# CARGO DISPUTES AND THE METRONOME SYNDROME

## (Part 1)

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More than any other sphere of litigation which comes to mind does the maritime cargo claim manifest the metronome syndrome: the lawyer's pathological obsession to see the burden of proof oscillate between cargo and ship like a rebounding ping-pong ball. Though the mania was diagnosed in the nineteenth century, the Hague Rules did not prescribe any therapy in 1924. The High Court of Australia did treat one of the symptoms as recently as 1981, yet the condition will remain unstable unless the Hamburg Rules can provide a favourable prognosis.

This article examines the respective burdens of proof as the issues fluctuate in the claim to recover compensation from the maritime carrier for the loss of or damage to cargo. In the cargo dispute it is frequently difficult to explain the cause of mischief to cargo, a difficulty which is exacerbated by the increasing incidence of containerized packing. Consequently, the outcome of a dispute so often turns on the burdens of proof and the failure of one party or the other to discharge his burden. Moreover, an examination of the burden of proof sequence is necessary to appreciate the framework of the Hague Rules and to understand the substantive liability imposed on the carrier.

## BACKGROUND

Nineteenth century cargo shipping inherited the doctrine espoused by Lords Holt and Mansfield[1] which equated the public sea-carrier with the common carrier and rendered him strictly liable for the safety of the cargo.[2] The carrier could escape liability on proof that a cause of loss or damage was excepted by the contract but common law subjected the exceptions to two secondary sources of liability.[3] The carrier could not take advantage of the

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1 *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909; *Forward* v. *Pittard* (1785) 1 T.R. 27.

2 *Riley* v. *Horne* (1828) 5 Bing. 217; *Liver Alkali Co.* v. *Johnson* (1872) L.R. 7 Ex. 267; *Nugent* v. *Smith* (1875) 1 C.P.D. 19; *Howland* v. *Greenway* 63 U.S. 491 (1860); *S.S. Willdomino* v. *Citro Chemical Co. of America* 300 F. 5 (1924), 272 U.S. 718 (1927).

3 *Nelson Line (Liverpool) Ltd* v. *James Nelson & Sons Ltd* [1908] A.C. 16; *Smith, Hogg & Co. Ltd* v. *Black Sea & Baltic Gen. Ins. Co.* [1940] A.C. 997; *The Niagara* v. *Cordes* 62 U.S. 7 (1859); *Clark* v. *Barnwell* 53 U.S. 272 (1851).

exception if the effective cause of the loss or damage was either his failure to supply a seaworthy ship at the beginning of the voyage[4] or his failure to exercise care in the carriage of the cargo.[5] English jurisprudence permitted an appropriately worded exemption to excuse the carrier from even these secondary obligations[6] whereas United States public policy would not tolerate a further diminution in liability.[7]

Model contracts attempted to resolve the international conflict[8] until the United States in 1893 passed the *Harter Act*[9] and Commonwealth countries passed similar legislation in the early twentieth century.[10] The Harter-type legislation has been superseded by legislation enacting the Hague Rules,[11] formulated in 1924, which now regulate international maritime carriage.

By reference to the definitions in Article I of the Hague Rules, Article II imposes on the carrier the responsibilities and liabilities set out in Article III and confers on the carrier the rights and immunities enumerated in Article IV. Paraphrasing the two Articles, the relevant passages read:

III. 1. The carrier shall be bound, before and at the beginning of the voyage, to exericse due diligence to make the ship seaworthy.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

IV. 1. Neither the carrier nor the ship shall be liable for loss or damage arising from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. . . . Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

[4] *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Kopitoff* v. *Wilson* (1876) 1 Q.B.D. 377; *The Caledonia* 157 U.S. 124 (1890); *The Carib Prince* 170 U.S. 655 (1897).

[5] *Notara* v. *Henderson* (1872) L.R. 7 Q.B. 225; *Thomas Wilson Sons & Co.* v. *The Xantho* (1887) 12 A.C. 503; *The New Jersey Steam Nav. Co.* v. *The Merchants' Bank of Boston* 47 U.S. 344 (1848); *The Bradley Fertilizer Co.* v. *The Edwin J. Morrison* 153 U.S. 199 (1894).

[6] *The Duero* (1869) L.R. 2 A. & E. 393; *Westport Coal Co.* v. *McPhail* [1898] 2 Q.B. 130; *Elderslie Steamship Co. Ltd* v. *Borthwick* [1905] A.C. 93; *Gilroy Sons & Co.* v. *W.R. Price & Co.* [1893] A.C. 56.

[7] *The Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U.S. 397 (1889); *The Towa* 50 F. 561 (1892); *The Energia* 56 F. 124 (1893); *The Guidhall* 64 F. 867 (1894).

[8] See C. W. O'Hare, "Allocating Shipment Risks and the UNCITRAL Convention" (1977) 4 *Mon. L.R.* 117, 119.

[9] 46 U.S.C.A. 190.

[10] *Shipping and Seamen Act* 1903-1908 (N.Z.); *Sea-Carriage of Goods Act* 1922 (N.Z.); *Sea-Carriage of Goods Act* 1904 (Cth.); *Water-Carriage of Goods Act* 1910 (Can.).

[11] *Sea-Carriage of Goods Act* 1924 (Cth.); *Water-Carriage of Goods Act* 1936 (Can.); *Carriage of Goods by Sea Act* 1971 (U.K.); *Carriage of Goods by Sea Act* 1936 (U.S.), 46 U.S.C.A. 1300.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
   (a) 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;
   (b) Fire, unless caused by the actual fault or privity of the carrier;
   (c) Perils, dangers and accidents of the sea or other navigable waters;
   (d) Act of God;
   (e) Act of war;
   (f) Act of public enemies;
   (g) Arrest or restraint of princes, rulers or people, or seizure under legal process;
   (h) Quarantine restrictions;
   (i) Act or omission of the shipper or owner of the goods, his agent or representative;
   (j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
   (k) Riots and civil commotions;
   (l) Saving or attempting to save life or property at sea;
   (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
   (n) Insufficiency of packing;
   (o) Insufficiency or inadequacy of marks;
   (p) Latent defects not discoverable by due diligence;
   (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

A cursory inspection of these provisions reveals a fault standard of liability on the carrier. Employing the usual rule that the burden rests on the party who must prove facts essential to his case, the plaintiff shoulders the burden of proving the ship's unseaworthiness (though not the failure to exercise due diligence) or negligence in the custody of the cargo (loading, handling, stowage, carriage, keeping, caring for and discharging the goods). Yet the cargo plaintiff is the party least able to identify the cause of loss or damage and to present evidence of the ship's unseaworthiness and the master's negligence. Moreover, if the plaintiff were to satisfy the components

of Article III.2, the defences available to the carrier under Article IV.2 are difficult to explain. If they represent instances of the carrier's lack of fault, they would not have to be proven as specific defences for they would be resolved by a general denial traversing the plaintiff's cause of action. If the immunities represent concurrent causes of the loss or damage, Article IV.2 would suggest the unlikely conclusion that the carrier could escape liability notwithstanding proof of his negligence. Furthermore, Article IV.2(q), which expressly casts the burden on the carrier to negate negligence, would make no sense because the negligence issue would have been resolved in the plaintiff's cause of action.

The division of Article III liabilities and Article IV immunities reflects a burden of proof sequence emanating from the carrier's bailment. Historically, the Hague Rules attempted to harmonize disparate standards and to formulate a uniform system of carrier's liability. They were not intended to be an autonomous code in national jurisdictions.[12] Rather, they were devised simply to adjust the general law standards of liability. Accordingly, they should be applied in the context of conventional litigious rules and procedures.[13] In the cargo dispute, the plaintiff's grievance is that the cargo was lost or damaged in the course of transportation, that is, after the carrier received the goods and before they were delivered in accordance with the contract. (Indeed, if the Hague Rules are to apply, loss or damage must have been caused after loading on and before discharge from the ship.) If the plaintiff proves these issues he may avail himself of the process applicable to bailments generally.

The plaintiff's cause of action alleges a breach of contract in that the carrier failed to exercise due diligence to render the ship seaworthy (Article III.1) or to exercise care in the custody of the cargo (Article III.2). The bailment process relieves the plaintiff from proving his case affirmatively as it presumes the guilt of the carrier. The burden is thrust onto the carrier to rebut the prima facie case against him. To answer a case alleging breach of Article III.1 the carrier may plead a defence which either denies the presumptive want of due diligence under Article IV.1 or discloses a cause of loss or damage excepted by Article IV.2(a) to (p). To answer a case alleging breach of Article III.2 the carrier may plead a defence which either denies the presumptive want of care under Article IV.2(q) or discloses a cause of loss or damage excepted by Article IV.2(a) to (p).

The plaintiff's reply depends upon the carrier's defence. To a defence based on Article IV.1 the plaintiff must reply with a breach of Article III.2.

[12] *Chandris* v. *Isbrandtsen-Moller Co. Ins.* [1951] 1 K.B. 240, 247; *Robert C. Herd & Co. Inc.* v. *Krawill Machinery Corp.* 359 U.S. 297, 301-302 (1959).

[13] For rules of interpretation see *Stag Line Ltd* v. *Foscolo, Mango & Co.* [1932] A.C. 328, 342-343, 350; *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Co. Ltd* [1961] A.C. 807, 836 ,874; *James Bunchanan & Co. Ltd* v. *Babco Forwarding & Shipping* (U.K.) Ltd [1978] A.C. 141, 152; *Shipping Corporation of India Ltd* v. *Gamlen Chemical Co. Australasia Pty Ltd* (1980) 55 A.L.J.R. 88, 92.

To a defence based on Article IV.2(q) the plaintiff must reply with a breach of Article III.1. To a defence based on Article IV.2(a) to (p) the plaintiff may reply with a breach of Article III.1, or Article III.2 or both. A reply based on Article III.1 requires the carrier to aver Article IV.1 in rejoinder.

Although not entirely articulated by the courts, it should become apparent as we proceed that the foregoing is the most cogent way to rationalize the interaction of Articles III and IV. The following diagram illustrates the bailment process which, for convenience, is divided into three phases: the claim (Phase 1), the defence (Phase 2) and the reply and rejoinder (Phase 3).

BURDEN OF PROOF

| PHASE 1 | | PHASE 2 | PHASE 3 | |
|---|---|---|---|---|
| Claim | | Defence | Reply | Rejoinder |
| Plaintiff | | Defendant | Plaintiff | Defendant |
| Bailment plus | Art. III.1 or Art. III.2 | Art. IV.2(a)-(p) | Art. III. 1 — or — Art. III.2 | Art. IV.1 |
| | Art. III.2 | Art. IV.2(q) | Art. III.1 | Art. IV.1 |
| | Art. III.1 | Art. IV.1 | Art. III.2 | |

## PHASE 1

To make out a prima facie case, the plaintiff must adduce evidence proving (a) his right to sue, (b) that the defendant carrier became the bailee of the cargo, (c) that the cargo was lost or damaged while in the carrier's custody (and, if the Hague Rules are relied upon, while on board ship), and (d) the quantum of loss or damage. He may adduce any admissible evidence at his disposal but his evidentiary task is simplified if inferences can be drawn from documentary evidence. The bill of lading will provide the shipper with evidence of his contract and the consignee with evidence of his right to possession of the cargo.[14] This, coupled with direct evidence of pecuniary loss and the quantum of loss,[15] will satisfy components (a) and (d). What concern us here, though, are the components (b) and (c).

[14] See *Gardano & Giampieri* v. *Greek Petroleum* [1961] 2 Lloyd's Rep. 259; *Pacific Molasses Co.* v. *Entre Rios Compania Naviera* [1976] 1 Lloyd's Rep. 8; *The Albazero* [1976] 2 Lloyd's Rep. 467; *Aunt Jemima Mills Co.* v. *Lloyd Royal Belge* 34 F. 2d 120 (1929); *Levatino Co. Inc.* v. *S.S. President Hayes* 233 F. Supp. 697 (1964); *Levatino Co. Inc.* v. *M.S. Helvig Torm* 295 F. Supp. 725 (1968).

[15] See *The Arpad* (1934) 49 Ll.L.R. 313; *Monarch Steamship Co. Ltd* v. *Karlshamns*

A receipt issued by or on behalf of the carrier provides some evidence of the bailment and, depending upon its contents, may evidence the quantity of cargo, its order and condition and its loading on board. The authenticity of the receipt must be proven and its terms explained. Of the many pre-shipment receipts which may issue,[16] Article III of the Hague Rules provides for the issue of a "received-for-shipment" bill of lading showing the identifying marks on the cargo, the quantity of cargo and its apparent order and condition.[17] The "received-for-shipment" bill is issued when the carrier receives the cargo in his charge before loading and it constitutes presumptive evidence of his bailment over the goods described therein.[18] When the cargo is loaded aboard ship, the "received-for-shipment" bill of lading is replaced by a "shipped" bill of lading which is evidence not only of the bailment but also that the goods have been loaded on board and shipped. Both documents are usually prepared on the carrier's forms by the shipper or prepared by the ship's agent from information supplied by the shipper.

In the hands of the shipper/plaintiff, the "shipped" bill of lading is presumptive evidence of its contents which, to defeat the plaintiff's prima facie case, the defendant must rebut.[19] In the hands of the consignee or indorsee/plaintiff, the "shipped" bill of lading supplies conclusive evidence of its contents. The *Bills of Lading Act* 1855 (U.K.), which is reproduced in all Australian States,[20] was enacted to protect the consignee and indorsee from misrepresentations in the bill of lading on the faith of which he purchased or financed the cargo. The Act estops the signatory of the bill from denying that the described cargo was in fact shipped as represented. Section 3 provides:

> "Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the

*Oljefabriker* [1949] A.C. 196; *William D. Branson Ltd* v. *Furness (Canada) Ltd* [1955] 2 Lloyd's Rep. 179; *Holden* v. *S.S. Kendall Fish* 395 F. 2d 910 (1968); *Zajicek* v. *United Fruit Co.* 459 F. 2d 395 (1972); *Emmco Ins. Co.* v. *Wallenius Caribbean Line* 492 F. 2d 508 (1974).

16 See C. W. O'Hare, "Shipping Documentation for the Carriage of Goods and the Hamburg Rules" (1978) 52 A.L.J. 415, 416-422.

17 See *The Marlborough Hill* v. *Alex Cowan & Sons Ltd* [1921] 1 A.C. 444; *Diamond Alkali* v. *Bourgeois* [1921] 3 K.B. 443; *Canada & Dominion Sugar Co. Ltd* v. *Canadian National (West Indies) Steamships Ltd* [1947] A.C. 46.

18 The *Sea-Carriage of Goods Act* 1924 (Cth.) s. 7 does not alter its presumptive status.

19 *McLean* v. *Fleming* (1871) L.R. 2 H.L. (Sc.). 128; *Smith & Co.* v. *Bedouin Steam Nav. Co. Ltd* [1896] A.C. 70; *Harrowing* v. *Katz* [1896] A.C. 73; *Bennett* v. *Bacon* (1897) 2 Com. Cas. 102.

20 *Usury, Bills and Written Memoranda Act* 1902 (N.S.W.) s. 7; *Goods Act* 1958 (Vic.) s. 74; *Mercantile Acts* 1867-1869 (Qld.) s. 7; *The Bills of Lading Act* 1857 (Tas.) s. 3; *Mercantile Law Act* 1936 (S.A.) s. 15; *Bills of Lading Act* 1855 (U.K.) s. 3 by adoption 20 Vict. No. 7 (W.A.).

bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board."

The preamble to the British Act indicates that it was intended to apply to misrepresentations of quantity in actions for non-delivery or short delivery. However, the section can be read to apply equally to statements of leading marks and the condition of cargo.[21] Whether or not statutory estoppel applies to other information contained in the bill of lading is of little consequence since the common law has come to recognize estoppel by representation. At common law, unambiguous representations of fact in a bill of lading upon which the consignee or indorsee for value relies, give rise to estoppel.[22] However, estoppel is not available to the consignee who is also the consignor. In *Australian General Electric Pty Ltd* v. *A.U.S.N. Co. Ltd*,[23] the plaintiff argued that the defendant carrier was estopped from proving that damage to electrical equipment shipped from Sydney to Port Adelaide was caused by insufficient packing, because the carrier had issued a bill of lading which acknowledged receipt of the cargo "in apparent good order and condition". In the Supreme Court of South Australia, Abbott J. ruled that the *Bills of Lading Act* and its Australian derivations applied only to the plaintiff who had accepted the bill of lading on the faith of the statements therein and not, as in this case, to the consignee who, as consingnor, could have had first hand knoweldge of the true condition of the cargo before shipment.

In the United States, the "shipped" bill of lading also affords presumptive evidence of its contents to the plaintiff[24] which the defendant must adduce evidence to rebut.[25] And the doctrine of estoppel by representation has been applied to the bill of lading in the hands of the consignee or indorsee who relied upon it to his detriment. In contrast with the British legislation, the *Bills of Lading Act* 1916 (U.S.),[26] known as the *Pomerene Act*, uses a sword not a shield. It furnishes a statutory action for damage against the defendant who misrepresents the description of the cargo in the bill of lading.[27] Should a shield be necessary, because the *Pomerene Act* does not

21 *Parsons* v. *New Zealand Shipping Co. Ltd* [1900] 1 Q.B. 714; *Australian General Electric Pty Ltd* v. *A.U.S.N. Co. Ltd* [1946] S.A.S.R. 278.

22 *Martineaus Ltd* v. *The Royal Mail Steam Packet Ltd* (1912) 17 Com. Cas. 176; *Evans* v. *James Webster Bros. Ltd* (1928) 34 Com. Cas. 172; *Silver* v. *Ocean Steamship Co. Ltd* [1930] 1 K.B. 416; *The Skarp* [1935] P. 134.

23 [1946] S.A.S.R. 278.

24 *California Packing Corp.* v. *S.S. P. & T. Voyager* 180 F. Supp. 108 (1960); *Samincorp South American Minerals Corp.* v. *S.S. Cornwall* 240 F. Supp. 327 (1963); *Levatino Co. Inc.* v. *S.S. Norefjell* 231 F. Supp. 307 (1964); *Tupman Thurlow Co. Inc.* v. *S.S. Cap Castillo* 490 F. 2d 302 (1974).

25 *Wagman & Co.* v. *U.S. Lines* 103 F. Supp. 189 (1952); *Fideli Fisheries Ltd* v. *Thorden* 142 F. Supp. 798 (1956); *Otis McAllister Export Corp.* v. *Grancolombiana* 216 F. Supp. 756 (1963); *Interstate Steel Corp.* v. *S.S. Crystal Gem* 317 F. Supp. 112 (1970).

26 49 U.S.C.A. 102.

