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# Admiralty -- "Both-to-Blame" Clause in Ocean Bills of Lading

# CASES NOTED

## ADMIRALTY—"BOTH-TO-BLAME" CLAUSE IN OCEAN BILLS OF LADING

Cross libels by the United States as owner of the S.S. "Nathaniel Bacon" and the Belgian Overseas Transport, S.A., as owner of M.V. "Esso Belgium," (wherein the cargo owners were impleaded, or intervened) to recover respective damages resulting from the collision of the two vessels. The question framed by the pleadings was the validity of the "Both-to-Blame" clause[1] in the bill of lading. *Held*, reversing the district court, that said clause was invalid as an agreement limiting the carrier's liability. *United States v. Farr Sugar Corp. et al.*, 191 F.2d 370 (2d Cir. 1951).[1a]

The validity of the Both-to-Blame clause in an ocean bill of lading has been questioned,[2] but a decision squarely meeting the issue is lacking.[3] The clause itself is a product of several indigenous American doctrines.

The first of these is the system of divided damages[4] as developed by the United States admiralty courts, as opposed to the theory of apportioned damages as expressed in the Brussels Collision Convention.[5] Thus where two vessels are at fault in a collision, the one suffering the least damage pays to the other the amount necessary to make them equal, which amount is one-half of the difference between the respective losses sustained.[6] It has been said that equal apportionment is the rule, although one tort-feasor is

1. "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier . . .," KNAUTH, OCEAN BILLS OF LADING 85 (3d ed. 1947).

1a. *Cert. granted sub nom.* United States v. Atlantic Mutual Ins. Co., 20 U.S.L. WEEK 3185 (U.S. Jan. 15, 1952).

2. See KNAUTH, *op. cit. supra* note 1.

3. *See* W.W. Bruce, 94 F.2d 834, 837 (2d Cir. 1938), *cert. denied sub nom.* Pacific-Atlantic S.S. Co. v. Weyerhauser Timber Co., 304 U.S. 567 (1938); (". . . this renders it unnecessary to consider the much debated legal question as to the validity of the both-to-blame collision clause.").

4. The Catherine, 17 How. 170 (1854); The North Star, 106 U.S. 17 (1882).

5. The Brussels Collision Convention of 1910, 6 BENEDICT ON ADMIRALTY 3-7 (6th ed. 1941); Article 4: "If two or more vessels are in fault the liability of each vessel shall be in proportion to the *degree of the faults* respectively committed. . . . The damages caused either to the vessels, *or to their cargoes*, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties." (Italics supplied.)

6. See note 4 *supra.*

guilty of much greater fault, because of the impossibility of correctly ascertaining the quantum of fault involved.[7] This rule obtains as to actions between the vessels, but the position of cargo is that of an innocent party not liable for the consequences of a collision.[8] Therefore the shipper has the election of proceeding *in personam* at common law or at admiralty *in personam* or *in rem*, as well as an election between joint tort-feasors where he has been damaged as a result of a collision involving two vessels, both of which were at fault.[9] "The United States alone . . . adheres to the peculiar doctrine that cargo in ships does not accept the same proportion of fault as its carrier ship in a both-to-blame collision. . . ."[10]

The second is based on the fundamental and jealously guarded principle of common law that a common carrier cannot limit its own liability.[11] Any attempt to establish exemptions from liability for the negligence of the carrier's servants was stricken by the federal courts as wanting in the element of voluntary consent, and as in conflict with public policy.[12] In order to enable United States shipping to compete favorably for world markets, Congress enacted the Harter Act.[13] Its purpose was twofold: (1) it provided for mitigation of the common law "insurer's" liability of carriers,[14] in exchange for, (2) a prohibition of clauses in the contract of carriage lessening the carrier's liability.[15] In effect, the Act relieved the carrier from liability for the negligence of its servants or agents, if in fact it did provide a "seaworthy" vessel.[16] As a result, the shipper lost his right of action against one joint tort-feasor, the carrier, in a both-to-blame

7. The Atlas, 93 U.S. 302 (1876).
8. *Ibid.*
9. *Ibid.*
10. See KNAUTH, *op. cit. supra* note 1, at 158-159.
11. Liverpool & G.W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 441 (1889).
12. Inman v. South Carolina Ry., 129 U.S. 128 (1889); *accord*, The Kensington, 183 U.S. 263 (1920); *cf.* The Folmina, 212 U.S. 354 (1909); see The Delaware, 161 U.S. 459, 461 (1895). (The rule against limitation by contract of the carrier's liability for negligence had been abrogated in England, as shown by this excerpt from a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives: "That, taking advantage of this practical monopoly, the owners of the steamship lines combined to adopt clauses in their bills of lading, very seriously and unduly limiting their obligations as carriers of the goods, and refuse to accept consignments for carriage on any other terms than those dictated by themselves. That this policy has been gradually extended by the steamship owners until at the present time their bills of lading are so unreasonable and unjust in their terms as to exempt them from almost every conceivable risk and responsibility as carriers of goods. . . .").
13. 27 STAT. 445 (1893), 46 U.S.C. § 190 (1946).
14. Scarburgh v. Compañía Sud Americana De Vapores, 174 F.2d 423 (2d Cir. 1949).
15. See L. Hand, J., concurring in American Mut. Liability Ins. Co. v. Mathews, 182 F.2d 322, 325, 326 (2d Cir. 1950).
16. "The Harter Act is intended to relieve the shipowner who has done all that he can to send out a well-fitted expedition from liability for damages caused by faults or errors in the navigation and management of his vessel after his ship has gone away from his personal observation." See 6 BENEDICT, *op. cit. supra* note 5, at 290.

collision. This left him to pursue his remedy against the other tort-feasor, the non-carrier.

