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IS A CARRIER LIABLE for a shipment it did not receive? What is the situation when a carrier receives only part of the goods from the preceding carrier, or when it receives them all but in damaged condition? How is the carrier's liability affected if the damage is latent or patent?

Discussion of these questions will be limited to shipments in interstate commerce and in three basic areas: (1) carrier's common law liability,[1] (2) effect of federal enactments, and (3) establishment of a prima facie case.

Carrier's Common Law Liability

Under the common law the connecting carrier was liable for loss or damage only while the shipment was in its possession.[2] Dependent on the view taken,[3] such a carrier acted as the agent of the initial carrier or as the agent of the shipper. This did not mean, however, that the initial carrier could not contract otherwise with the shipper.

The common law placed a heavy burden on common carriers and held them accountable for all losses or injuries except by Acts of God or by the Public Enemy.[4] To escape this liability the originating carriers devised contracts limiting their liability to their own lines.[5] The result was to shift upon the shipping public the burden of establishing where the loss or

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[1] Seth v. British Overseas Airways Corp., 216 F. Supp. 244 (D. Mass. 1963).

[2] Miller, Law of Freight Loss and Damage Claims 7 (2d ed. 1961); Strickland Transportation Co. v. Brown Express, 321 S. W. 2d 357 (Tex. Civ. App. 1959); Atlantic Coast Line Railroad Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167 (1911).

[3] The English Courts treated the connecting carrier as the agent of the originating carrier whereas the American Courts considered such a carrier the agent of the shipper.

[4] Common law exceptions were later extended to include the inherent nature of the property, public authority and acts or default of the shipper. United States v. Mississippi Valley Barge Line Co., 285 F. 2d 381 (8th Cir. 1960); Taff, Traffic Management 374 (1st ed. 1955); Adams Express v. Croninger, 226 U. S. 491, 57 L. Ed. 314 (1913).

[5] Miller, *op. cit. supra* n. 2 at 13.

damage occurred.[6] This could conceivably involve separate actions against each carrier participating in the through movement.

Although, through contract, the carriers could limit their liability to their own lines, the common law imposed a high degree of care upon them. The principal reasons were absolute possession and control by the carrier, shipper's inability to protect the freight by his own efforts, and his difficulty in proving fraud or negligence.[7]

Many cases loosely compare the carrier's liability with that of an insurer. A common carrier is not an insurer even though the extent of its responsibility may be equal to that of an insurer or even greater. The nature of the two is not the same. The contract of carriage does not call for indemnity independent of care and custody. A carrier is not entitled to have the loss adjusted on principles peculiar to a contract of insurance. When a loss occurs, unless the result of excepted causes, the carrier is always at fault.[8]

Effect of Federal Enactments

As the common law liabilities became heavier with the growth of transportation, the states began to confuse the issues of rights and liabilities by passing their own statutes.[9]

One of the first federal enactments to clarify the situation was the Carmack Amendment to the Interstate Commerce Act.[10] Basically, the Carmack Amendment affected rail carriers and placed the burden on the originating carrier for loss or damage to goods throughout its journey.[11] In essence this made the connecting carrier the agent of the originating carrier.[12] Several subsequent amendments were made to the Interstate Commerce

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[6] *Ibid.*

[7] *Id.* at 4.

[8] Port Terminal Railroad Association v. Rohm & Haas Co., 371 S. W. 2d 403 (Tex. Civ. App. 1963); Hall v. Nashville & Chattanooga Railroad Co., 80 U. S. 367, 20 L. Ed. 594 (1872).

[9] Miller, *op. cit. supra* n. 2 at 12.

[10] 34 Stat. 584, 49 USCA § 20 (11) (1906).

[11] Minneapolis, St. Paul & Sault Ste. Marie Railroad Co. v. Metal-Matic, Inc., 323 F. 2d 903 (8th Cir. 1963); Miller, *op. cit. supra* n. 2.

[12] Miller, *Id.* at 13; Goliger Trading Co. v. Chicago & N. W. Railway Co., 184 F. 2d 876 (7th Cir. 1950); McCready v. Atlantic Coast Line Railroad Co., 212 S. C. 449, 48 S. E. 2d 193 (1948); Atlantic Coast Line Co. v. Riverside Mills, *supra* n. 2.