27 *Strohmeyer & Arpe Co.* v. *American Line Steamship Corp.* 97 F. 2d 360 (1938) *Toho Bussan Kaisha Ltd* v. *American President Lines Ltd* 155 F. Supp. 886 (1957);

apply to bills issued abroad,[28] the common law supplies it on terms almost identical to those of the Anglo-Australian law.[29] In *Portland Fish Company* v. *States Steamship Company*,[30] Kilkenny Ct.J. explained in the Court of Appeals:[31]

> "Under the Pomerene Act or, in the case of inbound bills, under the doctrine of estoppel, such statements as the carrier does make become conclusive as against the holder in due course.
>
> Of course we recognise that the party urging estoppel against the carrier must demonstrate that he has relied on the description that appears in the bill, for it is elementary that, absent reliance, there can be no estoppel. Thus the doctrine is not applicable in a suit by a shipper against a carrier,[32] or where reliance on the description by a holder for value is not reasonable,[33] or where the holder does not rely on the description at all."[34]

Whether presumptive or conclusive, the bill of lading is material evidence only against the person who signed it and such persons who authorised its signing. Traditionally, the bill of lading is signed in the name of the master, usually by the ship's agents. As a matter of agency law, the signatory who purports to sign on behalf of a principal is not personally bound by the receipt, for it is his principal's act if he possesses the requisite authority.[35] Where the signatory does not purport to sign by procuration he personally is bound, in addition to the principal who, though undisclosed, conferred authority upon him expressly or by implication.[36] In this context, an issue crucial to the plaintiff's prima facie case against the carrier is whether the bill of lading signed by or on behalf of the master can bind the defendant carrier.

*Micronesian Line Inc.* v. *New Zealand Ins. Co.* 397 F. 2d 236 (1968); *Elgie & Co.* v. *S.S. Nederburg* 1980 A.M.C. 231.

28 49 U.S.C.A. 81.

29 *The Carso* 43 F. 2d 736 (1930); *General Foods Corp.* v. *The Felipe Camarao* 172 F. 2d 131 (1949); *Daido Line* v. *Thomas P. Gonzalez Corp.* 299 F. 2d 669 (1962); *Cummins Sales & Service Inc.* v. *London & Overseas Ins. Co.* 476 F. 2d 498 (1973).

30 510 F. 2d 628 (1974).

31 Ibid. 633.

32 *American Trading Co.* v. *The Harry Culbreath* 187 F. 2d 310 (1951); *Dal International Trading Co.* v. *S.S. Milton J. Foreman* 171 F. Supp. 794 (1959). Nor when the consignee is also consignor: *Louisville & N.R. Co.* v. *Cullman Warehouse Inc.* 147 So. 421 (1933).

33 *Austin Nichol & Co.* v. *Isla de Panay* 267 U.S. 260 (1925); *Tokio Marine & Fire Ins. Co.* v. *Retla Steamship Co.* 426 F. 2d 1372 (1970).

34 *Tellez* v. *Canton Railroad Co.* 1957 A.M.C. 1350; *Plata American Trading Inc.* v. *Lancashire* 1958 A.M.C. 2329; *Freedman* v. *The Concordia Star* 250 F. 2d 867 (1959).

35 *Brown* v. *Powell Coal Co.* (1875) L.R. 10 C.P. 562; *J. & J. Cunningham Ltd* v. *Codan Shipping Co. Ltd* [1961] 2 Lloyd's Rep. 204; cf. *Jessel* v. *Bath* (1867) L.R. 2 Ex. 267; *Du Pont de Nemours & Co.* v. *Barge Carriers* 55 F. Supp. 728 (1944); *Valkenburg* v. *The Henry Denny* 295 F. 2d 330 (1961); *Dietrich* v. *U.S. Shipping Board* 9 F. 2d 733 (1925).

36 *Brown* v. *Powell Coal Co.* (1875) L.R. 10 C.P. 562; *Smith & Co.* v. *Bedouin Steam Navigation Co. Ltd* [1896] A.C. 70; *V.O. Rasnoimport* v. *Guthrie & Co. Ltd* [1966] 1 Lloyd's Rep. 1; *The Niagara* 297 F. 667 (1923); *Loma Fruit Co.* v. *International Navigation Co.* 11 F. 2d 124 (1925); *Tube Products of India* v. *S.S. Rio Grande* 334 F. Supp. 1039 (1971).

Apart from the *Pomerene Act*, which expands the carrier's liability for the receipt signed by the master,[37] the rule in *Grant* v. *Norway*[38] prevails in Anglo-Australian[39] and American[40] common law.[41] The master and ship's agents do not have implied authority to acknowledge receipt of cargo until and unless the cargo is in fact loaded on board ship. Therefore, in the absence of express authority, the consignee who sues the carrier for the non-delivery or short delivery of cargo cannot rely upon the bill of lading as conclusive evidence of shipment if the bill of lading was signed by or on behalf of the master. However, the signature of the master or ship's general agent does raise a presumptive inference of the bailment which the carrier must rebut by "clear, distinct and convincing"[42] evidence to the contrary.[43]

In *Rosenfeld Hillas & Company Proprietary Limited* v. *The Ship Fort Laramie*,[44] the indorsee of bills of lading sued for the non-delivery of cargo. The carrier defendant alleged that the cargo had not been shipped and sought to admit evidence to contradict the bills of lading which acknowledged shipment of the cargo. The defendant successfully argued that the bills of lading were not conclusive against the four owners of the ship when they had been signed by the managing owner alone. At first instance in the High Court of Australia,[45] Knox C.J. admitted the evidence from which he inferred, on the balance of probabilities, that the cargo had not been laden on board ship. On appeal, the Full Court applied the rule in *Grant* v. *Norway* and affirmed that the bills of lading were not conclusive against the carrier. However, the appellate Court held that the implied authority of the managing owner to sign the bills of lading on behalf of all owners was nevertheless presumptive evidence against the carrier and found that the carrier had not adduced sufficiently persuasive evidence to rebut the presumption. Isaacs J. said:

[37] *Gleason* v. *Seabord Airline Railway Co.* 278 U.S. 349 (1929); *Bussan Kaisha Ltd* v. *American President Lines Ltd* 155 F. Supp. 886 (1957).
[38] (1851) 10 C.B. 665, 138 E.R. 263.
[39] *Cox, Patterson & Co.* v. *Bruce & Co.* (1886) 18 Q.B.D. 147; *Brown* v. *Powell Coal Co.* (1875) L.R. 10 C.P. 562; *Thorman* v. *Burt, Boulton & Co.* (1886) 54 L.T. (N.S.) 349; *J. & J. Cunningham Ltd* v. *Codan Shipping Co. Ltd* [1961] 2 Lloyd's Rep. 204; *V.O. Rasnoimport* v. *Guthrie & Co. Ltd* [1966] 1 Lloyd's Rep. 1.
[40] *The Freeman* v. *Buckingham* 59 U.S. 182 (1855); *Pollard* v. *Vinton* 105 U.S. 7 (1882); *Friedlander* v. *The Texas & Pacific Rly. Co.* 130 U.S. 416 (1888).
[41] For Continental law, see *Elder, Dempster & Co.* v. *Dunn & Co.* (1909) 11 Asp. M.L.C. 337; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank* [1897] 1 Q.B. 460.
[42] *Rosenfeld Hillas & Co. Pty Ltd* v. *The Fort Laramie* (1923) 32 C.L.R. 25, 33; or "most cogent evidence": *Venesta Ltd* v. *Walford Lines Ltd* (1922) 12 Ll.L.R. 139, 141 and "not by mere surmise and speculation": *Karabagui* v. *The Shickshinny* 123 F. Supp. 99, 102.
[43] *Harrowing* v. *Katz* [1896] A.C. 73; *Smith & Co.* v. *Bedouin Steam Nav. Co.* [1896] A.C. 70; *Hain Steamship Co.* v. *Herdman & McDougal* (1922) 11 Ll.L.R 58; *The Freeman* v. *Buckingham* 59 U.S. 182 (1855); *The Isola di Procida* 124 F. 942 (1902).
[44] (1923) 32 C.L.R. 25.
[45] (1922) 31 C.L.R. 56.

> "Unless a bill of lading holder can prove an actual authority from the owners greater than the apparent authority implied from the position in which he finds the managing owner—for instance, an actual authority to issue a conclusive receipt—he cannot assert an authority larger than that of conducting the business in the usual manner. And, as the usual manner is to give a receipt for goods shipped only after they are in fact shipped, it follows that, unless goods have been in fact shipped, any receipt for them has been given beyond the scope of the managing owner's implied authority, and in that case his co-owners, unless otherwise estopped, are not bound unless sufficient actual authority is proved. The final test of the liability of the co-owners is not whether the goods have been put on board: that is only an instance of whether the final test is or is not satisfied. The final test is whether the bill of lading has been given within the scope of the managing owner's implied authority, that is, in the usual course of business."[46]

Article III.3(b) of the Hague Rules requires the carrier, on demand, to issue a bill of lading disclosing, *inter alia*, the quantity of cargo received unless he has reasonable grounds for suspecting the information to be inaccurate or unless he has no reasonable means of checking the information. A recital of bulk cargo weight is not evidence against the carrier where the weight was measured independently and that fact is stated in the bill.[47] In all other respects, the bill of lading is evidence that the quantity of cargo acknowledged therein as having been shipped, was in fact shipped.[48] Nevertheless, the probative weight attaching to recitals in the bill depends upon the construction of the terms of the bill. Recitals of quantity may be effectively negatived or qualified by such notations as "weight unknown",[49] although words indicating merely that the carrier relies upon information supplied by the shipper do not usually displace the presumptive value of recitals.[50]

In *Attorney-General of Ceylon* v. *Scindia Steam Navigation Co. Ltd India*,[51] the carrier issued bills of lading in Rangoon which acknowledged receipt of 100,652 bags of rice with an average net weight of approximately 160 lb. each. On arrival at Colombo, only 100,417 were discharged from

[46] (1923) 32 C.L.R. 25, 32-3.

[47] *Sea-Carriage of Goods Act* 1924 (Cth.) s. 8; *Carriage of Goods by Sea Act* 1936 (U.S.) s. 11, 46 U.S.C.A. 1310. In the United Kingdom section 5 of the 1924 Act was not reproduced in the *Carriage of Goods by Sea Act* 1971 (U.K.).

[48] *Smith & Co.* v. *The Bedouin Steam Navigation Co. Ltd* [1896] A.C. 70; *Hain Steamship Co. Ltd* v. *Herdman & McDougal* (1922) 11 Ll.L.R. 58; *The Ciano* 69 F. Supp. 35 (1945); *General Foods Corp.* v. *The Felipe Camarao* 172 F. 2d 131 (1949); *Insurance Co. of North America* v. *S.S. Exminster* 127 F. Supp. 541 (1954); *Holden* v. *S.S. Kendall Fish* 212 F. Supp. 106 (1962).

[49] *Jessel* v. *Bath* (1867) L.R. 2 Ex. 267; *Hogarth Shipping Co. Ltd* b. *Blyth, Greene, Jourdain & Co. Ltd* [1917] 2 K.B. 534; *New Chinese Antimony Co. Ltd* v. *Ocean Steamship Co. Ltd* [1917] 2 K.B. 664; *The Dixie* 46 F. 403 (1891); *Vanderbilt* v. *Ocean Steamship Co.* 215 F. 886 (1914); *Hellenic Lines* v. *Louis Dreyfus Corp.* 249 F. Supp. 526 (1966); cf. *The Seefahrer* 133 F. 793 (1904).

[50] *Pettinos* v. *American Export Lines* 68 F. Supp. 759 (1946); *American Trading Co.* v. *The Harry Culbreath* 187 F. 2d 310 (1951); *Spanish American Skin Co.* v. *The Ferngulf* 143 F. Supp. 345 (1956).

[51] [1962] A.C. 60.

the ship and the consignee sued for the value of 235 bags of rice of 160 lb. weight relying on the bills of lading as evidence of the short delivery. However, the bills of lading contained the printed condition—"weight, contents and value when shipped unknown." On appeal to the Privy Council, the Judicial Committee affirmed that the bills of lading, signed by the master, could not estop the carrier from proving that the stated cargo was not in fact shipped but that the bills did constitute prima facie evidence against the carrier. However, the printed disclaimer was held to displace the presumptive quality of the recital in respect of the weight of cargo, its contents and its value. The onus, therefore, was on the plaintiff to prove the average bag weight, and that the bags contained rice and the value of the cargo lost. Because the disclaimer did not purport to contradict the *number* of bags, the plaintiff could rely upon the recital as presumptive evidence of the number of bags in question.

Subject to the general proviso, Article III.3(a) requires the carrier to disclose in the bill of lading the leading marks which identify the cargo as supplied to him by the shipper provided those marks should remain legible until the end of the voyage. Article III.5 requires the shipper to indemnify the carrier against any liability occasioned by the inaccuracy of the details supplied. Once inserted in the bill of lading Article III.4 provides that the notation of marks is presumptive evidence that cargo bearing such marks was in fact shipped. Indeed, if the marks disclosed in the bill of lading are material to the description of the goods, the signatory is estopped from denying their shipment against a consignee who relied upon the information to his detriment.[52] In *Parsons* v. *New Zealand Shipping Co.*[53] the bill of lading described 608 carcasses as having been marked "622X." On arrival only 507 carcasses marked "622X" were discharged but there were also 101 carcasses marked "522X". The indorsees of the bill contended that the carrier was liable for the non-delivery of 101 carcasses and that he was estopped from showing that the carcasses marked "522X" were part of the shipment. The Court of Appeal held that the carrier could only be estopped from denying that 608 carcasses marked "622X" were in fact shipped if the notation carried some special significance on which the consignee relied. The trial court had found that the marks carried no meaning of value or quality in the meat market and the Court of Appeal therefore denied the estoppel. The carrier was free to rebut the presumption and prove that the cargo in fact shipped, irrespective of marks,[54] was the cargo delivered.

Likewise, the plaintiff may rely upon the statement in the bill of lading which attests to the apparent order and condition of the cargo and which Article III.3(c) requires the carrier to disclose. In contrast to the action for

[52] *Parsons* v. *New Zealand Shipping Co. Ltd* [1901] 1 K.B. 548; *Compagnia Importadora de Arroces* v. *P. & O. Steam Nav. Co.* (1927) 28 Ll.L.R. 63.
[53] [1901] 1 K.B. 548.
[54] *Sandeman & Sons* v. *Tyzack & Branfoot Steamship Co. Ltd* [1913] A.C. 680.

non-delivery or short delivery, there is greater scope for estoppel in the action for damage to cargo. Whereas in the former the carrier may adduce evidence that the master did not in fact receive and ship the quantity of cargo represented in the bill of lading, in the latter he is unable to do so if in fact the stated quantity is delivered, albeit in a damaged condition.

A bill of lading bearing a notation that the cargo was, on shipment, in good order and condition, known commercially as a clean bill of lading, is at least presumptive evidence of that fact in English[55] and American[56] jurisdictions. In the hands of the consignee or indorsee for value the clean bill of lading is conclusive evidence.[57] For example, in *Compagnia Naviera Vasconzada* v. *Churchill & Sim*[58] the evidence before the court revealed that the cargo of timber had been badly stained by petroleum before shipment. Nevertheless the master had signed bills of lading reciting the shipment of timber in "good order and condition" and the court held that against the consignee plaintiff, the carrier was estopped from disputing the recital. In *Continex Inc.* v. *The Flying Independent*,[59] the mate's receipt reported that some of the steel envelopes in the cargo were buckled before loading. Nevertheless, the ship's agents signed a clean bill of lading and the District Court held that the carrier who issues a clean bill for goods manifestly damaged is estopped from denying it against the purchaser of the bill who is misled by reliance on the misrepresentation.

The recital of order and condition may be qualified or negatived by appropriate notations on the bill, and its probative weight is affected accordingly.[60] In *Canada and Dominion Sugar Company Ltd* v. *Canadian National (West Indies) Steamships Limited*,[61] the shipper presented a "received-for-shipment" bill of lading to the ship's agents containing an entry that the cargo of sugar was "received in apparent good order and condition." Pending a report in the ship's receipt of the condition of the cargo upon loading, the ship's agents endorsed in the margin of the bill the notation "signed under guarantee to produce ship's clean receipt." The bill

[55] *The Peter Der Grosse* (1875) 1 P.D. 414, (1876) 34 L.T. 749; *Crawford & Law* v. *Allan Line Steamship Co. Ltd* [1912] A.C. 130.

[56] *Kupfermann* v. *United States* 227 F. 2d 348 (1955); *Samincorp South American Corp.* v. *S.S. Cornwall* 240 F. Supp. 327 (1963); *Demsey & Associates Inc.* v. *S.S. Sea Star* 461 F. 2d 1009 (1972); *Emmco Ins. Co.* v. *Wallenius Caribbean Line* 492 F. 2d 508 (1974).

[57] *Martineaus Ltd* v. *The Royal Mail Steam Packet Co. Ltd* (1912) 17 Com. Cas. 176; *Brandt* v. *Liverpool, Brazil & River Plate Steam Nav. Co. Ltd* [1924] 1 K.B. 575; *Evans* v. *James Webster & Bros. Ltd* (1928) 34 Com. Cas. 172; *Olivier Straw Goods* v. *Osaka Shosken Kaisha* 27 F. 2d 129 (1928); *The Robin Gray* 65 F. 2d 376 (1933); *Levatino Co.* v. *S.S. Norfjell* 231 F. Supp. 307 (1964).

[58] [1906] 1 K.B. 237.

[59] 106 F. Supp. 319 (1952).

[60] See *The Peter der Grosse* (1875) 1 P.D. 414, (1876) 34 L.T. 749; *Compagnia Naviera Vasconzada* v. *Churchill & Sim* [1906] 1 K.B. 237; *The Tromp* [1921] P. 337, *The Sharp* [1935] P. 134; *Nicholas & Co.* v. *S.S. Isla de Panay* 267 U.S. 260 (1925); *Groban* v. *S.S. Pegu* 331 F. Supp. 883 (1971); *Maurice Pincoffs Co.* v. *Atlantic Shipping Co.* 1975 A.M.C. 2128; *Seneca Oil Co.* v. *S.S. Starman* 1980 A.M.C. 207.

[61] [1947] A.C. 46.

was indorsed to the plaintiff who purchased the cargo on the assumption that the cargo was in good order and condition. In fact, as the ship's receipt disclosed, the cargo was damaged before loading. Delivering the opinion of the Judicial Committee on appeal, Lord Wright held that the carrier was not estopped from proving the damaged state of the cargo before shipment. Construing the bill as a whole his Lordship concluded that the notation so qualified the recital that it ceased to be the clear and unambiguous statement necessary to found an estoppel. In *Tokio Marine & Fire Insurance Co. Ltd* v. *Retla Steamship Company*[62] the plaintiff, having proven the rusted state of steel rods on delivery, sought to rely upon the clean bill of lading as evidence of the cargo's good condition on shipment, contrary to the mate's receipt. However, the bill of lading, having recited the good order and condition of the cargo, displayed a prominent notation that the recital did not mean the goods "were free of visible rust or moisture." Following the English decision, the United States Court of Appeals held that the notation counterbalanced the recital with the result that the bill of lading made no representation of the order and condition.

