REMEDIES OF THE BUYER FOR DAMAGE TO GOODS CARRIED BY SEA

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The object of this article is to consider (i) the circumstances in which the buyer of goods being carried by sea can sue the carrier in contract in respect of loss of or damage to the goods and (ii) whether, perhaps lacking any such remedy, the buyer can assert an alternative claim in tort where the loss or damage happened before he acquired title. The latter claim is a controversial one and the discussion will, therefore, concentrate in particular on the various legal problems it raises. Furthermore, as similar kinds of claims may be made in other, different, contexts, the wider implications of allowing or denying a subsequent owner's claim will also be examined.

The present concern is only with the international carriage of goods. Contracts for the carriage of goods within New Zealand are governed by the Carriage of Goods Act 1979 and will not be discussed here.

I. THE HAGUE RULES

The international carriage of goods by sea from any port in New Zealand to any port outside New Zealand under contracts of carriage covered by a bill of lading or similar document of title is governed by the Sea Carriage of Goods Act 1940. By section 7(1) and the Schedule, the Act gives statutory force to the set of uniform rules relating to bills of lading adopted by the Brussels Convention of 1924, known as the Hague Rules. The Act requires (in section 9) that every bill of lading or similar document of title issued in New Zealand must contain an express statement that it is to have effect subject to the provisions of the Rules as applied by the Act. The Act does not apply to goods imported into New Zealand. However, such goods normally will be carried pursuant to contracts evidenced by bills of lading subject to the Hague Rules or, since the amendment to the Brussels Convention by the Brussels Protocol of 1968, the Hague-Visby Rules.[1]

The Rules regulate in considerable detail the rights, duties and immunities of the carrier. They provide an intricate blend of responsibilities and liabilities[2], rights and immunities[3], limitations in the amount of damages recoverable[4], time bars[5], indemnities[6], and liberties[7].

Goods are not invariably shipped pursuant to contracts evidenced by a bill of lading. The advent of container shipping has led to increasing use of the ocean waybill, which is a non-transferable receipt and contract of carriage. The waybill is not a document of title and seemingly is not

[1] See Generally Goode *Commercial Law* (1982) Ch. 23. The Visby amendments have not been incorporated into the domestic law of New Zealand. For the changes they introduced see Diamond "The Hague-Visby Rules" [1978] L.M.C.L.Q. 225.

[2] Article III.

[3] Article IV.

[4] Article IV, rule 5.

[5] Article IV, rule 6.

[6] Article III, rule 5 and Article IV, rule 6.

[7] Article IV, rules 4 and 6.

subject to the Hague Rules[8] although this cannot be regarded as certain[9]. In any event all ocean waybills incorporate the Hague Rules or the Hague-Visby Rules into the contract, although problems can arise as regards the authority of the incorporated Rules in relation to the existing terms of the waybill.[10]

II. The Buyer's Remedy in Contract

The shipper of goods who makes the contract of carriage may of course be the buyer or seller. In the case of a c.i.f. or c. and f. contract obviously the seller is the contracting party and even in the case of an f.o.b. contract the seller may make the contract on the buyer's behalf. In these cases where there is no privity as between the buyer and the carrier there arises a potential source of difficulty for a buyer seeking redress from the carrier for loss of or damage to the goods. It has been overcome for most cases, by the early development of a special common law exception to the privity rule and thereafter by statutory intervention. Some problems remain, however, as will be seen.

Clearly the seller who is party to the contract can sue so long as the loss or damage happens before the property in the goods passes to the buyer. If the buyer later pays for the goods and the seller thereafter sues the carrier, he holds the proceeds of the action as trustee for the buyer.[11] Where the breach occurs after the property has been transferred the seller suffers no loss and if he sues the carrier then on ordinary principles he should recover only nominal damages. However it was held by the House of Lords in *Dunlop v Lambert*[12] that in such a case the seller still could recover substantial damages against the shipowner but would be accountable to the true owner for the proceeds of his judgment. Recently in *The Albazero*[13] Lord Diplock rationalised *Dunlop's* case as an application of the principle that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.

Dunlop's case was decided at a time when the non-contracting consignee had no other right of action in respect of the goods. In *The Albazero*[14] Lord Diplock considered that its rationale could no longer apply to cases covered by the Bills of Lading Act 1855 (U.K.) which, as will be seen, does give the consignee an independent right to sue[15], nor to contracts

[8] Goode, op.cit. at 569.
[9] Tetley "Waybills: The Modern Contract of Carriage of Goods by Sea" (1983) 14 J.M.L.C. 465 at 471.
[10] Ibid.
[11] *The Charlotte* [1908] P. 206.
[12] (1839) 6 Cl. & F. 600; 7 E.R. 824.
[13] [1977] A.C. 774 at 847.
[14] Ibid., at 847-848.
[15] See below p.88

which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of goods carried pursuant to the original contract.[16] On this reasoning *Dunlop* would not apply either to cases falling within the terms of the Contracts (Privity) Act 1982[17]. Furthermore, with the development of the law of negligence since 1839, where the carrier's breach of contract is caused by negligence there is no objection to the buyer with property suing the carrier for negligence alone. In *Karlshamns Oljefabriker v Eastport Navigation Corporation: The Elafi*[18] for example, damage by water was done to a cargo of copra after title had passed to the plaintiff buyers, who were thus held entitled to sue the negligent shipowners in tort.

