

**BETWEEN**

**PORTS OF AUCKLAND LIMITED**

Appellant

**AND**

**SOUTHPAC TRUCKS LIMITED**

Respondent

Hearing: 06 October 2009

Court: Blanchard J  
Tipping J  
McGrath J  
Wilson J  
Anderson J

Appearances: C R Carruthers QC with G J Mercer for the Appellant  
P M Smith for the Respondent

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**CIVIL APPEAL**

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**MR CARRUTHERS QC:**

10 May it please Your Honours, I appear with Mr Mercer for the appellant.

**BLANCHARD J:**

Yes, thank you Mr Carruthers.

15 **MR SMITH:**

May it please Your Honours, Smith for the respondent.

**BLANCHARD J:**

Yes, thank you Mr Smith. Yes, Mr Carruthers.

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**MR CARRUTHERS QC:**

Your Honours, I want to deal with the oral argument in this way, I want to begin by dealing with the scheme of the Act by reference first to its text and then I want to look at the scheme of the Act as to its purpose and that's by  
5 reference to the background material leading to the Act. Your Honours, I want to begin by going right through the Act, by the text of the Act, to show the scheme of the Act because, in my submission, the case is disposed of really in quite a straightforward way, on the scheme of the Act. If I can take you to  
10 volume 1 of the appellant's bundle of documents under tab 1 and in section 2, I want to identify the main definitions on which the appeal turns and then, as I deal with the scope of the Act, I'll deal with some of the other definitions.

The starting point is "carrier" and the relevant words are those appearing towards the end of the definition, "carrier means" and then there's a definition  
15 in perhaps conventional terms and then the last three lines "and includes a person who, in the ordinary course of his business, performs or procures to be performed, any incidental service in respect of such goods". Let me take you just above "carrier" to "carriage" and –

**20 BLANCHARD J:**

Just before you leave "carrier", I would have thought the more significant words are in the second line of the definition of carrier, "procures to be carried, goods owned by any other person". Isn't that what POAL did? It contracted with, I can't remember the name of the party –

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**MR CARRUTHERS QC:**

With CP Ships, was –

**BLANCHARD J:**

30 No, no, in the other direction?

**MR CARRUTHERS QC:**

Oh, with Wallace?

**BLANCHARD J:**

Well, it didn't. There's an intermediate party but –

**MR CARRUTHERS QC:**

5 Yes –

**BLANCHARD J:**

– we could probably ignore that.

10 **MR CARRUTHERS QC:**

Yes.

**BLANCHARD J:**

15 Didn't it procure that that party, via a sub-subcontract with Wallace, would carry the goods?

**MR CARRUTHERS QC:**

Yes, yes, that's so, yes.

20 **BLANCHARD J:**

So you don't need to get to incidental services?

**MR CARRUTHERS QC:**

25 Well, on that analysis no but if one does the analysis under incidental service, one gets to the same issue in terms of definition of carrier.

**ANDERSON J:**

30 But there's no difference between the appellant and respondent over the question whether Ports of Auckland is the carrier within the –

**MR CARRUTHERS QC:**

No, no, that's right.

**BLANCHARD J:**

I'm sorry, I interrupted you when you were going to –

**MR CARRUTHERS QC:**

5 No, no, that's –

**BLANCHARD J:**

– carriage.

10 **MR CARRUTHERS QC:**

I was just going to “carriage” to point out that it does have an extended meaning to include any incidental service and carry has a corresponding meaning. “Incidental service” is defined and that, in relation to goods means, “Any service such as that performed by consolidators, packers, stevedores and warehousemen, the performance of which is to be or is undertaken to facilitate the carriage of goods pursuant to a contract of carriage.” Now, just in response to Your Honour Justice Blanchard, you'll see that one gets to really a same result because in the course of the stevedoring contract, in the course of the performance of the stevedoring contract, Ports was entitled by the contract with CP Ships to, in a sense, engage other carriers to do the work of discharge as I've noted in the written outline.

**BLANCHARD J:**

Did that stevedoring contract include the movement of goods which had been off-loaded from the ship to another point on the wharf?

**MR CARRUTHERS QC:**

Yes. Let me just take you to the case on appeal, at page 36 in the case, it's under tab 9. That's the side letter to the agreement and you'll see at page 37, mobiles which are the trucks, or the vehicles that were involved on the roll-on roll-off services from the ship's ramp and you'll see that the rates prescribed are based on and include the shipboard labour and supervision to secure or unsecure mobiles, importantly, “Provision of labour to transfer mobiles from vessels stow to wharf storage area, or vice versa and receiving and delivery

services.” That’s what R&D is, so it is a full service from the stevedoring work to what is probably more correctly called wharfingering work, once the discharge of the truck was complete, that is once the truck left the ship and came on to the wharf and then warehousing at the stage that the truck is held pending collection for ultimate delivery.

**BLANCHARD J:**

Does “vessel stow” mean the position that the goods are stowed on the vessel?

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**MR CARRUTHERS QC:**

On the vessel, yes, yes. So, that is it how, one way or another, Ports is a carrier covered by the legislation. I need to then deal just with the scope of the Act and I’m moving to section 5. You’ll see that the Act under section 5(1) applies to, “Every carriage of goods, not being an international carriage, performed or to be performed by a carrier pursuant to a contract entered into after the Act.”

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**BLANCHARD J:**

One of the commentators seem to be critical of the decisions below, on the basis that this might be an international carriage. Now, I assume that there’s no issue as far as you and your opponent are concerned about that?

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**MR CARRUTHERS QC:**

No, there’s not Your Honour but let me clear it away because regrettably, some of the commentators seem to have had as much difficulty with this case as the Court of Appeal did. This is not an international carriage. International carriage is defined and if I can just go back to the definition section. You’ll see under B, in relation to the carriage of goods by sea, means carriage and I omit the irrelevant words, “To any port in New Zealand, from any port outside New Zealand, commencing when the goods are loaded on to a ship and ending when they are discharged from a ship.” So what is critical here for the commencement of the Carriage of Goods Act 1979 is, “discharged from the ship”. So, you can see from the analysis of the scope of the work that the

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work that is being actually carried out, that the properly so called stevedoring work on the ship prior to discharge, would still be subject to the international carriage and would be governed by the contract that's evidenced by the sea waybills but the moment that the truck in this case is discharged, that is  
5 when it comes off the ramp of the ship, then the scheme under our local legislation applies and that's how one gets to the application of the Act.

**McGRATH J:**

So if we're interpreting section 5(1) when it says, "not being international  
10 carriage", that really means not being during the phase of international carriage?

**MR CARRUTHERS QC:**

That's right, yes. In our case, "international carriage" has come to an end and  
15 the scheme applies.

**BLANCHARD J:**

We're not called upon to decide that but it's helpful to have that explanation.

20 **MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

Seems pretty plain on the face of the words.

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**MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

30 It's caused trouble has it?

**MR CARRUTHERS QC:**

Well it goes, it all goes back to a case called *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* in the 1950s and that was a case where there was a contract with the Indian government to buy fire engines –

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**TIPPING J:**

I didn't mean to trouble you with the detail Mr Carruthers.

**MR CARRUTHERS QC:**

10 No, no.

**BLANCHARD J:**

This is fascinating.

15 **MR CARRUTHERS QC:**

It is actually just a fascinating point and I –

**TIPPING J:**

But when it hits the wharf?

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**MR CARRUTHERS QC:**

– I will entertain you with it for a moment. What happened there was that the ship's gear was being used to load one of the fire engines and through negligence the fire engine disappeared into the sea before it actually got to its loading place on the ship and it's a star studded case because it was argued by Megaw who was a silk at that time, with MacCrindle, who by then had not taken silk. On the other side was Mocatta who was a silk and Michael Carr who had not taken silk at that stage and it was decided by Mr Justice Devlin, as he then was, so it was quintessentially a shipping case. What Justice Devlin said on this point about discharge or loading is this, "Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail." That is why the issue of discharge actually has some importance but it's not an issue in –

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**BLANCHARD J:**

What's the reference to that case?

5 **MR CARRUTHERS QC:**

It is 1954 and it's only reported in the All England Reports, 2 All England Reports at page 158 and the passage I read to you is at page 164.