In British[63] and American[64] jurisdictions, the recital in a clean bill of lading relates only to the apparent order and condition of the cargo externally discernible on a reasonable examination.[65] After all, the recital is not a contractual promise of the cargo's condition but a factual certification that the cargo appeared to be able to withstand the voyage.[66] In *Copco Steel & Engineering Co.* v. *S.S. Awaki*,[67] a quantity of bundled steel bars were shipped from Antwerp to Baltimore under clean bills of lading. Suing in the United States District Court for damage caused by rust, the consignee was allowed to rely upon the bills in respect of the outer layers of steel rods which were visible to the carrier when loaded but not in respect of the interior rods in the bundles. Consequently, the burden remained with the plaintiff to prove by direct evidence that the cargo was shipped in good order and condition or that the carrier knew, and was estopped from denying, that the bars were rusted before shipment. In *Silver* v. *Ocean Steamship Co.*,[68] the (English) Court of Appeal held that the clean bill of lading estopped the carrier from proving that tins of frozen eggs had been insufficiently packed and seriously gashed on shipment, because such defects

[62] 426 F. 2d 1372 (1970).
[63] *The Peter Der Grosse* (1875) 1 P.D. 414, (1876) 34 L.T. 749; *Martineaus Ltd* v. *The Royal Mail Steam Packet Co. Ltd* (1912) 17 Com. Cas. 176; *Dent* v. *Glen Line Ltd* (1940) 45 Com. Cas. 244.
[64] *M.S. Cowen Co.* v. *American President Lines* 168 F. Supp. 838 (1959); *F. Badrena E. Hijo Inc.* v. *S.S. Rio Iguazu* 182 F. Supp. 885 (1960); *Aetna Ins. Co.* v. *General Terminals Inc.* 1969 A.M.C. 2449; *E. T. Barwick Mills* v. *Hellenic Lines Ltd* 331 F. Supp. 161 (1971).
[65] R. Colinvaux, *Carver's Carriage By Sea* (12th Ed., London, Stevens, 1971) Vol. I p. 73.
[66] *Compagnie Naviera Vasconzada* v. *Churchill & Son* [1906] 1 K.B. 237, *Orient Ins. Co.* v. *Flota Mercante* 102 F. Supp. 729, 731 (1951).
[67] 131 F. Supp. 332 (1955).
[68] [1930] 1 K.B. 416.

would have been apparent on reasonable inspection. However, the carrier was not estopped from proving the presence on shipment of pin-hole perforations which would not have been readily visible.

A comparison of these decisions reveals a striking discrepancy. The American decision took the view that if a bill is evidence of apparent condition only, then it cannot attest at all to a non-apparent condition which the plaintiff must prove by other means. The English decision, on the other hand, treated the recital of apparent condition as presumptive evidence of the non-apparent condition which the defendant must rebut. To discuss this discrepancy we must move into the next phase of the saga.

## PHASES 1 AND 2 STRADDLED

Unless the cargo plaintiff can establish a prima facie case in bailment, he must assume the burden of proving the carrier's negligence[69] under Article III.2 (or unseaworthiness under Article III.1). A case in bailment is made out if the evidence discloses that the cargo was not delivered or was outturned in a damaged state[70] and that the cargo had been shipped in good order and condition. Statements in the bill of lading provide at least presumptive evidence of the quantity shipped and the apparent order and condition of the cargo on shipment. In the leading English case of *Silver* v. *Ocean Steamship Co.*,[71] while denying that a clean bill of lading repudiates the existence of a non-apparent defect, the Court of Appeal drew a presumptive inference which thrust the burden onto the carrier to refute the non-apparent good order and condition of the cargo on shipment. How is this inconsistency explained?

Although this question arises in Phase 1 of our working model, its examination encroaches upon Phase 2, for which reason it is discussed here in a hybrid segment. In *Silver's* case, the Court took the view that the defendant should assume the burden of proving invisible defects because of Article IV.2(m) which exonerates the carrier from "wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods." This reflects the historical position when, as a defence to strict liability, the burden of proving an inherent vice was borne by the carrier.[72] As with other immunities itemized in Article IV.2, the burden of proving that loss or damage was caused by exception (m),[73] in English

[69] *The Ida* (1875) 32 L.T. 541; *Warner Barnes & Co.* v. *Kokosai Kisen Kabushiki* 102 F. 2d 450 (1939); *Salzman Tobacco Co. Ltd* v. *S.S. Mormacwind* 371 F. 2d 537 (1967); *U.S.A.* v. *Lykes Bros. Steamship Co. Inc.* 511 F. 2d 218 (1975).

[70] *Miami Structural Iron Corp.* v. *Cie Nationale* 224 F. 2d 566 (1955); *Otis McAllister Export Corp.* v. *Grancolombiana* 216 F. Supp. 756 (1963); *Kurt Orban Co. Inc.* v. *S.S. Federal St. Laurent* 1964 A.M.C. 55.

[71] [1930] 1 K.B. 416.

[72] *The Peter Der Grosse* (1875) 1 P.D. 414; (1876) 34 L.T. 749; *Nugent* v. *Smith* (1876) 1 C.P.D. 423; *F.L. Bradley & Sons Ltd* v. *Federal Steam Navigation Co.* (1927) 27 Ll.L.R. 395 cf. *Moore* v. *Harris* (1876) 1 App. Cas. 318, 326.

[73] *Chris Foodstuffs Ltd* v. *Nigerian National Shipping Line Ltd* [1966] 1 Lloyd's Rep. 677; *Albacora S.R.L.* v. *Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53.

jurisprudence, reposes in the carrier defendant. In *White & Son (Hull) Ltd* v. *The Hobsons Bay*,[74] a cargo of apples was shipped from Melbourne to Hull under a clean bill of lading which incorporated the Australian *Sea-Carriage of Goods Act* 1924 (Cth.). The apples were damaged on arrival and the court held that the carrier had to show the inherent defect in the apples to overcome the presumption of their good order and condition on shipment. In *Jahn* v. *Turnbull Scott Shipping Company Ltd*,[75] where a cargo of cocoa was outturned in a damaged condition, Roskill J. held that the burden rests upon the carrier to prove the defence of inherent defect. The same ruling was made by the Federal Court of Canada in *Westcoast Food Brokers Ltd* v. *The Hoyanger*.[76] A cargo of apples was found to have deteriorated after a 45 days voyage from Buenos Aires to Vancouver and the carrier contended that the apples had been overripe when shipped. Addy J. remarked:

> "As to onus of proof, the plaintiffs must establish that the goods were loaded in good order and condition. . . . Normally a clean bill of lading will be conclusive. But in the case of perishables such as apples, it is still open to a defendant to establish that the damage was due to an inherent defect, quality or vice of the fruit and not to any lack of care on his part. The onus of establishing it rests of course on the person who raises such a defence."[77]

By contrast, United States courts will not draw from the clean bill of lading the inference necessary to sustain the plaintiff's prima facie case if the defendant pleads exception (m) as his defence. To make out a case that damage occurred during the carrier's bailment, the plaintiff must produce evidence comparing the condition of the cargo at shipment with its condition on arrival. Whereas an inference can be drawn from a clean bill of lading about the apparent condition of the cargo at shipment, the bill of lading does not attest to its latent condition. Accordingly, the bill of lading does not of itself afford evidence that the cargo was, patently and latently, fit to endure the voyage, and a plethora of judicial authorities in the United States hold that the plaintiff must adduce additional evidence to prove the actual condition of the cargo at shipment.[78] For example, in *General Traffic Service Co. Inc.* v. *S.S. Cape San Martin*,[79] the plaintiff relied upon the clean bill of lading to prove a case against the carrier for the death of an elephant on board. The District Court ruled that the recital of apparent good order and condition was insufficient without direct evidence

[74] (1933) 47 Ll.L.R. 207.
[75] [1967] 1 Lloyd's Rep. 1.
[76] [1979] 2 Lloyd's Rep. 79.
[77] Ibid. 82.
[78] *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F. Supp. 438 (1949), 194 F. 2d 449 (1951); *Commodity Service Corp.* v. *Hamburg-America Line* 354 F. 2d 234 (1966); *J. Howard Smith Inc.* v. *S.S. Maranon* 501 F. 2d 1275 (1974); *J. Gerber &* v. *Holland-America Lijn* 261 F. Supp. 893 (1966); *C. Itoh & Co. (America) Inc.* v. *Hellenic Lines Ltd* 470 F. Supp. 594 (1979).
[79] 1952 A.M.C. 1360.

of the elephant's condition at the time of shipment. In *United States of America* v. *Lykes Bros. Steamship Co. Inc.*,[80] the Court of Appeals held that the clean bill of lading failed to make out a prima facie case in bailment when the cargo of flour was infested on discharge.

The burden on the plaintiff, which is said to be considerable,[81] can be traced to the majority judgment of the Circuit Court of Appeals in *Bradley* v. *M.S. Niel Maersk*[82] where proof of the cargo's condition at shipment was held to be an integral component of the plaintiff's cause of action. Although the decision was not concerned with the Hague Rules, the principle has been applied to disputes under the Hague Rules. For example, in *Hecht, Levis & Kahn Inc.* v. *S.S. President Buchanan*,[83] the defendant alleged an inherent vice to have been the cause of the deterioration of rubber carried from Singapore to New York. Delivering the judgment of the Court of Appeals, Lumbard Ct.J. said:

> "Our prior decisions indicate that when deterioration of the goods may have resulted from a hidden defect, the shipper has the burden of proving their good condition upon delivery to the carrier and to sustain that burden he must present some evidence beyond the bill of lading since the bill of lading is evidence only of apparent or external good condition. . . . There is nothing to the contrary in the [Hague Rules]."[84]

Notwithstanding some illogicality in the British process, the American approach does require the plaintiff to prove a fact which obviates the need for the carrier to prove the cause of the loss or damage as an integral function of his defence. This anomaly has not escaped the attention of the United States courts. In *American Tobacco Co.* v. *Goulandris*,[85] a District Court pointed out that because the proof of causation lies with the defendant, both parties must bear the burden.[86] On appeal, the Court of Appeals commented:

> "We perceive no reason to shift from the shipper his burden of proving that the cargo was free of inherent vice. . . . It seems reasonable to place the burden of proof on the shipper once the damage is shown to have been of internal origin for he is clearly the one who has access to the information on this question."[87]

This explanation is questionable where the plaintiff is the consignee and even further removed from the conditions prevailing at the time of shipment.

[80] 511 F. 2d 218 (1975).
[81] *Compagnie de Navigation Fraissinet* v. *Mondial United Corp.* 316 F. 2d 163, 170 (1963); *Midwest Nut and Seed Company* v. *S.S. Great Republic* 1979 A.M.C. 379, 384.
[82] 91 F. 2d 932 (1937).
[83] 236 F. 2d 627 (1956).
[84] Ibid.
[85] 173 F. Supp. 140, 175 (1959).
[86] See also *Daido Line* v. *Thomas P. Gonzalez Corp.* 299 F. 2d 669, 671 (1962).
[87] 281 F. 2d 179, 182 (1960).

The Court of Appeals has since adverted to the problem but has declined to resolve it.[88] In *Vana Trading Co. Inc.* v. *S.S. Mette Skou*,[89] dealing with a cargo of yams which was outturned in damaged condition, the Court commented in a footnote:

> "It is not necessary for us to reconsider the question whether under the [Hague Rules] . . . the carrier has the burden of proving inherent vice under [Article IV.2(m)] or the shipper has the burden of disproving that exception as a part of the requirement that it must establish the good condition of the goods upon delivery to the carrier."[90]

## PHASE 2

This phase comprises defences itemised in Article IV which the carrier may advance to answer the plaintiff's prima facie case. The burden of proving an Article IV defence lies with the defendant carrier.[91] In *Gosse Millerd Ltd* v. *Canadian Government Merchant Marine Ltd*, Viscount Sumner observed from the House of Lords:

> "As the cargo in question was shipped in good order and condition and was delivered damaged . . . there was sufficient evidence of a breach by the carrier of his obligations under Art. III, r. 2 . . . to shift to him the onus of bringing the cause of damage specifically within Art. IV, r. 2 so as to obtain the relief for which it provides."[92]

Apart from the ambiguous position of Article IV. 2(m) (latent defects), the approach is identical in the United States. The plaintiff's prima facie case shifts the issue to the carrier affirmatively to prove that the cause of the loss or damage is excused.[93] The celebrated statement on the burden of proof is extracted from the judgment of the Supreme Court in *Schnell* v. *The Vallescura*[94] which, although a decision under the *Harter Act*, has been repeatedly applied to the Hague Rules. Stone J. explained:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. . . . The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary

[88] *Salzman Tobacco Co. Ltd* v. *S.S. Mormacwind* 371 F. 2d 537, 539 (1967).
[89] 556 F. 2d 100 (1977).
[90] Ibid. 105.
[91] *Silver* v. *Ocean Steamship Co.* (1930) 1 K.B. 416, 425; *Dent* v. *Glen Line Ltd* (1940) 67 Ll.L.R. 72, 78; *Kaufman Ltd* v. *Cunard Steamship Co. Ltd* [1965] 2 Lloyd's Rep. 564, 566; *Albacora S.R.L.* v. *Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53, 63; *Chubu Asahi Cotton Spinning Co. Ltd* v. *The Tenos* (1968) 12 F.L.R. 291, 293.
[92] [1929] A.C. 223, 234.
[93] *Shroeder Bros. Inc.* v. *The Saturnia* 226 F. 2d 147, 149 (1955); *Daido Line* v. *Thomas P. Gonzales Corp.* 299 F. 2d 669, 671 (1962); *Demsey & Associates Inc.* v. *S.S. Sea Star* 461 F. 2d 1009, 1014-15 (1972); *Tupman Thurlow Co. Inc.* v. *S.S. Cap Castillo* 490 F. 2d 302, 303 (1974); *The Madow Co.* v. *S.S. Liberty Exporter* 569 F. 2d 1183, 1185 (1978).
[94] 293 U.S. 296 (1934).

duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain, or, explaining, bring within the exceptional case in which he is relieved from liability."[95]

1. Article IV.2: The Shipper

However, the very terms of the bill of lading may estop the carrier from relying upon one of the excepted defences: i.e. (n), insufficiently of packing. Against a consignee who relies upon a clean bill of lading, the carrier cannot resort to insufficiency of packing if the deficiencies were apparent to reasonable inspection at the time of shipment, including those deficiencies which would not protect the cargo from the rigours of the proposed voyage. In *Silver* v. *Ocean Steamship Company Limited*[96] the cargo of frozen eggs was shipped in metallic rectangular tins whose sharp corners and edges were not covered by cloth, fibre or cardboard as was the usual practice. In an action by the consignee against the carrier for damage to the cargo the trial judge found that the cargo was insufficiently packed in that the sharp corners and edges were likely to pierce other containers in the consignment. The Court of Appeal did not disagree with this finding but denied the defence to the carrier because the bill of lading had described receipt of the cargo in good order and condition. Slesser L.J. remarked:

"I think that the capacity of the goods safely to travel was part of their order and condition, and so, being apparent on the face of it, I cannot see how the shipowners can now say that the goods were insufficiently packed."[97]

In cases dealing with uncrated cargo, the estoppel issues are blurred with the factual finding that the packing was sufficient. In *Chrysler Corporation Export Division* v. *Farley*,[98] the carrier endorsed the bill of lading for an unboxed automobile "uncrated at owner's risk of damage." Citing *Silver's* case, the United States District Court ruled that "the carrier cannot raise any question as to insufficiency of packing." In *Nissan Automobile Co. (Canada) Ltd* v. *Continental Shipper*,[99] the Federal Court of Appeals in Canada held, in respect of an uncrated motor vehicle shipped under a clean bill of lading, that "it is not open to the carrier to raise the defence of insufficiency of packing." Although the language is appropriate to issue estoppel, both cases appear to have been decided on the grounds that the packing was sufficient according to the custom of the trade.[100] Indeed,

[95] Ibid. 303-4.
[96] [1930] 1 K.B. 416.
[97] Ibid. 441.
[98] 1940 A.M.C. 59.
[99] [1974] Lloyd's Rep. 482.
[100] See also *Colton* v. *New York & Cuba Mail Steamship Co.* 27 F. 2d 671 (1928); *Norman & Burns* v. *Waterman Steamship Corp.* 105 F. Supp. 590 (1952); *American Motor Sales* v. *Furness, Withy & Co.* 1958 A.M.C. 911; *Ford Motor Co.* v. *S.S. Milross* 1963 A.M.C. 2095.

estoppel cannot be sustained if the consignee is alerted to the uncrated state of the consignment, as in the first case, or is not misled by the clean bill of lading because of the custom to ship uncrated, as in the second.

In the absence of estoppel, the burden of proving the insufficiency of packing and that the insufficiency caused the loss or damage is borne by the carrier.[101] In *Parke, Lacey, Hardie Ltd* v. *The Clan MacFadyen*,[102] a large machine was received by the carrier encased in wooden coverings except for protruding cast iron ends. The carrier endorsed the bill of lading "deemed insufficiently packed." On arrival, one of the cast iron ends was fractured. In the Supreme Court of New South Wales, Street C.J. held that in the absence of an explanation how the damage occurred, the carrier had failed to discharge his burden under Article IV.2(n) of proving that the insufficiency of packing had caused the damage.

While it is possible for the doctrine of estoppel to deprive the carrier of a defence under Article IV.2(n), the usual bill of lading should not interfere with any other defence including Article IV.2(o): insufficiency or inadequacy of marks. We have seen in Phase 1 that the signatory of the bill may be estopped from disputing the accuracy of marks described in the bill of lading, if material to the cargo's description. In such a case the signatory cannot prove that cargo bearing the misdescribed marks was not in fact shipped on board. But the estoppel does not prevent the carrier from relying upon Article IV.2(o) to prove that loss was caused by the insufficiency or inadequacy of marks on the cargo itself.

The difficulty confronting the carrier is not the estoppel but the problem of proving that the insufficiency or inadequacy of marks was causally connected to the loss. It may render the cargo unidentifiable and cause confusion but to sustain the defence the carrier must prove that the insufficiency or inadequacy was the effective cause of the cargo being misplaced, misdelivered or non-delivered. In *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co. Ltd*[103] some 28,000 bales of jute were shipped from Calcutta to thirty-seven different consignees. On arrival in Dundee 14 bags were missing and a further 11 could not be correlated with the marks noted on the bills of lading. The carrier resisted the counterclaim by one consignee for the loss of six bales pursuant to an exemption from "inaccuracies, obliteration or absence of marks." The House of Lords found against the carrier because he did not discharge his burden of proving that the consignee's six undelivered bales were among the unidentified eleven and not among the fourteen missing bales.

101 *The Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro* 1963 A.M.C. 443; *Hunt Foods & Industries Inc.* v. *Matson Navigation Co.* 249 F. Supp. 572 (1966); *Vana Trading Co. Inc.* v. *S.S. Mette Skou* 556 F. 2d 100 (1977) *Seneca Oil Co.* v. *S.S. Starman* 1980 A.M.C. 207.

102 (1930) 30 S.R. (N.S.W.) 438.

103 [1913] A.C. 680.

