cargo owners in Hoskyn could not prove the cause of the fire, carrying these items of cargo on to Ilo Ilo was certainly not the

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316. Id. at 166.
317. Id. at 167.
319. Id. at 468.
cause. If we focus on the damage, however, as is correct in deviation law, then clearly the damage to the cargo would not have occurred but for the overcarriage to Ilo Ilo. This is a classic case of a good cause of action for deviation. When the Hoskyn court reasoned that (1) there might have been an action for damages for overcarriage had there been no fire, and (2) that it is illogical to say that because of its overcarriage, the carrier should have the protection of the Fire Statute just as the carrier did for cargo actually destined for Ilo Ilo, the court simply is saying that taking an already established liability in contract and saying the cargo owner must qualify in tort through the Fire Statute appears ridiculous.

In Haroco Co. v. The Tai Shan, the Tai Shan was a general cargo vessel engaged in service between ports in the Far East and the United States. At Tientsin, China, the ship took on cargo destined primarily for United States ports. The ship then called at ports in the Philippines and Japan before reaching the United States. While at Cebu in the Philippines, fire broke out and damaged some cargo. The claim of the cargo owner was that calling at ports in the Philippines was a deviation. The court first held that there had been no deviation. Calls to the Philippines, of the duration in this case, were customary in Far East-United States general cargo carriage. Second, the court was bound by the Second Circuit rule in The Ida and Globe calling for a “causal connection” between the deviation and the fire and placing the burden of proof on the cargo owner. The court did note that the burden rule of the Second Circuit was contrary to that announced in The Indrapura, but showed no evidence of recognizing why The Indrapura, in rejecting the application of the Fire Statute, dealt with allocation of the burden of proof as to “but for” causation in a cargo owner’s action for breach of contract arising from deviation. The Ida and Globe decisions, requiring the application of the Fire Statute, stated the usual burden of proof of the cargo owner to show cause of fire.

The court in Haroco quoted the factual distinction made in Hoskyn without commenting on how the distinction would avoid the

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321. Id. at 645.
"causal connection with the fire" rule of *The Ida* and *Globe*. The court said that cargo owners had not shown that if the vessel had not gone to the Philippines, the cargo would have been delivered before the fire occurred. The court then suggested that "it might be urged that, in any case where a vessel, proceeding by a direct route, would have discharged her cargo before the date of a fire which damaged the cargo during a deviation, there must have been a causal connection between the deviation and the fire." A good deviation action could be made out on those facts. The "but for" relationship between deviation and the damage suffered is present. There is, however, no "must" causal connection with the fire. If, due to the delay time or an event occurring in the deviation, the cargo caught fire, a causal connection would exist between the deviation and the fire. If a fuel line broke, however, or some other event totally unconnected with the cargo started a fire elsewhere in the ship, then no causal relation exists with the fire, only the fire damage (cargo would have been delivered earlier had it not been for the deviation). In any event, the apparent desire of the *Haroco* court to give relief in such a situation would accord with *The Indrapura*.

The *Hoskyn* and *Haroco* holdings suggest that district courts in the Second Circuit may be promoting a more accurate analysis of the relationship between deviation and the Fire Provisions. The lack of cases suggests that the combination of fire and deviation cases, and therefore the opportunities to alter the law, may be few. Most cases will appear in the Second Circuit, however. The cases on the relationship of deviation to the Fire Provision assuredly indicate no judicial hostility to giving proper effect to those statutes.

**VIII. Conclusion**

It is a heretic that makes the fire ..

In providing a comprehensive outline of modern American maritime law regarding fire damage to cargo, this Article points out four "heresies" that threaten the traditional application of fire

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322. *Id.* at 646.
323. *Id.* at 647.
damage law. The first heresy, the intertwining of the Limitation Act and the Fire Provisions, was committed by Gilmore and Black primarily. Analysis of Fire Provision cases illustrates that courts are not allowing current judicial hostility to the Limitation Act to spill onto the Fire Provisions improperly. The courts, therefore, avoid the first heresy by recognizing the history and policy distinctions between the Limitation Act and the Fire Provisions.

The second heresy is the confusion of the maritime doctrine of unseaworthiness with the Fire Provisions. The third heresy is closely related: the application of Maxine Footwear and the Canadian COGSA to American law, allowing the doctrine of unseaworthiness to override the Fire Provisions. Through analysis of Asbestos Corp. and Sunkist Growers, this Article has argued that the doctrine of unseaworthiness is distinct and that differing policies dictate separate treatment for the Fire Provisions.

The fourth heresy is the confusion of the doctrine of deviation with the Fire Provisions. Because deviation is a contract based cause of action, application of the tort-based Fire Provision analysis to deviation cases is inappropriate and confusing. In discussing The Ida and The Indrapura, this Article distinguishes the doctrines.

The Fire Provisions are alive and well. In determining whether courts restrictively interpret the Fire Provisions, this Article examined qualifications for eligibility, major substantive and procedural aspects of the Fire Provisions, the judicial standards for determining personal negligence of the carrier, and, finally, ways that the carrier could lose Fire Provision protection. Examination of each of these issues illustrates that the trial and appellate courts are engaged in fair-minded, thorough appraisal of the evidence in each case, and that the carrier is not being deprived unduly of the benefit of the Fire Provisions. In the American maritime law of fire damage to cargo, the courts generally have kept the destructive fire from these heresies small. That is all the reason more, in Shakespeare's words, for having those heresies "quickly trodden out."