IN THE SUPREME COURT OF NEW ZEALAND

SC 18/2009
[2009] NZSC 112

	BETWEEN	PORTS OF AUCKLAND LIMITED Appellant
	AND	SOUTHPAC TRUCKS LIMITED Respondent

Hearing: 6 October 2009

Court: Blanchard, Tipping, McGrath, Wilson and Anderson JJ

Counsel: C R Carruthers QC and G Mercer for Appellant
P M Smith for Respondent

Judgment: 30 October 2009

JUDGMENT OF THE COURT

A The appeal is allowed and the judgment of the High Court is restored.

B The appellant is awarded costs of $15,000 in this Court together with its reasonable disbursements as fixed by the Registrar. The costs order in the Court of Appeal is reversed.

REASONS

(Given by Blanchard J)

The purposes and principles of the Carriage of Goods Act

[1] The Carriage of Goods Act 1979 came into force on 1 June 1980, nearly 30 years ago. Although it must govern thousands of carriages of goods every working day, such was the quality of the work which produced the legislation that it has required little in the way of amendment and this appears to be a rare instance in

which litigation on the interpretation of the Act has needed to come even as far as the Court of Appeal.

[2] Until the purposes of the Act are properly understood the intended operation of specific provisions may not be fully appreciated. Once they are understood, the Act can be seen to present an elegant and clearly expressed solution to the mischiefs which it was addressing. These are discussed in the *Report of the Contracts and Commercial Law Reform Committee*[1] presented to the Minister of Justice in 1968. The Committee explained that at common law carriers were liable for any loss of or damage to the goods entrusted to them except where it was caused by an Act of God, the Queen's enemies, inherent vice in the goods or the fault of the consignor. Gresson P had described the liability in *Campbell v Russell*[2] as being, first, "the almost absolute liability as a common carrier needing neither contract nor the existence of negligence to support it" and, secondly, liability for the negligence of the carrier's servant – "the vicarious liability which frequently arises between principal and agent, master and servant, etc." But by contract and statute such liability had been made subject to certain defined limitations. Having recommended that the distinction between common and private carriers[3] should be abolished, the Committee said that it approached the question of the basis on which carriers should be liable:[4]

> in the knowledge that every carriage of goods involves the risk of loss of, or damage to, the goods carried and that, in part at least, our function is to recommend where that risk should lie in any given case.

[3] The Committee acknowledged that the common law had allocated the risk of loss on the basis partly of fault and partly of strict liability. But, the Committee said, whatever its justification in the past, the use of the fault principle for this purpose had serious disadvantages. "It encourages unnecessary litigation, it leads to difficulties of proof and it is uncertain in its application."[5] The Committee continued in a passage which is key to an understanding of the 1979 reforms and which was

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1 *Carriage of Goods: Report of the Contracts and Commercial Law Reform Committee of New Zealand* (April 1968).

2 [1962] NZLR 407 (CA) at p 412.

3 A common carrier was somebody who undertook to carry for anyone on request; a private carrier carried for particular persons only.

4 At para 11.

5 At para 11.

quoted by the Minister of Justice, the Hon David Thompson, who said in moving the first reading of the Bill that it implemented the Committee's recommendation:[6]

> We would prefer that in a commercial transaction like a carriage of goods, the risk should lie where the balance of convenience places it. Since the risk of loss or damage is readily insurable, the question becomes one of which party should be expected to effect insurance.

The Committee said that once this approach was accepted several consequences followed:

> Within certain limits, it is more convenient that the carrier shoulder the risk but, for insurance purposes, it is necessary that absolute upward limits should be placed on his liability. Equally, it is desirable that those upward limits be placed at a point beyond which it is reasonable to expect the goods owner to take out insurance cover for himself. By the same reasoning, the carrier's liability should be absolute up to the given limit (which means an end to the old distinction between common and private carriers) but should cut out completely beyond it. Similarly, where goods for carriage may be accumulated in cargo containers, it is necessary for the goods owner to know beforehand whether he must insure or not.
>
> Finally, convenience requires that a new claims procedure be adopted, and acceptance of the insurance principle makes this easier to achieve.

