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THE FRANK STEWART DETHRIDGE MEMORIAL ADDRESS

by

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The Significance of Tort in Claims in respect of Carriage by Sea

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It is a great honour to be invited to Australia to attend this Conference and to give this address. I am the more honoured because I am merely an academic, in extreme danger of having anything I say instantly shot down by those who really know, whereas Mr. Dethridge was a practitioner of great experience and wisdom. I am also conscious of and alarmed by the great distinction of those who have given this address in previous years. I can only hope that in the presence of this august body I can nevertheless say something that may be of interest: though the chances may not be good.

The subject which I would like to discuss is the use of actions in tort in claims in respect of the carriage of goods by sea. Such actions have always been possible in the days of the law as we know it now. The first editions of both Carver and Scrutton, dated 1885 and 1886 respectively and of course well before a whisper of Donoghue v. Stevenson, both make it clear that carriers may be liable in tort as well as in contract, and

subsequent editions have said the same in very similar wording, though without much explanation. But a stream of recent and not so recent leading cases provides reminders of this possibility. I have in mind particularly the recent decisions of the House of Lords in The Sennar (No.2),[1] which concerns the application of an exclusive jurisdiction clause to a tort claim in respect of a false representation in a bill of lading; The Antonis P. Lemos,[2] which concerns the question whether a claim in tort ranks as "any claim arising out of an agreement relating to the carriage of goods in a ship or the use or hire of a ship" for the purpose of Admiralty jurisdiction; and also The Aliakmon,[3] a decision of the English Court of Appeal concerning title to sue in tort for damage to cargo. This last case of course reconsiders the well-known Margarine Union case[4] of 1969 on the same topic, and the more recent Irene's Success [5]where Lloyd J. decided that developments in negligence liability subsequent to 1969 required new conclusions on this issue. Taking it further back, the leading cases on the extent to which stevedores when sued in tort can take advantage of the Hague Rules protections, The Eurymedon[6] and The New York Star[7], are still fresh in the memory.

I have difficulty in seeing how some of these tort claims, for example that in The Antonis P. Lemos, would stand up. But so long as such claims were confined to actions in respect of destruction of or damage to property, they could be accommodated within a framework which is largely contractual without much difficulty. A number of leading cases in Australia, New Zealand

and the United Kingdom have however extended the possibility of negligence actions, especially in respect of purely financial loss. I have in mind particularly the Caltex[8] case and of course Junior Books[9]. What we have seen in England subsequently can be represented as a tendency to draw back on this issue. To the cautious dicta in Tate & Lyle Industries Ltd. v. Greater London Council[10] and Peabody Donation Fund v. Sir Lindsay Parkinson Ltd.[11] must now be added the actual decisions of the Privy Council in The Mineral Transporter[12] and Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.[13] However, once it is accepted that a negligence action can lie for pure economic loss, a type of loss towards which the main thrust of the law of contract is directed, some study of the interaction of tort and contract becomes imperative. I would like in this address to look at the question primarily from the contract side and consider why actions in tort are brought in connection with carriage of goods by sea, and whether the law of contract can and should be adjusted to avoid the necessity for at least some of those actions.

I should make it clear at the beginning that the purpose of what I shall say is to suggest lines of inquiry which might be pursued, and I shall therefore be referring to many separate points. I have not sought to investigate any of these fully.

It is at least arguable that many of the claims brought in tort would be better dealt with under the law of contract, which

is after all a part of the law specially developed to provide appropriate rules for the undertaking of responsibilities for reward. At least three factors may make contract actions more appropriate than tort actions in claims regarding carriage by sea (and indeed elsewhere). First, leaving aside special torts such as deceit, tort liability is in general for negligence only. Contract liability can be, and in commercial situations usually is, prima facie, strict. It so happens that in carriage of goods by sea the carrier's liability is, by virtue of the Hague and Visby Rules, in general for negligence only, but this does not affect the main point. The tort liability is in principle lesser than the contract liability. Secondly, tort liability is for misfeasance, at least in the absence of any clear undertaking. Contract liability is for non-feasance as well as misfeasance. Thirdly, the rules as to damages in contract have been fairly well developed as being based on an undertaking to compensate in respect of risks contemplated at the time the duty was undertaken. Such an undertaking can be declined or limited by one unwilling to assume the full risk. The introduction of such reasoning into tort law, while far from impossible, has not yet occurred. For example, suppose that in the Junior Books case the proprietor had come to the sub-contractor after the sub-contractor had entered into a contract to do the work, but before he actually started work and certainly before he committed any possible tort, and warned him of specially lucrative contracts that would be lost if the flooring was not properly completed, consequences that the sub-contractor could not

normally have foreseen. Does he thereby make the sub-contractor liable for those consequences, though the sub-contractor can vis-a-vis the main contractor no longer decline the risk? There is no doubt that an appropriate solution can be found to such a problem in tort law, but it does lie readier to hand in the law of contract.