In other cases it seems the seller can still sue for substantial damages. In *The Albazero*[19] Lord Diplock observed that negligence liability does not provide a complete substituted remedy for some types of loss caused by breach of a contract of carriage, giving late delivery as the most obvious example. His Lordship also noted that the Bills of Lading Act and the development of the doctrine in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. Ltd*[20] had reduced the scope and utility of the rule in *Dunlop* where goods were carried under a bill of lading.[21] However, the rule extended to all forms of carriage including carriage by sea where no bill of lading had been issued, and there might still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it. Lord Diplock thus thought that the rule should not simply be jettisoned.

While the seller may then, exceptionally, maintain an action, probably he cannot be compelled by the buyer to do so. Certainly in *The Albazero*[22] this was Lord Diplock's understanding of the limits to the *Dunlop* rule.

Turning to the statutory reform in this field, by section 13 of the Mercantile Law Act 1908 the holder of a bill of lading issued in respect of goods acquires a cause of action in contract against the carrier. Section 13 is the New Zealand equivalent of section 1 of the United Kingdom Bills of Lading Act 1855, providing that every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods passes on or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities, in respect of such goods as if the contract contained in the bill of lading had been made with himself.

A buyer cannot take the benefit of section 13 if he does not acquire property in the goods under a bill of lading. An important example of such a case can be where bulk cargo is shipped and the buyer buys part of the bulk. A buyer who takes under a ship's delivery order may thereby enter into a contract with the carrier, certainly if he pays the freight and thus provides consideration[23], but if he becomes the holder of a seller's

[16] See below p.89
[17] See below p.89
[18] [1981] 2 Lloyd's Rep. 679.
[19] [1977] A.C. 774 at 846-847.
[20] [1924] 1 K.B. 575.
[21] See below p.89
[22] [1977] A.C. 774 at 845.
[23] As to which see below p.89

delivery order he will not acquire any contractual rights against the carrier without an attornment by the carrier. In this type of case property cannot pass until the goods become ascertained[24] and this will be after the damage has occurred. Similarly a freight forwarder may consolidate consignments by different shippers and take the bill of lading in his own name. He may then split the consignment among his clients by procuring the issue of ship's delivery orders or by issuing his own "house" bill of lading (which is not technically a bill of lading at all because it is not issued by the carrier) or a forwarder's certificate of transport. Section 13 does not seem to apply here either. Again, where goods are shipped under an ocean waybill rather than a bill of lading, section 13 does not apply as waybills are not documents of title.

An alternative means by which the buyer may be able to sue on the contract of carriage is under the general provisions of the Contracts (Privity) Act 1982. Whether he can do so turns on whether the terms of section 4 are met. The buyer must be a third party beneficiary who is sufficiently designated "by name, description, or reference to a class" and who is intended to take the benefit of the contract between the consignor and the carrier. Depending on the particular facts these conditions might sometimes be satisfied. It seems likely that they would be in the case, for example, of goods shipped to a named consignee under a non-transferable ocean waybill. But take the situation where goods are shipped under a bill of lading which does not name the consignee. Could the consignee still be regarded as sufficiently identified by description? And could the requisite intention be established? The answer to questions such as these cannot be regarded as certain.[25] Clearly, however, the 1982 Act has the potential to provide a remedy in circumstances not covered by section 13.

Lastly, the buyer may in any event be able to sue on the basis of an implied contract with the carrier, in accordance with the decision of the United Kingdom Court of Appeal in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. Ltd*[26]. Here the plaintiffs were bankers to whom a bill of lading had been endorsed and delivered by way of pledge. They were not at any time owners of the goods in question and were unable to rely on the 1855 Act. It was held that a contract incorporating the terms of the bill of lading was to be implied between the plaintiffs and defendants because the plaintiffs had paid the freight due on the cargo and the defendants had delivered the goods to them against surrender of the bill. The principle in *Brandt's* case was applied in the case of a purchaser of goods in *Cremer v General Carriers S.A.*[27] where part of a bulk cargo of tapioca was delivered to the purchaser in exchange for a ship's delivery order and payment by the purchaser of the freight.

[24] Sale of Goods Act 1908, s. 18.

[25] S. 4 was considered by the Court of Appeal in *Gartside v Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, where it was held (at 41-42, 49, 54) that the beneficiary under a will benefited only incidentally from the performance of the contract of retainer between testatrix and solicitor and thus could not have taken advantage of s. 4 even had it been in force at the relevant time. The solicitor nonetheless owed a negligence duty to the beneficiary to take care to present the will for execution by the testatrix within a reasonable time.

[26] [1924] 1 K.B. 474.

[27] [1974] 1 W.L.R. 341.

III. THE NEGLIGENCE CASES

A buyer who is in a position to sue in contract might prefer to make a claim in negligence, for reasons to be considered later. A buyer who is not in that position has a more pressing need to do so. In the United Kingdom there were until recently conflicting first instance decisions on whether the carrier owed a duty of care to the buyer without property at the time of the damage. As will be seen, the House of Lords has now resolved the conflict in favour of the carrier and against the buyer. In New Zealand there are many arguably analogous cases but none on the particular matter in issue.