[4] Although over 10 years were to elapse before the Committee's work bore fruit it is plain from the legislative history, including a further report from a working party[7] commissioned by the Select Committee on the Bill comprising trade and insurance representatives well-known for their experience and expertise and chaired by a prominent commercial lawyer, Mr Colin Patterson, who had been the Deputy Chair and signatory for the Contracts and Commercial Law Reform Committee, that the principles recommended in the 1968 Report were adopted in the 1979 Act. They are conveniently stated by the working party at paragraph 2 of its report dated 14 November 1978 and include:

> (a) That a common set of rules should be enacted relating to the liability of all domestic carriers, whether by land, sea, or air, extending to bailments incidental to contracts of carriage.
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> (b) That the distinction between "common" and "private" carriers should be abolished.

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6 At para 11.

7 *Report of the Working Party on the Carriage of Goods Bill 1977* (14 November 1978).

(c) That the new rules should apply to all who contract to procure contracts of carriage, whether or not they take any part in the carriage itself.[8]

...

(e) That liability for loss of or damage to goods during carriage should lie where the balance of convenience places it, irrespective of fault.

...

(g) That the rights of action against carriers should vest in the consignor and consignee, notwithstanding the absence of privity of contract.

...

(i) That there should be a limitation upon a carrier's liability related to the package or unit tendered by the consignor.

The Act must be read with those principles firmly in mind and with regard also to its long title, which shows that its purpose was "to restate and reform the law relating to the carriage of goods within New Zealand."

The scheme of the Act

[5] We briefly describe the main features of the Act. We must later discuss some of these in more detail. The Act defines a carrier quite widely to include persons who procure carriage of goods but do not themselves do the work of carriage. It removes the common law liability of someone acting as a carrier (as defined). Section 6 says that, notwithstanding any rule of law to the contrary, no carrier is 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 the Act or (b) where the carrier intentionally causes the loss or damage. The common law liability is replaced with a statutory limited liability[9] for two particular types of carrier, namely:

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8 The Law Reform Committee had given the examples of forwarding agents and freight consolidators to whom goods are delivered for carriage but who do not themselves carry.

9 Section 15. This is known as carriage at limited carrier's risk: s 8.

(a) The carrier who makes a contract of carriage with a consignor or consignee (the contracting carrier);[10] and

(b) The carrier who is in possession of the goods when they are lost or damaged (the actual carrier).[11]

The liability of contracting and actual carriers is then limited to $1,500 for each unit of goods[12] unless the contract of carriage expressly provides for a greater level of liability.[13] Contracting out is permitted,[14] but the contract must nevertheless be one of the four types specified in s 8(1). These include a contract of carriage at the owner's risk, in which case the provisions imposing liability do not apply.

[6] A contracting carrier has "responsibility for the goods" and thus has liability for them in terms of the Act from the time when they are accepted for carriage until tender of delivery to the consignee or collection by the consignee.[15] An actual carrier is liable to the contracting carrier for loss or damage to the goods while "separately responsible" for them.[16] A contracting carrier and an actual carrier have that (limited) liability whether or not the loss of or damage is caused by them in whole or in part.[17] Responsibility, and the consequences flowing from it, are different from and not dependent on causation of loss or damage, i.e. fault.