**BLANCHARD J:**

10 Thank you.

**MR CARRUTHERS QC:**

Now, let me come to section 6 because this is the key to the scheme of the Act in my submission. There are really three qualifiers, "notwithstanding any  
15 rule of law to the contrary"; the second qualifier, "whether in tort or otherwise" and the third qualifier, "whether personally or vicariously". So, it is a wide sweep that defines the scope of the legislation and of course the key point is "no carrier shall be liable as such". Now, those words "as such", are used consistently throughout the Act as I shall come to when talking of the various  
20 carriers. My submission is that liable "as such" means liable in the capacity of. So where a defined carrier is acting in the capacity of a carrier under a contract, then that provision excludes liability. Now, that brings me to this point, that the protection for Ports of Auckland arises because it is a carrier in that it procured the carriage, as Your Honour pointed out and also, that it  
25 performed an incidental service of stevedoring and warehousing in the discharge of cargo from the ship.

**BLANCHARD J:**

Can you give us an example of when you say a carrier would not be acting in  
30 the capacity of a carrier?

**MR CARRUTHERS QC:**

I think the High Court Judge gave –



**BLANCHARD J:**

This is the grandstand –

**MR CARRUTHERS QC:**

5 Yes, yes –

**BLANCHARD J:**

– example?

10 **MR CARRUTHERS QC:**

Yes where – I suppose if Ports of Auckland, in arranging its financial affairs, gave some financial advice to a party wanting to invest and the advice was negligent then Ports of Auckland, as defined as a carrier but in giving that advice, it wouldn't be acting as such because it wouldn't be acting –

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**TIPPING J:**

Would the geometric four corners test be suitable for this or something similar. If you're acting in good faith within the four corners of your contract –

20 **MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

– you're as such?

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**MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

30 If you're outside that, circle, corners, never mind what, you're not as such?

**MR CARRUTHERS QC:**

Yes, yes Your Honour, I think that's –

**TIPPING J:**

That sort of idea.

**MR CARRUTHERS QC:**

5 – a helpful analysis, yes.

**McGRATH J:**

So you look to what's being done by Ports of Auckland in relation to the goods that are the subject of the consignment of carriage?

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**MR CARRUTHERS QC:**

That's right Your Honour, one of –

**McGRATH J:**

15 You don't look beyond that?

**MR CARRUTHERS QC:**

No. One of the issues in the case is asking the right question and you'll see that the commentators said well, what did the forklift driver have to do with the damage to the truck and that is a manner of thinking that is irrelevant to the scheme of this Act. If you ask a different question, if you ask the question, what did Ports of Auckland have to do with the carriage of the truck, you get a very different answer and the way Your Honour has put it is, with respect, correct.

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**McGRATH J:**

Thank you.

**TIPPING J:**

30 Does that mean Mr Carruthers, that you are focusing on the conduct of the carrier –

**MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

– rather than the conduct of the otherwise tortfeasor?

**5 MR CARRUTHERS QC:**

That's right. The enquiry is what work was the carrier doing, what was the carrier doing? The enquiry, as I'll come to as I'll explain the legislation, is about who had responsibility within the statutory framework which is contractually based. So it looks at, it looks at the responsibility at the time of  
10 the damage for the goods and the philosophy behind it is to deal with all of those historical arguments where there was endless argument as to just at what point of the carriage the damage had occurred. So what I will take you to under the scheme, is a scheme that is based on responsibility in terms of contractual arrangements at the time. It is not a conventional common law  
15 analysis as to who caused the damage.

Where this leads to, on an analysis of section 6, my section 6 analysis doesn't end there because what defines the scope of the provision is the word "except". So, what the legislation is doing, is saying, a carrier who's acting  
20 under the Contract of Carriage is not liable, no matter how you want to frame it, whether you want to frame it in tort or bailment, or whatever you want to frame it as, not liable "except" and the scheme is, in accordance with the terms of the Contract of Carriage and the provisions of this Act. So what – let's leave aside intentional damage that I don't think needs consideration, so  
25 what's happening is that the scheme is, well let's, let's exclude, let's exclude every carrier as defined when that carrier is acting within the contract "except" in accordance with the provisions of the Act. So, let us define a liability regime that is governed by the Act and it's that that I want to turn to next.

**BLANCHARD J:**

30 So all common law liability is removed by section 6, subject to the three exceptions, under contract, under the Act itself –

**MR CARRUTHERS QC:**

Yes.

**BLANCHARD J:**

5 – or for intentional damage?

**MR CARRUTHERS QC:**

Intentional damage. That's right.

**WILSON J:**

10 Mr Carruthers, does it follow from that argument that a carrier who is neither a contracting carrier nor an actual carrier, would only be liable if it caused intentional damage or if it assumed liability by contract?

**MR CARRUTHERS QC:**

15 Yes, that's exactly the position because, as I'm coming to, the liability regime that the Act imposes turns on the over-riding liability of the contracting carrier and the only relevance of the actual carrier is that the regime provides that the actual carrier may be liable to the contracting carrier but not to anybody else. So, you have a self contained regime, where the contracting carrier is made liable throughout the course of the contract, that is responsible, the contracting carrier is responsible for the goods throughout the course of the  
20 contract and that is where the primary liability is.

This is why the case is interesting and one assumes why the respondent has taken this course because there was no claim against the contracting carrier and of course there are periods of notice and limitation periods and I expect  
25 that this is an argument to simply try and avoid what is a carefully thought through and practical scheme. So, let me just look at the liability regime. In passing, I draw attention to section 7, so that is that the parties are free to contract out except in relation to the contracting carrier provision and so the parties can make their own contract and I think one –

30 **McGRATH J:**

Is that reflected in 6(a) dual elements, it's in accordance –

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– with the terms of both the Contract of Carriage and the provisions of the  
5 Act, you’ve got to satisfy both –

**MR CARRUTHERS QC:**

That’s right.

**McGRATH J:**

– for that to apply?

10 **MR CARRUTHERS QC:**

Yes and I would describe the Act as a code and I think in one of the pieces of writing, it may have actually been in the debates, it was described as something of a code.

15 **McGRATH J:**

Yes.

**MR CARRUTHERS QC:**

I expect that the reason for that description is that one can see that you can  
20 deal with liability provisions under section 7.

**TIPPING J:**

Following on from my brother’s comment, it’s not so much both is it, with respect, it’s, you can have the better of the Act or the contract?

**MR CARRUTHERS QC:**

25 Yes, that’s right, yes. I don’t need to deal with section 8, other than to draw attention to the fact that you can have various kinds, various terms of contracts as to who carries risk but I want to go to the next part of the Act, dealing with liability of carriers and dealing with section 9. So, you’ll see that a contracting carrier is liable “as such” to the contracting party for loss or  
30 damage occurring while he is responsible for the goods in accordance with

these provisions. Now, let me just deal with some definitions at this point. "Contracting carrier" and "contracting party" are defined terms and I just draw attention to the definition of contracting carrier and similarly to contracting party.

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In this case, the contracting party is the consignee, that is Southpac Trucks and I just ask you to note in that connection that section 20 preserves the consignee's rights, I don't need to take you to that. You'll see immediately, that under section 9(1), the statutory scheme is contract based and the period of responsibility is defined in subsections (2) and (3) and I don't need to take you to those.

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**TIPPING J:**

Clearly here, it was within the period of responsibility, wasn't it?

**MR CARRUTHERS QC:**

15 Yes, it was.

**TIPPING J:**

Yes, no argument about that?

**MR CARRUTHERS QC:**

There's no argument about that. The contracting carrier had liability from the time the goods were, well let's say loaded in Melbourne, through to the time that they were actually delivered.

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**TIPPING J:**

Delivered to Southpac?

**MR CARRUTHERS QC:**

25 Yes, that's right, yes, yes.

**ANDERSON J:**

So, it's the first carrier in the chain is the first one hit?

**MR CARRUTHERS QC:**

That's right, the –

**ANDERSON J:**

- 5 Either of the suit of the consignor if they engaged them, or the consignee if that person engaged them?

**MR CARRUTHERS QC:**

Well, yes I, the reason that the consignee has rights is –

**ANDERSON J:**

- 10 They might've organised the contract?