Act until passage of the Newton Amendment, which holds the delivering carrier liable as well.[13] This latter amendment allows a vendee to file his claim with the local delivering carrier who may be more co-operative than the more distant origin carrier.[14] The rationale of the amendments is that, since the carriers have exclusive control over the freight, it is better to place the burden on either the originating or delivering carrier, who has better access to the facts, than to require the claimant to prove where the loss or injury took place. This added burden does not appear harsh when considering the probability of prompt reimbursement by the carrier actually at fault. If prompt reimbursement is not made, the co-operation and through route courtesies between the carriers would be in jeopardy.[15] Similar acts have since been passed affecting other forms of surface transportation.[16]

The common law was further modified by the passage of the Bill of Lading Act[17] which standardized the terms of the contract of carriage, and the instrument of the same name. The effect has been to provide for a uniform standard of liability which all originating carriers are required to issue.[18] The through bill of lading governs the entire transaction and fixes the obligations of all connecting carriers.[19] A connecting carrier cannot change the terms of the original bill of lading[20] and, if none is issued, one is implied.[21] In the event an action is brought directly against a connecting carrier, the contract provisions made by the origin carrier enures to its benefit and its liability is measured by its terms.

In addition to standardizing the contract of carriage, the bill of lading allows the carrier to limit its common law li-

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[13] 44 Stat. 1446, 49 USCA §20(11) (1927).

[14] Thomas Foods v. Pennsylvania Railroad Co., 102 Ohio App. 76, 168 N. E. 2d 612 (1960); Atlantic Coast Line Co. v. Riverside Mills, *supra* n. 2.

[15] Atlantic Coast Line Co. v. Riverside Mills, *Ibid.*

[16] Motor Carriers—49 Stat. 543, 49 USCA § 319 (1935); Freight Forwarders —56 Stat. 284, 49 USCA § 1013 (1942).

[17] 39 Stat. 538, 49 USCA §§ 81 thru 124 (1916).

[18] 34 Stat. 584, 49 USCA § 20(11) (1906).

[19] Johnson Motor Transport v. United States, 149 F. Supp. 175 (U. S. Ct. Claims 1957); Commodity Credit Corp. v. Norton, 167 F. 2d 161 (3rd Cir. 1948); Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Railway Co., 285 U. S. 127, 76 L. Ed. 659 (1932).

[20] Inland Waterways Shippers Association v. Mississippi Valley Barge Line, 194 F. Supp. 818 (D. C. E. D. Mo. 1960).

[21] 34 Stat. 584, 49 USCA § 20(11) (1906).

ability.[22] For this privilege the carrier must offer, in consideration thereof, lower rates than would otherwise be charged. A shipper is not obligated to utilize this standard bill of lading and can hold the carrier to its full common law liability. When this is done a ten percent increase in rates is assessed.[23] Today, the rules, regulations and rates filed with the regulating commissions enter into and form a part of all contracts of shipment whether the shipper has notice of them or not.[24] Thus, the liability of interstate carriers for loss or damage to freight is based on the common law, the statutory law, the lawful conditions of the bill of lading, the pertinent provisions of applicable tariffs legally on file and the decisions of the federal courts.[25]

Neither the original Carmack Amendment nor the Bill of Lading Act abrogated the common law rule limiting the connecting carrier's liability to its own line.[26] The intent of the Carmack Amendment was not to confer new substantive rights but only new remedial ones.[27] Any substantive rights, however, that may flow from the statute are determined by reference to the common law.[28] As to actions between carriers, the Carmack Amendment has no application. Once an origin or destination carrier has paid the claimant, its only remedy is against the carrier actually causing the loss or damage and it must establish where this actually took place.[29]

The liability of domestic air carriers is somewhat more lenient than that provided by the Carmark Amendment.[30] Congress has not deemed it advisable to impose the provisions of that amendment upon the airline carriers. Here the common

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22 Miller, *op. cit. supra* n. 2 at 86 & 87; Tedrow, Regulation of Transportation 65 (5th ed. 1959); Taff, *op. cit. supra* n. 4.

23 Tedrow, *Ibid.*

24 American Airlines v. Miller, 356 S. W. 2d 771 (Tex. 1962); Thomas Foods v. Pennsylvania Railroad Co., *supra* n. 14.

25 Modern Wholesale Florist v. Braniff International Airways, 162 Tex. 594, 350 S. W. 2d 539 (1961); Miller, *op. cit. supra* n. 2 at 12; Thomas Foods v. Pennsylvania Railroad Co., *supra* n. 14; Argo v. Southeastern Greyhound Lines, 72 Ga. 309, 33 S. E. 2d 730 (1945).