[7] Other important features of the Act are that an owner's claim must be made only against the contracting carrier, who in turn can claim against the actual carrier, in either case with the $1,500 per unit limit applying unless the contract of carriage

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10 Section 9.
11 Section 10.
12 Defined in s 3. The onus of proof that a carrier has this statutory protection lies on the carrier: *Wolters Cartage Ltd v W D & H O Wills (NZ) Ltd*, (unreported, CA 160/91, 17 February 1993, Casey, Hardie Boys and McKay JJ) at p 8.
13 Where the contract of carriage is not one of the other kinds of contract specified in the Act (owner's risk, declared value risk, or declared terms) the carriage is deemed to be at limited carrier's risk: s 8. Under s 14, which is an overriding provision, a carrier has no liability for loss or damage to the extent the carrier proves that it resulted directly and without fault from certain causes, including inherent vice, which have no present relevance.
14 Section 7.
15 Section 9.
16 Section 10(2).
17 Sections 9(1) and 10(2).

says otherwise.[18] Claims for damage or partial loss must be notified within specified periods[19] and proceedings must be brought within 12 months.[20]

The facts

[8] Against that framework, it is necessary to consider the facts of the present case, which are not in issue. The goods the subject of the carriage were a Kenworth truck[21] being transported from the factory of its Australian supplier to a New Zealand purchaser, the respondent, Southpac Trucks Ltd. The supplier was the consignor under a contract of carriage made with the shipping company, Australia New Zealand Direct Line, a division of CP Ships (UK) Ltd, which was accordingly the contracting carrier. Property in the truck having passed to Southpac, the right of action under the contract also vested in it as consignee.[22]

[9] CP Ships engaged the services of a business unit of the appellant, Ports of Auckland Ltd (POAL), to discharge the truck from the ship on which it had come to Auckland and to transfer it to a storage area on POAL's wharf. POAL subcontracted that work to Southern Cross Stevedores Ltd which in turn further subcontracted it to Wallace Investments Ltd. It was after the truck had been driven off the ship and onto the wharf by an employee of Wallace, i.e after discharge,[23] that it was involved in a collision with a fork hoist being driven by an employee of POAL, on business unrelated to the carriage of the Kenworth but within the scope of his employment by POAL. It is common ground that the POAL driver was negligent in failing to keep a proper lookout and exercising insufficient care so as to avoid the collision. The repairs needed to the truck cost $60,201.64.

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18 Sections 15.

19 Section 18.

20 Section 19.

21 It constituted one unit of goods.

22 If the property in the goods has passed to the consignee and that person is not the contracting party, the action against the contracting carrier may be brought by the consignee: s 20(1).

23 The Act does not apply to "international carriage", which, in relation to carriage of goods by sea, ends when goods are discharged from a ship: s 2. The parties were agreed that discharge had been completed. At that point the responsibility of the contracting carrier began under the Act: s 9(7).

The proceeding

[10] Southpac, or probably its insurer, having apparently made no claim under the Act against CP Ships as contracting carrier, has brought this proceeding directly against POAL seeking damages for the negligence of its employee. It says that in circumstances where POAL was neither a contracting carrier nor an actual carrier in relation to the goods at the time the damage was caused, the provisions of the Act removing or limiting liability do not apply. In particular, it says that is so because it is not endeavouring to sue POAL *as a carrier "as such"*. It says the employee's negligent conduct had nothing to do with arrangements for the carriage of the truck and that the Act protects a carrier only where loss of or damage to goods occurs as a result of something done by it in the capacity of carrier of the goods in question.

[11] The Courts below have differed in their response to this argument.

The District Court judgment

[12] POAL brought an application for a defendant's summary judgment. In the District Court[24] at Auckland, Judge Joyce QC concluded that POAL was not at the time of the accident an "actual carrier" because that term did not include an entity which simply procured another to perform a part of the carriage.[25] Nor was it a "contracting carrier", for it had not entered into a contractual relationship with the consignor. It did, however, come within the definition of "carrier" in s 2:

> **Carrier** means a person who, in the ordinary course of his business, carries or procures to be carried goods owned by any other person, whether or not as an incident of the carriage of passengers; and, except in sections 21 to 24 of this Act, includes a person who, in the ordinary course of his business, performs or procures to be performed any incidental service in respect of any such goods.

POAL had, the Judge said, procured another (Southern Cross Stevedores which had in turn procured Wallace) to perform an "incidental service" in respect of the truck:

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[24] *Southpac Trucks Ltd v Ports of Auckland Ltd*, (unreported, CIV 2004-004-003246, 16 September 2005).