(1) The Wear Breeze

In *Margarine Union G.m.b.H.v Cambay Prince Steamship Co. Ltd (The Wear Breeze)*[28] the plaintiffs purchased part of a bulk shipment of copra being shipped by the defendant shipowners from the Far East to Hamburg. When the copra was unloaded it was discovered that it had been seriously damaged by giant American cockroaches. The damage occurred because the defendants had failed adequately to fumigate the vessel prior to loading its cargo. The plaintiffs accepted the goods under sellers' delivery orders and had no action under the 1855 Act. The plaintiffs thereupon sued the shipowners in negligence. Roskill J. held that the action failed because the shipowners owed no duty of care to anyone who was not the owner of the goods at the time when the tort of negligence was committed and that the plaintiffs only acquired title to the copra at the time of discharge, when it was separated from the bulk.

Counsel for the plaintiffs argued that since *Donoghue v Stevenson*[29] and, more particularly, *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*[30] it was sufficient that loss to the plaintiff was foreseeable, at least so long as there was physical damage to goods which ultimately became the property of the plaintiffs and so long as the relationship between the parties was sufficiently proximate. On the latter point counsel stressed that the range of foreseeability was limited to the last c.i.f. buyer who might buy the goods while still afloat and that it did not extend to a buyer ex-ship or beyond. Alternatively he submitted that the plaintiffs had a cause of action in negligence because the goods were at their risk as from the moment of shipment and for this reason came within the range of those to whom the defendants must be taken to owe a duty of care.

Counsel for the defendants argued on the contrary that in truth the plaintiffs were seeking to recover damages because their purchase had turned out to be less advantageous to them than they had anticipated: instead of getting the goods in sound contractual condition they got them badly damaged by cockroaches. This kind of loss was, he submitted, not recoverable in tort. Furthermore, the doctrine of risk was a concept of the law of sale of goods and was of no relevance in determining how far the duty of a tortfeasor extended.

Roskill J. did not comment expressly on the desirability of recognising a duty of care owed by the carrier to the buyer. He was, however, satisfied that there was a long established line of authority which precluded the

[28] [1969] 1 Q.B. 219.
[29] [1932] A.C. 562.
[30] [1964] A.C. 465.

buyer's claim and which was unaffected by *Hedley Byrne*. This line of authority included the following cases: *Cattle v Stockton Waterworks Co.*[31] (contractor building a tunnel on another's land not entitled to recover from waterworks company which caused damage to the land, rendering the building contract less profitable); *Simpson v Thompson*[32] (insurance underwriter had no direct right against a tortfeasor who damaged the underwriter's assured's property); *Société Anonyme de Remorquage à Helice v Bennetts*[33] (plaintiff tug owners could not sue wrongdoer who had sunk the plaintiff's tow for loss of the benefit of the contract of towage); *Chargeurs Réunis Compagnie Française de Navigation à Vapeur v English and American Shipping Co*[34] (time charterers of ship unable to recover for economic loss because of damage done by a third party to the chartered vessel); *Weller v Foot and Mouth Disease Research Institute*[35] (cattle auctioneers could not recover for business loss when foot and mouth disease virus escaped from the defendants' premises, leading to the slaughter of or restrictions on movement of cattle in the area). Roskill J. found further support for his decision by reference to *Brandt's* case, asking himself the rhetorical question why, if the plaintiffs had a right to sue the defendants in tort for negligence, should there have been any need for implying a contract between them.

(2) The Irene's Success : The Nea Tyhi

The decision in *The Wear Breeze* stood unchallenged until 1982. Then in *Schiffahrt and Kohlen G.m.b.H.v Chelsea Maritime Ltd: The Irene's Success*[36] Lloyd J. (formerly counsel for the unsuccessful plaintiffs in *The Wear Breeze*) was persuaded that developments in negligence liability during the intervening period required that the no liability rule should be reconsidered. The plaintiffs were c.i.f. buyers of a complete cargo of coking coal being shipped on the defendants' ship. The cargo was damaged by sea water during the course of the voyage. The plaintiffs had no action in contract as they never became holders of the bill of lading and so brought an action in negligence. Lloyd J. held, adopting the two-stage test of duty laid down by Lord Wilberforce in *Anns'* case,[37] (i) that there was a sufficient relationship of proximity between the plaintiffs as c.i.f. buyers and the defendants as sea carriers to give rise to a prima facie duty of care on the part of the defendants, because under a normal c.i.f. contract the risk passed from the sellers to the buyers on shipment and so the sellers should reasonably have contemplated that carelessness by them in carrying the goods would be likely to damage the buyers at whose risk the goods were held: and (ii) that there were no considerations which negatived, reduced or limited the prima facie duty of care thus arising since the defendants would not be exposed to unlimited liability and the plaintiffs' loss was a direct reflection of the physical damage caused to the cargo.