An example of such drawbacks to the use of the law of tort in The Aliakmon itself, where Robert Goff L.J., having by elaborate reasoning come to the conclusion that the Margarine Union case was now superseded and The Irene's Success correct, with the result that a plaintiff who has neither property nor the immediate right to possession of goods but who is on risk can sue the carrier in tort in respect of them, was then forced to the conclusion that no tort had been committed by the particular defendant to the particular plaintiff. The negligence had occurred in the loading, which by the terms of the charter was being performed not by the shipowner but by or on behalf of the charterer. Yet it appears that the bill of lading made the shipowner liable. The case was surely one for a contract action, which was only prevented by what could be regarded as a technicality: it is not surprising that the tort action failed also.

Another problem to which attention should be drawn is the conflict of laws. The rule for contract claims is fairly straighforward: they are governed in general by the law chosen by

the parties. Where there is no express choice of law, the courts seek to ascertain the parties' assumed intentions by reference to jurisdiction and arbitration clauses and the like. Failing clear indications, but still taking such matters into account, the courts look for the system of law with which the facts have their closest and most real connection. This acceptance of the parties' right to choose is not easy to justify in theory, bearing in mind that the law of contract is in a domestic context assumed to apply to parties regardless of their actual intentions. But it has at any rate the advantage of practicality and certainty. The law of tort however has its own choice of law rule which is not geared to the contractual rules at all. The rule in the leading case of Phillips v. Eyre[14] is regarded as unsatisfactory as seemingly requiring compliance with both the lex fori and the lex loci delicti. But proposals for reform tend to consider which of these two systems is the more appropriate. It is probable that neither is appropriate where the tort arises in connection with a contract. In the principal case where an issue of this type has been faced, Sayers v. International Drilling Co. N.V.,[15] where the dispute concerned the effect of a contractual protection on a tort claim, the English Court of Appeal managed to treat the contract rule as prevailing, though for varying reasons. Yet in the recent case of Coupland v. Arabian Gulf Oil Co.[16] the Court of Appeal made it clear that the tort action (for personal injuries suffered at work) was quite separate from the contract action and governed by its own choice of law rule. Perhaps some doubt may be cast on this approach by

dicta in the judgment of Lord Scarman in the Tai Hong Cotton Mills case, for example:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship."

But the matter is certainly not clear.

Conflict of laws questions are of course sometimes ignored: in The Aliakmon the tort, if such it was, appears to have been committed in Korea. But it seems that in this branch of the law also it is necessary to bear in mind the context in which claims arise, and that rules developed for tort law in other and more obvious contexts may not be appropriate to contexts where tort interacts with contract. Again there is reason to consider what defects in contract law give rise to a necessity for tort actions, and whether these could be adjusted or overcome.

Obviously the reason for formulating a claim in tort may be one arising entirely out of the facts of the case. A particular defendant may be thought more worth suing; or more amenable to the jurisdiction, or to service out of it; or may have a ship that can be arrested. It may not be clear with whom the relevant contract was made - whether a bill of lading is a charterer's bill or an owner's, or who entered into the initial contract of carriage - so that formulating an alternative claim in tort may be prudent as a matter of course. There may be a genuine third party to sue, as where the cargo is fraudulently disposed of. But beyond this what are the reasons for suing in tort? Without

any pretence at completeness, I would like to take three obvious reasons for such a claim.

(1) Defects arising out of the wording of the Bills of Lading Act 1855 or its equivalent.

Section 1 of the Bills of Lading Act 1855 (U.K.), which was subsequently enacted in other jurisdictions,[18] reversed the effect of previous decisions that the transfer of a bill of lading did not of itself also transfer the contract of carriage. A doubtless oversimplified way of explaining the nineteenth century cases, taken from the arguments of counsel in The Albazero,[19] is to say that where goods were sold on an arrived basis, property remained in the seller till that time, and the contract of carriage was made with him; but that when they were sold on a shipped basis property would pass to the buyer on delivery to the carrier, and the contract of carriage was with him through the agency of the seller. But once bills of lading were recognised as transferable, it became possible to use such documents in such a way as to reserve the right of disposal until payment, and only then to transfer property. The contract of carriage was thus likely to be made with the seller, and required transfer when he duly indorsed the bill over against payment. It was decided that the transfer of the bill did not have this effect at common law.[20] The Act therefore made the contract pass with the property, which may well have seemed the natural technique at the time.

But the linking of matters of contract to the passing of property does not as a general proposition appear so appropriate nowadays. Indeed the draftsmen of the Uniform Commercial Code sought as a matter of principle to disentangle contract from title altogether. And the linking of the transfer of the contract to the passing of property in the specific context of the Bills of Lading Act has caused actual and potential trouble over many years.