[25] At para [28].

> **Incidental service**, in relation to any 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 the goods pursuant to a contract of carriage.

[13] Judge Joyce then referred to a central provision of the Act, namely s 6:

> **6 Other remedies affected**
>
> 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.

He asked himself what liability a mere carrier (one who is not an actual or a contracting carrier) has under the Act, concluding that there were but a few situations where a mere carrier was so liable, and that none of them applied in the present case.[26] He referred to s 16 which reads:

> **16 Liability of carrier's employee**
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> (1) Every employee of a carrier who, in the course of his employment, intentionally causes the loss of or damage to any goods being carried by the carrier shall be liable to the owner of the goods for that loss or damage.
>
> (2) Subject to subsection (1) of this section, no employee of a carrier shall be liable as such, whether under this Act or otherwise, to the owner of any goods being carried by the carrier for the loss of or damage to any of those goods.

[14] The Judge focused on the meaning of "as such" where it appears in ss 6 and 16, observing that a carrier can only enjoy protection under s 6 when acting as a carrier *as such*. He was of the view that the negligent POAL employee was "not (relevantly) acting as an employee of a carrier of the goods (here the truck) actually in question." Therefore POAL was not acting as a carrier as such: it was not pertinently operating in that capacity.[27] The attention was on the negligently operated fork hoist which did the damage, not on the Kenworth which was damaged. The "actual and legal reality" was that Southpac claimed against POAL as a

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[26] At paras [33] – [34].
[27] At paras [35] – [41].

negligent third party rather than as any kind of carrier. The fork hoist driver was not performing any service in relation to the carriage of Southpac's truck.[28]

[15] Judge Joyce therefore accepted Southpac's principal argument regarding the meaning of the words "as such" in s 6 and dismissed POAL's application for summary judgment.[29]

The High Court judgment

[16] In the High Court[30] at Auckland, Allan J said that Judge Joyce had been "undoubtedly correct" to find that POAL was a "carrier" for the purposes of s 6.[31] He noted that s 2 provides that "carriage" includes any incidental service and that "carry" has a corresponding meaning. POAL was contracted to CP Ships to provide services as a stevedore, wharfinger and warehouseman, all of which expressly or by implication fell within the definition of "incidental service".[32]

[17] Allan J referred to some of the history of the development of the legislation, saying that the intention of the Legislature was to dispense with the fault principle in cases involving carriers and carriage of goods and "to substitute a statutory code involving the imposition of statutory liability and the abolition of liability at common law".[33] Turning to the significance of the expression "liable as such" in s 6 and in a number of other sections, Allan J said that it meant that a carrier would be exempt from liability if at the time when the loss or damage occurred the party concerned was acting in its capacity as a "carrier" of the goods concerned, and not in some other capacity unconnected with its work as a "carrier" of those goods:

> [40] The statutory limitation on liability extends to all those carriers who play a role in the carriage of the goods, as contemplated by the contract of carriage, for the whole of the duration of the contract of carriage. Such carriers are acting in their capacity as parties undertaking obligations contemplated by the contract of carriage (in this case the sea way bill). Various carriers will undertake the carriage of the goods at different points

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28 At paras [52] – [54].
29 At paras [55] – [56].
30 *Ports of Auckland Ltd v Southpac Trucks Ltd* [2007] 2 NZLR 656.
31 At para [32].
32 At para [33].
33 At para [38].

> in time. Some will be involved in physically moving the goods from place to place; others may simply provide incidental services. But provided in each instance that they were performing a role falling within the s 2 definition of the term "carrier" in connection with the carriage of the goods, they will be acting as carriers "as such".