**TIPPING J:**

Well the property may have passed too?

**MR CARRUTHERS QC:**

Yes, that's the provision that allows the consignee to –

- 15 **BLANCHARD J:**

What actually happened here, did Southpac enter into the contract with the shipping company, or was it a matter of title passing afterwards?

**MR CARRUTHERS QC:**

I think it is –

- 20 **BLANCHARD J:**

Again, nothing turns on this but we might as well be clear.

**MR CARRUTHERS QC:**

- No, no, nothing turns on it, let me just... I think that the contract was actually entered into by Kenworth Trucks. In the case at page 27, is the invoice from  
25 Kenworth Trucks to Southpac and the sea waybills on the next page at 28 and these are very poor copies but nothing turns on the provisions of the sea waybill. You'll see that the consignor was Kenworth Trucks and the consignee is Southpac Trucks. So, that's how you get the position where, that

Southpac Trucks have the rights on the, under the bills of lading – under the sea waybills.

**BLANCHARD J:**

And section 20 would have come into operation if necessary?

5 **MR CARRUTHERS QC:**

Yes, that's right.

**BLANCHARD J:**

Thank you.

**MR CARRUTHERS QC:**

10 It's on this basis that I have made the submission already to you, that this is, this is the foundation of that concept of responsibility and not an enquiry as to who caused the damage and one can immediately see why historically that regime is appropriate. Now, the next issue concerning the liability regime is the role of the actual carrier and you'll see under section 10, the provisions  
15 deal with the situation where there's one actual carrier or more than one actual carrier but under subsection (2), you'll see that the contracting carrier, where one actual carrier is involved, that carrier is subject to the terms of his contract with the contracting carrier liable "as such" to the contracting carrier. So, I talked of the consistency of the use of the words "as such" and one can  
20 see that they are referring to the capacity in which the carrier is operating.

**ANDERSON J:**

Who's the contracting carrier here, is that Kenworth?

25 **MR CARRUTHERS QC:**

No, no, the contracting carrier –

**BLANCHARD J:**

Shipping company –

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**MR CARRUTHERS QC:**

– is CP Ships, CP Ships.

**TIPPING J:**

5 So, interestingly, if the actual carrier is outside the four corners of his contract with the contracting carrier, he's not liable to the contracting carrier?

**WILSON J:**

Under the Act.

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**TIPPING J:**

Under the Act.

**MR CARRUTHERS QC:**

15 That, yes, that has –

**TIPPING J:**

So maybe –

20 **BLANCHARD J:**

But he wouldn't get the protection of section 6 then.

**TIPPING J:**

Then he'd be liable directly to the consignor or consignee –

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**MR CARRUTHERS QC:**

Well, I think once –

**TIPPING J:**

30 – because he wouldn't, as my brother says, have the protection of the Act.

**MR CARRUTHERS QC:**

Yes, once you get outside, once you get outside the Act –

**TIPPING J:**

Yes, then he's liable as a bailee.

**MR CARRUTHERS QC:**

5 Yes.

**TIPPING J:**

I just wanted to explore how that –

10 **MR CARRUTHERS QC:**

No, no, no –

**TIPPING J:**

– as such fitted in there, if you like because –

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**MR CARRUTHERS QC:**

Well, I think that must be the –

**TIPPING J:**

20 – must be –

**MR CARRUTHERS QC:**

– that must be the correct analysis, yes.

25 **TIPPING J:**

– must be, it can't mean something, "as such" must mean the same thing throughout the Act?

**MR CARRUTHERS QC:**

30 Yes, yes it must. Yes and because the statutory scheme is contract based, you could see that what the driving force is looking to, what the contractual responsibility is.

**TIPPING J:**

And there is symmetry because if you go outside your contract, you are not acting “as such” and therefore vulnerable to a suit at common law still?

5 **MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

Yes.

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**MR CARRUTHERS QC:**

That must be the analysis.

**TIPPING J:**

15 Mhm.

**MR CARRUTHERS QC:**

What’s important, just in this context is, let us assume that the actual carrier is within the contract.

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**TIPPING J:**

Yes, yes.

**MR CARRUTHERS QC:**

25 The liability of the actual carrier is only to the contracting carrier.

**TIPPING J:**

Quite, that’s your essential point, isn’t it –

30 **MR CARRUTHERS QC:**

That is –

**TIPPING J:**

– and I diverted it just because I wanted to ensure to my own mind, I am now, that the two work, the “as such” works equally well there as it does at the first step.

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**MR CARRUTHERS QC:**

Yes, yes that, with respect, is correct. The subsections (4) and (5) deal with the scope of responsibility of the actual carrier, subsection (6) when that arises and then (7) through (9) show how that is shared and none of this arises in the present case but you’ll see that actual carriers are liable in proportion to freight, in relation to the amount that the contracting carrier will have been liable for.

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**BLANCHARD J:**

Is this to deal with a situation where the goods arrive in a damaged state, they’re passed through the hands of several successive actual carriers and it’s not known when they were damaged?

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**MR CARRUTHERS QC:**

That’s precisely right and the interesting feature of it is that the onus is on an actual carrier to prove that that actual carrier did not damage the goods, so as to avoid any responsibility and that is in sharp contrast with what the historical regime was where the consignee, or the owner of the goods, had to prove that a particular carrier had damaged them in order to get a remedy. So, again you see the –

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**McGRATH J:**

Why does the actual carrier have to prove that he was not responsible? I thought fault was not, oh sorry, not responsible for the goods?

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**MR CARRUTHERS QC:**

Yes, yes, yes.

**McGRATH J:**

I'm sorry. Nothing to do with fault, just whether they were in his possession and control –

5 **TIPPING J:**

If you can show as an actual carrier that the damage clearly occurred when you weren't in charge of the goods, so to speak, then you're out of this sharing regime?

10 **MR CARRUTHERS QC:**

That's right, that's subsection (4). Now, there is another leg to the liability of an actual carrier under section 11. I just draw it to attention, "If the contracting carrier is insolvent, or cannot with reasonable diligence be found, the same rights arise against an actual carrier as the contracting carrier had." So, there  
 15 is a provision that's designed to protect in the event that the contracting carrier is not available. I don't need to deal with section 12, dealing with baggage. Section 13 deals with carriage by air. Section 14 just needs a comment because it just refers to, "A carrier is not liable, damage occurring while he is responsible." I just draw attention to those special exceptions but of course  
 20 this section can only apply to circumstances where a carrier has a prima facie liability. So, "carrier" in that sense, would be, can only refer to the contracting carrier and the actual carrier.

The next pointer to the statutory regime for which I contend is section 15.  
 25 This is where there is a limitation of amount and really a conventional package limitation and significantly and consistently, the section deals only with the contracting carrier and the actual carrier. So, the liability under section 15(1), liability of the actual carrier, the contracting carrier to the contracting party and the separate liability of any actual carrier to the contracting carrier and then  
 30 the joint liabilities is limited to \$1500 for each unit of goods lost or damaged.

**WILSON J:**

So that really reinforces the proposition that a carrier who is neither a contracting or an actual carrier, has no liability unless assumed by contract?

**MR CARRUTHERS QC:**

Yes, with respect, that's correct. Now, I'll come back to –

**5 TIPPING J:**

And of course, the contract would then provide its own limitations and that's, yeah, that's the...

**MR CARRUTHERS QC:**

10 I'll leave section 16 just for a separate comment at the moment because I want to just continue on with the overall liability regime. Section 18, still dealing with what action may be taken. You'll see that section 18(1) provides that, "No action may be brought against a contracting carrier for damage occurring while he is responsible for them unless written notice within 30 days  
15 after the date on which the carrier's responsibility for the goods ceased." So, in subsection (1) notice to the contracting carrier, subsection (2) notice by the contracting carrier against an actual carrier and then the notices are defined by subsection (4) as to who gives the notice.

20 In similar vein, in section 19 there is a limitation provision, again it just refers to a carrier but significantly it's a carrier occurring while he was responsible for the goods and the limitation period is 12 months and again, that can only refer to those proceedings which are capable of being taken which involve the contracting carrier and the actual carrier. So, what I've been dealing with  
25 there, is the overall scheme of the legislation.