Article IV.2(i) completes the group of exceptions which relieve the carrier from responsibility for the conduct of the shipper or owner of the goods, his agent or representative. It is now convenient to review four exceptions which focus on the conduct of those in charge of the ship: Article IV:2(l), (a), (b) and (p).

2. Article IV.2: The Ship

Article IV.2(l) protects the carrier from loss or damage caused by saving or attempting to save life or property at sea. The defendant must establish that the loss or damage is causally related and not merely co-incidental to the efforts to save life or property. Whether those efforts involve a deviation is immaterial to the defence. A deviation is protected by Article IV.4 if for safety or other reasonable cause,[104] indicating that the former is justified *ipso facto*.

That Article IV.2(a) should relieve the carrier from responsibility for errors in the navigation and management of the ship is the most controversial topic in the reform of the Hague Rules.[105] It does not absolve the carrier from personal neglect but it does relieve him of vicarious liability for the errors of a wide range of personnel. The loss or damage must be caused by an act or omission in the navigation or management of the ship as distinct from neglect in the management of cargo. This fine distinction has caused judicial problems in England[106] and the United States,[107] since the exemption first appeared in standard form bills of lading and was granted immunity by the *Harter Act*. No less is this true of the Hague Rules when courts in England[108] and the United States[109] have attempted to differentiate between conduct referable to the operation of the ship and conduct referable to the safe carriage of the cargo.

In *Gosse Millerd Ltd* v. *Canadian Merchant Marine Ltd*[110] tarpaulins used to cover cargo were removed to enable repairs to be carried out on

[104] See *Stag Line Ltd* v. *Foscolo, Mango & Co. Ltd* [1932] A.C. 328; *G.H. Renton & Co.* v. *Palmyra Trading Corp. of Panama* [1957] A.C. 149; *Hirsch Lumber Co.* v. *Weyerhauser Steamship Co.* 233 F. 2d 791 (1956); *Surrendra (Overseas) Ltd* v. *S.S. Hellenic Hero* 213 F. Supp. 97 (1963).

[105] See C. W. O'Hare, "Allocating Shipment Risks and the UNCITRAL Convention" op. cit. 117:

[106] *The Ferro* [1893] P. 38; *The Glenochil* [1896] P. 10; *The Rodney* [1900] P. 112; *Rowson* v. *Atlantic Transport Company Ltd* [1903] 2 K.B. 666.

[107] *Knott* v. *Botany Worsted Mills* 179 U.S. 69 (1900); *Oceanic Steam Navigation Co. Ltd* v. *Aitken* 196 U.S. 589 (1905); *The Persiana* 185 F. 396 (1911); *Andean Trading Co.* v. *Pacific Steam Navigation Co.* 263 F. 559 (1920).

[108] *Hourani* v. *Harrison* (1927) 32 Com. Cas. 305; *Foreman and Ellams Ltd* v. *Federal Steam Navigation Co. Ltd* [1928] 2 K.B. 424; *C.H. Smith & Sons Fellmongery Pty Ltd* v. *P. & O. Steam Navigation Co.* (1938) 60 Ll.L. Rep. 419; *International Packers Ltd* v. *Ocean Steamship Co. Ltd* [1955] 2 Lloyd's Rep. 218.

[109] *Instituto Cubano* v. *Star Line Shipping Co. Inc.* 1958 A.M.C. 166; *Hershey Chocolate Corp.* v. *The Mars* 172 F. Supp. 321 (1958); *Firestone Synthetic Fibers Co.* v. *M.S. Black Heron* 324 F. 2d 835 (1936); *California & Hawaiian Sugar Co.* v. *Columbia Steamship Co.* 381 F. Supp. 894 (1972); *Int. Produce Inc.* v. *S.S. Frances Salman* 1975 A.M.C. 1521.

[110] [1929] A.C. 223.

the ship, exposing the cargo of tinplate to rain. The House of Lords decided that this conduct constituted neglect in the care of cargo rather than neglect in the management of the ship and the defence therefore failed. In *Chubu Asahi Cotton Spinning Co. Ltd* v. *The Tenos*[111] tanks used to carry bulk vegetable oil were filled with water to test for leaks. The water overflowed and entered the hold causing damage to a cargo of wool. In the Supreme Court of New South Wales, Macfarlan J. held that the primary purpose of testing the tank was not in the management of the ship but for the safe carriage of cargo, albeit not the damaged cargo. By contrast, the same judge in *Minnesota Mining and Manufacturing (Australia) Pty Ltd* v. *The Novoaltisk*[112] held that the defence under exception (a) succeeded. There, a crew member instructed to fill a fresh water tank accidentally admitted the water into a bilge pipe. The water entered a hold and damaged a cargo of abrasive paper. Macfarlan J. held that the operation was undertaken for the purposes of and in the management of the ship.

To sustain the defence it is immaterial whether the act or omission is referable to the care of cargo, the important issue being whether it was referable to the management or navigation of the ship. In *The Bulknes*,[113] for example, the court inferred from the evidence that a hatch must have been left open by a member of the crew. There was no evidence as to why the crew had opened the hatch apart from speculation that crew, having been seen smoking cannabis, may have opened the hatch to hide drugs in the forecastle. Sheen J. ruled that the surreptitious opening of a hatch did not qualify as an act or default in the management of the ship,[114] and the defence failed.

Although inferences may be drawn from the evidence, the court must be satisfied on the balance of probabilities that all components of the defence are made out,[115] including the nature of the act or omission. In *Herald and Weekly Times Ltd* v. *New Zealand Shipping Co. Ltd*[116] the consignees claimed compensation for a cargo of newsprint damaged by seawater. The evidence disclosed several possible acts or omissions by which water could have entered the hold but Morris J. was not satisfied that the carrier had proven the defence. He said:

> "Unless it can be shown to me with reasonable clearness what was the act or default, I think it is very difficult to say whether that act or default was done in the navigation or management of the ship."[117]

The carrier bears the onus of proving not only the elements of the exception but also that it caused the loss or damage. In the American case

111 (1968) 12 F.L.R. 291.
112 [1972] 2 N.S.W.L.R. 476.
113 [1979] 2 Lloyd's Rep. 39.
114 Ibid. 41.
115 *Chubu Asahi Cotton Shipping Co. Ltd* v. *The Tenos* (1968) 12 F.L.R. 291, 296; *In re Grace Line Inc.* 1974 A.M.C. 1253.
116 (1947) 80 Ll.L.R. 596.
117 Ibid. 606.

of *Insurance Company of North America* v. *S.S. Flying Trader*,[118] the carrier succeeded with a defence of insufficient packing in relation to synthetic latex which spilled when the clips securing containers sprang open in heavy weather. However, the evidence did not explain how a cargo of gasoline additive became mixed with the spilled latex. The court was satisfied that the master had been negligent in the navigation of the ship when taking aboard a pilot in heavy seas but the carrier failed to establish a causal link between the error in navigation and the damage to the gasoline additive.

The carrier may avail himself of exception (b) when he proves that fire[119] proximately or effectively caused the loss or damage.[120] Fire occupies an exceptional place in the law of sea carriage. Independently of the Hague Rules, legislation in the United Kingdom,[121] Australia[122] and the United States[123] confers immunity on the shipowner from vicarious liability for loss or damage caused by fire, and the fire legislation is preserved by the Hague Rules.[124] In addition, Article IV.2(b) excuses the carrier from fire loss or damage "unless caused by the actual fault or privity of the carrier." This phrase is borrowed from the British legislation in preference to the American terminology "unless such fire is caused by the design or neglect of such owner", but the difference is of no consequence.[125] Problems with this proviso are twofold. First is the artificiality of attributing personal fault to a corporate carrier. Beyond recognizing the difficulty of proving corporate fault, the organic theories of corporate responsibility in England[126] and the United States[127] should not concern us here. The second problem is with the burden of proving the proviso, which is of interest.

In *Royal Exchange Assurance* v. *Kingsley Navigation Co. Ltd*[128] a cargo of lime was destroyed on a barge when its contact with water generated heat

118 306 F. Supp. 221 (1970).

119 See *The Diamond* [1906] P. 282; *David McNair & Co. Ltd* v. *The Santa Malta* [1967] 2 Lloyd's Rep. 391; *Cargo Carriers Inc.* v. *M.S. Buckeye State* 39 F. Supp. 344 (1941); *Cargo Carriers Inc.* v. *Brown Steamship Co.* 1950 A.M.C. 2046.

120 *Charbonnier* v. *United States* 45 F. 2d 166 (1929); *Federazione Italiana* v. *Madask Compania* 342 F. 2d 215 (1965).

121 *Merchant Shipping Act* 1894 (U.K.) s. 502; *Merchant Shipping (Liability of Shipowners and Others) Act* 1958 (U.K.).

122 *Navigation Amendment Act* 1979 (Cth.) ss. 104, 65; *Navigation Act* 1912 (Cth.) s. 338.

123 46 U.S.C.A. 182.

124 Hague Rules Article VIII: *Sea-Carriage of Goods Act* 1924 (Cth.) s. 10; 46 U.S.C.A. 1308.

125 *Asbestos Corp. Ltd* v. *Compagnie de Navigation Fraissinet* 480 F. 2d 669, 672 (1973).

126 *Lennard's Carrying Co. Ltd* v. *Asiatic Petroleum Co. Ltd* [1915] A.C. 705; *Standard Oil Co. of New York* v. *Clan Line Steamers Ltd* [1924] A.C. 100; *The Truculent* [1952] P. 1; *Beauchamp* v. *Turrell* [1952] Q.Q.B. 207; *Yuille* v. *B. & B. Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep. 596.

127 See *Kellogg & Sons* v. *Hicks* 285 U.S. 502 (1931); *Earle & Stoddart* v. *Ellerman's Wilson Line* 287 U.S. 420 (1932); *Consumers Import Co.* v. *Kakushiki Kaisha Kawasaki* 320 U.S. 249 (1943); *The Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro* 159 F. 2d 661 (1947); *In re M.V. Republica de Colombia* 440 F. Supp. 704 (1977).

128 [1923] A.C. 235.

which ignited a fire. Against the action by the cargo underwriter, the carrier pleaded immunity pursuant to the *Water Carriage of Goods Act* 1910 (Can.) which was incorporated into the bill of lading. That Act excused the carrier from loss or damage (i) caused by fire or (ii) arising without his actual fault or privity. The Judicial Committee held that the first defence failed on the facts because the loss was naturally and directly attributable to the unseaworthiness of the vessel which allowed the water to enter, notwithstanding that the fire was the immediate cause of loss. In the second defence, the Judicial Committee held that although the exculpatory phrase was not annexed to the fire exception in the Canadian Act, it was identical to the phrase in the British fire legislation and the burden of proof should be identical.[129] Under the British fire legislation the burden of proving that the loss or damage occurred without the "actual fault or privity" of the carrier lies with the defendant.[130] By analogy, the burden under the Hague Rules rests with the carrier to dispel personal blameworthiness before his exception (b) defence can succeed. However, it is worth commenting that the material phrase in the Canadian legislation was the active component of the exemption whereas in Article IV.2(b) it appears as a proviso to the exception. In fact the Canadian exception corresponds with Article IV.2(q) which expressly imposes the burden of proof on the defendant.

In the United States, decisions on the fire statute have held that once the defendant establishes fire as the cause of loss or damage, the issue reverts to the plaintiff to dislodge the defence by proof of the "design or neglect of the owner."[131] So as not to undermine the fire statute[132] by a contradictory application of the Hague Rules, American law requires the cargo plaintiff to prove the "actual fault or privity of the carrier" under Article IV.2(b). In *Automobile Insurance Company* v. *United Fruit Company*,[133] the United States Court of Appeals said:

> "We think that Congress intended as a condition for recovery for damage due to fire loss to place the burden on cargo interests of establishing that the fire was caused by the design or neglect of the owner. . . . The exemption provided by the [Hague Rules Article IV.2(b)] was the same as that provided by the Fire Statute and the purpose of the exemption was the same. . . . No case has been called to our attention which would indicate a tendency on the part of the courts to relieve cargo interests of that burden."[134]

[129] See also *Paterson Steamship Ltd* v. *Canadian Co-op. Wheat Producers Ltd* [1934] A.C. 538.
[130] *Lennard's Carrying Co. Ltd* v. *Asiatic Petroleum Co. Ltd* [1915] A.C. 705.
[131] *The Older* 65 F. 2d 359 (1933); *Hoskyn & Co. Inc.* v. *International Standard Electric Corp.* 143 F. 2d 462 (1944); *American Tobacco Co.* v. *The Katingo Hadjipatera* 194 F. 2d 449 (1952); *Fidelity-Phenix Fire Ins. Co. of New York* v. *Flota Mercante* 205 F. 2d 886 (1953).
[132] See *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki* 320 U.S. 249, 254-6 (1943); *Sunkist Growers Inc.* v. *Adelaide Shipping Lines Ltd* 603 F. 2d 1327, 1333 (1979).
[133] 224 F. 2d 72 (1955).
[134] Ibid. 75.

There is an undercurrent of tension with the American burden of proof under the fire statute and, therefore, the Hague Rules proviso. As with British legislation,[135] the fire statute is accompanied by a limitation of liability available to the shipowner unless damage is caused with his "privity or knowledge."[136] When petitioning for a limitation of liability, the shipowner bears the burden of proving his lack of privity or knowledge[137] which has prompted one court to question why he should not bear the same burden under the fire statute and the Hague Rules fire proviso.[138] It does seem that the proviso in Article IV.2(b) was intended to place the burden on the defendant carrier because the cargo plaintiff would in any event be entitled, in Phase 3, to prove the fault of the carrier.

Article IV.2(p) absolves the carrier from latent defects of the ship which are not discoverable by due diligence. The carrier must therefore prove that a defect caused the loss or damage and that the defect was latent;[139] that is, one which could not be discovered by a person of competent skill using ordinary care,[140] or could not be discovered by any known and customary test.[141] To sustain the defence, however, the carrier need not prove that he in fact exercised due diligence. He will of course adduce evidence of his due diligence to support his plea in rejoinder because his evidence of a latent defect supplies the plaintiff with evidence of unseaworthiness. In practice this defence is a rehearsal of the issues pleaded under Article IV.1.

3. Article IV.2: Third Parties

The next group of defences may be classified as interference from third parties. It comprises Article IV.2(e), (f), (g), (h), (j) and (k) which relieve the carrier from causes ranging from quarantine and civil detention through strikes to riots and war.[142] Of that group, exception (j)—strikes or

[135] *Merchant Shipping Act* 1894 (U.K.) s. 503; *Merchant Shipping (Liability of Shipowners and Others) Act* 1900-1958 (U.K.); *Navigation Amendment Act* 1979 (Cth.) ss. 104, 65, Sch. 6; *Navigation Act* 1912 (Cth.) s. 333; *Kosinklijke Rotterdamsche Lloyd N.V.* v. *Western Steamship Co. Ltd* [1957] A.C. 386; *Northern Fishing Co. (Hull) Ltd* v. *Eddom* [1960] 1 Lloyd's Rep. 1; *The Lady Gwendolen* [1965] P. 294; *Rederij Erven H. Green* v. *The England* [1973] 1 Lloyd's Rep. 373; *China Ocean Shipping Co.* v. *South Australia* (1980) 48 A.L.J.R. 57.

[136] 46 U.S.C.A. 183.

[137] *Coryell* v. *Phipps* 317 U.S. 406 (1943); *Petition of American Dredging Co.* 235 F. 2d 618 (1956); *Holloway Concrete Products Co.* v. *Beltz-Beatty Inc.* 293 F. 2d 474 (1961); *The Marine Sulphur Queen* 460 F. 2d 89 (1972).

[138] *Complaint of M.S. Caldas* 350 F. Supp. 566 (1973). And see *Verbeeck* v. *Black Diamond Steamship Corp.* 269 F. 2d 68 (1959), 273 F. 2d 61 (1959); *Commercial Union Ass. Co.* v. *S.S. Hellenic Leader* 1979 A.M.C. 2809, 2814; R. H. Thede, "Statutory Limitations of Carrier's Liability to Cargo" (1971) 45 *Tulane L.R.* 959, 985.

[139] *Charles Brown & Co. Ltd* v. *Nitrate Producers' Steamship Co. Ltd* (1937) 58 Ll.L.R. 188; *Corporation Argentina de Productores* v. *Royal Mail Lines Ltd* (1939) 64 Ll.L.R. 188; *Waterman S.S. Corp.* v. *S.S. Smelting, Refining & Mining Co.* 155 F. 2d 687 (1946); *Price Paper Corp.* v. *S.S. Granwood* 1975 A.M.C. 374.

[140] *The Dimitrios N. Rallias* (1922) 13 Ll.L.R. 363, 366; *The Falls City* (1932) 44 Ll.L.R. 17, 18.

[141] *Brazil Oiticica Inc.* v. *S.S. Bill* 1942 A.M.C. 1607, 1621; *Union Carbide & Carbon Corp.* v. *S.S. Walter Raleigh* 1952 A.M.C. 618, 637.

[142] See *Larringa Steamship Co. Ltd* v. *King* [1945] A.C. 246; *Pesquerias Y. Secaderos*

lockouts or stoppage or restraint of labour from whatever cause, whether partial or general—varies in the United States from the British and Australian legislation by the addition of a proviso: "provided that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts." In all jurisdictions the burden is on the carrier to prove the excepted cause of loss or damage whereupon the burden reverts to the plaintiff to prove that carrier's negligence contributed to the loss or damage.

In this group the carrier is confronted with the problem encountered in all defences where the exception is not the immediate cause of the loss or damage. In order to establish a causal connection between the remote excepted event and the loss or damage he may have to exclude other factors as potential causes which would break the chain of causation.[143] So he may have to adduce evidence that his negligence did not cause the loss of damage.[144] For example, in *General Goods Corporation* v. *United States of America*[145] the carrier gave evidence that due to a stevedore's strike, the cargo of cocoa beans remained on board ship in port for some 26 days before it was unloaded. The United States District Court held that the carrier had failed to discharge his burden of proving that the strike caused the damage. Clancy D.J. said:

> "As to the evidence concerning the strike, nothing more was proved than that a strike of a Seamen's Union occurred. How long it lasted, why no resources were available to the respondent during it to care for the cargo, what conditions of weather were required to be borne, whether or not any care taken was on the vessel or on the dock, or what his duties were if one were present or even what if anything he was able to do does not appear. . . . It is the respondent's burden to prove that the strike disabled it from giving the cargo the required attention and thereby constituted a cause of damage."[146]

4. Article IV.2: The Elements

Articles IV.2(c) and (d) are closely related. They excuse the carrier from cargo loss or damage caused by perils dangers and accidents of the sea or other navigable waters and acts of God. As with other defences, the carrier bears the burden of proving that the loss or damage was caused by the excepted event. Yet these two exceptions are more complicated than

v. *Beer* [1949] 1 All E.R. 845; *The Estrada Palma* 8 F. 2d 103 (1923); *Clark S.S. Co. Ltd* v. *Munson S.S. Line* 59 F. 2d 423 (1932).