In the present case, Allan J said, the collision occurred during the currency, and in the course of performance of, the contract of carriage made between the contracting party and CP Ships. At the very time of the accident, POAL was engaged in the provision of incidental services:[34]

> It was contractually responsible to CP Ships for the provision of stevedoring services which were, at the moment of the collision, being carried out by the party contracted to POAL's subcontractor. Furthermore, POAL was providing wharfinger services and had set aside warehousing facilities for which the truck was bound at the time of the collision. In a temporal sense, the contract of carriage was on foot at the time of the collision and POAL was directly involved in carrying out its obligations to CP Ships, for the purpose of enabling CP Ships to carry out its contractual obligations to its contracting party.

It was therefore acting as a carrier "as such" in relation to the carriage of goods and its common law liability was excluded under s 6. That liability for the admitted negligence had been replaced and substituted by the statutory regime.

[18] The High Court Judge recognised, however, that the protection of s 6 would not have applied if at the time the contract of carriage had already come to an end (if the collision had occurred on a public road outside the port area after Southpac's representative had uplifted the truck) or if POAL was at the time of the collision undertaking an activity involving the truck which did not fall within the provisions and purposes of the contract (such as taking it from storage on the wharf to use as a grandstand for viewing yacht races). Then POAL would not be acting as a carrier "as such".[35]

[19] Allan J also rejected an argument for Southpac focused on the fact that the negligent act was not that of POAL in its capacity as a carrier, but rather that of its employee who was not involved in the carriage of the truck. He saw this as an irrelevant distinction which would make it necessary in many instances to conduct a

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34 At para [41].
35 At paras [44] – [45].

very detailed factual inquiry of the sort that was "deliberately excluded from the scheme of the Act".[36] It was instead the status of POAL – whether it fell within the definition of "carrier" in relation to the goods at the time of the accident – that governed its liability. Nor was Allan J favourably disposed to an argument, based on the wording of s 16, that POAL's driver had no immunity in respect of his negligence because he was not acting at the time pursuant to the contract of carriage relating to the goods which were damaged.[37]

[20] POAL's appeal was accordingly allowed and summary judgment entered in its favour.

The Court of Appeal judgment

[21] The Court of Appeal by majority[38] allowed Southpac's appeal and restored the District Court's judgment. For the majority, Robertson J remarked that it was common ground that, if the fork hoist had belonged to and been driven by an employee of someone who was not a party to the carriage of the truck, liability would not have been excluded by the Act.[39] The majority considered that it was not decisive that the fork hoist driver was geographically proximate to the location of the carriage (i.e on POAL's premises), that the damage occurred during the currency of the contract of carriage or that the fork hoist driver was a POAL employee:[40]

> What matters is the capacity in which POAL was acting at the time of the collision, and that the collision occurred because of the negligence of someone occupied in an activity wholly independent from the actual carrying activities of POAL.

[22] The majority held that the sphere of POAL's role as a "carrier" was "bounded by its contractual relationship with the actual carrier, Wallace":[41]

> To the extent that it is the fork hoist driver's negligence, and not any action of the Wallace driver, that founds Southpac's cause of action, POAL is not

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36 At para [49].
37 At paras [62] – [66].
38 *Southpac Trucks Ltd v Ports of Auckland Ltd* [2009] 2 NZLR 79 (O'Regan and Robertson JJ; Baragwanath J dissenting).
39 At para [18].
40 At para [19].
41 At para [28].

> in fact being held liable as a carrier. POAL cannot claim the Act's protection because the kind of liability for which it is being sued is not the kind of liability contemplated by the Act.

[23] The majority also considered that although POAL was a "carrier", because it procured the performance of an incidental service (stevedoring by the sub-contractor, Wallace), it was not acting as a carrier "as such" when the collision occurred. The majority believed that if POAL's liability was limited under s 6 by virtue of its being a carrier, then there was no meaning for the phrase "no carrier shall be liable as such":[42]

> If all carriers are within the limited liability regime, the Act would simply provide that "no carrier shall be liable". The Act, read as a whole, provides that carriers are "liable as such" only when they are actual or contracting carriers, not when they are mere carriers without more.