There is first the fact that the wording of section 1 seems to require the property to pass at the same time as the goods are consigned or the bill of lading indorsed. If this is correct, the section has no operation where the property passes before such time (for example, when it passes a hose connection on shore) or after (which will be the case in most situations of bulk cargo, since property cannot pass in unascertained goods and so will not pass till the goods are separated out). It is now 130 years after the passing of the Act, and this point is still unsettled. It now seems that the difficulty can be avoided by adoption of the view originally expressed in Carver, adopted by Roskill L.J. in The San Nicholas[21] and subsequently approved in other cases:

> "It appears that the property need only pass from the shipper to the consignee or indorsee under a contract in pursuance of which the goods are consigned to him under the bills of lading, or in pursuance of which the bill of lading is indorsed in his favour."

This still will not help, however, where because of some

special arrangement between the parties the property does not pass between the parties under the contract, or perhaps even does not pass between them at all. One of these appears to have been the case in The Aliakmon, where the buyer was unable to pay against the bill of lading and a special arrangement was entered into whereby the goods were landed and warehoused for the seller, and resold by the buyer with notice to him. The full interpretation of this transaction, which gave rise to differences of opinion between the judge of first instance and the Court of Appeal, is not clear: but it seems that the property did not, in the Court of Appeal's view, pass under the contract, and indeed it may not have vested in the buyer at all if he resold as agent of the seller.

This may be an unusual case. But another problem might be this. The goods are destroyed by fire while in transit, but the bill of lading is later indorsed across, which may well be legitimate. It is then arguable that there are from the moment of destruction no goods in which property can pass, so that the Act is inoperative. This is a situation where a Brandt v. Liverpool[22] contract could not usually be found either.

There are other matters relating to the Bills of Lading Act which are unsatisfactory or unsettled, or both. The Act speaks of "the contract contained in the Bill of Lading": it was pointed out long ago that there is arguably no contract contained in it except when it is in the hands of a transferee.[23] The Act

speaks as if any transfer of the bill transfers the property. It has been long established that not every indorsement does so. The Act also speaks as if property passes by reason of the consignment or indorsement. But property clearly passes by virtue of the underlying transaction. An indorsee may by his indorsement take full property and constructive possession (or, at least, became bailor of the carrier); or he may take a security interest, which can be regarded as constructive possession; or no property rights at all, as where the bill is indorsed to facilitate collection - depending on the facts.

These are perhaps technicalities which mislead no one. But there are more significant obscurities. It does not appear to be clear whether the indorsee of a bill of lading who does receive property thereby and so has the contract transferred to him is subjected to liabilities on the contract which have already accrued against the shipper, as where dangerous goods were shipped or demurrage is owing. The current Canadian sulphur litigation shows clearly that it may be difficult for the carrier to establish exactly who makes the contract of carriage with him,[24] and he therefore might well prefer the liability of the receiver. It can also be argued that since section 2 of the Act preserves the consignor's liability for freight, the inference is that his other liabilities are transferred. On the other hand the receiver may think it inappropriate that he should be subjected to breaches of which he knew nothing and over which he had no control; and it is suggested in Carver that the duty as to

dangerous goods is not part of the main contract but a warranty outside it which induces acceptance of the goods and issue of the bill of lading, and so is not transferred.

Equally, is the shipper liable after he has transferred the bill of lading away? Similar arguments apply. It might seem that he should be liable in respect of dangerous goods, and perhaps even under the contract generally, which would include such matters as demurrage. But it is arguable that the express preservation of his liability for freight indicates that other liabilities do not survive transfer of the bill of lading.

Another difficulty is that it was long ago held that the contract only passes to a person who obtains full property, and not to an indorsee who obtains merely a pledge interest. The reasoning behind the leading decision, Sewell v. Burdick,[25] is that it would be inappropriate to make him liable for freight. This may well be correct policy, but the result is that where a pledgee wishes to realise his security and take the goods, and requires to sue the carrier in respect of damage to them, a special contract has to be invented, the Brandt v. Liverpool contract, under which in appropriate circumstances the carrier may be interpreted as delivering to him on bill of lading terms. But this contract is merely a remedial device, and it is not certain when it will operate. For a start, I have already mentioned that it will be difficult to find one where the goods never arrive. Equally, it has recently been said that it may not

be found

> "where the possession of goods is taken against a bill of lading in circumstances in which nothing remains to be done in performance of the relevant contract of carriage save physically to hand the goods over to the receiver, who came to the shipowner with the bill of lading in his hand as evidence of his entitlement to take delivery."