The recent cases relied upon by Lloyd J. in reaching this conclusion,

[31] (1875) L.R. 10 Q.B. 453.
[32] (1877) 3 App. Cas. 279.
[33] [1911] 1 K.B. 243.
[34] (1921) 9 Lloyd's Rep. 464.
[35] [1966] 1 Q.B. 569.
[36] [1982] Q.B. 481.
[37] [1978] A.C. 728 at 751-752.

and the principles they espouse, will be amplified shortly.[38]

Similar views to those of Lloyd J. were expressed, obiter, by Sheen J. in *The Nea Tyhi*[39]. The claim here succeeded in contract in any event but the learned judge also said that he would if necessary have followed *The Irene's Success* rather than *The Wear Breeze*, for the reasons given by Lloyd J. in the former case.

(3) The Aliakmon

The conflict between *The Wear Breeze and The Irene's Success* was subsequently resolved by the U.K. Court of Appeal and thereafter by the House of Lords in *Leigh & Sillavan Ltd v Aliakmon Shipping Co. Ltd: The Aliakmon*[40]. The plaintiffs made a c. and f. contract to buy from the sellers steel coils to be shipped from Korea to Immingham, England. The price was to be paid by a 180 day bill of exchange to be endorsed by the buyer's bank in return for a bill of lading relating to the goods. The buyers intended to finance the transaction by reselling the goods to sub-buyers before the bill of lading was tendered by the sellers. They were, however, unable to find the hoped-for purchasers and in these circumstances their bank declined to back the bill of exchange. Representatives of the buyers and sellers discussed the matter and it was agreed to vary the original contract of sale so that (i) the sellers, despite delivery of the bill of lading, should have the right of disposal of the goods, (ii) the buyers should take delivery of the goods on presentation of the bill of lading but solely as agents for the sellers and (iii) the goods should be stored in a covered warehouse to the sole order of the sellers. The terms of the varied contract were duly carried out but after discharge the goods were found to have been damaged by improper stowage. The buyers subsequently paid the sellers and then brought an action against the carriers claiming damages for breach of contract and/or negligence.

It was held by Staughton J. at first instance[41] that the claim in contract succeeded and that there was, therefore, no need to consider the merits of the claim in tort. On appeal to the Court of Appeal[42], however, it was held that both claims should fail. The buyers further appealed to the House of Lords but only as regards the negligence action. The Lords affirmed the decision of the Court of Appeal and refused to recognise any duty of care as being owed to the buyers.

As regards the buyer's contractual cause of action the Court of Appeal held that *Brandt's* case should be distinguished and that there was no implied contract between the buyers and the carriers, because the buyers acted as agents for the sellers in presenting the bill of lading and taking delivery of the goods. The buyers did not, it was held, acquire any rights under the Bills of Lading Act either. The sellers having reserved the right of disposal of the goods, the property in them did not pass to the buyers upon or by reason of the endorsement of the bill of lading, as required by the Act, but only upon payment of the purchase price by the buyers to the sellers, after the goods had been discharged and stored. The Act

[38] These cases included *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 C.L.R. 529 and *Junior Books Ltd v Veitchi Co. Ltd* [1983] 1 A.C. 520.

[39] [1982] 1 Lloyd's Rep. 606.

[40] [1986] A.C. 785

[41] [1983] 1 Lloyd's Rep. 203.

[42] [1985] Q.B. 350.

could not, therefore, apply to the varied contract. Ordinarily in the case of a contract ex-warehouse the risk would pass at the same time as the property but here it had already passed to the buyers on shipment because of the original c. and f. terms, and there was nothing in the new terms which caused it to revert to the sellers.

As for the claim in negligence, neither the Court of Appeal nor the House of Lords saw the developments in negligence liability since 1969, and in particular the increasing readiness of some courts to allow recovery for pure economic loss, as any reason for departing from the decision of Roskill J. in *The Wear Breeze* or from the older authorities relied upon in that case. Counsel for the buyers had urged upon the House a number of grounds for contending that *The Wear Breeze* was wrongly decided at the time or at any rate should be regarded as wrongly decided today. These contentions, and the reasons given for their rejection, will be examined in turn.

It was argued first of all that in the other non-recovery cases the plaintiffs were persons whose contractual rights entitled them to have either the use or services of the property concerned and thereby make profits or to render services to the property concerned and thereby to earn remuneration. By contrast buyers under c.i.f. or c. and f. contracts of sale were persons to whom it was intended that the legal ownership of the goods should later pass and who were, therefore, prospectively the legal owners. Lord Brandon, with whose judgment Lords Keith, Brightman, Griffiths and Ackner concurred, recognised that the difference existed, but thought it made no difference to the principle of law to be applied. In all cases the plaintiffs were complaining that by reason of their contracts with others they had suffered loss caused by damage to the others' property.[43]

Secondly, counsel argued that the buyers, by agreeing to buy ascertained goods, had thereby acquired equitable ownership of the goods and thus were entitled to sue in tort for damage to the goods without joining the legal owner. Lord Brandon rejected the argument, noting that in the field of equitable ownership of land the equitable owner must join the legal owner as a party, whether as co-plaintiff or co-defendant, and there was no reason why this should not also be so in the field of equitable ownership of goods. His Lordship also expressed the view that while it was possible for equitable interests in goods to be created and to exist, it was extremely doubtful whether this could happen within the confines of an ordinary contract of sale. He said that the Sale of Goods Act is a complete code in respect of contracts for the sale of goods and the sections of the Act dealing with the passing of property draw no distinction between the legal and the equitable property. He thought there was much force in the observations of Atkin L.J. in *In re Wait*[44] to the following effect:

"It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than, the rights so carefully set out in the various sections of the code."