[24] Counsel for POAL, Mr Carruthers QC, had made an alternative submission that POAL was an actual carrier of the truck at the time of the damage, but the majority also rejected that argument, saying that actual carriage requires physical possession and that the Act envisages that only one carrier can be in possession of the goods at any one time. What was critical about the application of s 6 was that the actual carrier was in possession of the goods and responsible for them as an actual carrier: "actual possession is a pre-condition to the application of s 6".[43]

[25] It was on the interpretation of "actual carrier" that Baragwanath J dissented. He was of the opinion that nothing in s 10 [Liability of actual carrier] excluded the concept of concurrent carriage by principal (POAL) and subcontractors (Southern Cross and Wallace). He considered that POAL was "intimately involved" with the goods, that there was an analogy with partnership and that treating POAL as an actual carrier accorded with commonsense and the policy of the Act: that those functionally engaged in carriage should receive protection.[44] But in apparent agreement with the majority he added:[45]

> 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

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42 At para [32].
43 At para [42].
44 At paras [71] – [79].
45 At para [83].

> within the other carefully defined specific class of actual carrier, to receive the protection of s 6.

POAL had that protection, in Baragwanath J's opinion, by virtue of being an actual carrier.

Discussion

[26] As we indicated at the beginning of these reasons, in order to comprehend the scheme and intended operation of the Carriage of Goods Act it is necessary to have full regard to the intentions of the Law Reform Committee on whose work the Act is based. The Committee had identified concerns about the amount of litigation which was occurring under the existing law, of bailment and negligence, as modified by the Carriers Act 1948.

[27] The members of the Committee appreciated that this litigation was largely insurer driven, because the vast majority of consignors, consignees and carriers had insurance cover against loss of or damage to goods. They and their insurers found themselves embroiled in court proceedings because in many instances it was uncertain under the existing law whether or not a carrier was under a liability. That might depend upon questions of fault (how the goods came to be damaged). But also, as in the present case, many carriages involved performance by a succession of persons and the existing law often required the pinpointing of exactly when and in whose hands damage had occurred.

[28] In essence, what the Committee recommended was that all existing forms of carrier's liability should be removed and replaced by a statutory limited liability which depended upon the role the carrier was fulfilling at the time damage occurred. By restricting liability to the contracting carrier and the actual carrier and capping its amount, the new law would provide much needed certainty. The Committee made it plain that the statutory protection and limited liability was to apply regardless of whether the carrier was at fault in causing or contributing to the loss or damage. What it was concerned to do was to ensure that all participants in a carriage of goods knew where they stood concerning liability for loss of or damage to those goods.

They and their insurers could then make their insurance arrangements accordingly. A consignor could elect to take all the risk (no liability for anyone in the chain of carriage – owner's risk) or it could be agreed that there would be a greater liability of the carrier (declared value risk or declared terms) or – the default position – the owner could claim no more than the amount specified from time to time in the legislation.[46] The legislative scheme allowed the parties to allocate risk in accordance with the contract of carriage. Certainty for insurance purposes was therefore achieved either by means of an agreement allocating risk as permitted by the Act or in default of agreement pursuant to the default statutory regime.

[29] The Act was not of course intended to protect someone at fault who was not at the time a carrier vis-à-vis the lost or damaged goods. But, provided the person concerned was acting as a "carrier" in relation to those goods, there was to be protection. The Committee also made it clear that in order for the scheme to work it also had to protect a negligent employee, for otherwise the situation in *Campbell v Russell*, to which the Committee referred,[47] would be perpetuated. In that case, the employer had statutory protection but the employee did not, and so the employer could for practical reasons be forced to indemnify the employee and thereby be made indirectly liable.