143 See *Attorney-General* v. *Ard Coasters Ltd* [1921] 2 A.C. 141; *Liverpool & London War Risks Ass. Ltd* v. *Ocean Steamship Co. Ltd* [1948] A.C. 243; *The Wildwood* 133 F. 2d 765 (1943); *Hearty* v. *Ragunda* 114 F. Supp. 869 (1953).

144 *Schroeder Bros. Inc.* v. *The Saturnia* 226 F. 2d 147 (1955); *British West Indies Produce Inc.* v. *S.S. Atlantic Clipper* 353 F. Supp. 548 (1973); *Page Communications Engineers Inc.* v. *Hellenic Lines Ltd* 356 F. Supp 456 (1973); *United States of America* v. *Lykes Bros. Steamship Co. Inc.* F. 2d 218 (1975).

145 104 F. Supp. 494 (1952).

146 Ibid. 496.

others in that circumstances surrounding the loss or damage must be taken into account to qualify the cause as a peril of the sea or act of God.

The defence "peril of the sea" is available where loss or damage is inflicted or caused by a peril peculiar to the navigation of the sea in a fortuitous accident or casualty. In *Thomas Wilson, Sons and Co.* v. *The Xantho*[147] the House of Lords held that the loss of cargo on a ship which foundered following a collision was caused by a "peril, danger or accident of the sea." Lord Herschell said of this concept:

> "Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against the natural and inevitable action of the wind and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."[148]

On the same day the House of Lords delivered judgment in *Hamilton, Fraser & Co.* v. *Pandorf & Co.*[149] and held that the entry of sea-water into the hold through a hole in a lead pipe gnawed by rats was a "danger and accident of the sea." Lord Macnaghten said:

> "It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care."[150]

In both cases the Lords ruled that "peril of the sea" means the same in carriage contracts as in marine insurance, though factors of causation may differ. Insurance cases[151] applying this concept also emphasize that loss or damage must arise from an unexpected accident on the voyage and not a predictable incident of the voyage. Rough weather may qualify as a peril if the damage could not have been avoided by foresight.[152] Yet in Anglo-Australian jurisdictions, the element of unforeseeability is not directed to the peril but to the circumstances in which the peril causes or inflicts the loss or damage, namely, an unexpected casualty. For example, in *N.E. Neter & Co.* v. *Licenses and General Insurance Co. Ltd*,[153] a cargo of china clay was damaged when casks stowed with it stove in as a result of heavy weather. In the course of judgment Tucker J. said:

> "I think it is clearly erroneous to say that, because the weather was such as might reasonably be anticipated, there can be no peril of the seas.

147 (1887) 12 App. Cas. 503.
148 Ibid. 509.
149 (1887) 12 App. Cas. 518.
150 Ibid. 530.
151 *Canada Rice Mills Ltd* v. *Union Marine and General Ins. Co. Ltd* [1941] A.C. 55; *E.D. Sassoon & Co.* v. *Western Assurance Co.* [1912] A.C. 561; *P. Samuel & Co. Ltd* v. *Dumas* [1924] A.C. 431; *Skandia Ins. Co. Ltd* v. *Skoljarev* (1979) 53 A.L.J.R. 683.
152 *Mountain* v. *Whittle* [1921] 1 A.C. 615; *W. Angliss & Co. (Aust.) Pty Ltd* v. *P. & O. Steam Nav. Co.* (1927) 28 Ll.L.R. 202; *The Llven* (1928) 32 Ll.L.R. 8; *W.P. Wood & Co.* v. *Hanseatische Reederei* (1930) 37 Ll.L.R. 144; *The Assunzione* [1956] 2 Lloyd's Rep. 468.
153 (1944) 77 Ll.L.R. 202.

> There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss. . . . It is not the weather by itself which is fortuitous, it is the stoving in due to the weather, which is something beyond the ordinary wear and tear of the voyage."[154]

In Anglo-Australian law, the ordinary motion of wind and waves can give rise to the defence. It is this feature to which Mason and Wilson JJ. alluded in *Shipping Corporation of India Ltd* v. *Gamlen Chemical Co. (Australasia) Pty Ltd* when their joint judgment in the High Court of Australia recorded:

> "In the United Kingdom and Australia it is not necessary that the losses or the cause of losses should be 'extraordinary'. . . . Consequently, sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea."[155]

To invoke the defence the carrier must prove that the loss or damage was caused, proximately or effectively, by a peril of the sea in the circumstance of a casualty. In *The Xantho* the plaintiff contended that the carrier could not rely on the defence if the loss was induced by negligent navigation. On appeal, the House of Lords held that the carrier satisfied the terms of the exemption on proof that a peril of the sea was the proximate cause of loss, irrespective of antecedent negligence. Of course, the carrier would ultimately bear liability if his negligence were the effective cause of loss and in ordering a new trial to determine the carrier's negligence, the House left open the question on whom the burden of proving negligence lay. However, in the *Pandorf* case, in which negligence was not in issue, Lord Fitzgerald said:

> "When the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of ascertaining whether the remote cause may not have been negligence of the carrier, and indeed the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity."[156]

The opinion expressed in this dictum was exploded in *The Glendarroch*[157] when the Court of Appeal decided that once the carrier had satisfied the proof of a proximate cause, the issue reverted to the plaintiff to prove that the carrier's negligence was the effective cause of loss or damage. This view has prevailed in Australia.[158]

There is no reason in principle why the carrier, having proven his defence, should additionally negate his negligence. However, the very concept of "act of God" imports the element that human care and skill could not have

154 Ibid. 205.
155 (1981) 55 A.L.J.R. 88, 95.
156 (1887) 12 App. Cas. 518, 528.
157 [1894] P. 226.
158 *Shipping Corp. of India Ltd* v. *Gamlen Chemical Co Australasia Pty Ltd* (1981) 55 A.L.J.R. 88, 96; *Vacuum Oil Co. Pty Ltd* v. *Commonwealth & Dominion Line Ltd* [1922] V.L.R. 693.

prevented the casualty. To sustain this defence the carrier must show that the loss or damage was caused by an act of nature entirely independent of human action and that the event was irresistible.[159] In *Nugent* v. *Smith*,[160] Mellish L.J. explained:

> "If the loss of the goods carried is occasioned by an irresistible act of Nature [the carrier is] protected. . . . I think, however, that in order to prove that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented."[161]

In contrast with the peril of the sea, the common carrier was immune from the act of God because it was beyond the control of mankind. To establish the defence the carrier must prove that no reasonable precautions would have prevented the casualty. This view also prevails in the United States.[162] In *Mamiye Bros.* v. *Barber Steamship Lines Inc.*,[163] Wyatt D.J. commented:

> "The Act of God exception by definition cannot be established unless and until the carrier or bailee shows that the loss could not have been prevented by reasonable care and foresight. This logic would seem that . . . the burden is on the respondents [carrier] to show the exercise by them of reasonable care or, to put it another way, that the damage could not have been prevented by the exercise of reasonable care."[164]

Just how far the negative fault component has pervaded the peril of the sea defence in the North American jurisdictions is an issue for conjecture. Courts in Canada[165] and the United States[166] have so defined the concept as to incorporate ingredients of unforeseeability and unavoidability. In *R.T. Jones Lumber Co. Inc.* v. *Roen Steamship Co.*[167] the Court of Appeals accepted the following definition:

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."[168]

159 *Forward* v. *Pittard* (1785) 1 T.R. 27; *Siordet* v. *Hall* (1828) 4 Bing 607; *Oakley* v. *The Portsmouth & Ryde Steam Packet Co.* (1856) 11 Ex. 618; *Nitro-Phosphate Co.* v. *London & St. Katherine Dock Co.* (1877) 9 Ch.D. 503.
160 (1876) 1 C.P.D. 423.
161 Ibid. 441.
162 *The Majestic* 166 U.S. 375 (1897); *Gans S.S. Line* v. *Wilhelmsen* 275 F. 254 (1921); *Levatino Co. Inc.* v. *American President Lines Ltd* 337 F. 2d 729 (1964); *British West Indies Produce Inc.* v. *S.S. Atlantic Clipper* 353 F. Supp. 548 (1973).
163 241 F. Supp. 99 (1965), 360 F. 2d 774 (1966).
164 241 F. Supp. 99, 109 (1965).
165 *William D. Branson Ltd* v. *Furness (Canada) Ltd* [1955] 2 Lloyd's Rep. 179; *Charles Goodfellow Lumber Sales Ltd* v. *Verreault, Hovington & Verreault Nav. Inc.* [1971] 1 Lloyd's Rep. 185; *Falconbridge Nickel Mines Ltd* v. *Chimo Shipping Line* [1973] 2 Lloyd's Rep. 469; *The Washington* [1976] 2 Lloyd's Rep. 453.
166 *The Warren Adams* 74 F. 413 (1896); *The Giulia* 218 F. 744 (1914); *Duche* v. *Brocklebank* 40 F. 2d 418 (1930); *Blanchard Lumber Co.* v. *S.S. Anthony II* 259 F. Supp. 857 (1966).
167 270 F. 2d 456 (1959).
168 Ibid. 458.

The peril need not inflict violent trauma, as sweat or condensation may qualify as a peril of the sea.[169] The feature which distinguishes the American concept from the English is that the peril be out of the ordinary in nature or degree. Whereas the element of foreseeability in English law merely differentiates between fortuitous casualties and damage incidental to the voyage, in American law it qualifies the peril itself. Consequently, in the United States, the carrier must prove that the peril which caused the loss or damage was of such a character[170] that, taking into account its nature, intensity and duration,[171] precautions which should be taken to resist perils likely to be encountered on the voyage could not have prevented the casualty. In other words,[172] the peril is extraordinary if of such character as to prevail over good seamanship[173] and a seaworthy ship.[174]

To complete his defence the carrier is not obliged to prove that his ship was seaworthy, although evidence of it may emerge from his case. Historically, seaworthiness was closely associated with the defence. At common law, the carrier would adduce evidence of seaworthiness prospectively to rebut the plaintiff's reply of unseaworthiness. Under the *Harter Act* the burden was placed squarely on the carrier to prove that the ship was seaworthy or that he exercised due diligence to make the ship seaworthy, as a condition precedent to his immunity.[175] Under the Hague Rules, however, the defence is not contingent upon the exercise of due diligence and therefore proof of seaworthiness is not a prerequisite to the success of the defence. Of course, the carrier may choose to lead evidence of seaworthiness to prove that the peril was extraordinary by the process of elimination: as the ship was seaworthy and yet unable to withstand the peril, the peril must have been extraordinary.[176]

Along the same line of reasoning the carrier should not be required to dispel his negligence if he can otherwise prove the peril to have been extraordinary. To succeed he must persuade the court that reasonable precautions would not have averted the loss or damage, but not that he in fact took such precautions. As we shall see, the plaintiff in Phase 3 may overcome the defence on proof that the carrier's negligence was a con-

169 *Clark* v. *Barnwell* 53 U.S. 272 (1851); *Wessels* v. *The Asturias* 126 F. 2d 999 (1942); *General Goods Corp.* v. *United States* 104 F. Supp. 629 (1952); *Hunt Food & Industries Inc.* v. *Matson Navigation Co.* 249 F. Supp. 572 (1966).

170 *Johnson* v. *S.S. Schickshinny* 45 F. Supp. 813, 817-8 (1942).

171 *Pincoffs Co.* v. *Atlantic Shipping Co.* 1975 A.M.C. 2128, 2129; *J. Gerber & Co.* v. *S.S. Sabine Howaldt* 437 F. 2d 580, 586 (1971).

172 *Chiswick Products Ltd* v. *S.S. Stolt Avance* 257 F. Supp. 91, 95 (1966).

173 *The Rosalia* 264 F. 285, 288 (1920); *Ptn. Pennsylvania R. Co.* 44 F. Supp. 617 (1942); *Palmer Distributing Corp.* v. *American Counselor* 158 F. Supp. 264 (1957).

174 *Philippine Sugar Centrals Agency* v. *Compania General de Tabacos* 106 F. 2d 32, 34 (1939); *Ore Steamship Corp.* v. *D.C. Hassel* 137 F. 2d 326, 328 (1943); *Virgin Islands Corp.* v. *Merwin Lighterage Co.* 251 F. 2d 872, 873 (1958).

175 *May* v. *Hamburg* 290 U.S. 50 (1933).

176 *Jordan International Co.* v. *Federal Commerce & Nav. Co. Ltd* 1975 A.M.C. 130, 137 *Artemis Maritime Co. Inc.* v. *Southwestern Sugar Co. Inc.* 189 F. 2d 488, 491 (1951).

current cause of the loss or damage. Yet, along this path of reasoning, the sweat cases pose the obstacle that the absence of negligence has entered the very definition of peril of the sea, thereby compelling the defendant to disprove negligence to sustain his defence.[177]

In *Clark* v. *Barnwell*[178] the Supreme Court acknowledged that moisture deposited from the atmosphere could qualify as a peril of the sea if it damaged the cargo in the absence of any defect in the ship, its navigation or the stowage of the cargo.[179] The judgment stressed that the plaintiff in turn could overcome the defence by proving that the carrier might have prevented the damage by the exercise of reasonable skill and diligence.[180] The Court did not explain what scope was left to the plaintiff to prove negligence if the defendant needed to preclude negligence in order to classify the source of moisture as an extraordinary peril. Following this decision, the Court of Appeals in *Wessels* v. *The Asturias*[181] affirmed that under the Hague Rules the carrier must bear liability if his negligence contributed to the cause of damage but declined to set up a hierarchy of presumptions or of rules relating to burden of proof.[182] Yet a passage from the judgment has since been acclaimed as the definitive statement[183] on the carrier's burden of proof:

> "Sweat, then, can be regarded as a peril of the sea only when all available and reasonable precautions are taken to avoid it."[184]

It is not clear why the court focused its attention on the "is" question rather than the "ought" question: "did the carrier take reasonable precautions to avoid the peril?" rather than "could the peril have been avoided by reasonable precautions?" It must be remembered that, in the American scheme, the object of the exercise is to classify the source of mischief as an inescapable condition of ocean carriage.[185] And while proof that precautions[186] taken were reasonable is one evidentiary tactic available to the carrier, it should not preclude proof by other means that the peril was inevitable, leaving it to the plaintiff to prove that the carrier did not take reasonable precautions. Yet, the sweat cases have consistently required the carrier to prove that he took reasonable precautions to avoid the peril,[187] even when recognizing the plaintiff's burden to prove negligence in

177 *J. Gerber & Co.* v. *S.S. Sabine Howaldt* 437 F. 2d 580, 588-9 (1971).
178 53 U.S. 272 (1851).
179 Ibid. 282.
180 Ibid. 280, 282, 283.
181 126 F. 2d 999 (1942).
182 Ibid. 1000.
183 G. Gilmore and C. L. Black, *The Law of Admiralty* (2nd ed., New York, Foundation Press, 1975) p. 162, whose opinion has been approved judicially.
184 126 F. 2d 999, 1000 (1942).
185 *Compagnie de Navigation Fraissinet* v. *Mondial United Corp.* 316 F. 2d 163, 169 (1963).
186 See *Armour & Co.* v. *Compania Argentina de Navegacion* 1958 A.M.C. 332, 263 F. 2d 323 (1959).
187 *General Foods Corp.* v. *United States* 104 F. Supp. 629 (1952); *Tri-Valley Packing*

reply.[188] Referring to sweat damage in *Compagnie de Navigation Fraissinet and Cyprien Fabre S.A.* v. *Mondial United Corporation*, the Court of Appeals said:

> "But to show this as an excepted peril, the Carrier in effect has to absolve itself from negligence by showing that despite prompt, timely, prudent and adequate steps in ventilation and protective measures, the sweating nonetheless occurred from the inescapable conditions of ocean carriage."[189]

The crux of the problem lies in the nature of sweat damage. If sweat damage cannot be traced to an extraordinary peril without an enquiry into negligence it is questionable whether the defence should be entertained under Article IV.2(c). Yet the essential issue in sweat cases is whether the carrier provided adequate ventilation. Therefore, this issue is more appropriately contested under Article IV.2(q) which caters for less obvious causes of damage and compels the carrier to dispel negligence. In fact, the *California Packing* cases[190] read as though the peril of the sea defence was conducted and decided under the (q) clause. There, as in most sweat cases, condensation was predictable for the voyage in question and the dispute revolved around stowage and ventilation. If the sweat case defence must be classified under Article IV.2(c), the burden of proof rules should be regarded as an exception to the mainstream principle. Preferably, though, the defence should be treated as an example of Article IV.2(q) in disguise. In either event, the words of Roche D.J. serve as a useful introduction to the (q) clause:

> "As [the carrier] maintains, if he can show due diligence in protecting the cargoes, he need not show how the damage did, in fact, come about. . . . But where the record discloses policies, the wisdom of which is questionable, or conduct in which it is doubtful that the carrier has exercised due care, it is difficult to see how [the carrier] can carry his burden . . . without establishing a reasonable alternative to his own negligence as a probable cause for the damage."[191]

5. Article IV.2(q)

The foregoing passage should not relate to the (c) exception because no defence can succeed under the specified exceptions (a) to (p) unless affirmatively proved to have been a cause of the loss or damage.[192] The

*Assn.* v. *States Marine Corp. of Delaware* 310 F. 2d 891 (1962); *Hunt Food & Industries Inc.* v. *Matson Navigation Co.* 249 F. Supp. 572 (1966).

188 *George F. Pettinos Inc.* v. *American Export Lines* 68 F. Supp. 759, 761 (1946); *Daido Line* v. *Thomas P. Gonzales Corp.* 299 F. 2d 669, 671 (1962).

189 316 F. 2d 163, 169 (1963).

190 *California Packing Corp.* v. *The Empire State* 180 F. Supp. 19 (1960); *California Packing Corp.* v. *The P. & T. Voyager* 180 F. Supp. 108 (1960); *California Packing Corp.* v. *States Marine Corp. of Delaware* 187 F. Supp. 540 (1960), 310 F. 2d 206 (1962).

191 *California Packing Corp.* v. *States Marine Corp. of Delaware* 187 F. Supp. 540, 542 (1960).

192 *Schroeder Bros. Inc.* v. *The Saturnia* 226 F. 2d 147; *Establissements Edouard Materne S.A.* v. *S.S. Leerdam* 143 F. Supp. 367; *President of India* v. *West Coast*

alternative of proving due diligence is available to the carrier only under clause (q). Article IV.2(q) confers immunity from "any other cause" arising without the fault of the carrier and[193] his servants and agents,[194] but the burden of proof is on the carrier to show that "neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." To answer the plaintiff's case under Article III.2, the carrier may either avail himself of a specific exception or,[195] akin to the ordinary bailee, negative the presumption of negligence against him. The relationship between the (a) to (p) exceptions and the (q) clause is well documented in American cases,[196] though the use of the phrase "due diligence" in this context is unfortunate.[197]

By analogy with the ordinary bailee, and contrary to some statements,[198] the carrier need not affirmatively prove the actual cause of loss or damage if he can otherwise refute negligence. The carrier's defence under the (q) clause must succeed if it displaces the case against him. Since the case against him is one of presumptive negligence, the carrier's defence is sustained by negating the negligence. Clause (q) cannot be read *iusdem generis* with the preceding exceptions[199] and neither in English[200] law nor in American[201] federal[202] law is the ordinary bailee obliged to prove both the cause of loss or damage and the absence of negligence.[203] As the United States Court of

*Steamship Co.* 213 F. Supp. 352 (1962); *Nichimen Co. Inc.* v. *M.V. Farland* 462 F. 2d 319 (1972).