Here again questions of the conflict of laws may also arise. In the recent case of The Elli 2[26] (from which this passage is taken) the English Court of Appeal were able to hold that a Brandt v. Liverpool contract supposedly entered into in Jeddah was governed by the law governing the bill of lading. In another case, The St. Joseph,[27] such a contract supposedly entered into in Guatemala was held governed by a law other than that governing the bill of lading. In each of these cases, for different reasons, English law applied. But this may not always be so, and other legal systems may not recognise this device.

Finally, the Act is not effective where the receiver does not obtain a bill of lading, but rather a delivery order, or perhaps no document at all. This may fairly often be the case where a bulk cargo is shipped which it is desired to resell in small packages. The use of large numbers of bills of lading or even ship's delivery orders may not be practicable. Hence the receiver may only obtain a delivery order issued by a shore warehousing organisation or the like, a document giving no rights against the ship nor even perhaps presented to the ship.

It may well be that no remedy can be found for this last

problem in terms of the Bills of Lading Act; perhaps amendment of the law regarding property in unseparated bulk is required. I merely mention the case as another example of the contract machinery not working smoothly, and of other repercussions from the use of the notion of the passing of property in this context.

It is possible that the fact that so many of the issues which I have mentioned are long recognised but long undecided means that none of them create practical problems. But it seems to me that the use of tort claims is at least in part a sign of the unsatisfactory nature of this legislation and that the legislation itself needs to be reconsidered.

If this is so, the first obvious matter for thought is whether the transfer of the contract should continue to be linked with the passing of property. It would secondly be desirable to establish the extent to which the transfer of the contract extinguishes the liabilities of the original shipper and what liabilities are placed on the receiver. I have suggested some considerations relevant to this already. But perhaps a more fundamental question is whether it is actually necessary or appropriate to use the mechanism of transferring the contract at all, or whether it might not be more satisfactory simply to provide that new rights arise under the contract on transfer of the bill of lading. This would leave the initial contracting party liable, and also entitled to sue (in so far as he could prove loss), and simply provide for third party rights on the

contract in favour of holders of bills of lading. A contract of carriage of goods which are dealt with while in transit is arguably a form of third party contract. This is a very specific context for such a contract: it should be possible to avoid the difficulties which confront those who try to formulate statutes conferring rights on third parties to contracts generally. Such is in effect the technique used in the United States by the Federal Bills of Lading Act 1916.[28] The main difference in result caused by this technique would be to prevent receivers of goods being suable for freight. But it may be worth consideration whether the carrier's lien would not be adequate to secure the payment of unpaid freight (though as to this I have doubts[29]). The abandonment of the link between contract and property, and of the notion that the burdens of the contract were to be transferred as well as the benefits, might then make it possible for pledgees to sue under such a provision in respect of damage to the goods without recourse to the hazards of the Brandt v. Liverpool contract; their right to do so being controlled by the proposition that a person can only recover loss which he can prove he has suffered. The same principle would control actions by other indorsees. This reasoning is of course reaffirmed in The Albazero, which in effect disallowed for most purposes another contractual way round the difficulties, that the consignor could sue for the full loss in respect of the goods and hold the proceeds in trust for the appropriate party.

The status of the legislation from the point of view of the

Conflict of Laws might also be clarified. It is suggested in Scrutton,[30] on slender authority, that English courts must apply section 1 regardless of the law governing the transfer of the bill of lading. This does not seem clear; nor is it clear whether or not the English provision only applies where the contract of carriage is governed by English law. Similar considerations may apply in other jurisdictions.

Overall my suggestion is that the question of suit by the receiver of goods is one that requires study; that the techniques to transfer the contract to him used 130 years ago by the Bills of Lading Act may not be satisfactory for present needs; and that the cure may lie in conferring rights on third parties in this limited situation. If the problems created by the Act of 1855 could be eliminated, there might be less need for claimants to try to correct the deficiencies in contract law by the use of tort actions, with the repercussions into and out of a different area of the law which they bring.

(2) The desire to sue other persons not parties to the contract of carriage.

Tort actions seem frequently to be brought to obtain the liability of someone who is not a party to the contract of carriage but who participates in its performance. An obvious example is provided by an action brought against the shipowner

where the bill of lading is a charterer's bill: perhaps a tort claim may be added as a matter of course in case it may be established that the contract is not with the shipowner. Equally, in the converse situation, dangerous goods may be shipped and it may not be clear who made the contract of carriage, as in the Canadian sulphur cases. It may also be desired to sue an on-carrier; or the carrier where the bill of lading is issued by a freight forwarder who may himself contract with the carrier.

At what might be called a lower level are actions against stevedores, or even against the master or members of the crew of the vessel, or dock workers.

There is a temptation to start by saying that in principle such actions should not be brought at all: that goods have been entrusted to a particular person, and it is the liability of that person which should be looked at. Actions against those who may be loosely (and leaving out the employees) described as subcontractors are only evasions of the terms under which the goods were accepted for carriage, and, except in cases where it is arguable that the contract has not commenced operating or is functus officio (e.g. the goods are being warehoused after discharge) should be disallowed.