Lord Brandon did not finally determine the point but his provisional

[43] [1986] A.C. 785 at 811.
[44] [1927] 1 Ch. 606 at 635-636.

view was in accordance with that of Atkin L.J.[45]

The heart of the case which was made for the buyers lay in counsel's third submission, concerning developments in the law of negligence since 1969. The proper way to approach the present case was, he said, to apply Lord Wilberforce's two-stage test of duty in *Anns*' case (as Lloyd J. had done in *The Irene's Success*). The answer to the first question had to be that there was here a sufficient relationship of proximity between the carriers and the buyers as to give rise to a prima facie duty. With regard to the second question, counsel conceded that it would be unjust if the terms of the bill of lading under which the shipowner agreed to carry the goods were to be disregarded. He thus argued that the shipowners' duty was qualified by those terms: the buyers had, by entering into a c. and f. contract with the sellers, impliedly consented to the terms of the bailment of the goods by the sellers to the shipowners.

As a preliminary matter, Lord Brandon made it clear that he did not think the *Anns* test was appropriate in the instant circumstances.[46] It did not provide, and could not have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in negligence. Lord Wilberforce was, moreover, dealing with the approach to be adopted in a novel type of factual situation which was not analogous to any factual situation in which the existence of a duty had already been held to exist. He was not suggesting that the same approach should be adopted in a factual situation in which the existence of a duty had been repeatedly denied.[47]

Lord Brandon had no doubt that the present case fell into the latter category. He had earlier referred to the authorities relied upon by Roskill J. in *The Wear Breeze* and he added to this list the recent decision of the Privy Council in *Candlewood Navigation Corp. Ltd v Mitsui O.S.K. Lines Ltd*: *The Mineral Transporter*[48]. In this case the plaintiffs were time charterers of a ship which was involved in a collision with the defendants' ship, the collision being caused by the negligence of the defendants. The plaintiffs suffered loss in the form of wasted payments of hire and loss of profits. It was held that the rule against recovery for non-owners should be upheld. Lord Fraser, delivering the judgment of the Board, thought that this common law limitation provided an acceptable control mechanism upon the liability of a wrongdoer toward those who suffered economic damage in consequence of his negligence. The rule was generally accepted

[45] [1986] A.C. 785 at 813.

[46] Ibid., at 815.

[47] Any useful continuing role for Lord Wilberforce's two-stage test was also downplayed by Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210 at 240. Differing views about the test have been expressed in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 59 A.L.J.R. 564, Brennan and Deane J.J. rejecting it (at 586, 588 and 593-595, 598-600) and Gibbs C.J. supporting it (at 570). The two-stage approach has recently been affirmed as part of New Zealand law by Woodhouse P. in *Takaro Properties Ltd v Rowling* [1986] 1 N.Z.L.R. 22, in a broad way by Cooke J. in *Brown v Heathcote* [1986] 1 N.Z.L.R. 76 and by Tompkins J. in *Craig v East Coast Bays County Council* [1986] 1 N.Z.L.R. 99. It has also been accepted by the Supreme Court of Canada in *City of Kamloops v Nielsen* (1984) 10 D.L.R (4d) 641. For discussion of the uncertainties and difficulties involved in the *Anns* approach, see Smillie "Principle, Policy and Negligence" (1984) 11 N.Z.U.L.R. 111.

[48] [1986] A.C. 1.

in many countries and had the merit of drawing a definite and readily ascertainable line. It enabled legal practitioners to advise their clients with reasonable certainty and their Lordships were not aware of any widespread dissatisfaction with the rule.

Counsel in *The Aliakmon* contended that the policy reason behind the exclusion of the duty in *The Mineral Transporter* and earlier cases was to avoid the opening of the floodgates so as to expose a negligent defendant to unlimited liability to an indefinite number of other persons whose contractual rights had been adversely affected by the negligence. He argued that recognition of a duty owed to a c.i.f. or c. and f. buyer would not open any floodgates and would create only a strictly limited exception to the general rule. Lord Brandon thought, however, that the law should not allow special pleading in a particular case to detract from a long established rule which was simple to understand and easy to apply. Further detractions would, moreover, inevitably be attempted. This would undermine the certainty of the rule, a factor of the utmost importance in commercial cases.