193 *Hourani* v. *Harrison* (1927) 32 Com. Cas. 305, 317; *Paterson Steamships Ltd* v. *Canadian Government Co-op. Wheat Producers Ltd* [1934] A.C. 538, 549.

194 See *Heyn.* v. *Ocean Steamship Co.* (1927) 137 L.T. 158; *Leesh River Tea Co.* v. *British India Steam Nav. Co.* [1967] 2 Q.B. 250; *Metalimport of Romania* v. *S.S. Italia* 1976 A.M.C. 2347; *Int. Minerals & Chemicals Corp.* v. *Int. Properties Management* 604 F. 2d 254 (1979).

195 See *Gordon H. Mooney Ltd* v. *Farrell Lines Inc.* 616 F. 2d 619, 625 (1980).

196 *George F. Pettinos Inc.* v. *American Export Lines* 68 F. Supp. 759, 761 (1946); *Copco Steel & Enigneering Co.* v. *The Prins Frederik Hendrik* 129 F. Supp. 469, 470-1 (1955); *Caterpillar Overseas S.A.* v. *S.S. Expeditor* 318 F. 2d 720 (1963); *Dewsey & Assoc.* v. *S.S. Sea Star* 461 F. 2d 1009, 1015 (1972); *The Madow Co.* v. *S.S. Liberty Exporter* 569 F. 2d 1183, 1185 (1978).

197 *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F. Supp. 438, 445 (1948), 194 F. 2d 449 (1952); *General Foods Corp.* v. *S.S. Troubador* 98 F. Supp 207, 208 (1951); *Lekas & Drivas* v. *Goulandris* 306 F. 2d 426, 429 (1962); *M.W. Zack Metal Co.* v. *S.S. Birmingham City* 311 F. 2d 334, 337 (1962).

198 *The Kite* [1933] P. 154, 168; *The Stranna* [1937] P. 130, 147-8; W. Tetley, *Marine Cargo Claims* (2nd ed., Toronto, Butterworths, 1978) pp. 246-7, 272.

199 *A.E. Potts & Co. Ltd* v. *Union Steamship Co. of N.Z. Ltd* [1946] N.Z.L.R. 276.

200 *Joseph Travers & Sons Ltd* v. *Cooper* [1915] 1 K.B. 73; *The Ruapehu* (1925) 21 Ll.L.R. 310; *Brook's Wharf & Bull Wharf Ltd* v. *Goodman Bros.* [1937] 1 K.B. 534; *Port Swettenham Authority* v. *Wu & Co.* [1979] 1 Lloyd's Rep. 11.

201 *Commercial Molasses Corp.* v. *New York Tank Barge Corp.* 314 U.S. 104 (1941); *O.F. Shearer & Sons* v. *Cincinnati Marine Service Inc.* 279 F. 2d 68 (1960); *Scsung* v. *Tiger Pass Shipyard Co.* 303 F. 2d 318 (1962); *Nichimen Co. Inc.* v. *M.V. Farland* 462 F. 2d 319 (1972).

202 Compare with state law in *Leather's Best Inc* v. *S.S. Mormaclynx* 451 F. 2d 800 (1971).

203 Distinction between evidentiary inferences drawn to support a plaintiff's burden and the burden of non-persuasion resting with the defendant need not be of concern here. Compare cases in fn. 201 with *Frankhauser* v. *Mark Dykes Pty Ltd* [1960] V.R. 376, 377-8; *Hobbs* v. *Petersham Transport Co. Pty Ltd* (1971) 45

Appeals said in *Richmond Sand and Gravel Corporation* v. *Tidewater Construction Corporation*:

> "There are, in general, two ways in which the bailee may rebut the presumption. He may show either how the disaster in fact occurred and that this was in no way attributable to his negligence, or that he exercised the requisite care in all that he did with respect to the bailed article so that, regardless of how the accident in fact transpired, it could not have been caused by any negligence on his part."[204]

Contrary statements confuse principle with evidentiary practicalities. The carrier's plea which denies negligence is acceptable without alleging a cause. However, the court at trial may not be satisfied on the balance of probabilities that the plea is sustained unless the carrier can isolate the circumstances in which the loss or damage occurred. The greater the degree of precision with which he can identify the possible causes, the more confident the court can be of adjudging the negligence issue on the preponderance of evidence. The comment of Atkinson J. in *Phillips and Co.* v. *Clan Line Steamers Ltd* is apposite:

> "It is not necessary for the defendants to establish exactly why and how the damage occurred, provided they can disprove negligence; but, of course, it is not easy to do that unless they can establish some reasonably possible alternative explanation. If the damage is entirely unexplained it is difficult to see how the onus can be discharged."[205]

For example, in *Pendle and Rivet Ltd* v. *Ellerman Lines Ltd*,[206] a case was shipped containing wool and silk goods but on arrival was found to contain old newspapers. Because the carrier could not shed light on the mystery he could not preclude the possibility of negligence and his (q) defence failed. In *City of Baroda* v. *Hall Line Ltd*[207] the contents of boxes were probably stolen at an intermediate port by local thieves. Although the crime could have been perpetrated without negligence of the carrier and his servants, the carrier failed to discharge his burden of proving that it had so occurred. On the other hand, in *Glidden Co.* v. *The Vermont*,[208] the carrier's defence under clause (q) did succeed. The carrier was unable to explain how a bulk cargo of oil had become contaminated but the court accepted, on evidence of the ship's preparation, the management of the ship and the discharge of the cargo, that it could not have been caused by want of care. So too, in *Manhattan Fruit Export Corporation* v. *Royal Netherlands Steamship Company*,[209] the carrier discharged his (q) burden

A.L.J.R. 356, 364; *Gamlen Chemical & Co. (Australasia) Pty Ltd* v. *Shipping Corp. of India Ltd* [1978] 2 N.S.W.L.R. 12, 24.

[204] 170 F. 2d 392, 393-4 (1948).
[205] (1943) 76 Ll.L.R. 58, 61.
[206] (1927) 33 Com. Cas. 70.
[207] (1926) 25 Ll.L.R. 437.
[208] 47 F. Supp. 877 (1942).
[209] 271 F. 2d 607 (1959).

by proving that the refrigeration of the cargo was adequate and could not have contributed to the unexplained spoilage of plums.

6. Article IV.1

It should be recalled that exceptions (a) to (p) provide a good defence to the plaintiff's prima facie case irrespective of its nature. Clause (q) is clearly applicable where the cause of action alleges negligence in the custody of cargo under Article III.2. Read literally, clause (q) is broad enough also to embrace allegations under Article III.1 of the failure to exercise due diligence to supply a seaworthy ship. It is submitted, however, that the conceptual symmetry of Articles III and IV did not envisage its use in this respect and hence the Article IV.1 defence is specifically addressed to the unseaworthiness issue. The need for a defence to negate the presumptive case of want of due diligence explains why Article IV.1 duplicates, as an immunity, what is already expressed in Article III.1, as a liability.

Proof of the bailment in Phase 1 is sufficient to make out a prima facie case against the carrier founded on Article III.1, which presumes that the loss or damage was caused by the carrier's failure to exercise due diligence to make the ship seaworthy. The carrier must bear the burden of his defence under Article IV.1 to prove that want of due diligence to make the ship seaworthy did not contribute to the loss or damage.[210] In *Socony Mobil Oil Company Inc.* v. *Texas Coastal and International Inc.*[211] the carrier could not explain how the cargo of oil became contaminated with water and invoked Article IV.1. In the course of judgment, the United States Court of Appeals said:

> "The shipper need only show that cargo was loaded in undamaged condition, and discharged in contaminated condition, to establish a *prima facie* case. The carrier then has the burden of showing that the vessel was seaworthy or that due diligence was used to make it seaworthy."[212]

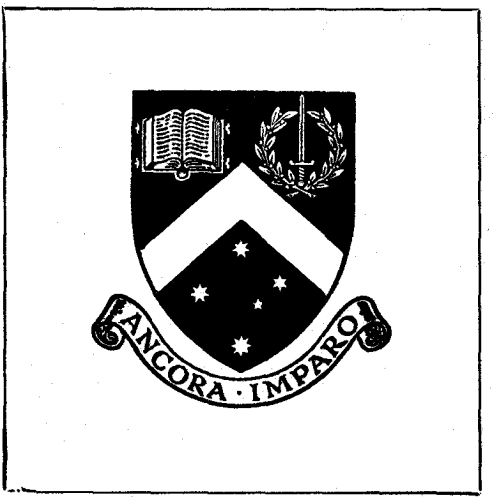
In the English case *Corporacion Argentina De Productores De Carnes* v. *Royal Mail Lines Ltd*[213] the plaintiff alleged a breach of Article III.1 which caused damage to his cargo and the defendant successfully relied upon Article IV.1. In the course of judgment Branson J. said:

> "*Prima facie*, the carcasses having been shipped, as is admitted, in good order and condition, and having arrived damaged by brine, the defendants are liable; and in order to discharge their liability they must bring themselves within the immunity given by Art. IV in par. 1 or in par. 2 thereof."[214]

[210] *The Australia Star* (1940) 67 Ll.L.R. 110; *Encyclopedia Brittanica Inc.* v. *S.S. Hong Kong Producer* 422 F. 2d 7 (1969); *Interstate Steel Corp.* v. *S.S. "Crystal Gem"* 317 F. Supp. 112 (1970); *International Produce Inc.* v. *S.S. Frances Salman* 1975 A.M.C. 1521.
[211] 559 F. 2d 1008 (1977).
[212] Ibid. 1010.
[213] (1939) 64 Ll.L.R. 188.
[214] Ibid. 189.

*In Part Two of this article, the author discusses the relationship between Phases 2 and 3 and examines Phase 3 of the burden of proof.*

# MONASH UNIVERSITY LAW REVIEW




# BOOK SUPPLEMENT

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# BOOK REVIEWS

*The Mortgagee's Power of Sale*, by C. E. CROFT, (Sydney, Butterworths, 1980), pp. xxxii and 176.

This book discusses the statutory and common law regulating the exercise of the mortgagee's power of sale out of court. It deals with the rights and duties of legal and equitable mortgagees of both general law and Torrens system land in Victoria and New South Wales. The text incorporates extensive extracts from the relevant statutory provisions, which makes it a convenient source of reference. Where the mortgagee exercises his power of sale it will frequently be necessary for him to recover possession of the mortgaged land. For this reason the book contains a useful discussion of the general law and Torrens system mortgagee's right to possession, and of the techniques available for the recovery of possession.

A number of difficult problems remain unresolved in this area of the law. They include: the nature of the duty owed by the mortgagee to the mortgagor in exercising his power of sale; the effect of the statutory provisions designed to protect a purchaser from a Torrens system mortgagee; the effect of failure to lodge a caveat in a conflict between unregistered mortgagees of Torrens system land; and the effect of exercise of the power of sale by a registered morgagee of Torrens system land on caveats lodged by subsequent unregistered mortgagees.

With respect to the first question, in Australia it is not yet clear whether the High Court will follow the English Court of Appeal decision in *Cuckmere Brick Co. Ltd* v. *Mutual Finance Ltd* [1971] Ch. 949, in which it was held that the mortgagee owes a duty to the mortgagor to take reasonable care to obtain a proper price on the sale of the property. The case law in this area is conflicting. The author discusses it in detail, and presents a useful summary of his conclusions. In this area, as in some of the other areas he discusses, he leans in favour of a solution which protects the position of the mortgagee rather than the mortgagor. He comments that:

> "If the courts do take the view that the mortgagee is liable to the mortgagor for any negligence in the exercise of the power of sale the mortgagee's position becomes very unsatisfactory, because of the number of situations which will commonly arise where it will not be clear whether the taking of one course of action rather than another will leave him open to a negligence claim".

One issue which he does not address is whether the standard of care adopted by the court is likely to influence its conclusion. In an interesting article in (1979) 53 A.L.J. 842 Stone argues that the court's view on the appropriate standard of care has not been crucial in the outcome of the decided cases, and that the existing concepts of "recklessness" or "negligence" are both sufficiently nebulous to enable the cases to be dealt with on their merits.

With respect to the second question mentioned above, the author discusses the difficult question whether a purchaser from a Torrens system mortgagee is protected prior to the registration of his transfer from any defects in the exercise of the mortgagee's power of sale. His treatment of this problem could usefully be expanded. In Victoria the answer to this question could be affected by the opening words of section 77(4) of the *Transfer of Land Act* 1958 (Vic.) which are "Upon the registration of any transfer under this section". In New South Wales the answer to this question may be affected by the *Real Property Act* 1900 (N.S.W.) s. 43A.

With respect to the third question mentioned above the author analyses the conflicting case law which deals with the effect of failure to lodge a caveat. He does not express a preference for any particular viewpoint. It is surprising that in this

section he fails to mention the decision of Gillard J. in *AVCO Financial Services Ltd* v. *White* [1977] V.R. 561. Useful reference could also have been made to the South Australian decision in *Taddeo* v. *Catalano* (1975) 11 S.A.S.R. 492 (see also *Taddeo* v. *Taddeo and Catalano* (1979) 19 S.A.S.R. 347).

With respect to the fourth question mentioned above the author points out a peculiar drafting omission in the provisions of the New South Wales *Real Property Act* 1900, and in the Victorian *Transfer of Land Act* 1958. Neither Act provides for the lapsing of caveats protecting subsequent mortgagees when an earlier mortgagee contracts to sell the mortgaged land. The difficulties which this may cause for a mortgagee exercising his power of sale were recently illustrated in *Forster* v. *Finance Corporation of Australia Ltd* [1980] V.R. 63. The author suggests that the appropriate procedure for the mortgagee is to seek to have the caveats removed under the *Real Property Act* 1900, (N.S.W.) s. 97(2) or the *Transfer of Land Act* 1958, (Vic.) s. 89A. He points out some difficulties involved in the use of the procedure laid down in s. 89A. However he does not refer to the alternative procedure available under s. 90(3) of the *Transfer of Land Act* 1958 (Vic.). His suggestion that the reasoning in *Kerabee Park Pty Ltd* v. *Daley* [1978] 2 N.S.W.L.R. 222 would apply in Victoria has recently derived support from the decisions in *Commercial Bank of Australia Ltd* v. *Schierholter* [1981] V.R. 292 and *Lewenberg and Pryles* v. *Direct Acceptance Corporation Ltd* [1981] V.R. 354, where however the mortgagees applied for removal of the caveat under s. 90(3) of the *Transfer of Land Act* 1958 (Vic.).

In conclusion, this book would be a useful text for New South Wales and Victorian practitioners concerned with the principles regulating the exercise of a mortgagee's power of sale. The extracts from cases and statutes set out in the work, and the forms and precedents at the back of the book, are likely to assist the busy practitioner. However for students and practitioners wishing to discover the law in other states, or to investigate wider aspects of the law of mortgages, Sykes, *The Law of Securities* (3rd ed., Sydney, The Law Book Company, 1978) may be a preferable purchase.

M. NEAVE*

## *The International Arbitral Process: Public and Private*, by J. GILLIS WETTER, (New York, Oceana Publications, 1979), 5 vols.

The volumes represent a veritable *tour de force* by a writer active in the field of arbitration. In the preface to the first volume Dr Wetter says that the work springs not from the inner imagination of a legal mind but from reality such as he has seen and experienced. Indeed that comment may account both for the strengths and shortcomings of the work. Dr Wetter is a continental lawyer, a Solicitor Royal of Sweden, who has been much influenced by his experience in the United States where he obtained a J.S.D. at Chicago.

The format is as follows. Volume one is concerned with Public International Arbitration, whilst volume two outlines aspects of Private International Arbitration dealing first with U.S. Arbitration law and then the various arbitration institutions with some consideration of a uniform procedure. Volume three commences with a study of the Venezuela-Guyana Boundary dispute and then proceeds to a consideration of standards of independence and impartiality of tribunals. Volume four opens with a comparative study of Swedish and English law applicable to private arbitration and then proceeds to an analysis of Swiss procedures as Dr Wetter knew them, concluding with a chapter on Transnational Private Arbitration rules. This latter question is taken up again in Volume five which is then given over to a consideration of Public International Law Arbitration Rules and then a study of various rules applicable

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today in private commercial international arbitration. All is held together, to the extent that it can be, by an index in the fifth Volume.

The main shortcoming of this work is that it is hopelessly organized, and yet some may well say that is part of the charm. The work is full of odd bits of memorabilia which on its face could have been culled out. But should they have been? The work really represents the bringing together of an astute practitioner's papers. His prologue in Volume one gives an overview, albeit short. The epilogue, halfway through Volume four (pp. 283-300) sums up his thinking. Everything in between represents in one form or another documentary texts and following the epilogue there are extracts of both national laws and international rules.

Dr Wetter's emphasis is on process. In his prologue he states "as any experienced lawyer knows, procedure governs and shapes substance", and then later, "The international arbitral process is a process that I have seen before my own eyes and with which I work every day. It exists now, just as it did one hundred years ago; and indeed it has not changed greatly in the meantime. Man has not transformed his character appreciably in the past century; why should arbitration have done so?". It should not be lost on the reader that his dedication is to Karl Llewellyn, the realist, to whom he ascribes the title of the greatest legal thinker of the twentieth century. Indeed the emphasis upon process, practice, and apparently insignificant memorabilia associated with certain arbitrations, is explicable in terms of Llewellyn and his approach allied with Wetter's own not insignificant practice. Dr Wetter is, after all, experienced in both public and private international arbitrations and has published on some very interesting arbitration subjects.

Why should anyone buy this compendium? In the field of international law there are a number of texts on commercial international arbitration but there is nowhere collected the heterogeneous material assembled here. The material is designed to emphasise the flexibility of the process and the influence on the outcome of the participants in the process. Wetter in emphasizing process exhibits arbitration in a very personal yet thoroughly professional way. The advocate and the arbitrator are to him of crucial importance. Doctrinaire attitudes tend to be softened by the process.

Perhaps this personal approach and his belief in its importance is best brought out in the first Volume. For example, there is lengthy documentation on the famous Alabama Claims Arbitration describing the hearing scene and the participants, and then again, where he pays attention to the great jurist Max Muber, a person who stands in the arbitration field in much the same standing as a personality and judge as our own Sir Owen Dixon in the Australian context.

There are included in the text some of the pleadings in a number of arbitrations. This is useful for pleadings, which are of fundamental importance in international litigation. Access to pleadings as distinct from awards in arbitrations is not available in contradiction to litigation in the I.C.J. where the whole of the pleadings are recorded as well as the judgments.