It is of course possible to draft provisions under which one contracting party procures a promise from the other that actions

against subcontractors will not be brought. But where this is not done, to disallow such actions or even to suggest doing so would be to go against much of the law of bailment: or in a more modern context, against the principle that persons owe a duty not wilfully or negligently to harm the person or property of others. As Bramwell L.J. said, perhaps before his time, in Hayn v. Culliford (1879)[31]:

> "It may be asked where is the duty of care? I answer that duty that exists in all men not to harm the propertyof others. This is not a mere nonfeasance which is complained of, it is a misfeasance; an act and wrongful."

If this action cannot (except by prior agreement of the parties) be prevented altogether, then two problems of general importance need solving. The first is to prevent the defendant from being liable for more than he actually undertook, or for more than the main contractor undertook. The second is to set limits on who can bring this action.

As to the first point, the tension was well expressed by Lord Denning M.R. in Morris v. C.W. Martin & Sons. Ltd. [31]:

> "On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the defendants if they are held to a great responsibility than they agreed to undertake."

If one approaches the question from the point of view of the contract between the plaintiff and the main contractor, to seek to extend these benefits to the subcontractor will obviously

cause difficulty with the notion of privity of contract. This in general seems to have been what happened in the leading case of Midland Silicones Ltd. v. Scruttons Ltd.[33]. If the notion of privity of contract is adhered to, then the only way out consistent with principle is to detect or invent a further contract between the plaintiff and the subcontractor. This I imagine is what Lord Roskill meant when he said in his Holdsworth lecture of 1981 that this method of extending the question of the contractual exemptions was "very much more soundly based in legal principle".[34] It was the route taken in The Eurymedon and subsequently reaffirmed in The New York Star. Knowing that both cases originate from this part of the world, I hope I am not taking undue risks by saying that I respectfully find the detection of new contracts between parties who may not have known that they were making them a rather fragile device. The Brandt v. Liverpool contract is open to the same criticism. There are situations where even the most vigilant detective may not be able to find a contract. It is worth noting that the English Court of Appeal in The Leonidas D[35] was unwilling to detect a contract from inactivity by both sides in pursuing on arbitration, though the case may of course go to appeal. There are also difficulties with agency law, both as to authority, for the supposed agent may not know who his subcontractor-principal is likely to be, and as to ratification.

It appears that the Midland Silicones case was argued almost entirely on the basis of the exemption clause in the bill of

lading, that is to say, in the main contract. A bold decision modifying privity of contract to the extent that third parties may rely on exemption clauses clearly expressed so as to be intended to protect them could of course cut this knot: and it is worth noting that in Woodar v. Wimpey[36] Lord Scarman suggested that the privity of contract doctrine might be a suitable topic for judicial (rather than legislative) reconsideration. But if this is not likely to occur, I suggest that it may be that more thought could be given to the other contract, that between main contractor and sub-contractor.

It is plainly possible for a person to undertake limited contractual duties of a sort which would also limit his duty of care to the other contracting party in tort. It should also be possible for him likewise, when undertaking the sub-contract, to limit his liability to the goods owner. Lord Denning in the passage from Morris v. C.W. Martin & Sons Ltd. from which I have quoted goes on to suggest that this is possible if the goods owner consents:

> "The owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise."

But perhaps one can go further. The subcontractor may take the risk that the sub-bailment may be unauthorised, and he a trespasser. But where he has no reason to suspect this, I suggest that the bailee has normally apparent authority to make a sub-bailment, and to accept a normal modification of the

sub-bailee's duty of care.

It may well be that the tort doctrine of volenti non fit iniuria is too limited to accommodate such reasoning: but there are clear suggestions in Junior Books that the subcontractor's terms may indicate the undertaking of a limited duty of care; and such reasoning also appears in the judgment of Robert Goff L.J. in The Aliakmon. Such is of course also the reasoning used by Lord Denning in his dissenting judgment in the Midland Silicones case, which may have gone beyond the scope of the arguments advanced by counsel. It has also been employed in one case concerning a road carrier who placed goods in a port terminal, Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.,[37] where Donaldson J. said:

> "In my judgment there was no duty of care, apart from that arising out of the status of (sub) bailee, and that duty was owed not only to the head bailee but also to the owners of the goods."

It is true that this is a case where the sole liability was for failure to take care of the goods, and that to this the terms on which they were received was more obviously crucial. Donaldson J. expressly excluded consideration of what would have happened if the bailees had actually damaged the goods. But I suggest that the same reasoning may be applicable elsewhere.

