

Negligence and the Carriage of Goods Act: Whither Third Party Liability?

By Pauline Barratt

Judgments on issues arising under the Carriage of Goods Act 1979 are few and far between, and for that reason alone the recent decision of the High Court in *Ports of Auckland Limited v Southpac Trucks Limited* is of interest. Apart from that though, the case raises an unusual issue about carriers' liability.

The facts of the case were straightforward and were not in dispute. Southpac imported six Kenworth trucks from Australia, and they were duly brought to Auckland on board the vessel *Rotoiti* under a sea waybill issued by ANZDL, a division of CP Ships.

CP Ships and Ports of Auckland Limited (POAL) were parties to a terminal contract which made POAL responsible for unloading cargo from CP Ships' vessels. As a result, when the ship arrived the trucks were driven off it by a stevedore who (essentially) was acting under the terms of the terminal contract.

Five of the trucks were discharged without incident and were driven safely into the marshalling area from where they were to be collected. The sixth was not so fortunate. After having been discharged it was involved in a collision with a fork hoist which was being driven while carrying an oversized load of timber. The fork hoist driver was a POAL employee. The cost to repair the damage to the Kenworth was \$60,201.64.

Southpac sued POAL in the Auckland District Court to recover the repair costs, alleging negligence on the part of the fork hoist driver. POAL admitted the negligence and admitted also that the negligence was the cause of the damage to the truck. However, POAL said that at the time of the accident it was carrying out an "incidental service" under the Carriage of Goods Act ("the Act"), that being the service of stevedoring. It said that the service was provided pursuant to the terminal contract, with CP Ships being the contracting carrier and POAL being an actual carrier. Therefore, POAL's liability for the damage to the truck was limited to \$1500. Further, the only party to whom POAL could be liable under the Act was CP Ships – it had no liability to Southpac Trucks.

Southpac applied for judgment on liability on the basis of POAL's admissions, and POAL applied for summary judgment against Southpac. Both applications were heard in the District Court on 5 July 2005. The Judge found in favour of Southpac. He said that although POAL was undoubtedly a carrier for the purpose of discharging the Kenworth from the ship, that was essentially irrelevant given that the damage arose from the unrelated and unintended intervention of the fork hoist. Therefore, at the time of the accident, POAL was not a carrier *as such*.

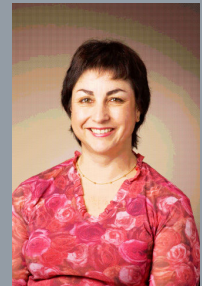
The words *as such* on which the judgment turned come from section 6 of the Act, which reads:

Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except -

- a) *In accordance with the terms of the contract of carriage and the provisions of this Act; or*
- b) *Where he intentionally causes the loss or damage.*

POAL appealed. The issue for the High Court was whether the District Court Judge had been right to find that POAL was not acting as a carrier *as such* because the admitted negligence was that of an employee of POAL, who at the time was not engaged in an activity related to the carriage of the truck. Southpac's claim was that it was entitled to recover damages against POAL in POAL's capacity as the employer of a driver whose negligence had caused damage to Southpac's property, that claim having nothing to do with POAL's role as carrier of the truck.

The High Court held that the proper interpretation of the phrase "liable as such" is that a carrier will be entitled to the benefit of section 6 if, at the time when the loss or damage occurred, the carrier was acting as a carrier of



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the goods, and not in some other capacity unconnected with its work as a carrier. In any given case, if the service being provided in respect of the goods at the time of the loss brings the person providing the service within the definition of "carrier", the person will be a "carrier as such".

On the facts of the case before the court, the collision occurred while POAL was performing part of the contract of carriage between the owner of the truck, and CP Ships. It was providing an incidental service. It was also contractually responsible to CP Ships for the provision of stevedoring services, and those were being carried out at the time of the collision. Therefore, POAL was a carrier "as such" when the collision occurred, and the effect of section 6 was to prevent POAL from being sued for the admitted negligence of its fork hoist driver.

In reaching this conclusion, the High Court rejected Southpac's argument that POAL's liability did not arise in its capacity as a carrier of the truck, but rather as the employer of the negligent fork hoist driver – the actions of the driver were entirely outside the contract of carriage. The court considered this to be irrelevant; and said that the Act was intended to avoid the detailed factual inquiries that would be necessary to determine whether a carrier was acting "as such" if these sorts of distinctions were to be drawn.

The result of the court's findings was that POAL was not liable at all to Southpac. The contracting carrier was CP Ships, and the Act does not allow a contracting party to sue anyone other than the contracting carrier. POAL's liability (which in any event was limited to \$1500) was as an actual carrier and was to CP Ships. In reaching this conclusion the court commented that Southpac was being left without a remedy for virtually the whole of its loss, but added:

But it is no doubt insured for such loss. The certainty which the Act confers on contracting parties enables those parties to assess and provide for the risks arising in the course of the carriage of goods.

The judgment of the District Court was set aside, and summary judgment was entered for POAL.

Comment: It is hard to escape the suspicion that POAL's involvement in this case in more than one capacity, clouded the issue. If the facts are looked at again but showing the forklift driver as employed by ABC Stevedores which is then the defendant, the logic of the High Court decision starts to look rather tenuous. It will be interesting to see what the Court of Appeal makes of it all - notice of appeal has been filed by Southpac Trucks.

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For further information or for copies of the decisions, please contact Pauline Barratt at Jones Fee.