In *The Chattahoochee*,[17] the Supreme Court held that any payment by the non-carrier to the shipper for damages resulting from a both-to-blame collision could be included in computing the total damages suffered by the non-carrier, and recouped from the carrier when a balance was struck between the vessels. Thus it may readily be seen that the carrier may be forced to contribute by this indirect proceeding although exempt from direct action brought by the shipper.[18] Also, it follows that where the carrier is *wholly* to blame it is completely exempt from liability, but where it is only *partially* to blame it may incur a loss in spite of the provisions of the Harter Act.[19] To correct this anomalous situation carriers have uniformly included the Both-to-Blame clause in the bill of lading, providing for the indemnification of the carrier by the shipper for all losses sustained by the former in the recoupment or set-off proceedings between the vessels.[20]

The district court upheld the clause as a means of evading the procedural difficulties which operate as barriers to the effectuating of public policy *as changed and declared* by the Harter Act.[21] In reaching this conclusion Judge Medina relied upon the decision in *The Jason*,[22] which gave rise to the so-called Jason Clause,[23] a standard clause in all ocean bills of lading. The circuit court reversed on the ground that the clause was in violation of the Carriage of Goods by Sea Act.[24] Judge Clark, speaking for a divided court, maintained that the Jason Clause creates a *right* in cargo as opposed to the contention that it is a valid contractual limitation of the carrier's liability.

It is submitted that an enactment of the legislature is an incontro-

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17. 173 U.S. 540 (1899).

18. The admiralty rule as to contribution between tort-feasors is an exception to the common law rule. However, the right to include damages paid to cargo in the division does not stand on *subrogation*, but arises from the *tort*. The George W. Roby, 111 Fed. 601 (6th Cir. 1901); Erie R.R. v. Erie & West. Transp. Co., 204 U.S. 220 (1907); Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394 (1935).

19. See note 13 *supra*.

20. See note 1 *supra*.

21. United States v. The Esso Belgium, 90 F. Supp. 836, 842 (S.D.N.Y. 1950).

22. 225 U.S. 32 (1912).

23. "In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. . . ." KNAUTH *op. cit. supra* note 1, at 86.

24. 49 STAT. 1208 (1936), 46 U.S.C. § 1300 (1946); a restatement of the Harter Act, and now controlling. Section 1303(8) states, "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability *otherwise than as provided in this chapter or section 25 of Title 49*, shall be null and void and of no effect. . . ." (Italics supplied.)

vertible statement of public policy.[25] Although a particular act may be the result of "pressurized" legislation, designed to change established theories of liability, it should not be so strictly construed as to result in a partial defeat of over-all legislative intent. This anomalous situation created by legislative omission can readily be corrected, not only by legislating, but also by a judicial finding that the clause in question is a contractual limitation that *has been provided for* in the act.

## ADMIRALTY—RIGHT OF CREW UNDER "LAY PLAN" TO RECOVER FOR NEGLIGENT INTERFERENCE WITH ADVANTAGEOUS ECONOMIC RELATIONS

Libelants were engaged in fishing under a lay plan[1] as the crew of the Bear. Respondents' boat, the Marsha Ann, collided with and damaged the Bear, necessitating the Bear's return to port and compelling her crew to abandon their fishing venture. The crew libeled the respondents for damages based upon their expectant share of profits under the lay plan. *Held*, the Marsha Ann negligently damaged the Bear, for which her owners were awarded damages;[2] but the crew sustained only damnun absque injuria. *Borcich v. Ancich*, 191 F.2d 392 (9th Cir. 1951), *cert. denied*, 72 Sup. Ct. 293 (1952).[3]

Collision cases involving the rights of seamen under a lay plan have been rare. It has been held that such seamen may join with their boat owners against an intentional tort-feasor.[4] Also, where the fish were already caught when the collision occurred recovery was allowed the crew against the negligent boat's owner.[5] In addition, where the owner of a negligent vessel was also the employer of the crew of the damaged boat, the members of the crew, though under the lay plan, were allowed to sue in their own names for the loss of prospective profits.[6] However, the courts are divided as to whether a crew on the lay plan may join with the owner

25. The Irrawaddy, 171 U.S. 187 (1897); The Jason, *supra* note 22.

1. The lay plan is an agreement whereby seamen receive as their compensation a certain share or profit of the proceeds of the voyage (usually fish). In the instant case the crew's collective lay was 68%; whereas the owners' share was 32%. However, the courts are divided as to what kind of interest a crew's lay share represents. Some cases have followed the rule adopted by Lord Avanley in Wilkinson v. Frasier, 4 Esp. 182, 170 Eng. Rep. 684 (1802) and regard the shares under the lay plan as wages. *See* United States v. Laflin, 24 F.2d 683, 685 (9th Cir. 1928); Reed v. Hussey, 20 Fed. Cas. No. 11,646, at 444 (D.C.S.D.N.Y. 1836); Lewis v. Chadbourne, 54 Me. 484, 485 (1865). Some decisions apparently regard the crew's interest under the lay plan as a tenancy in common The Columbia 6 Fed. Cas. 173, No. 3,035 (E.D.N.Y. 1877); The Mary Steele, 16 Fed. Cas. 1003, No. 9,226 (D. Mass. 1873).

2. The court awarded damages of $4,320 as the owners' 32% interest in the prospective catch and $17,770.67 as a reasonable amount for the cost of repairs.

3. Mr. Justice Black took the unusual position that not only should certiorari be granted, but that the judgment should be reversed.

4. United States v. Laflin, 24 F.2d 683 (9th Cir. 1928).

5. The Mary, 61 F. Supp. 329 (E.D.N.Y. 1945).

6. Van Camp Sea Food Co. v. DiLeva, 171 F.2d 454 (9th Cir. 1948).