[30] When the Act is approached from this perspective and not from the perspective of the common law, its meaning becomes plain. The best starting point, which Mr Carruthers adopted in his oral argument, is to notice the extended definition of "carrier" (and correspondingly of "carriage" and "carry") in s 2. A carrier under the Act is a person who in the ordinary course of business carries or procures to be carried goods owned by any other person. So it covers both a person who will physically carry the goods and someone like a freight forwarder who merely arranges for someone else to do so but never has physical possession. It also

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[46] In the Act as passed the amount specified in s 15 was $500 per unit. The Law Reform Committee had recommended that the dollar amount should be "placed at a point beyond which it is reasonable to expect the goods owner to take out insurance cover for himself" (para 11). The figure was lifted to $1,000 in 1986 and $1,500 in 1989. There has been no subsequent adjustment.

[47] At para 17.

expressly includes a person who in the ordinary course of business performs or procures to be performed any incidental service in respect of the goods. As we have seen, an "incidental service" is a defined term and is any service "(such as that performed by consolidators, packers, stevedores and warehouseman)" to facilitate carriage of the goods.

[31] In this case, there is no doubt that POAL was a "carrier" of the truck at the time of the accident, either because it procured Wallace (through Southern Cross) to carry the Kenworth or because in the same way it procured Wallace to perform the function of a stevedore in relation to it.

[32] Given that POAL was at the relevant time a carrier, s 6 applied to it. That section is expressed to apply notwithstanding any rule of law to the contrary. It says that no carrier is "liable as such", which must mean when acting as a carrier, whether in tort or otherwise (so excluding the law of negligence and the law of bailment) and whether personally or vicariously (so excluding liability for anything done by an employee in the course of his or her employment) for the loss of or damage to any goods carried by the carrier. It is again necessary to remind oneself of the wide definition of "carry". You "carry" goods when you are acting as a carrier in terms of the definition of "carrier". Thus someone who procures a carriage by an actual carrier is treated as carrying the goods whilst that carriage by the actual carrier continues.

[33] Section 6 makes only three exceptions to the removal of liability of a person acting as a carrier. The first is where the terms of the contract of carriage say otherwise, the second is where the other provisions of the Act apply so as to create a statutory liability and the third, paralleled for an employee in s 16(1), is where the carrier has intentionally caused the loss or damage, which is not alleged in the present case.

[34] Because there would be de facto liability for an employer carrier if its negligent employee were personally liable, and consistently also with the express removal of vicarious liability under s 6, s 16(2) declares that no employee of a carrier

is liable as such, that is, liable when acting in the course of the employment, whether under the Act or otherwise (thus negating liability in tort or in bailment), to the owner of any goods being carried by the carrier for the loss of or damage to the goods. *Campbell v Russell* is thereby overturned.

[35] It is noticeable that s 16(2) does *not* say that the employee's liability is removed only for goods which the employee is carrying in the course of his or her employment. Section 16(2) applies to any goods being carried by the carrier, not any goods being carried by the employee. So if the employer is protected in relation to the goods by s 6, so is its employee in relation to those goods even if the employee was not doing any work in relation to them, but always provided that the employee was acting in the course of his or her employment. Protection would not therefore extend to the employer/carrier in the hypothetical situations posited by Allan J,[48] as he said, because POAL would not in either case be acting as a carrier of the goods. Nor, for the same reason, would POAL's employee be protected in those situations by s 16(2), not because he or she was acting outside the employment but again because POAL would not be acting as a carrier at the relevant time, that is, when the goods are damaged or lost.

[36] In his submissions Mr Smith suggested as other examples of possible situations that of a hypothetical chief executive of POAL who negligently and possibly drunkenly had driven his own vehicle in the wharf area and caused the collision. The answer to that, is that regardless of the quality of the driving, if the chief executive was engaged upon POAL's business and not some frolic of his own, the Act would protect both the individual and POAL in relation to the loss or damage. Fault is irrelevant unless the loss or damage was done intentionally. Counsel also illustrated his argument by referring to the possibility that the collision might hypothetically have been caused by an employee of another carrier who was engaged on the business of that other carrier. That case is also easily answered. If that other carrier was not a carrier of the Kenworth, the Act would not prevent a claim being made against either the employee or the employer, neither being a carrier of the damaged goods.