Not all is old material. The volumes were published by Oceana in 1979 and yet Dr Wetter has managed to incorporate, for example, in the interesting chapter on "Autonomy or Subordination" materials on House of Lords debates on Reform of English Arbitration Law, the Arbitration Bill, now the *Arbitration Act* 1979 (U.K.), and accompanying discussions on it.

These are volumes continually to be dipped into. Printed by an off-set process, the documents are clear and live. The binding is rich and meant to last. Expensive, as a whole, the set will not form part of the ordinary practitioner's library, but universities and research institutions would regard the set as quite basic. It would be a valuable addition to any practitioner who aspires to or finds himself concerned with the international arbitration process.

H. B. CONNELL*

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*Environmental Law in Australia*, by D. E. FISCHER, (St. Lucia, University of Queensland Press, 1980), pp. xxx and 197.

When Dr Fisher set out to write his book he bravely embarked on an endeavour in an area of law largely devoid of legal analysis either in the schools of law or the courts of law. The book is a success in that it achieves what the text first must achieve—it defines the parameters of the area and then gives the area a contextual basis.

The need for a text in the field of environmental law has been great—it has been long overdue. Until I commenced a similar task myself, I had often wondered why such a field of law being apparently so ripe for the picking by an academic explorer had, to date, not been exploited. It soon became evident that it is the vast diversity of the subject "Environmental Law" which creates the challenge. I have since discovered that many have started similar works but have fallen by the wayside in the face of the sheer mass of material.

A quick glance at the table of enactments or a perusal of the index provides immediate evidence of the enormous scope of this field of law. All too often the ignorant enquirer, believing environmental laws are merely those restrictive controls on pollution emissions, is shocked by the discovery that nearly every law on the statute books can in some way or other be classed as an environmental law, as there is usually some impact, even if indirect, on the environment (using the term in its widest sense). The problem that faced Dr Fisher was obviously not that of looking for material to include in the work but rather looking for ways to justify leaving material out in the interests of making his task workable. He has quite successfully achieved this aim by defining the parameters, as he says at page eight, "arguably, environmental law properly should be restricted to the law that protects the environment and facilitates consideration of the environmental dimension in the several decision-making processes".

The most significant revelation that will dawn upon the reader is that environmental laws in Australia are in essence administrative in their processes and discretionary in their application. Dr Fisher highlights well the disturbing extent of these characteristics of environmental laws. The text shows that in all states of the Commonwealth the bureaucratic and/or ministerial arm of the given government has the discretion to apply or vary the stated law. I define discretionary laws, for the purposes of this review, as laws where the operative decision which is to start a train of events is made by a Minister or an Authority in circumstances where that decision cannot be examined or challenged—that is, the decider can within his own discretion decide whether a law should be made to apply.

The rationale for the creation of laws which may, in extreme circumstances, only exist on the statute books due to non-use of the law or over use of exemption powers, may be found in the controversial nature of its application. Environmental laws invariably involve elements of control processes, restrictions or the removal of existing freedoms. Dr Fisher states that the distinctive feature of environmental law is that it deals with the relationship between man and his surroundings. This area of law invariably forces each man to consider others in those surroundings. A policy decision is made, as a premise to each environmental law, that a certain state of the environment is for the "common good" and so is desirable.

The difficulty, as Dr Fisher indicates, is the nature of our society which values individual freedoms—some of which are exploitive freedoms. He says that an economist views the environment "as an asset" which has the effect of restricting the conception to matters of value to man. However, the law regulates matters of social, political or cultural value as much as those of economic value. The balance between the individual's rights and society's rights will always be the issue behind all environmental laws and the arbiter will invaribly be the political wing of our society. The real measure of the quality of our environmental laws will be the degree to which the relevant considerations, to determine an environmental law's application, are spelt out in detail.

The essence of the debate and the problem is well illustrated by Lord Scarman who is quoted by Dr Fisher at page 11:

> "Tied to concepts of property, possession and fault, the judges have been unable by their own strength to break out of the cabin of the common law and tackle the broad problems of land use in an industrial and urbanised society. The challenge appears, at this moment of time, to be likely to overwhelm the law. As in the area of social challenge, so also the guarding of our environment has been found to require an activist, intrusive role to be played by the executive arm of government."

Dr Fisher elaborates on the point when he states at page 12 of his book:

> "The reason, of course, is that the concepts of the common law were available largely for 'protecting private right and enforcing private obligation'."

The law, he summarised, "has never understood or accommodated a public right or obligation in the environment".

Environmental laws are, perhaps due to their controversial and far reaching application, constantly being reviewed and revised. The cynic could say that the healthier the economy then the more environmental laws will be enacted while the corollary is that the weaker the economy then the fewer will be the environmental laws that will be enacted. Over the last year the call for streamlining of development controls or the removal of restrictions is an indication of this factor.

The result is a changing or evolving array of laws—even in the few months since Dr Fisher's book was published the changes to the environmental laws have been significant—particularly in Victoria and New South Wales. These changes are too numerous to highlight in this review. Any book in this field must be used as a guideline for an overall impression rather than as a reference source to solve a legal problem. The changes to the law in this field are too frequent for the conscientious legal practitioner to rely solely on such a text and not examine the latest changes to the legislation.

Another problem facing the practitioner in this field of law is the lack of judicial interpretation of many of the working terms in the legislation. There is in Australia a dearth of case law which could assist a lawyer trying to interpret a problem on which he may be working. Invariably if the environmental law field is discretionary and administrative in nature there is less opportunity for review. Another factor is that the majority of environmental laws are determined by tribunals or boards which are not courts of record.

The extent of this absence of guidelines or precedent is arguably a direct consequence of the consideration of matters which are often emotive and subjective. Further, the subject of an environmental issue often involves esoteric, technical or scientific considerations which are not easily understood by the lawyer. It should be evident to the reader of Dr Fisher's book that there is a calling for multi-disciplinary lawyers—that is, lawyers who are trained to understand fields of learning in the natural sciences.

I can illustrate the problem facing a lawyer in the environmental law field by referring to Dr Fisher's discussion on page 147 of the Victorian *Environment Effects Act* 1978. The operative provision of this Act requires the preparation of a Preliminary Environment Report or an Environment Effects Statement in relation to public works which could reasonably be considered to have or be capable of having a significant effect upon the environment. Dr Fisher asks: where the proponent does not doubt whether the works could reasonably be considered to have a significant effect upon the environment, does the proponent have to prepare a Report or a Statement? He concludes that "the scheme of the Victorian Act, unlike the federal procedures, seems to indicate, it is suggested, no such possibility". Hence he states that "the proponent of any public works must submit a Report or a Statement to the Minister"—even if the proponent does not doubt that the works could not reasonably be considered to have a significant effect upon the environment.

This Victorian Law has all the problem elements facing the environmental lawyer:

(a) it is discretionary, (a decision regarding "significance" must be made to determine its application, yet that decision is beyond review);

(b) it is both technical and emotive, ("significance" could be interpreted in many different ways—for instance, what may be scientifically uninteresting may be aesthetically appealing); and,

(c) it is ambiguous, requiring legal analysis, yet it is unlikely to be subject to judicial review.

My latter statement is derived from my analysis of the relevant section which is contrary to Dr Fisher's analysis. With respect to the author, I am of the opinion that if the proponent has no doubt that his works would not be capable of having a significant effect upon the environment then he need not prepare a Preliminary Environment Report, let alone a Statement. The operation of this Act over the last two years has endorsed my analysis in that public works including countless minor works, (such as, say, fixing a road drain), by public authorities have not been subject to the operation of the Act. The point I wish to emphasize, and it is a disturbing point, is that irrespective of such debate there is no legal interpretation likely to be forthcoming. The nature of the law is such that Parliament is unlikely to elaborate on it, (in case it fetters the discretion), and the courts will probably never get a chance to interpret it (because of its Ministerial application). This is typical of the bulk of modern environmental laws.

Overall Dr Fisher's work is an excellent introduction to one of the most challenging and complicated fields of law—a field of law which is exciting in its dynamism and potential. Environmental law is evolving and the body of learning associated with it is growing, placing a responsibility on all those who are involved with it to keep abreast of the changes.

SIMON R. MOLESWORTH*

*Statutory Conditions of Employment*, by G. J. MCCARRY and C. SAPPIDEEN, (Sydney, Butterworths, 1980), pp. xxiv, 224.

The authors state in their preface that their text ". . . is based on that of the same title written by Mr C. P. Mills 20 years ago although the arrangement adopted is different from that used by Mills" (p. ix). However, some of the departures from the original theme of Mills have led to a rather miscellaneous collection of materials in some chapters.

The words "New South Wales" have been dropped from the title of Mills' text, but the more general title, "Statutory Conditions of Employment", is not completely indicative of the materials contained in the book. The statutory material it encompasses covers federal legislation and the legislation of the state of New South Wales. Whilst a comprehensive text on statutory conditions Australia-wide, encompassing federal and all state jurisdictions, would be a massive undertaking indeed, it was not one attempted by the authors and it seems preferable that the coverage of the text should have been made clear in a sub-title or at least the preface.

Although many provisions under the laws of other states are similar to those in New South Wales, readers in other states should not assume that this is the case. Certainly, for New South Wales readers, the text is valuable for it provides a comprehensive coverage of the statutory conditions affecting employers and employees in the federal and New South Wales jurisdictions.

As the authors point out in their preface (p. ix), a very broad definition has been given by them to "statutory conditions of employment". Not only does this include a discussion of those provisions which could be said to be conditions of employment but it also includes provisions which could be described more correctly as *affecting* employment or employers and employees, such as the chapter devoted to a discussion

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of the statutory restrictions and sanctions on strikes. In addition, the conditions are not necessarily confined to truly statutory conditions but include, for example, the guidelines in employment issued by the Privacy Committee of New South Wales.

The text commences with a chapter on provisions which are relevant prior to the engagement of employees or which place restrictions on the employment of persons—advertisement of positions, employment of apprentices and so on. Chapter 2 is devoted to conditions of employment which the authors state discusses "the extent to which statutes impose upon an employer minimum terms upon which they must employ their staff" (p. 25). Two important aspects of minimum employment conditions, wages and leave, are dealt with comprehensively in separate chapters, so that Chapter 2 is rather a hotch-potch of topics—from discrimination in employment to entry to premises and inspection of records by union officials, including a section on privacy, dealing with the guidelines in employment formulated by the Privacy Committee of New South Wales.

Probably one of the main contributions of the book to the field of employment law is the treatment of the topic of industrial safety legislation. This does not include workers' compensation, a discussion of which the authors understandably left to books devoted to that area alone, but is rather a discussion of New South Wales statutory provisions relevant to safety at work. The treatment of the *Constructive Safety Act* 1912 (N.S.W.) and its regulations is comprehensive, taking up some 20 pages. The chapter concludes with a discussion of employees' remedies for injuries received at work, other than workers' compensation. This section includes common law (non statutory) remedies which do not sit comfortably in a text on the statutory conditions of employment, even when these words are interpreted liberally. These remedies have been covered more adequately by such texts as J. J. Macken, C. Moloney and G. J. McCarry, *The Common Law of Employment* (Sydney, The Law Book Co. Ltd, 1978), and E. I. Sykes, and D. Yerbury, *Labour Law in Australia—The Individual Aspects* (Sydney, Butterworths, 1980).

The final chapter concerns the dismissal of employees. The section on reinstatement in employment, particularly at the federal level, is important as this is an issue of concern to employees today. The authors' examination of the legal problems surrounding the jurisdiction of the Australian Conciliation and Arbitration Commission in dismissal and reinstatement as well as the practice of the Commission in the area of reinstatement is a helpful guide, for there is a paucity of published material in this area.

The authors state that the principal readers for whom the book is intended are employers and trade union officials. The book should be a valuable reference for these persons. The text is essentially descriptive, rather than analytical; the style is clear; headings and sub-headings are specified within the chapters, and numbers are given to each sub-heading so that specific topics are readily located from the index. The strength of this text lies mainly in the up-to-date collection in the one volume of both federal and New South Wales legislative provisions, thereby providing a handy text for industrial relations practitioners.

MARILYN J. PITTARD*

## *Negligence and Economic Torts: Selected Aspects*, edited by T. SIMOS Q.C., (Sydney, Law Book Company, for the New South Wales Bar Association, 1980), pp. vii and 159.

The essays in this book were originally presented as papers at seminars conducted by the Council for Continuing Legal Studies of the New South Wales Bar Association in 1971 and 1977. The ambiguous title of the book might suggest it is concerned with

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the relationship between negligence and the economic torts. In fact it comprises four independent essays on negligence and one on economic torts. There is no discussion of the relationship between the two.

The contribution on economic torts is by Professor J. D. Heydon. It is devoted to a thorough but rather tightly knit coverage of recent cases in the tort of interference with contractual relations. Readers fimiliar with Professor Heydon's book, *Economic Torts* (London, Sweet & Maxwell, 1978) will find this a useful supplement, especially the references to unreported decisions.

The four essays on negligence have nothing much in common except that they deal with various aspects of the duty of care. The first one, entitled "Law and Fact in Duty of Care", is by Mr Justice W. S. Jacobs. His main argument is that the existence or non-existence of a duty of care is a pure question of law. Further, Lord Atkin's "neighbour principle", despite its seemingly factual references to likelihood of injury, is merely the background against which a court determines this question. Accordingly, when a court is faced with a case in which the relationship between the parties at the moment of injury is not one of the well-known relationships, it must determine whether as a matter of law a duty should be imposed. This it does "not by evidence but by the judicial process of legal analogy and social judgment" (p. 7). However, as an updated postscript by Mr C. S. Phegan points out, the House of Lords in *Anns* v. *Merton London Borough Council* [1978] A.C. 728 adopted the view that prima facie a duty of care should always be imposed where the parties are within Lord Atkin's neighbour principle, unless there are considerations to the contrary. It is interesting to consider how far Australian courts should adopt this approach in view of the arguments presented in Mr Justice Jacobs' essay.

The second study of negligence is by Professor P. S. Atiyah. It is entitled "Property Damage and Personal Injury—Different Duties of Care?" As one might expect, Professor Atiyah is anxious that legal argument should be diverted from the familiar discussion of "foreseeability", "duties of care", etc. He presents a readable argument that there should be no liability for carelessly inflicted *property* damage. He considers that property damage is preferably treated as covered by owner insurance. While not pretending to have said the last word on the policy considerations involved, he argues that the general practice of insuring against certain types of risk should be a material factor in deciding whether legal liability should be imposed for such risks. Moreover, practitioners should present arguments in these terms to the courts. One can agree with Professor Atiyah that such arguments might be sympathetically received by at least some judges today. For example, Mr Justice Woodhouse recently said in *Takaro Properties Ltd* v. *Rowling* [1978] 2 N.Z.L.R. 314, 323: ". . . the more recent attitude of the Courts may reflect to some degree a realisation that potential defendants today are often well able to foresee and guard against the economic effects of their carelessness by building up internal reserves as a form of self-insurance or by the group insurance schemes which spread individual losses in the widest fashion". The same sort of argument may apply in certain situations to potential plaintiffs.

"An Evolving Duty of Care—Liability for Defective Structures" is the title of a paper presented by Mr C. S. Phegan. The author looks at the evolving responsibilities of architects, building contractors and local council building inspectors. A critical analysis is made of landlords' immunity in this area. The most difficult aspect of the topic, however, is that relating to duties of local authorities. The difficulty arises from the fact that "the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law": *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 854 per Lord Wilberforce. Mr Phegan underlines the complexity of the process envisaged by Lord Wilbeforce for defining a private law duty in a public law context, e.g. the employment of the planning/operational distinction. It becomes clear that a great deal remains to be done by judges and writers in identifying exactly what is the discretionary matter which enjoys immunity from the imposition of negligence liability.

The final essay on negligence is by Paul Gerber: "Occupiers' Liability—A Fossilised Duty of Care". It is a brave writer who tries to state coherently the law in the area of occupiers' duties to trespassers. Mr Gerber was obliged to write two postscripts in

an attempt to bring his work up to date, and this tends to diminish the unity of the essay itself. But maybe this is an area of endless postscripts. Instead of being reduced to tears, Mr Gerber quite understandably treats the topic with a degree of humour. He regards *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054 as being "the disaster of the century" (p. 100), and the result of *Herrington* v. *B.R.B.* [1972] A.C. 877 as being "chaos with respect". He asks (p. 136) what is the duty owed to little old ladies in white dresses who have fits on railway tracks? According to Barwick C.J. in *Public Transport Commission of N.S.W.* v. *Perry* (1977) 137 C.L.R. 107, it is "not to be reckless to the point of inhumanity". The author's treatment of recent developments could be more thorough. One can sympathise, however, with his conclusion that there is little point in embarking on legislative reform in this area unless the board is swept clean of all categories, including trespass, and a standard of care applied which is a function of the particular circumstances.

It is to be regretted that the book contains no index or table of cases. There are some oddities in presentation, e.g. there is a heading *Bolton* v. *Stone* at p. 22, but no discussion of that case follows. *Bourhill* v. *Young* seems to have missed its heading at p. 24. But despite these shortcomings, and the lack of a unifying theme in the book as a whole, the torts lawyer will find much information and some food for thought in these essays.

PETER HEFFEY*

*De Facto Marriages in Australia*, by J. H. WADE, (Sydney, CCH Australia, 1981), pp. v, 122.

This book breaks new ground, in that it seeks to review under one roof, so to speak, what Australian laws, both state and federal, have to say in relation to de facto marriages. That is no mean task. It has not been done before within a single book devoted exclusively to this topic. Moreover, the author has dealt with it comprehensively in entering upon areas such as adoption and foster care which, while not conceptually part of the subject, are often of practical importance in connection with de facto relationships. This brings us to a very pertinent question, in the words of another reviewer: For what market is this book intended? The author's charter is to give "a brief and comprehensive overview of the law as it relates to de facto marriages and families. It aims to provide a guide to cases and legislation for the practitioner, student and law reformer" (p. iii). It certainly achieves the first of those objectives. It contains a good deal of useful and up-to-date reference material. More important, it attempts to systematize the law in its chosen field, where previously one had to go to the sources under a variety of headings.

Having said that, however, one becomes conscious of the book's shortcomings. Certainly the practitioner must still do his own spadework, since the book is really no more than an introduction to this complex subject. It gives useful pointers to the kind of areas on which further research must focus, but to the user it provides little more than a starting point, and he will neglect to delve much deeper at his, and his client's peril.

More specific criticisms can be made. The author puts forward again his theory, which he has propounded at greater length elsewhere, that "it is arguable that all de facto marriages are void marriages" (para. 203), thereby attracting ancillary jurisdiction under the *Family Law Act* 1975, (Cth.). He does hint at the limitation to this theory by suggesting that "judges may well require some attempted ceremony before a de facto marriage is classified as a void marriage" (para. 203), but he then goes on to play down the seriousness of this obstacle by suggesting that perhaps "a party of friends" or "an exchange of rings" may constitute sufficient compliance with the

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requirement of a ceremony (para. 203). In this reviewer's opinion it is dangerous to entice the unsophisticated into the shoals and shallows of these unchartered waters without at least sounding a warning against ingenious but irresponsible attempts to attract jurisdiction by a mere colourable device, as in *Read* (1977) F.L.C. 90-201, which was quickly laid to rest in *Tansell* (1977) F.L.C. 90-307. For a marriage to be void, there must first be a "marriage". This would rule out the overwhelming majority of de facto relationships. Similarly, the "common law marriage" as recognised in the *Savenis* v. *Savenis* [1950] S.A.S.R. 309 type of situation must be narrowly confined to very special circumstances, and consequently is of very little use in the usual de facto marriage where the parties know only too well that they are not legally married.