Junior Books Ltd v Veitchi Co. Ltd[49] was also cited in support of the buyers' argument. In this case, of course, the owner of a factory was held to have a direct action in tort against a sub-contractor installing a new floor in his factory, as regards defects in the method of construction of the floor. The decision was said to be of no direct help to the buyers in the present case because the plaintiffs held to have a good cause of action were the legal owners of the floor. Lord Roskill's judgment was, however, also put forward in support of the contention that any duty owed to the c.i.f. buyer would be subject to the terms of the bill of lading pursuant to which the goods were shipped. Lord Roskill had suggested[50] that the existence of an exclusion clause in the main contract [51] might limit the duty of care owed by the sub-contractor. Lord Brandon opined that on the contrary there was no convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A was, but B was not, a party.[52] In the Court of Appeal Sir John Donaldson M.R. had observed that the commonest form of contract of carriage by sea is one on the terms of the Hague Rules and had found himself unable to see how the responsibilities and liabilities laid down in those Rules could be synthesised into a standard of care.[53] Lord Brandon similarly was unable to understand how the necessary synthesis could be made.[54]

The majority in the Court of Appeal[55] concluded that a good policy reason against recovery was the fact that recognition of a duty of care owed to non-owners would impose on the shipowner most of the liabilities which he would generally assume by contract by virtue of the Hague Rules but without the protection of those Rules. Seemingly, then, Lord Brandon was of a similar view.

Lord Brandon turned finally to consider the principle of "transferred

[49] [1983] 1 A.C. 520.

[50] Ibid., at 546.

[51] Does this refer to the contract between the owner and the main contractor or between the sub-contractor and the main contractor? In context it is presumably the latter.

[52] Lord Brandon thus read Lord Roskill's judgment in the way suggested above, fn. 51.

[53] [1985] Q.B. 350 at 368.

[54] [1986] A.C. 785 at 818.

[55] Sir John Donaldson M.R. and Oliver L.J.

loss" put forward by Robert Goff L.J. in the Court of Appeal.[56] The principle was formulated in this way. Where A owes a duty of care in tort not to cause physical damage to B's property, and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C. Robert Goff L.J. recognised that there would have to be exceptions to the principle, in particular in the case of contracts of insurance. However the principle was, he thought, desirable in point of policy. There was no question of any wide or indeterminate liability being imposed on wrongdoers: the shipowner was simply held liable to the buyer in damages for loss for which he would ordinarily be liable to the goods owner.

Lord Brandon thought that this principle was not only not supported by authority but on the contrary was inconsistent with it. Even if there was a genuine lacuna in the law he would be reluctant to fill it in this way. In any event there was in fact no such lacuna. Section 1 of the Bills of Lading Act provided an adequate and fair remedy to the buyer and there was no need for any alternative remedy in tort for negligence. In the present case the buyers should have made it a term of the variation of the contract that the sellers should exercise their right to sue for damage to the goods for the benefit of the buyers or should assign such right to them. As matters stood, the buyers had deprived themselves of their rights under the Act and had not stipulated for any independent right.[57]

In the result Lord Brandon affirmed *The Wear Breeze* as good law at the time it was decided and good law today. *The Irene's Success* was overruled and the dicta of Sheen J. in *The Nea Tyhi* disapproved.

IV. Evaluation of the Negligence Action

The objections to giving a tort remedy to the buyer which were influential in *The Aliakmon* may be summarised as (i) the risk of opening the floodgates, (ii) the uncertainties inherent in the notion of proximity, and (iii) the by-passing of the carrier's contractual rights. The first of these is, perhaps, the least troublesome. It would, indeed, have been met if the Lords had simply accepted that a person who agreed to buy goods acquired an equitable property in the goods and with it an independent right to sue for loss of or damage to the goods. It is of interest to note that the decision in *re Wait*, rejecting equitable interests in parts of bulk consignments of goods, which met with Lord Brandon's provisional approval, was described at the time by Sir Frederick Pollock as being "as inconvenient to many merchants as it is surprising to the Equity Bar"[58]. No doubt with the passage of time any possibility of recognising equitable interests under contracts for the sale of goods has receded further, this being reflected in Lord Brandon's judgment. There is nonetheless a clear affinity between this

[56] [1985] Q.B. 350 at 399.
[57] [1986] A.C. 785 at 819.
[58] (1927) 43 L.Q.R. 293.

contention and the principle of transferred loss propounded by Robert Goff L.J. This principle similarly meets the "indeterminacy" factor and in addition resolves the objection that from the point of view of the carrier, the no liability rule can operate in a quite fortuitous manner. As Sheen J. observed in *The Nea Tyhi*, the advantage of the decision of Lloyd J. in *The Irene's success*, in a case where legal ownership of the goods passed while they were still afloat and damage to them was done progressively during the voyage, was that it obviated the need for a difficult enquiry into how much of the damage occurred before, and how much after, the time when the ownership passed. Of course, the carrier would be liable to the buyer for the whole loss if the damage happened to occur after the passing of property or if, as he normally would, the buyer acquired a cause of action in contract. In a comment on *The Mineral Transporter*[59] it has similarly been observed that where a ship is subject to a time charter the loss of profits is divided between the owner and the time charterer but the loss is the same and should be recoverable by the party on whom it happened to fall. Why should the tortfeasor's liability be *reduced* because (quite fortuitously from his point of view) the chattel happened to be the subject of a contract of hire?