**TIPPING J:**

So damage and partial loss, there's this notice requirement, full loss there's a general limitation of 12 months, not that I think this is going to affect this  
30 present case but that's the general thrust of it is it, that if it's damage or partial loss these notice provisions come into effect?

**MR CARRUTHERS QC:**

They come into effect anyway.

**TIPPING J:**

Do they?

5 **MR CARRUTHERS QC:**

Yes. For damage to or partial loss of the goods.

**TIPPING J:**

You see, there seems to be a distinction in here between partial loss and loss.

10 Now, I don't think it really matters but if we're looking at the whole scheme of the Act, is there anything you can clarify there Mr Carruthers? I had a quick look at it and didn't take it any further.

**MR CARRUTHERS QC:**

15 Under subsection (2), 19(2), "No action may be brought against a carrier for damage to or partial loss of goods occurring while he was responsible after the expiration of the 12 months from the date where such notice is served."

**TIPPING J:**

20 I don't want you to strain yourself, it doesn't matter for the moment but it just seems that they are making a distinction between partial loss and full loss but, leave it.

**MR CARRUTHERS QC:**

25 Yes, thank you.

**McGRATH J:**

Only for the point of view of giving a notice.

30 **TIPPING J:**

Quite, quite.

**MR CARRUTHERS QC:**

Yes and I just want to finish this analysis by looking at section 16 which deals with the liability of employees and section 6 having protected the carrier, other than the contracting carrier and the actual carrier, section 16 protects the employee. The employee can be liable for intentional damage and then subsection (2), “No employee of a carrier shall be liable as such, whether under this Act or otherwise, to the owner of any goods being carried.” So, it’s again where the employee is acting in the capacity of an employee, one would assume that that would be within the course and scope of his employment, that employee is protected in the same way as a carrier is under section 6. So that, what I have been analysing is the text of the section in a conventional way in accordance with the Interpretation Act and my submission is that one can see that that is a statutory code that has a clear liability regime based on a contractual responsibility for goods turning on an overall responsibility of a contracting carrier and a liability of an actual carrier to the contracting carrier.

**McGRATH J:**

Mr Carruthers, I’m sorry, could I just ask you to go back to section 16(2). Is the point you’re making there that no employee of a carrier can ever be liable while acting in the course of his employment?

**MR CARRUTHERS QC:**

Yes, yes, that’s right.

**25 TIPPING J:**

Unless it’s intentional.

**MR CARRUTHERS QC:**

Unless it’s intentional.

30

**McGRATH J:**

Unless it’s intentional, so that’s even if the Act occurs with no relation to the contract of carriage?



**MR CARRUTHERS QC:**

Well, as in this case, the wrong question is, what does the forklift driver have to do with it? The right question is, what does Ports of Auckland have to do with it and Ports of Auckland has everything to do with it because it was responsible for the carriage of the truck and you'll remember the wide words of section 6, whether vicariously or otherwise, so this is really a mirror that protects the employee of the carrier in circumstances where the carrier is protected.

10 **McGRATH J:**

I understand that, thank you.

**WILSON J:**

In doing that, it ensures presumably that the statutory scheme isn't subverted by the employee being sued?

**MR CARRUTHERS QC:**

With respect, yes, that's precisely the position.

20 **BLANCHARD J:**

It would be a very odd consequence if an employee was left exposed but the employer nevertheless, had the protection of section 6, so the two have got to dovetail.

25 **MR CARRUTHERS QC:**

Yes, they do.

**TIPPING J:**

And the "as such" there, is designed to say that if the employee is acting within the framework of his, or within the four corners of his employer's contract, then he's okay. If he's outside those four corners, he's on his own if you like?

**MR CARRUTHERS QC:**

Yes, yes, with respect, yes.

**TIPPING J:**

- 5 Although the positioning of it is perhaps, well you could say there could be some semantic – an employee as such though doesn't make much sense, it's the of a carrier as such is the much more sensible reading of it.

**BLANCHARD J:**

- 10 Yes, he'd be acting outside the four corners of the contract for the carriage of the particular goods in this case because he wasn't doing anything in relation to those goods. So, I think you'd have to read it on Mr Carruthers' argument as he actually put it to us, that the employee has no liability while acting in the course of his employment.

15

**MR CARRUTHERS QC:**

Yes, yes, with respect, that is the way in which I do put it.

**BLANCHARD J:**

- 20 So then the employee, if he went off on a frolic of his own, if he said this is a lovely Kenworth, I think I'll take it for a spin down the motorway and proceeded to crash it, he would not be covered.

**MR CARRUTHERS QC:**

- 25 No.

**BLANCHARD J:**

- Interesting question, whether section 6 would protect the employer in those circumstances but if he was acting in complete disobedience of orders, as he  
30 would be, I suppose there would be that protection.

**MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

So the “as such” then here goes, it is being suggested, with the concept of employment rather than the concept of carriage.

5 **McGRATH J:**

Yes, that’s what I understood Mr Carruthers to say, yes.

**BLANCHARD J:**

Well that’s the natural reading, “No employee of a carrier is liable as such,” –

10

**TIPPING J:**

As such –

**BLANCHARD J:**

15 – is liable as –

**TIPPING J:**

– an employee –

20 **BLANCHARD J:**

– an employee of the carrier.

**TIPPING J:**

As such an employee, yes.

25

**MR CARRUTHERS QC:**

As an employee, yes and one, I suppose one derives some help from the part, the heading to the part and the heading to the section that we’re looking at the liability of the employee and as I’ve submitted, it’s really a mirror image to section 6 and, with respect to Justice Wilson, my submission is, he  
30 puts it correctly.

**TIPPING J:**

So, it isn't very well worded. It should really say, no employee shall be liable if acting in the course of his employment.

5 **MR CARRUTHERS QC:**

Well –

**TIPPING J:**

You see, this is a rather awkward use of the concept of “as such”. It has to –

10

**BLANCHARD J:**

Well, it does say that really because –

**TIPPING J:**

15 I'll be the devil's advocate slightly Mr Carruthers because I don't see this – I think it has to mean what you're suggesting because otherwise the whole thing breaks down, as my brother Wilson has said.

**BLANCHARD J:**

20 “No employee of a carrier shall be liable as an employee.” That must mean as an employee acting in the course of his employment.

**MR CARRUTHERS QC:**

In the course of his employment, yes. Now, I've been analysing the text up to  
25 this point and I now want to turn to really the other leg of the Interpretation Act, that is the purpose of the legislation. I've dealt with that in my written submissions at paragraphs 12 to 17 and what I want to do in relation to that section is simply to identify the passages that I have relied on from the material, so that Your Honours have easy access to it. I want to take  
30 you, in volume 1 of the bundle of authorities, to tab 12 and you will see that this is the report of the Contracts and Commercial Law Reform Committee of New Zealand. That's the 1968 report and if I can just take you to page 148, so you can really see the scope of the work that went into that. I just draw attention to the members of the committee at the bottom of the left-hand

column, to paragraph 24 as to the preparation of the report of the committee and if I can just draw attention in the first schedule to those who made submissions and if I can just draw attention to P & I Services Ltd for reasons that I'll come to when I deal with the Working Party Report. Now, I think  
5 my learned friend has referred to this as a Law Commission Report but, as Your Honours will see, it's not, it's one of the society's law reform committees and the passages that –

**McGRATH J:**

10 Or the Ministry, or the Department of Justice Law Report.

**WILSON J:**

Page 140 indicates that I think.

**MR CARRUTHERS QC:**

15 Yes, it's to the Minister of Justice –

**McGRATH J:**

I'm sorry, you said society and I think it's an official committee despite the composition of its membership?

**MR CARRUTHERS QC:**

20 Yes, that's right. Now, the first passage that I have referred to in my written submissions appears on page 142 of the casebook. Paragraph 6 at the bottom of the left-hand column and in the right-hand column to about the middle of that passage, "the end of the journey". I don't intend to read this material, I'm simply identifying it for you. The second passage that I have  
25 relied on from this report begins at page 144 in the right-hand column under paragraph 11 and it begins in the middle of that page, "We have approached this question" and runs on to the next page, 145 to the end of the first paragraph in the left-hand column, finishing with the words, "whether he must insure or not."