26 Wald-Green Food Corp. v. Acme Fast Freight, 103 N. Y. S. 2d 768 (N. Y. C. Mun. Ct. 1951).

27 J. & H. Flyer v. Pennsylvania Railroad, 316 F. 2d 203 (2d Cir. 1963).

28 *Ibid.*

29 Consolidated Forwarding v. Union Truck Depot, 356 S. W. 2d 693 (Tex. Cir. App. 1962).

30 Federal Aviation Act—72 Stat. 731, 49 USCA § 1373(a) (1958).

law liability has not been extended beyond its own lines.[31] If a loss or damage occurs, neither the origin nor the destination carrier can be held liable if it can prove that the injury occurred prior or subsequent to the receipt by it. Domestic air carriers are liable only in case of fault. In contrast, the liability of international air carriers is similar to that provided for surface carriers. The governing provisions of the Warsaw Convention[32] also provide for remedial measures against either the origin or destination carrier.

Under the existing statutes, all forms of transportation can limit the amount of their liability by publishing released value rates; however none of these carriers can exempt themselves from liability for their own negligence.[33] Although surface carriers utilize released value rates to some extent, the air carriers, primarily, take advantage of this provision. The main purpose behind the development of the limited liability doctrine is to allow the carriers to grow without fear of being destroyed financially by one catastrophe.[34] A secondary purpose is to allow the movement of certain valuable shipments at reduced rates that could not otherwise be shipped except at exorbitant rates.

Under the provisions of the Warsaw Convention, an air carrier loses its right to limited liability if it fails to complete the air bill of lading as provided.[35] Such a carrier may also lose its right to limited liability if the loss or damage is wilfully caused by an agent acting within the scope of employment.[36]

Establishment of a Prima Facie Case

To establish a prima facie case against the origin or destination carrier, the claimant has the burden of proving the following three elements: (1) receipt of the shipment by the origin carrier in good condition, (2) arrival of the shipment at destination in damaged condition and (3) amount of the loss sus-

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[31] American Airlines v. Miller, *supra* n. 24.

[32] Convention for the Unification of Certain Rules Relating to International Transportation by Air—49 Stat. 3000, Art. 30 (1929).

[33] Miller, *op. cit. supra* n. 2 at 87.

[34] Coblentz, Limitation of Liability for Aircraft, 23 So. Cal. L. R. 473 (1950).

[35] Hardman, International Air Cargo Shipments under the Warsaw Convention 121, 29 Ins. L. J. 120 (1962).

[36] *Id.* at 124.

tained.[37] Contrary to general principles, the carrier has the burden of proving freedom from negligence.[38]

In the first element, the claimant must establish the good condition of the merchandise when initially shipped.[39] If the bill of lading indicates the goods were tendered in apparent good order, it raises a rebuttable presumption that they were free from damage.[40] The degree of proof necessary to satisfy the first element will vary and depend on whether the damage was latent or patent. If latent, the shipper's burden of proof may not be satisfied by merely introducing the bill of lading in evidence,[41] for the facts on the bill are not conclusive.[42]

The claimant also must show receipt of the goods at destination in a worse condition than when tendered for shipment.[43] This is a prerequisite to carrier's liability.[44] There is no reason why damaged goods may not be shipped and, without proof to the contrary, it may be presumed that they were shipped in the same condition as received. In addition to all this, the claimant must prove the market value before and after damage.[45]

Once a prima facie case has been established, the claimant may rely on the common law presumption that the damage to goods, while in transit, was caused by the terminal carrier.[46] The presumption consists of the statement of a probability and, once shown, the burden is on the carrier to rebut or dispel the

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[37] Thomas Foods v. Pennsylvania Railroad, *supra* n. 14; Texas-Arizona Motor Freight v. Bennett, 324 S. W. 2d 32 (Tex. Civ. App. 1959); Yuspeh v. Acme Fast Freight, 222 La. 747, 63 S. 2d 743 (1953); New Jersey Bell Tel. Co. v. Pennsylvania-Reading Seashore Lines, 11 N. J. S. 129, 78 A. 2d 150 (1950).

[38] Hardman, *op. cit. supra* n. 35.

[39] Yuspeh v. Acme Fast Freight, *supra* n. 37.

[40] Ideal Plumbing & Heating Co. v. New York, New Haven and Hartford Rwy., 143 Conn. 640, 124 A. 2d 908 (1956).

[41] *Ibid.*

[42] Miller, *op. cit. supra* n. 2; Silver Lining v. Shein's Express, 37 N. J. S. 206, 117 A. 2d 182 (1955).

[43] Silver Lining v. Shein's Express, *Ibid.*

[44] *Ibid.*

[45] Texas-Arizona Motor Freight v. Bennett, *supra* n. 37; Gude v. Pennsylvania Rwy. Co., 77 N. J. L. 391, 71 A. 1128 (1909).