If some such view is not taken, it may be difficult to avoid the extreme view which is sometimes put forward: that the

subcontractor is liable as a bailee unaffected by the terms of either contract, and that his liability to the goods owner is either that of a common carrier, or a liability analogous to that of a common carrier. Such liability would be strict, subject only to the common law exceptions of Act of God, Queen's Enemies and inherent vice. Although the High Court of Singapore toyed with this reasoning in The Golden Lake[38] it surely cannot be permitted.

Overall therefore I suggest, though this is not a proposal directly addressed to the principles of contract, that the law could be reconsidered on the basis of the contract between carrier and subcontractor. What is needed is a new Albazero to set in order the many and inconsistent strands of nineteenth century bailment cases (especially those concerning on-carriers), and to determine how they stand against the background of modern principle. I believe that the much-maligned Elder Dempster case[39] would be of assistance in this respect, and I venture to suggest that although that case may have seemed puzzling on the approach taken in the Midland Silicones case, and although the relation between bailor and sub-bailee was of course there more direct than it would be in most cases, viewed in the above light the case, and the dicta of Lord Sumner on the last two pages, are not difficult to follow.

When we come to the second question, however, who can sue, it seems to me that the action being for damage to property, it

is only the owner or the person entitled to immediate possession of that property who should be able to do so. Such indeed was the decision of Roskill J. in the Margarine Union case. Once the possibility of an action in negligence of an action for purely financial loss is accepted an obvious obstacle against extension of the action is removed. But to allow a person who is on risk but has neither possession nor property to sue in tort is to use the tort action to circumvent the rules of privity of contract. This may be on occasion useful as an expedient, but I have already suggested that the proper way to approach this problem is by way of the extension of contractual rights. The full facts in The Irene's Success do not appear, but it looks on its face to be a case where a proper scheme of contractual rights would allow an action in contract. In The Nea Tyhi,[40] where plywood was wetted when carried on deck, Sheen J. was rightly sceptical about the task of determining whether the plaintiff could sue in tort by taking meteorological evidence as to the time at which rain was likely to have occurred in the Bristol Channel, and relating this to the ownership of the cargo at that moment. But he was able to hold the shipowner liable for breach of contract in carrying the goods on deck, and this was surely the correct approach in principle. Although it may be rash to talk about The Aliakmon I would suggest that the decision that an action in tort was not available to the plaintiff who had no property in the goods was correct. It will now be the more difficult to argue the contrary because of dicta in The Mineral Transporter, some of which are expressed in such a way that could be taken to cover a situation

such as that in The Aliakmon (quite apart from the fact that The Aliakmon is referred to without apparent disapproval). What I would respectfully suggest as being more dubious is the reasoning of the Master of the Rolls and Oliver L.J., that to allow the action would be to allow evasion of the contractual protections. I have already suggested how I think these could be regarded as applying even if the action was allowed. The reason for not allowing the action is I venture to think a more fundamental one concerning the different nature of the duties undertaken in contract on the one hand and laid on persons generally by the law of tort on the other.

It is perhaps also worth noting that the facts occurred before the Visby Rules came into operation in the United Kingdom, and that the bill of lading would probably not have been subjected to the Rules even had they been in operation. Where these are applicable, the new Article IV. BIS extends the contractual protections to actions brought in tort. The extent to which these provisions cover tort actions between other parties than the actual parties to the contract of carriage is however doubtful and at present, it seems, merely a matter of assertion.[41]

A matter to which attention might however be given in this area is that of the position of buyers of part of a bulk cargo. An alteration of the Bills of Lading Act could protect them if they have bills of lading. Where they have not, which would

doubtless be more common, an action in tort may be a legitimate recourse: but if they can have no property in part of a bulk, even this action may be denied to them. If it was available to persons without property or the right to possess, the problem would be solved. But if the limits which I have suggested above are to be adhered to, another solution is to consider the possibility of permitting property to pass in part of a bulk. That is to say, section 16 of the Sale of Goods Acts (U.K.) and its counterparts may require modification of the sort long ago effected in the United States.

(3) Actions on false statements in the bill of lading.

The third category of tort action which I would like to consider briefly is that of actions in respect of false statements in the bill of lading. These may concern the fact of shipment, or the quantity of goods shipped, their date of shipment or their apparent order and condition upon shipment. The notion that such statements form part of a contract to deliver at destination goods as described except in so far as some failure was excused by excepted perils was long ago denied: they are not part of promises, but non-contractual statements. A person who takes up a bill of lading relying on such statements may however use them as prima facie evidence that goods as described were shipped: and if he can estop the carrier from denying the statements he may be able to sue for breach of

contract even though the reason for the breach is actually that the goods were never received, or shipped short, or shipped in a defective condition.