**TIPPING J:**

Is the essence of that submission, that the focus here is on who bears the risk?

**MR CARRUTHERS QC:**

5 Yes, yes, precisely, yes. That –

**TIPPING J:**

It's a risk bearing exercise, not a causation exercise?

**MR CARRUTHERS QC:**

That's right, it's not, it's not a causation exercise at all.

10 **WILSON J:**

It's really an allocation of risk.

**TIPPING J:**

Yes, allocation of risk, yes.

15 **MR CARRUTHERS QC:**

Yes and it meets that historical situation that I drew attention to, where there was really an endless chase to find out who actually caused the damage and that's why this committee said well, it needs a different approach. In paragraph 15 of my written submissions I've referred to two cases which have  
20 discussed the scheme and let me take you first to tab 5 which is the earlier case in time. I've referred to them in a different order in my submissions but this is *Fletcher Panels* where Justice Hillyer makes an analysis of the legislation and at page 233 between lines 5 and 15, he captures the essence of the case.

25

Then, just going back to *Transtext* under tab 4, Justice Hammond makes an analysis of the drivers for the legislation under paragraph 31, I'm in page 68 of the casebook, paragraph 31 and 32, he deals with the recommendations. Now, that takes me through to the Working Party Report and if I can take you  
30 to volume 2 of the appellant's authorities and just so that you see the constitution of this Working Party, if I can take you to page 252 of the volume,

you will see that 10 years on Mr Colin Patterson is still approaching this exercise in the same way as he and his committee did in 1968. Now –

**BLANCHARD J:**

Was this a report commissioned because the Bill which had presumably not  
5 been drafted by the original people, had gone into Parliament and was found to be unsatisfactory?

**MR CARRUTHERS QC:**

It certainly went through.

**BLANCHARD J:**

10 Because I notice it talks about, “The Carriage of Goods Bill introduced into Parliament during 1977 to advise upon the proposals set forth in that Bill and to consider a number of specific questions.” So presumably, there was dissatisfaction with the Bill?

**MR CARRUTHERS QC:**

15 Yes, yes, I think that emerges from the terms of – is Your Honour looking at the terms of reference?

**BLANCHARD J:**

No I’m looking, well, I’m looking at the first paragraph of this report, page 193.

**MR CARRUTHERS QC:**

20 Yes. If you go to page 253 under appendix A, you will find the terms of reference which spell out what the Working Party was committed to do.

**McGRATH J:**

The Working Party had to take into account to some extent, new international agreements didn’t they, the Hague-Visby Rules are mentioned somewhere.

25 I don’t know if that sort of factor had anything to do with the changes that were made.

**MR CARRUTHERS QC:**

Well, I’m not sure whether it had anything to do with the changes that were made because as at 1968, the Hague Rules were the – that was

the regime that applied then. Just excuse me for a moment. Yes, Hague-Visby did not formally become part of New Zealand law until 1994 with the passage of the Maritime Transport Act but Your Honour, there is – let me just pause for a moment. At this time, you are correct, the  
5 Hague-Visby Rules were being debated as were the Hamburg Rules and one of the reasons that I was taking you to page 252 was to identify the proponents, or to identify the membership of the Working Party and you'll recognise Mr Colin Patterson. Mr I M Mackay, that's another Ian MacKay, Ian Munro MacKay, I drew attention to P & I Services and he was the senior  
10 member of P & I Services and that organisation represented and represents in New Zealand, the international shipping clubs which are mutual clubs that carry the insurance risk internationally.

So, his experience has undoubtedly appeared in this which is why your  
15 question about the Hague-Visby Rules was germane because that was material that he was entirely familiar with. Similarly, Mr R L Whyte, Bob Whyte, was at that time the managing director of New Zealand Shipping, so again, you can see with Mr Patterson's background going back to 1968 with the membership he had there and with the membership here, you can  
20 see the influences that brought together what I've described as a code.

**McGRATH J:**

You're saying really there's more industry experience, 10 years on in 1978, than there was in the Contracts and Commercial Law Reform Committee –

25

**MR CARRUTHERS QC:**

Yes but not –

**McGRATH J:**

30 – which is primarily a legal committee?



**MR CARRUTHERS QC:**

Yes, not in any way criticising what was done in 1968 but just, you do have people who had a day by day experience of what the problems were with the pre-existing regime.

5

**BLANCHARD J:**

The 1968 people hadn't prepared a Bill, or had they?

**MR CARRUTHERS QC:**

10 No, I don't, I think that's correct, I don't think they had prepared a Bill –

**BLANCHARD J:**

Yes, so you have a combination of no Bill in 1968, plus 10 years' movement in the law?

15

**MR CARRUTHERS QC:**

That's right.

**BLANCHARD J:**

20 And a Bill gets introduced which isn't satisfactory, so they go back to a committee of experts to get advice?

**MR CARRUTHERS QC:**

25 That's the process that was followed and this was – this Working Party followed on from the submissions that were made to the Statutes Revision Committee on the Bill that was introduced.

**McGRATH J:**

30 So, one can surmise that the industry wasn't happy with the Bill, didn't think it was particularly the best solution, or workable, or something of that kind and they got a committee that instead of having them make submissions, had them with the majority of the membership?

**MR CARRUTHERS QC:**

Yes, yes but –

**ANDERSON J:**

5 But they didn't disagree with the basic approach of the '68 committee at all?

**MR CARRUTHERS QC:**

No, that was exactly the submission I was going to make, that –

10 **ANDERSON J:**

I'm just trying to find what page, page 119 –

**MR CARRUTHERS QC:**

Page 193 which is where I'm just drawing attention to, 193 through to 195 –

15

**BLANCHARD J:**

I'm right in thinking, aren't I – I'm sorry to keep interrupting, that the critical sections that we're concerned with, 6 and 16 in particular and also the definition of "carrier", were introduced by the Statutes Revision Committee

20

after getting this report? The answer to that I think –

**MR CARRUTHERS QC:**

Yes.

25 **BLANCHARD J:**

– is yes –

**MR CARRUTHERS QC:**

Yes, it –

30

**BLANCHARD J:**

– provided I check the date of that report because I've got the version as reported back in front of me. No, actual – yes, yes, in fact it's almost a year later that the Bill gets reported back, with those new provisions in it.

**MR CARRUTHERS QC:**

Yes.

5 **ANDERSON J:**

The recommendations start at page 260, recommendations of amendments to the Bill.

**MR CARRUTHERS QC:**

10 Yes, appendix F, yes. The passage that I have quoted in my written submissions appears at page 198 of the bundle at paragraph 12. Your Honours, that brings me to this issue that exercised the Court of Appeal in various ways and that is this concept of actual carrier and possession and, on the analysis that I have made of the legislation, there is no need for me to  
15 revisit that issue at all. In fact, my submission is that that is an irrelevant enquiry because one's not concerned here with the actual carrier at all and the question of possession doesn't arise at all. If there's anything that emerges from my learned friend's submissions that requires me to deal with those issues, I'll deal with them in reply.

20

My submission in relation to the Court of Appeal judgment is this. I have made an analysis in my written submissions, I'm not going to take you back to that but the short point in my submission is that the Court of Appeal has failed to focus on the scheme of the Act and identify the way in which the Act  
25 allocates responsibility and it is that short point that makes the discussion and analysis by the Court of Appeal as being an error, in my submission.

**BLANCHARD J:**

Are you able to pinpoint where you say the Court of Appeal went off the rails?

30

**MR CARRUTHERS QC:**

In the Court of Appeal judgment?

**BLANCHARD J:**

Yes.

**MR CARRUTHERS QC:**

5 Yes, I can, just bear with me for a moment.

**ANDERSON J:**

Para 41 might be of some help, do you think Mr Carruthers?

10 **MR CARRUTHERS QC:**

I beg your pardon Sir?

**ANDERSON J:**

15 Para 41. They focus on the question of whether Ports of Auckland was an actual carrier.

**MR CARRUTHERS QC:**

Yes, yes. I was just looking at the way in which I've dealt with it in my written submissions and –

20

**BLANCHARD J:**

Well, in paragraph 28, they appear to be concentrating on fault?