It is apparent that the Lords saw certainty in the law as all important and were not prepared to make exceptions for "special" cases. The difficulty in drawing distinctions between persons who in some way suffered financial loss as a consequence of physical damage being inflicted on another's property was such that the exercise should not be attempted. In other fields, however, not concerning contracts with long-established commercial practice as background, some courts have been prepared to allow recovery for pure financial loss if the relationship between the parties is a particularly close and proximate one. For example in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[60] the defendant dredge negligently damaged a third party's oil pipeline running directly to the plaintiffs' oil terminal and was held liable for the expense incurred by the plaintiffs in arranging alternative means of transporting the oil to their terminal. This case was accorded close attention by the Privy Council in *The Mineral Transporter*, but their Lordships found themselves unable to extract from the five judgments in the High Court any single ratio decidendi. Again in *Gartside v Sheffield, Young and Ellis*[61] a testatrix's solicitors were held to owe to a named beneficiary under the testatrix's proposed will a duty to take care to present the will for execution with all due diligence.

Perhaps cases such as these may be regarded as too far removed from any claim by a buyer of damaged goods. Arguably more in point, however, are the defective building cases. Of these, only *Junior Books* attracted any comment. In *The Mineral Transporter* the Privy Council recognised that *Junior Books* might be regarded as having extended the scope of duty somewhat, but any extension was not in the direction of recognising a title to sue in a party who suffered economic loss because his contract with the victim of the wrong was rendered less profitable or unprofitable.[62]

[59] Jones (1986) 102 L.Q.R. 13 at 16-17.
[60] (1976) 136 C.L.R. 529 (H.C.A.).
[61] [1983] N.Z.L.R. 37. See also *Allied Finance and Investments Ltd v Haddow & Co.* [1983] N.Z.L.R. 22; *Meates v Attorney-General* [1983] N.Z.L.R. 308; *Takaro Properties Ltd v Rowling* [1986] 1 N.Z.L.R. 22.
[62] [1986] A.C. 1 at 24-25.

In *The Aliakmon* the decision in *Junior Books* was rationalised, as we have seen, as being of no direct help because the plaintiffs were the legal owners of the floor.[63] Neither of these arguments looks convincing. As regards the former, it could be said that the "victim" of the sub-contractor's breach of contract was the main contractor and this rendered the plaintiff's contract with the victim less profitable. Once the plaintiff's right of action is recognised he becomes, ipso facto, a victim of the wrong and the argument is thus circular, assuming what it seeks to prove[64]. As regards the latter, while it is true that Junior Books were always the owners, there are many other similar cases where the plaintiffs were subsequent purchasers. In the United Kingdom *Anns* is, no doubt, the leading case. In New Zealand a similar principle has frequently been applied by the Court of Appeal, initially in *Bowen v Paramount Builders (Hamilton) Ltd*[65] and *Mount Albert B.C. v Johnson*[66] and most recently in *Stieller v Porirua C.C.*[67], *Brown v Heathcote C.C.*[68] and *Craig v East Coast Bays C.C.*[69]. *Bowen, Johnson* and *Stieller* all concerned persons who bought houses with existing defects in them.

In *Brown's* case Cooke J. commented that there appeared to be nothing in any New Zealand decision contrary to the decisions of the Privy Council and the House of Lords in *The Mineral Transporter* and *The Aliakmon*. However, is there any real distinction in principle to be drawn between a subsequent owner of goods suing the carrier for damage inflicted on the goods before he became owner and the subsequent purchaser of a house suing the builder (and/or local authority) for defects in the house created in the course of construction? Both are suing for financial loss caused by having acquired damaged or defective property. If the aim solely is to achieve consistency then it is submitted that the buyer also should have his action.

There remains for consideration, however, the further problem in giving a tort remedy to the buyer, the nature of which also is inherent in the defective building and some other financial loss cases, concerning the capacity of the tort action to deprive the carrier of his contractual defences in the Hague Rules. He might wish, for example, to rely on Article IV rule 2(a) (carrier not responsible for neglect or default of master or crew as regards the navigation or management of the ship[70]), Article IV rule 5 (carrier not liable for loss or damage to goods exceeding $200 per package or unit unless nature and value inserted in the bill of lading[71]), or Article II rule 5 (suit to be brought within one year of delivery of the goods[72]).

The shipper himself cannot evade these contractual stipulations by suing in tort. By Article II of the Hague Rules, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods is subject to the responsibilities and liabilities and entitled to the rights and immunities

[63] [1986] A.C. 785 at 817.
[64] Jones (1986) 102 L.Q.R. 13 at 16.
[65] [1977] 1 N.Z.L.R. 394.
[66] [1979] 2 N.Z.L.R. 234.
[67] [1986] 1 N.Z.L.R. 84.
[68] [1986] 1 N.Z.L.R. 76.
[69] [1986] 1 N.Z.L.R. 99.
[70] See Tetley, *Marine Cargo Claims* (2nd ed.), ch. 14; Goode, op.cit. at 612-613.
[71] Goode, op.cit., at 614-616.
[72] Tetley, op.cit., ch. 30; Goode, op.cit. at 617-618.

contained in the Rules. Fairly clearly, then, any contract of carriage subject to the Hague Rules excludes any possible wider tort liability.[73] A claim by a non-contracting buyer under section 13 of the 1908 Act or under the Privity Act is similarly barred. This is because under section 13 the consignee or endorsee has transferred to him all rights of action in respect of the goods "as if the contract contained in the bill of lading had been made with himself", and under section 9(2) of the Privity Act the promisor has available to him by way of defence, counterclaim, set-off or otherwise any matter which would have been available to him (a) if the beneficiary had been a party to the deed or contract in which the promise is contained or (b) if the beneficiary were the promisee, the promise had been made for the benefit of the promisee and the proceedings had been brought by the promisee. In these postulated events the carrier would be able to rely on the terms of his contract containing the Hague Rules and may thus do likewise in any action brought by the consignee as such or as third party beneficiary.