[46] Thompson v. Collins & Son, 263 S. W. 2d 186 (Tex. 1953); Herman v. Railway Express Agency, 17 N. J. S. 10, 85 A. 2d 284 (1951); Commodity Credit Corp. v. Norton, *supra* n. 19; Thompson v. San Pat Vegetable Co., 207 S. W. 2d 195 (Tex. 1947); Chicago & Northwestern Railway Co. v. Whitnack, 258 U. S. 369, 66 L. Ed. 665 (1922); Gude v. Pennsylvania Rwy. Co., *supra* n. 45; Texas & Pacific Railway Co. v. Adams, 78 Tex. 372, 14 S. W. 666 (1890).

presumption. The law accepts the probability that the loss occurred on the terminal line because, to do otherwise, would place an undue burden on the shipper.[47]

To avoid liability, the carrier sued, whether it be the origin or the destination carrier, must either rebut the presumption or establish non-liability by virtue of the excepted causes.[48] Failure to do either will result in a judgment for the claimant. However this does not mean that the claimant can not bring a direct action against the mesne carrier. By doing so, however, the claimant must affirmatively prove that he caused the loss or damage.[49] The common law presumption does not prevail against the mesne carrier.[50]

Statutory relief action against the delivering carrier may be defeated by proving non-receipt of the material shipped. The so called "delivering carrier" need not establish where the loss occurred but merely that it did not receive any part of the initial shipment. A "delivering carrier" is one who receives actual or constructive possession of the shipment and not one which might or would have received it.[51] Thus, the designation of a delivering carrier in the bill of lading is not conclusive.

In a recent decision an international air carrier dispelled the presumption that the loss of baggage occurred on its line; however, under the provisions of the Warsaw Convention, this delivering carrier was still held liable when part of the service contracted for was performed.[52] In this case the carrier contracted to transport both the passenger and his baggage. Performance of part of his service was fatal to its immunity.

Although Congress has allowed domestic air carriers to limit their liability to their own lines, this does not abrogate the common law presumption that the loss or damage occurred on the

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[47] Modern Wholesale Florist v. Braniff International Airways, *supra* n. 25.

[48] Minneapolis, St. Paul & Sault Ste. Marie Railroad Co. v. Metal-Matic, Inc., *supra* n. 11; Port Terminal Railroad Association v. Rohm & Haas Co., *supra* n. 8; Johnson Motor Transport v. United States, *supra* n. 19; Dietz v. Southern Pac. Rwy. Co., 225 Mo. 39, 28 S. W. 2d 395 (1930); See *supra* n. 4 for list of excepted causes.

[49] Miller, *op. cit. supra* n. 2 at 189.

[50] Strickland Transp. Co. v. Johnston, 238 S. W. 2d 717 (Tex. Civ. App. 1951).

[51] Riss & Company v. United States, 213 F. Supp. 791 (W. D. Mo. 1962)—It is the writer's belief that the court may have properly held Riss and Company liable as a destination carrier since the railroad was acting as their agent under the provisions of Plan I.

[52] Seth v. British Overseas Airways Corp., *supra* n. 1.

destination carrier's line.[53] Thus, a claimant is entitled to rely on this presumption and need not establish where the loss or damage actually occurred. The delivering air carrier may avoid liability, however, by proving that the loss or damage occurred prior to its receipt of the merchandise.

The recent trend of moving road trailers on flat cars is opening a new and unsettled field in claims for loss and damage. Of the five plans available to the shipper, Plan III is the most troublesome.[54] To date, no cases have been found defining the carrier's liability. Basically, the rail carrier contracts to transport the trailer owned or leased by the shipper from one major terminal to another. The shipper is solely responsible for the movement of the trailer to and from the ramp sites. The degree of proof required becomes very critical considering that the claimant has taken part in the through movement and may have contributed to or caused the damage. Except where the rail carrier is obviously at fault, it would appear that those utilizing this mode of transportation will continue to bear the loss in the event of damage.

Conclusion

Most claims are settled without legal action. There is much evasiveness as to loss or damage claims. Officials of enterprises important to the economy and with high reputations for integrity have been known to resort to the "big stick policy." [55] The carrier understands very well that, if the claim is not paid, the business may be lost to a competitor. Thus, the claimant with a large volume of traffic can exert greater influence than the courts. On the other hand, there are some carriers who dodge legitimate claims, realizing that the claimant will not find it feasible to prosecute. Shippers can ill afford to continue the use of such carriers and will try other means wherever possible.

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[53] Modern Wholesale Florist v. Braniff International Airways, *supra* n. 25.

[54] For an explanation of each plan, see 116 Traffic World 175 (1963).

[55] Miller, *op. cit. supra* n. 2 at 4.