**MR CARRUTHERS QC:**

25 Yes, in paragraph – I begin at paragraph 19 Your Honour. You'll see that, in 19, that that is an analysis of fault rather than contractual responsibility at the time. Then, correctly at paragraph 28 which I've dealt with in paragraph 56 of my submissions, that that analysis also overlooks the particular roles of the contracting carrier and the actual carrier have. Then  
30 in 32, again we just come down to a debate as to the meaning of the word liable as such and really there's no answer to the proposition that if a carrier, as defined as acting in the capacity of a carrier, then the exemption applies.

**McGRATH J:**

Is it fair to say the Court of Appeal is looking, when it's trying to decide on liability "as such", at the circumstances in which the damage occurred –

5 **MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– rather than and you would say, wrong question?

10

**MR CARRUTHERS QC:**

Yes, exactly, yes. It is an analysis that the legislature has deliberately put to one side and said no, we need to have a certainty and a scheme that allocates risk.

15 **TIPPING J:**

On that –

**MR CARRUTHERS QC:**

Allocates responsibility.

**TIPPING J:**

20 On that Mr Carruthers and I don't think I appreciated the significance of this before but just having had the benefit of hearing you, section 8 that talks about different types of contract of carriage, all seems to be focused on the concept of risk, risks of different kinds, owners' risk, limited carriers' risk, declared value risk and declared terms which has an inherent risk element.

25 Now, does that support this argument of yours, that really what this Act is about is allocating risk rather than concentrating, rather than making things determined on how the damage has occurred?

**MR CARRUTHERS QC:**

Well yes it does, it does support my analysis.

30

**TIPPING J:**

It's the terminology that struck me more than anything else that this does seem to underline the, for us if you like and it's quite new because there's no comparable reference material at the end of this section.

5 **MR CARRUTHERS QC:**

No.

**TIPPING J:**

10 It's quite new and it does seem to have, picks up sort of industry practice if you like, of certain shorthand phrases and carries them into the Act, underlining perhaps the, this very point, that it's a risk assessment or a risk allocation?

**MR CARRUTHERS QC:**

Yes.

**TIPPING J:**

15 I'm repeating myself.

**MR CARRUTHERS QC:**

And what's important about it, about that analysis too, is that it emphasises the contractual based nature of the way in which the responsibility is allocated.

20 **TIPPING J:**

And of course, as section 8 itself makes clear, provided the parties are freely negotiating and so on, they are able to define their own risk allocation?

**MR CARRUTHERS QC:**

Yes, yes.

25 **WILSON J:**

I think also, linked very much to the question of allocation of risk, is the point you make in your written submissions of the value of having a clear and certain basis on which owners and carriers can make their insurance arrangements?

**MR CARRUTHERS QC:**

Yes and you will recall that from the, from reading both of the reports that, that is an –

5 **WILSON J:**

Yes, indeed.

**MR CARRUTHERS QC:**

– underlying driver of the concept that they were promoting. Your Honour Justice Blanchard, I'm not sure that I have been of as much help in relation to  
10 the Court of Appeal's judgment as I might have been but I can say that I have gone through that with some care in my written submissions.

**TIPPING J:**

Was the argument put to the Court of Appeal broadly to the same effect –

**MR CARRUTHERS QC:**

15 Oh, it was.

**TIPPING J:**

– as is being put now?

**MR CARRUTHERS QC:**

It was, it was.

20 **TIPPING J:**

Because one wouldn't really, with respect, sort of see it coming out very clearly in the discussion in the Court of Appeal?

**MR CARRUTHERS QC:**

No and I can say also that the same argument was put to the trial Judge who  
25 had a rather clearer view of just the way in which the Act, the –

**WILSON J:**

The High Court Judge.

**MR CARRUTHERS QC:**

The High Court Judge I'm sorry, not the trial Judge, the High Court Judge.

**BLANCHARD J:**

5 My attention was actually attracted when I was reading it to paragraph 45  
which seemed to me to contain a mis-statement in its second sentence when  
it says that, "Section 16(2) cannot apply since POAL was not a carrier acting  
as such in respect of Southpac Trucks" but that's not what section 16(2) says.  
The "as such" relates to acting as an employee.

**MR CARRUTHERS QC:**

10 As an employee, yes.

**TIPPING J:**

Well they may have, sort of – I think it was that that was causing me to be the  
devil's advocate Mr Carruthers, a few minutes ago.

**MR CARRUTHERS QC:**

Yes.

**BLANCHARD J:**

And, if I understand you correctly, you're not attempting to support,  
at least as this stage of your argument, the basis upon which  
20 Justice Baragwanath dissented?

**MR CARRUTHERS QC:**

No, I don't need to, I don't need to really deal with that issue at all. I have in  
my written submissions just drawn attention to one passage in  
Justice Baragwanath's decision with which I do disagree and it's counter – it's  
25 contrary to the argument that I have been making. Let me just identify that for  
you so it's clear. Yes, at paragraph 83. If I can take you to page 154 of the  
case at paragraph 83, where His Honour says, "While not expressly stated, I  
consider that the careful definition of the respective liabilities of contracting  
carrier and actual carrier exclude any argument that section 6 could exonerate  
30 Ports if it was neither of those. It would be inconsistent with the scheme of the  
measure for a third class of carrier, not entitled to the \$1500 limit of the



contracting carrier or falling within the other carefully defined specific class of actual carrier, to receive the protection of section 6.” With respect, I disagree with that.

**TIPPING J:**

5 His Honour, with respect, has got things the wrong way round.

**MR CARRUTHERS QC:**

Exactly, exactly. It started –

**TIPPING J:**

– it’s out unless you’re brought back in.

10 **MR CARRUTHERS QC:**

Yes, yes, that’s right and that’s –

**TIPPING J:**

And his question at the beginning of a heading to that paragraph demonstrates that extremely –

15 **MR CARRUTHERS QC:**

Yes, but –

**TIPPING J:**

– elegantly, as His Honour might himself have said.

**MR CARRUTHERS QC:**

20 Just in response to Your Honour Justice Blanchard, I do agree with the Judge’s analysis of possession but, as you’ll appreciate from the way in which I’ve put the case orally, that simply doesn’t arise on my analysis.

**BLANCHARD J:**

You’re going to avoid that quicksand?

25 **MR CARRUTHERS QC:**

Ah, no, I’m actually quite happy to face up –

**TIPPING J:**

Well, I don't think we should get into it Mr Carruthers because –

**MR CARRUTHERS QC:**

Well, I don't propose to –

5 **TIPPING J:**

– with respect, I'm not sure that I'm entirely comfortable but if we don't have to go there, don't lets.

**MR CARRUTHERS QC:**

10 No, I don't need to take you there for a moment but if you tempt me to take you there, I'm quite happy –

**TIPPING J:**

You will support it.

15 **MR CARRUTHERS QC:**

– to lock horns on that issue.

**TIPPING J:**

Yes, well no, not this time Mr Carruthers, not this time.

**MR CARRUTHERS QC:**

20 Well, may it please Your Honours, those are my submissions in support of the appeal.

**BLANCHARD J:**

Thank you Mr Carruthers. Yes, Mr Smith?

25 **MR CARRUTHERS QC:**

Your Honours, I'm sorry, there's one point I should have just mentioned. In my learned friend's bundle, there's a case of *Fatialofa* which was reported at first instance. That case did actually go on appeal and I have handed the registrar a copy of the decision on appeal. It's not something that I need to  
30 deal with except that the Judge on appeal, Justice O'Regan, records parties in

that case were agreed that this was a code and interestingly, as my learned friend will explain, he was arguing that case to try and avoid the implications of the section – a familiar position for him.

**MR SMITH:**

5 Yes, may it please Your Honours, if I might just summarise the essence of Southpac’s case in response, at least in commencing. Regardless of whatever carrier status Ports may have had in relation to the truck, when it was acting through the forkhoist driver, Southpac’s case is and has been throughout, that it was acting, Ports of Auckland was acting in a discreet  
10 non-carrier capacity, at least with respect to the truck. In that capacity, Ports does not fall under the protection of section 6 and therefore it’s liable to Southpac as any other stranger to the contract of carrying the truck would be. If there were to be a wholesale protection of carriers, no matter what task they were performing or what capacity they were acting in, it might expect the Act  
15 to say so but section 6 does say that, “no carrier shall be liable as such”.