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[48] See para [18] above.

[37] In summary, Southpac's fundamental argument is that its claim is outside the Act because it is not made against POAL *as a carrier*. That is, however, as Mr Carruthers said, to address the wrong issue. POAL had the protection of the Act when it was acting as a carrier of the damaged goods. It was doing so as a procurer of carriage at the time of the collision. That being so, the fault or otherwise of POAL or its employee is simply irrelevant. All that is required for protection is that the person sued be acting as a carrier (as defined) of the damaged goods at the time they are damaged. That person is then acting as a carrier "as such" within the meaning of s 6.

[38] That is not a conclusion which we are reluctant to reach. To hold otherwise would thwart the purpose of the legislation, which is intended to cover the situation of all carriers (including procurers of incidental services) throughout the period of the carriage, enabling insurance arrangements to be made accordingly with greater certainty. To hold otherwise would leave gaps and introduce the need for factual determinations and the making of fine distinctions. It would mandate a partial return to the situation which the Law Reform Committee deplored.[49]

[39] The present case provides an excellent example. It happened that POAL had subcontracted the movement of the truck from the ship to the storage area. If it had not done so, and had performed that service itself, it would certainly have been an actual carrier at that time and s 6 would have applied even though the negligent employee was not engaged in moving the truck. If the accident had occurred after Wallace delivered the truck to the storage area, POAL would then have been an actual carrier in its capacity as a warehouseman and s 6 would have similarly applied. Yet it is said that, because of the subcontracting, for the short time it took to drive the truck to the storage area the Act did not apply, with the consequence that POAL was exposed to unlimited liability. If Southpac's argument were accepted, POAL's insurance arrangements would have to be different whenever it subcontracted part of its function as a carrier because it would have a very different

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[49] There will remain a need to make such determination and distinction where it is alleged the carriage has come to an end or the carrier was departing from the contract of carriage, as in Allan J's examples, but that will be a comparatively rare occurrence.

exposure to liability. The seamless coverage of carriers under the Act in respect of goods they are carrying would have holes in it.

[40] We are therefore of the view that, considering both the wording of the Act and the policies which underlie it, s 6 of the Act protected both POAL and its employee from liability for the damage caused to the truck. Southpac's only recourse was to claim up to $1,500 from CP Ships, which could in turn have sought reimbursement from Wallace, which had liability under s 10 notwithstanding its lack of any fault.

[41] Before leaving this matter we should offer a brief comment on the appellant's alternative argument, which Mr Carruthers found it unnecessary to address orally, that in any event POAL was an actual carrier. It will be recalled that this submission attracted Baragwanath J and was the basis for his dissenting judgment below. It seems to us, however, that it is most unlikely that the drafters of the statute had in mind anything other than physical possession when they defined "actual carrier" in s 2 as "every carrier who, at any material time, is or was in possession of the goods". The plural is explained by the need to cover the case dealt with in s 10(3) which, as can be seen from the report of the working party to the Select Committee in 1978, is where there have been successive actual carriers and it is unclear on whose watch the damage actually occurred.

[42] Mr Smith, in his written submissions for the respondent, drew attention to the decision of the Court of Appeal in *Emery Air Freight Corporation v Nerine Nurseries Ltd*[50] which was apparently not cited to the Court of Appeal. It concerned carriage by air and decided that under the Guadalajara Convention 1961 an actual carrier, contrasted with a contracting carrier, did not include someone whose connection with the goods at the critical time was through contract only.[51] As we did not hear oral argument on it from the appellant, which succeeds on another ground, we take this point no further.

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50 [1997] 3 NZLR 723.

51 At p 734.

Result

[43] The appeal is allowed. We restore the order made by Allan J in the High Court. The costs order made in the Court of Appeal is reversed. The respondent is ordered to pay costs in this Court of $15,000 plus the appellant's reasonable disbursements as fixed by the Registrar.

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