Here however a major obstacle is the famous decision in Grant v. Norway,[42] that the master has no authority, neither actual nor apparent, to sign for goods not on board. In an extreme form, when no goods are shipped at all and the situation is one where the contract of carriage would only have been made by receipt of the goods on or behalf of the carrier, it may well be that there is no underlying contract at all, which may give rise to even more drastic reasoning.[43]

Here it seems that the law of tort may fit in with the law of contract, so that if there is no contract action there is no tort action either. It is arguable that the way round the impasse is to sue the signer or his employer, or perhaps the person for whom he acts as independent contractor, for fraud or negligence. The employer or other person may then be required to answer on the principles of vicarious liability in tort. However, this has always seemed an unsatisfactory evasion: as Scrutton says, "It would be curious if the master's acts could bind the owner in tort but not in contract".[44] If the decision of the English Court of Appeal in The Ocean Frost,[45] another recent case which is itself under appeal, is correct, this route will in many situations not be available. For it is there held that in the case of torts of representation the contract and tort

tests coincide, and it is not permissible to rely on the tortious "course of employment" test to render liable a person who would not be liable under the rules of actual and apparent authority.

No one seems to have much of a good word for Grant v. Norway. As Scrutton says,[46] "It is submitted that there would be ample justification for a higher court to reverse Grant v. Norway and hold that a master is held out by the shipowner as having ostensible authority to make representations as to quantity". The principles on which is is based are quite inconsistent with the notions of apparent authority and indeed tort liability as subsequently developed, of which perhaps the starting point is Lloyd v. Grace, Smith & Co.[47] But in The Nea Tyhi Sheen J. reviewed the subsequent authorities and came to the conclusion that there was more subsequent support for the supposed rule than might have been expected. He was fortunately able to distinguish it as inapplicable to statements as to shipment under deck.

In the United States this reasoning was long ago rendered inoperative in this context by statute,[48] and I would submit that this is another situation where a proper adjustment of the contract position would obviate the need even to consider evasion by the use of tort reasoning, even if the attempt would not succeed. Such a change would link with the other reconsiderations of the Bills of Lading Act which I have proposed, for the Act itself contains in section 3 a provision which certainly looks to have been intended to reverse some of

the effects of Grant v. Norway, decided two years earlier. It is however well known that its wording is not apposite to what would be thought necessary nowadays, as it confers no right of action and only provides conclusive evidence against the master or other person signing the same.[49]

Such a reform should enable actions to proceed in contract as is appropriate. That is not, however, to say that there is not a role for the tort action. Where the false statement is fraudulent, an action in deceit, with its possibly different features, such as the possibility of greater damages, may well be appropriate; it may also be proper to sue the person actually making or attesting to the statement. And there may be cases where an estoppel will not provide the right remedy. For instance, where the bill of lading is wrongly dated, a cause of action against a shipowner framed on the basis that he is estopped from saying that the goods in his ship are not March goods may not always be what is required; general damages at large for the putting into circulation of a false document may be more suitable. But the removal of Grant v. Norway would, I submit, remove the necessity for many contortions by way of actions in negligence or for breach of warranty of authority.

Conclusion

My principal suggestions for reform are that the wording of section 1 of the Bills of Lading Act, or its equivalent, should be reconsidered, and that section 3 should likewise be reconsidered with a view to removing the supposed rule emanating from Grant v. Norway. Beyond this I have a more general suggestion, not specifically related to law reform, for looking at the problems of litigation against third parties in a way that was not adopted in the Midland Silicones case.

Both Australia and New Zealand have been leading jurisdictions in connection with the formulation and development of the central principles of tort liability. It is not possible to be well informed on negligence liability without being familiar with a number of leading decisions of the High Court of Australia such as the Caltex case and (though this is not a maritime case) Jaensch v. Coffey.[50] Equally New Zealand has generated leading cases on statements and representations, and on defective buildings. The question of the proper adjustment of tort principles for the situations where contractual relations are involved is one requiring cautious but sophisticated developments in tort reasoning. Such developments must obviously be pursued. But I would suggest that not only must the matter be approached from the tort side, by the prolongation of principles laying down general public duties for behaviour in society. The situations which I have been discussing relate to persons who voluntarily undertake responsibilities by way of contract, who

consider whether or not to undertake risks, what insurance to carry and so forth. I suggest that detailed attention should be given to the operation of the contract rules in the area of carriage of goods by sea with a view to amending those which create such unsatisfactory results that attempts have to be made to circumvent them by the use of other reasoning.

1. [1985] 1 W.L.R. 490. See also The Makefjell [1976] 1 Lloyd's Rep. 29; The Happy Pioneer [1983] H.K.L.R. 43 (wrongful delivery of cargo).

2. [1985] 2 W.L.R. 468.

3. Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd (The Aliakmon) [1985] 2 W.L.R. 289.