If Ports were correct in its submission, then the words “liable as such” or “as such” would drop out. No carrier shall be liable, whether in tort or otherwise, would be perhaps a better definition if that were the case. I think  
20 it’s, to say that in the facts of this particular case, that Ports’ status as a carrier allows it to escape the negligence of its driver doing an unrelated task, perhaps takes the ambit of the Act too far. I’ve set out in my written submissions some examples in relation to that which I won’t, obviously, take Your Honours through, although I note that in various cases it  
25 was considered that carriers who were acting outside the ambit of the contract of carriage were considered liable in some other way and that’s the essence I suppose of Southpac’s position. *Auckland Wool Dumpers Limited v Melco Sales (New Zealand) Limited* is in the bundle, the respondent’s bundle of authorities at tab 2. There’s also a decision of *Sofrana* which is a first  
30 instance decision, again of Judge Joyce QC.

**WILSON J:**

Mr Smith if, on your argument and just assume hypothetically that the driver of the forklift had been an employee of Wallace, would the Act have applied?

5 **MR SMITH:**

Well, I think for the same reasons as I say Ports is liable for the act of its employee, I would say the Act wouldn't, no.

**WILSON J:**

10 It has to follow, doesn't it, in your argument?

**MR SMITH:**

Yes, that's right. Just returning to *Wool Dumpers v Melco*. The High Court in that case acknowledged that, "In some cases carriers may not be acting as  
15 such and therefore would not be liable as such" and certainly as I understand the facts of that particular case, the argument put by *Wool Dumpers* was that the whole of the, there was a contract, there was a carriage contract for the movement of the goods within New Zealand. That contract was stayed if you like and factually the District Court and the High Court was prepared to hold  
20 that in those circumstances that became constituted to bailee, notwithstanding that there was an overarching carriage contract in place. My learned friend –

**TIPPING J:**

Is the essence of your argument that simply because you fulfil the definition of  
25 a carrier, doesn't mean you are liable –

**MR SMITH:**

That's correct Sir.

30 **TIPPING J:**

– for some extraneous, to use a – for some conduct which is not related to the contract of carriage upon which you're embarked, is that –

**MR SMITH:**

That is correct Sir, yes.

**TIPPING J:**

- 5 But what about – there does seem to be quite a lot of material, both in the Act and in the predecessors to the Act, that suggest that, to borrow the same terminology, this was a risk allocating exercise rather than a fault or causation based exercise and it simply, however it happens, you're liable but only up to a certain amount and the protection is part of the risk allocation mechanism.
- 10 That's really the crunch point against you, as it's emerged.

**MR SMITH:**

Yes and Your Honour referred to section 8, referring to owner's risk limited –

15 **TIPPING J:**

Well, only as a sort of passing. It's just part of the landscape so to speak.

**MR SMITH:**

- 20 That's correct but those – section 8, those contracts, the types of contract of carriage, the risk that's being allocated is in respect to those contracts of carriage. My argument is that this is nothing, there's no risk relating, there's no allocation of risk here. The contract is the contract but we're looking at a set of facts which are outside that particular contract.

25 **WILSON J:**

- Just on that point. I've just been reflecting further on the hypothetical I put to you, where you acknowledge that if the driver of the forklift had been an employee of Wallace, Wallace wouldn't have got the protection of the Act but just to pursue that hypothetical a little further. If you'd sued the contracting carrier and the contracting carrier had then looked to Wallace as clearly an
- 30 actual carrier for contribution, would that leave Wallace in the position of being liable under the Act without having any protection under the Act?

**MR SMITH:**

No, he'd still be liable in respect of the contract that he had with the contracting carrier. The way in which the scheme allocates it under section 10 would mean that there'd be a reallocation if you like between Wallace and well, in this case CP Ships or Axis Intermodal.

**WILSON J:**

But doesn't section 10(2) say that, "The actual carrier will be liable to the contracting carrier while the actual carrier is separately responsible, whether or not the loss or damage is caused wholly or partly by the actual carrier"?

**MR SMITH:**

While the actual carrier is separately responsible for the goods in accordance with subsection (6)?

**TIPPING J:**

Yes, that makes the actual carrier an insurer in effect, vis a vis the contracting the carrier, during the period of the actual carrier's responsibility? This is where this – there's a quasi element of insurance here.

**WILSON J:**

Statutory insurance.

**TIPPING J:**

Statutory insurance.

**MR SMITH:**

Yes and –

**TIPPING J:**

It is in effect argued against you and what troubles me Mr Smith, with your argument is this, if you look at page 194 of the second, the bigger Patterson report if I may so describe it, 194, or it starts at the bottom of 193 and they're summarising the work of the previous committee and one of the

recommendations they pick up from the previous committee is, “(e) That liability for loss of or damage to goods during carriage should lie where the balance of convenience places it irrespective of fault” and that leads me to think and I don’t think they dissented from that, in fact I think they supported it,  
5 that leads me to think that what they were trying to do here was to make people insurers of the goods with the cap, with the \$1500 cap, on the terms of the Act and that how it happened was really not their concern.

**MR SMITH:**

10 Sir, I have no problem with that as a concept.

**TIPPING J:**

I would have thought you would have to have some problem with that in order to make headway against the argument against you?

15

**MR SMITH:**

Well, no Sir because I say it’s, like *Melco*, it’s completely outside the carriage contract. The statutory insurance scheme only relates to where you’re acting as a carrier, where you’re liable as a carrier. In this case we, Southpac, seeks  
20 to hold Ports liable as a negligent motor vehicle driver.

**TIPPING J:**

As if he was simply a stranger on the wharf –

25 **MR SMITH:**

That’s correct Sir.

**TIPPING J:**

– driving a car?

30

**MR SMITH:**

That’s correct Sir because to all intents and purposes he was.

**TIPPING J:**

Well is that really right? He was just part of the general wharf operation that was going on under the broad aegis of Ports of Auckland's activities. Isn't this just one of the risks –

5

**MR SMITH:**

My understanding –

**TIPPING J:**

10 – of carriage –

**MR SMITH:**

Sorry.

15 **TIPPING J:**

– that someone on the wharf is going to collide with your truck? You have to accommodate the complete stranger, obviously because otherwise, there's got to be a line somewhere but this chap wasn't a stranger to the contract, was he? I mean he was employed by the very body that was the carrier.

20

**MR SMITH:**

Well he was in the sense that he was not doing, he was doing an unrelated task to the contract of carriage that's in question which is covered by the Act.

25 **TIPPING J:**

Well that's the crunch, isn't it?

**MR SMITH:**

Yes.

30

**TIPPING J:**

Is the fact that the task was unrelated to the carriage of these goods.



**MR SMITH:**

My understanding is that's always been –

**TIPPING J:**

5 Yes, quite.

**MR SMITH:**

I was not counsel in the first instance but it was my understanding that that was always the position. This is a completely unrelated task, the forkhoist  
10 driver was driving a completely separate carriage, as far as I understand, with a container –

**TIPPING J:**

He was carrying some timber on his forklift.

15

**MR SMITH:**

That's right, yes.

**McGRATH J:**

20 It all comes down, I suppose, to the breadth of "liable as such", doesn't it?

**MR SMITH:**

Correct Sir.

25 **McGRATH J:**

I mean, your argument is that your view of outside the scope of carriage is really, it doesn't fit within the words "liable as such" –

**MR SMITH:**

30 In essence, yes.

**McGRATH J:**

– that's what we have to interpret in the end?

**MR SMITH:**

Yes.

**TIPPING J:**

5 Does the “as such” mean as the carrier of these goods, of the goods in question?

**MR SMITH:**

10 In my submission, that’s all it could be related to. I mean because this is the contract that we’re talking about.

**TIPPING J:**

15 So it’s not the four corners thesis that Mr Carruthers, my language but his thesis, “as such” is designed to look at the goods that are the subject of the carriage. If you damage them, if you like, when performing that contract, you’re liable with the cap but if you damage them not performing that contract but coincidentally, if you like, you don’t have the benefit of the cap?