Where the buyer does not sue in contract, one would think Lord Brandon clearly was right in concluding that the carrier cannot raise contractual defences against a non-party and that contractual obligations under a bill of lading incorporating the Hague Rules cannot be synthesised into a standard of care. A similar point was made in *Bowen* where Richmond P. held[74] that a builder cannot say that the nature of his contractual duties to the original owner of land sets a limit to any duty of care he owes to a subsequent purchaser. Thus a buyer who for some reason cannot take advantage of section 13 or the 1982 Act is not burdened by contractual stipulations between others. Equally this is the case, it seems, if a buyer has available to him a statutory right of action as consignee or third party beneficiary but chooses not to assert it. In New Zealand it would appear that a tort action is in fact far more likely to be employed as a means of avoiding contractual limitations rather than as providing a remedy where none otherwise exists.

In *Bowen* a duty was recognised irrespective of the builder's contractual position whereas in *The Aliakmon* the majority in the Court of Appeal and by implication Lord Brandon in the House of Lords denied any duty precisely because the carrier had only agreed to carry the goods in terms of the Hague Rules. *The Aliakmon* reasoning on this point does seem compelling. Apart from any question of injustice to the carrier, to give an unfettered tort action to the buyer would seem clearly to circumvent the policy of the Privity Act, if not section 13 of the Mercantile Law Act. Furthermore it would perhaps run counter to the international obligations of New Zealand in ratifying the Brussels convention and passing legislation incorporating the Hague Rules into domestic law. As the Rules are intended to provide an agreed code regulating the responsibilities of the sea carrier, domestic law should not, therefore, also provide an alternative and possibly wider remedy.

[73] Even in the absence of specific provision, tort liability would seem to be excluded by the rule against co-extensive liability in contract and tort laid down in *McLaren Maycroft & Co. v Fletcher Development Co. Ltd* [1973] 2 N.Z.L.R. 100. The rule has recently been affirmed by the Privy Council in the context of a banker-client relationship: see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80 at 107.

[74] [1977] N.Z.L.R. 394 at 407: see also Woodhouse J. at 419.

In New Zealand, at least, to deny a remedy in negligence to the buyer will create no serious injustice in the light of the statutory causes of action available to him. However, as it cannot always be regarded as certain that the Privity Act will fill the gaps left by section 13 of the Mercantile Law Act, some reform in the areas of doubt identified earlier would be desirable. The problem of purchasers of part of bulk cargoes could be addressed by allowing property to pass in an unascertained part of the bulk. This was the position in the United States under section 17 of the Uniform Sales Act. The same policy has been adopted in section 2-105(4) of the Uniform Commercial Code (in force in all States except Louisiana), which also specifically provides in section 1-201 (15) that documents of title (including bills of lading) may relate to portions of an unidentified mass[75]. Further, section 13 of the Mercantile Law Act could be amended to cover the consignee who acquires title other than through becoming the holder of a bill of lading[76].

There remains the wider question whether a similar attitude ought to be taken towards other kinds of third party claims for financial loss arising out of non-performance or mis-performance of contractual obligations. The kinds of difficulties identified above can equally arise in cases concerning the negligence liability to third parties of, for example, solicitors, accountants, engineers, builders and architects. Possibly the sea carrier's immunity from tort ought to be regarded as exceptional in the light of the international commercial context to the buyer's claim. Yet it can well be argued that the third party's remedy in all these cases should be found, if at all, within the terms of the Contracts (Privity) Act[77].

One final point will be noted. While *The Aliakmon* denies any claim in tort by the buyer without property when the damage occurs, it does not suggest that the buyer with property cannot sue. It was noted earlier that he can maintain an action on ordinary principles, being the owner of goods physically damaged by the negligent carrier. *The Elafi*[78] is a recent example. In this kind of case the carrier still cannot rely on the Hague Rules. The problem would be resolved if New Zealand (and the U.K.) were to ratify and enact into domestic law the United Nations Convention on the Carriage of Goods by Sea, adopted in Hamburg in 1978. The Hamburg Rules are intended to replace the Hague-Visby Rules, from which they differ in a number of respects. In particular, it is provided in Article 7 rule 1 that the defences and limits of liability provided for in the Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea as well as of delay in delivery, whether the action is founded in contract, in tort or otherwise.

[75] Nichol "The Passing of Property in Part of a Bulk" (1979) 42 M.L.R. 129 at 142.
[76] P. N. Todd "Bulk Buyers and Economic Loss" [1983] J.B.L. 42 at 54.
[77] See Reynolds"Tort Acts in Contractual Situations" (1985) 11 N.Z.U.L.R. 215.
[78] [1981] 2 Lloyd's Rep. 679.