4. Margarine Union GmbH v. Cambay Prince S.S. Co. Ltd(The Wear Breeze) [1969] 1 Q.B. 219.

5. Schiffahrt und Kohlen GmbH v. Chelsea Maritime Ltd. (The Irene's Success) [1982] Q.B. 481.

6. A.M. Satterthwaite & Co. Ltd. v. New Zealand Shipping Co. Ltd. (The Eurymedon) [1975] A.C. 154.

7. Salmond & Spraggon (Australia) Pty Ltd. v. Port Jackson Stevedoring Pty. Ltd. (The New York Star) [1981] 1 W.L.R. 138.

8. Caltex Oil Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 C.L.R. 529.

9. Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520.

10. [1983] 2 A.C. 509.

11. [1985] A.C. 210.

12. Privy Council, 1 July 1985.

13. Privy Council, 3 July 1985.

14. (1870) L.R. 6 Q.B. 1.

15. [1971] 1 W.L.R. 1176.

16. [1983] 1 W.L.R. 1136.

17. The same problem may arise where the passing of property is in issue. Books on the Conflict of Laws suggest with some firmness that this is in the interests of certainty governed by the lex situs. The examples mostly concern dispositions which by the local law extinguish (or do not extinguish) prior titles. But it is not clear that such a rule will always be appropriate, even where goods are not in transit. In the well-known case of President of India v. Metcalfe Shipping Co. Ltd. (The Dunelmia) [1970] 1 Q.B. 289 much turned on the question whether f.o.b. sellers in Ancona reserved property by retaining the bill of lading. English law was however applied, being the law governing the contract: see the award of Mr. R.A. Clyde reported at pp. 294-295. Italian law is not referred to.

18. e.g. Goods Act 1958 (Vic.) s.73; Mercantile Law Act 1908 (N.Z.), s.13.

19. [1977] A.C. 774.

20. Thompson v. Dominy (1845) 14 M. & W. 403.

21. Pacific Molasses Co. v. Entre Rios Cia. Naviera S.A. (The San Nicholas) [1976] 1 Lloyd's Rep. 8.

22. Brandt v. Liverpool, &c., S.N. Co. [1924] 1 K.B. 575.

23. Though it is also arguable that any earlier transaction is merged into and superseded by the bill of lading contract.

24. An example is Union Industrielle et Maritime v. Petrosul International Ltd. (The Roseline), 1985 A.M.C. 551; where, however, the reasoning is open to question bearing in mind the views expressed by the arbitrator in The Dunelmia, supra, note 18.

25. (1884) 10 App. Cas. 74.

26. Illyria Cia Naviera S.A. v. Bamaodah (The Elli 2, Toulla and Eleni 2) [1985] 2 Lloyd's Rep. 107.

27. [1933] P. 119.

28. s. 31 (49 U.S.C.A. s.111).

29. There may however be conflict of laws difficulties affecting the exercise of liens in different countries which make an action in personam useful.

30. 19th ed. at p. 26, note 23A.

31. (1879) 4 C.P.D. 182, 185.

32. [1966] 1 Q.B. 716, 729.

33. [1962] A.C. 446.

34. "Half a century of commercial law"; Holdsworth Club of the University of Birmingham, 1981, at p. 11.

35. Allied Marine Transport Ltd. v. Vale do Rio Doce Navegacao S.A. (The Leonidas D) [1985] 1 W.L.R. 925. Another case which might be mentioned in this context is Aotearoa International Ltd. v. Scancarriers A/S, Privy Council, 18 July 1985.

36. Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd. [1980] 1 W.L.R. 277.

37. [1976] 2 Lloyd's Rep. 215, 222.

38. [1982] 2 Lloyd's Rep. 632.

39. Elder Dempster & Co. v. Paterson, Zochonis & Co. [1924] A.C. 522.

40. [1982] 1 Lloyd's Rep. 606.

41. See Diamond [1978] L.M.C.L.Q. at pp. 248-253. The question is in broad terms one of the extent to which the Rules go beyond the control of contract terms and constitute overriding legislation-based control with carriage by sea. The latter technique could of course be overtly adopted by legislation suitably framed.

42. (1851) 10 C.B. 665.

43. e.g. Heskell v. Continental Express Ltd. [1950] 1 All E.R. 1033.

44. 19th ed. at p.112, note 56.

45. Armagas Ltd. v. Mundogas S.A.(The Ocean Frost) [1985] 1 Lloyd's Rep. 1. The case did not concern bills of lading, but a chartering manager who entered into an unusual charter in circumstances in which it was held that the other party was not justified in assuming that he had the authority he claimed.

46. 19th ed. at p. 115 note 72.

47. [1912] A.C. 716.

48. See V/O Rasnoimport v. Guthrie & Co. Ltd. [1966] 1 Lloyd's Rep. 1.

49. s.22 (49 U.S.C.A. s.102). See also U.C.C. ss. 7-102, 7-203, 7-301.

50. (1984) 54 A.L.R. 417.