**MR SMITH:**

20 That’s correct. I would say rather than confine it to the goods, it’s relating to that particular contract. You’re doing something –

**BLANCHARD J:**

25 It doesn’t fit very well with section 16(2) does it?

**WILSON J:**

And also section 10(2). In the case of an actual carrier, I don’t see how you can harmonise that thesis with the words of section 10(2).

**COURT ADJOURNS: 11.31 AM**

**COURT RESUMES: 11.50 AM**

**BLANCHARD J:**

Thank you.

5

**MR SMITH:**

Thank you Sir. Before the break, you were quizzing me in relation to “liable as such” in relation to section 6, section 10 and section 16. The references in the section 2 definitions for actual carrier and carrier which define the liability “as such” relate to a party who performs, well in the relation of a carrier, “Carries or procures to carry the goods including an incidental service, performs or procures to be performed, or in the case of an actual carrier party who was in possession of the goods for the purpose of performing the carriage or any stage of it.” I think my submission, in its barest form I suppose is that, if you’re not performing incidental service, or not carrying the goods in question as the carrier, you’re not liable as such in respect of the goods or that contract, you’ve got a different hat on. In this case, it’s the driver of the forkhoist who is carrying something completely different, performing presumably a different carriage and therefore seeking to hold him liable, or his employer liable, is not liable as such.

15  
20

**TIPPING J:**

But the definition of carrier is generic, whereas the definitions of actual and contracting carrier are more specific to the goods in question. I think the problem perhaps is that carrier is deliberately designed as a definition, to be descriptive of a type of person if you like, rather than a person who happens to be carrying these particular goods. Or do you wish to take issue with that proposition?

25

**MR SMITH:**

Well, whilst the definition may be a generic one, that doesn’t afford, I would say Sir, the protection of the Act to Ports on these particular facts because it’s not liable as that carrier, it’s liable as something completely different, or it’s

30

unrelated or random activity, well random in the sense of being unrelated to the task that it was doing which was driving the forklift.

**TIPPING J:**

5 But if you're operating a wharf and you have a variety of activities going on on that wharf, one of which is people zooming around with forklifts and one of them happens to damage the goods that you're at the moment engaged in carrying, you're one and the same person. This is quite without prejudice to the argument, if you like, who caused it, whose fault it is, is really nothing to  
10 the point. I can understand if it was a completely unrelated carrier. Say I'm an unrelated carrier, I'm a little carrier who goes around Auckland carrying things and I carry something on to the wharf and I bang into this truck negligently, then you may have a stranger argument. Equally, if I'm driving my own car on to the wharf for some business and I collide with the truck  
15 negligently, then I'm a stranger to the contract but Ports of Auckland are the carrier and as part of their activities on the wharf, they're working this forklift and it damages the truck.

**MR SMITH:**

20 I think that's – well, my answer to that Sir would be that Ports is a wharf operator but in doing so, it operates a myriad of contracts, a myriad of acts, a myriad of tasks. The argument that my learned friend is advancing is that no matter what task it's related, it's doing, Ports at any one time, in relation to any myriad of different contracts –

25

**TIPPING J:**

But isn't that why this whole Act was put in place, to try and sort out all this myriad of tasks thing and having to try and work out who did what to who at what time?

30

**MR SMITH:**

I'm sure that's correct Sir, although in these particular circumstances, Ports is still a stranger to the contract to the particular carriage of Southpac's truck.

**TIPPING J:**

Well, I can see an argument for you being a stranger if you're not a carrier at all and you collide with the truck, or you are a completely unrelated carrier just driving along the wharf to put something somewhere but I would have thought  
5 the Act was designed to draw the line there, not where you are the carrier and you are also carrying out incidental work around the wharf and you happen to bang into the truck.

**MR SMITH:**

10 But that incidental work is in relation to completely different acts, completely different tasks.

**TIPPING J:**

I know but surely that is a much clearer demarcation line as to  
15 what constitutes a stranger, to use your helpful term, to the contract. Ports of Auckland are not a stranger to the contract, they are donkey deep in the carriage.

**MR SMITH:**

20 They are a stranger in the sense of the forkhoist driver's activities which is what I've been focusing on.

**BLANCHARD J:**

Well what if, if Ports was the actual carrier and their unrelated driver going  
25 about some other business for Ports drove into the truck, there'd be coverage under the Act. I can't see why it should make any difference that instead of actually doing the carriage themselves, Ports have procured it. It's as if Mr Ports was standing on the edge of the wharf saying, please drive that truck to that warehouse. They're not a stranger in this kind of context and if they  
30 are it leaves a very strange gap in what was intended to be, on my reading, a seamless construction which would eliminate liability beyond \$1500 and then place that liability only on the contracting and actual carriers.

**MR SMITH:**

I'm not sure I can advance my argument any further Sir, other than to –

**TIPPING J:**

5 Well, without wishing to –

**MR SMITH:**

– for the sake of repetition, yes.

10 **TIPPING J:**

– be adding to your difficulties Mr Smith but if it's an actual carrier, that actual carrier is liable to the contracting carrier, isn't he, irrespective of whether he has actually caused the loss at the time and that, your argument seems to me to be inconsistent with that, I think that was Justice Wilson's point to be fair, inconsistent with what your argument is now inviting us to hold. There they've made it express, "whether or not the loss or damage is caused wholly or partly by the actual carriers or any of them", I'm looking at the plural one but it's the same for the singular one.

20 **MR SMITH:**

I suppose the answer, in my written submissions Your Honour, was that the difference between an actual carrier and a carrier is that the actual carrier is in possession. That makes a difference to the way in which the Act has been constructed in the scheme of the Act.

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**WILSON J:**

That's why I put the Wallace hypothetical to you earlier in your argument and I understood you to acknowledge that there was no material difference there.

30 **MR SMITH:**

But Wallace would have been the actual carrier in that particular situation?

**WILSON J:**

Yes, yes, indeed, that's what I put to you.

**TIPPING J:**

5 I don't think liability was intended, or this Act was intended to have subtle distinctions as to possession and constructive possession and all that stuff, quite frankly.

**MR SMITH:**

10 Well, I certainly –

**TIPPING J:**

There's nothing in the materials that suggests that and it's pulling quite a long bow, in my humble view and I don't want to provoke Mr Carruthers in a reply  
15 but seeing as how we're now sort of debating this particular facet of it...

**MR SMITH:**

Well, in my written submission Sir, I've gone through the arguments in relation to the scheme of the Act and the focus on bailment and possession.  
20

**TIPPING J:**

What I'm looking for you and I don't wish to press because that would be unfair but at the moment I can see inconsistency with the actual carrier regime, vis a vis their liability to the contracting carrier and the submission  
25 you're now making. Now, if you feel unable to pursue the point any further that's fine but I just thought it's a very important contextual issue for us.

**MR SMITH:**

Sir, I'm not certain I can add anything further other than is in my written  
30 submissions.

**TIPPING J:**

Thank you, no, no that's fine, that's fine. You can't do better than what ammunition is available to you.

**MR SMITH:**

Well, other than what is – I have adopted what’s in my written submissions, there were some points my learned friend made in respect of the scheme of the Act. I’m not certain actually that there’s anything further I could say in  
5 respect of that, other than to rely upon what’s in those submissions. So, unless Your Honours have questions for me?

**ANDERSON J:**

10 For my part, I’ve found your submissions very clear and well structured. Now whether you can advance them beyond that?

**MR SMITH:**

Those are my submissions in reply Your Honours. Is there any further  
15 questions?

**BLANCHARD J:**

Thank you Mr Smith. Mr Carruthers, do you wish to be heard in reply?

**MR CARRUTHERS QC:**

20 Are there any issues that Your Honours want me to deal with in reply? My own position is that I would be repeating really the analysis that I’ve already made, so unless there are specific matters that you want me to deal with, I don’t wish to reply.

25

**BLANCHARD J:**

Well, I found Mr Smith’s submissions in relation to “actual carriers” fairly convincing but we don’t appear to need to get in to that.

**MR CARRUTHERS QC:**

30 No, with respect, on my analysis you don’t need to get in to that.



**BLANCHARD J:**

Thank you Mr Carruthers. Thank you counsel. It's a very interesting case and we will of course be reserving our decision.

**COURT ADJOURNS: 12.01 PM**