Cohabitation agreements, and indeed the law of contract in relation to consensual cohabitation, are dealt with rather sketchily, although some attempt is made to bring in express cohabitation contracts, with alternative clauses providing for different lifestyles, and a few examples of possible clauses are given in Appendix B. The author does not attempt to emulate the sophistication and industry which has been devoted to such contracts by American writers like Lenore J. Weitzman ((1974) "Legal Regulation of Marriage: Tradition and Change" 62 *Calif. Law Rev.* 1169). In this the author is wise, for he recognises that they are of uncertain legal effect, certainly in Australia, and he pursues this aspect no further. There is every reason to suppose that it will not be long before Australian legislatures and courts will come to explore such attempts to regulate extra-marital relationships. The recent reference to the N.S.W. Law Reform Commission came probably too late after the book was written to have attracted the author's attention, but it seems likely that the innovative approach of the Commission in other matters may well lead it to examine this area with particular care. In this context it might have been instructive to discover the author's views on the question of regulation and non-regulation, as discussed in the report of the Royal Commission on Human Relationships. Discussion of this topic in the book is limited to about twelve lines, and the Royal Commission's report is not mentioned.

Where the author does attempt to deal conceptually with his subject, he is not always on safe ground. So he seeks to introduce the notion of a "cohabitation intention" analogous to the intention to marry, which he suggests similarly requires mutuality. While an intention to cohabit may sometimes be of significance, it seems that the objective fact of cohabitation is of far greater importance in establishing the basis for a legal relationship.

The treatment of the concept of the "child of the marriage" in s. 5 of the *Family Law Act* could also have been better handled. It is misleading to state (para. 701) that the "biological or adopted children of one of the cohabitants from his or her former ceremonial marriage" are known as "children of the marriage" under that section, without making it clear that that concept is relevant only in the former marriage or of proceedings arising out of it. These limitations have become only too apparent in the recent High Court decision of *Vitzdamm-Jones* v. *Vitzdamm-Jones* and *St. Clair* v. *Nicholson* (1981) 33 A.L.R. 537. The statement that it is proposed to widen the concept of the "child of the marriage" in s. 5(1) of the *Family Law Act* by introducing as a third category a stepchild who has been adopted into the household by a step-parent is confined to a bare reference to an announcement to that effect by the Attorney-General, Senator Durack. There is no mention of the fact that this third category was in the Act as originally enacted, but was removed from it in consequence of the decision in *Russell* v. *Russell* (1976) 134 C.L.R. 495. Nor is there any discussion of how such an amendment is to be validly achieved in the face of that decision—however desirable it may be.

It is in this area of the Australian dichotomy in state-federal jurisdictional competence that the book's treatment is perhaps least satisfactory. The recent case of *Vitzdamm-Jones*, for example, is mentioned only once, while such important decisions as *Re Demack; Ex parte Plummer* (1977) 14 A.L.R. 609 and *R.* v. *Lambert; Ex parte Plummer* (1980) 32 A.L.R. 505 are not mentioned at all. The present fragmentation in Australian family law is its least satisfactory aspect, yet in trying to understand the present pattern of delineation and delimitation these decisions are probably indispensable.

All this is not to detract from the author's valiant and valuable contribution. This book had to be written, and from it can be "fleshed out" the subject matters with which it deals with greater precision and particularity. That such a follow-up will be made is without question. Mr Wade's industry and scholarship, of which he has given evidence elsewhere, must ensure him a place in this field. If only he could be persuaded to abandon such stylistic inelegancies as the excessive use of the split infinitive, or of using "due to" when "owing to" is correct, his next book will be not only instructive, but for this reviewer also a pleasure to read.

H. A. FINLAY*

*Cases and Materials on Real Property*, by P. J. BUTT, G. L. CERTOMA, C. M. SAPPIDEEN and R. T. J. STEIN, (Sydney, The Law Book Company, 1980), pp. xlvi and 667.

The recent casebook on land law by P. J. Butt and Others will no doubt be keenly perused by property law teachers over the next few months. Their response to the book will directly affect its sale volume as its successful marketing largely depends on whether they are prepared to prescribe it as a text for their students. In this regard, the authors face a rather daunting prospect. For the book to gain such acceptance in law schools other than their own, it must be at least favourably compared with the standard work used in most Austrailan Law Schools, viz. Sackville & Neave's excellent *Property Law: Cases and Materials*. In this reviewer's opinion, however, several considerations may operate to reduce their chances of taking away any substantial chunk of the wide market presently enjoyed by the authors of that book.

In the first place, the book has limited coverage. It only deals with land encroachment, fixtures, co-ownership, the two registration schemes, easements, covenants, mortgages and leases. There are large gaps left by the authors. Thus, no treatment is given to the estates scheme, gifts and the nature of legal and equitable interests. Nor do they give any meaningful space to possession, limitation of actions and equities. Property law teachers covering these topics as part of their course are likely to be mindful of the fact that this book effectively covers only two-thirds of the curriculum taught in their own law school. Such teachers will need to be convincingly persuaded before they are likely to consider prescribing it for their students. One suspects that the limited content of the book may be largely a strategical problem which the authors could have, but evidently did not, attend to in their initial planning of the book.

Secondly, the weighting of the chapters may not please other teachers. There is a distinct emphasis given to easements, covenants, leases and mortgages. These total up to approximately 250 pages of text compared with 190 pages for the other topics in the book. This is again a consideration that property law teachers may well take into account. They may be less happy about using the book if they do not readily share the authors' obvious enthusiam for these topics or if they feel that the registration schemes, for instance, are more "important" to their course and should have been given that much more emphasis.

Thirdly, the authors have possibly left parts of their work open to the charge that insufficient attention has been given to legislative materials in other states. Where these materials are similar to those in New South Wales, there would of course be good reason for them to adopt the well-known format whereby relevant provisions from their own state are cited in the text and those in other states are merely footnoted. Even then, impressions of state parochialism could have been avoided if sample provisions from other states had been used from time to time. It is a simple

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technique used in Sackville & Neave's casebook with considerable effect. It gave that necessary "Australia-wide" outlook to that casebook.

However, there are areas where the book does not follow up a consistent format in its handling of similar statutory materials in other states. One instance appears in Chapter Six where the benefit of covenants is dealt with. There the statutory position in New South Wales is assiduously discussed but legislative provisions in other states are lumped together in one page and used as a source for rather tedious cross-referencing in other pages (see pages 344 and 348). One almost gets the feeling that the statutory position in other states has been grudingly included. The Chapter on Concurrent Ownership calls for particular mention. The treatment given to the extinguishment by partition of tenancies in common (page 73) is distinctly structured in the context of the law in New South Wales. No reference is made to statutory provisions in other states. There is not even a hint that the statutory device is well-known in the other states. To say the least, such an approach seems hardly appropriate for a book intended for a wider market than that in New South Wales.

In case a different impression is given, it must be stressed that the book does pay attention to different legal positions in other states where these differences appear. In this regard, it is worth noting that the authors included a vital reference to the *Tenancy Act* (1979) of the Northern Territory which in effect reversed the *Maridakis* v. *Kouvaris* (1975) 5 A.L.R. 197 decision, a point not made in Sackville & Neave's casebook. However, the book falls down in its discussion of the co-owner's liability to account to other co-owners in certain circumstances (page 78). That topic is outlined solely in the context of the peculiar position in New South Wales. No footnote or other indication is given to alert readers to the fact that the position is different in most of the other states. This type of blemish is not typical but it does tend to mar the book's potential rating as an Australia-wide text.

Fourthly, if the intellectual standing of a casebook is to be judged by the rash of questions, comments, etc. appearing after selected cases, the casebook would rank high amongst many legal casebooks published in Australia. But its handling of these adjuncts must be inevitably compared with that in Sackville & Neave's casebook. In this regard, the latter may well be regarded as much more probing, sophisticated, comprehensive and interesting. Many teachers and students who have used that book can readily testify to the fact that the barrage of poignant questions trailing behind selected cases constitutes the intellectual hallmark of that casebook. It reflects the long teaching experience and confidence of the authors, something which does not readily show up in the casebook under review.

Fifthly, the intellectual framework underpinning the casebook is orthodox. It is closely aligned with the ultra-conservative mould that dominated archaic legal scholarship for centuries. This is evident in its typical Chapter format—each body of rules is outlined without locating its socio-economic or political context. It reflects the same categorical treatment of land law as has been traditionally conceived in the Anglo-Saxon tradition. Its concern is mainly with the uncritical identification and structuring of rules as though property law were an end in itself. An inarticulated assumption seems to be that law students need not concern themselves with property law as a possible vehicle for social justice.

Nowhere is this approach of the authors more evident than in their treatment of the law relating to landlord-tenant relationship. Unlike Sackville & Neave's casebook, there is no hint that this branch of property law is encrusted with many anomalies and lop-sided developments. Nor does it give any indication to its readers that recent statutory reforms in the various states are an important wave that swept the consumer movement into traditional landlord-tenant law. Property law teachers presently using Sackville & Neave's casebook may well share the reviewer's impression that that book is more open-minded and to that extent, refreshing in the handling of these materials.

Finally, there are not many pedagogical features in the casebook. Diagrams and sample documents can be valuable textbooks materials in a complex subject such as property law. The casebook does offer a useful diagram (p. 616) to illustrate the pyramidal relationships arising out of a landlord-tenant relationship. There is also a

much-appreciated diagram of the land parcels in *Bursill Enterprises Pty Ltd* v. *Berger Bros. Trading Co. Pty Ltd* (1971) 124 C.L.R. 73 (p. 168). A copy of the plan attached to the subdivision of land in *Dabbs* v. *Seaman* (1925) 36 C.L.R. 538 (p. 276) is also included. Apart from these, however, the text offers nothing else as visual aids to its readers. It is rather a pity that there are no sample forms to help students familiarise themselves with transactions such as the mortgage, conveyance, etc. These are features that helped to make Sackville & Neave's casebook that much more attractive as texts for students. It is a pity that Butt and Others have not emulated their example.

Most of the preceding observations are of course chiefly concerned with the book as a potential casebook for the use of law students in other states than New South Wales. They do not necessarily have any bearing on the usefulness of the book in New South Wales. In fact, the authors' careful selection of leading cases and their thoughtful editing are two features that could make the book a viable competitor to Sackville & Neave's casebook within that state. Students will certainly appreciate their unhesitating slashing away of "irrelevant" paragraphs that tend to make case-reading a formidable and time-consuming task. It may be that the authors will concentrate on the "Australia-wide" market when they produce their second edition. In the meantime, property law teachers and students outside of New South Wales will have to content themselves with the leading text in their subject—Sackville & Neave's casebook.

G. TEH

## *Introduction to Land Law*, by PETER BUTT, (Sydney, The Law Book Co. Ltd, 1980), pp. xxxi and 395.

Property Law teachers using the case law method are usually more than a little disdainful about traditional texts. Student expectations are, however, somewhat different. More than in any other basic subject, property law students crave for a security blanket. Their immediate need is for an easy text that sets out the basic principles in the subject. Peter Butt's *Introduction to Land Law* may be just the very book they have in mind.

As its title suggests, the book is mainly an introduction to the subject. It does not aspire to be a standard text for law schools or even a practitioner's reference text. Besides, it deals only with land law; it does not pursue the more modern view that the proper scope of the law of property is much wider than just land law. In this regard, it must be seen as representative of the conservative school of thought so typically associated with the English tradition. It is to be distinguished from the more conceptual thinking evident in D. C. Jackson's *Principles of Property Law* (Sydney, The Law Book Co. Ltd, 1967) and R. Sackville and M. Neave's *Property Law: Cases and Materials* (3rd ed., Sydney, Butterworths, 1981).

The humble aspirations of the book are quite evident. It opens with an interesting overview of historical materials. A thoughtful guide is then given to some of the common technical terminology that has been known to create spine-chilling fears for those uninitiated with the mystiques of land law. This first chapter is definitely recommended reading for students about to start their year's struggle with this subject.

For those not blessed with a penchant for history, the contents of Chapters 2-4 may be rather boring. The author says his task is to "put modern land law into its historical perspective." Much of the contents of these chapters, however, look more like materials that students had already been punished with in their first year course in Legal Process or some similar subject by other esoteric label. One suspects that many readers would have been more inclined to wade through these uninviting pages had they been more specifically identified as oriented towards a necessary historical

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perspective of key concepts central to Anglo-Australian land law such as the concept of relativity of titles.

Is the book suitable for students outside New South Wales? This is a likely reaction from readers in other states as the book has been written primarily for students in New South Wales. There are noticeably abundant references to case law from that state. Statutory references in the book are of course to legislation enacted in that state and the last three chapters are based mainly on such local legislative materials. Potential readers in other states are thus entitled to wonder whether they should commit time and money to the book.

The author anticipates this marketing aspect in his preface. He says the book is concerned with general principles and on that basis hopes it will be useful to students "throughout Australia". Most chapters in the book are indeed relevant to students in other states. They deal with such basic concepts as estates in land, fixtures, co-ownership, future interests, easements, covenants, mortgages, prescription and both the deeds and the Torrens registration schemes. The author's broad treatment of these chapters more than bears out his hope that the book may be useful outside of New South Wales.

Many favourable comments may be made of this book. One feature that may be of particular appeal to many readers is the author's style. It is distinctive and deserves special mention. The author displays an admirable capacity to write with the lucidity and precision not normally associated with an exacting and demanding subject. The seemingly easy-flowing statements of law make the book very readable indeed.

Another feature of the book deserves immediate praise. Each topic is consistently presented in a format that other authors of students' texts may do well to emulate. This format basically comprises two components. There is first a brief but well-phrased introduction where careful attention is given to the practical context in which the subject-matter is located. There is even an explanation of technical terms commonly used in the chapter. One example of this aspect of the author's style may well be given here. The chapter on land covenants opens with a simple but effective description of what covenants are and an explanation of the function of covenants. The reader is at once given the picture of the world that land developers live in. Covenants are shown to be legal tools by which land developers and subsequent landowners control land use and their market values.

The other main component of the chapter format is the usual description of the main concepts. Thus, in the chapter on mortgages, there is a run-through on the nature of a mortgage, how it is created, the mortgagor's interests and his rights and duties under the mortgage. The powers of a mortgagee are then dealt with. The very important power of sale is given a relatively extensive treatment with a valuable summary on the standard of care expected of the mortgagee. The chapter winds up with a summary of the priorities structure. It is neatly tied up with a timely reference to the same priorities rules discussed in an earlier part of the book.

Such chapter-structuring is ideally suited to a book of this kind. It is more likely to gently ease the necessary skeletal framework into the reader's mind. In that way, he may then have the foundations to build up the many details of intimately complex rules that have made property law a traditional major hurdle to so many generations of law students.

To the purist case-law teacher the book may possibly appear to be too much of a nutshell of rules. Such a book may be frowned upon as tending to hide the observation that courts often expound property law principles eloquently in infinite pages of law reports, just when they are about to apply unarticulated rules and policies. The concerned teacher, however, cannot ignore other considerations. The relatively high failure rate in this subject points to the dilemma that the case-law teacher is constantly faced with. It is manifested in the fact that there is usually an uneasy gap between what he expects from the students and what they expect from him. It may well be that the solution lies in a good introductory book. Peter Butt's book could be prescribed reading for this purpose.

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*Cheshire and Fifoot, The Law of Contract*, (4th Australian ed., by STARKE, HIGGINS and SEDDON: Sydney, Butterworths, 1981), lxxxii and 759 pp.

and COLLINGE, *Tutorials and Contract*, (3rd ed.: Sydney, Law Book Co., 1981), xxi and 343 pp.

This pair of books on Contract law needs no introduction in Australia. The first is now in its fourth edition, the latter in its third. But let the reader beware: the fact of multiple editions does not necessarily testify to the intrinsic merit or popularity of book. Here are the reasons why.

*Cheshire and Fifoot*

The new edition of *Cheshire and Fifoot* by Starke, Q.C. and the late P. F. P. Higgins, assisted by N. Seddon, is as ponderous and verbose as the previous editions. It does not make for easy reading, particularly for the student, and is generally so wrapped in the development of principles that the wood often cannot be seen for the trees. Thus, although it does provide good historical insights, one must do considerable searching and wading through paragraphs of background, theory and antithetical views before discovering the *rules* which govern particular topics. There is no encapsulation of these principles, either at the beginning or at the end of each chapter, to assist in structuring the reader's approach to the subject. It reads like one long, long article punctuated by headings which attempt some form of statement of principle, but which are not always successful for lack of consistent treatment.

In reading the book, one cannot help but get the impression that the authors were fascinated and indeed, so absorbed by the beauty of the English language, that little thought has been given to simplicity and lucidity. It is the sort of book to which the reader reacts by wondering—whatever happened to plain English? To give but one example, at page 259 in the chapter on Misrepresentation, there is retention of a paragraph which deals with mere "puffs". But it is a paragraph that almost needs to be translated for comprehension. It begins with the heading "Simplex commendatio non obligat" which is immediately followed by these words:

> "Somewhat akin to the distinction between opinion and fact is the general rule that *simplex commendatio non obligat*. Eulogistic commendation of the *res vendita* is the age old device of the successful salesman, and it would be an impracticable and mischievous rule which permitted the rescission of contracts merely because expressions of a laudatory and optimistic nature, couched in the language of exaggeration, chanced to transcend the truth."

No explanation is given of the Latin expressions used in the passage. What latter-day student without the benefit of instruction in Latin or Civil Law could possibly comprehend these few lines? An ordinary law dictionary would not help; and recourse to the library copy of *Broom's Legal Maxims*, (10th ed., London, Sweet & Maxwell Ltd, 1939) or *Latin for Lawyers*, (3rd ed., London, Sweet & Maxwell Ltd, 1960) is necessitated. How much simpler it would have been to have explained the concept in plain English!

As for content, one cannot generally find fault with the statement of principles or interpretation of authorities. The standard cases are used. However, a constant source of annoyance is the practice of stating a number of possible views followed by an indication that the first, third or fifth view, as the case may be, was taken by a particular judge or court. Such style requires the reader to *work out* what the actual decision was when it could have been stated much more directly.

Although the preface claims that the fourth edition involves major revision and updating, these are not really in evidence. A perusal of the work suggests that re-writing has really been kept to a minimum and that even editorial tinkering (apart from the new format and paragraph numbering) has been patchy and demonstrably reluctant. Thus, in the chapter entitled "The Phenomena of Agreement", that perennial favourite, *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795 is still referred to as a decision made "in the last few years".

In similar vein, the monetary limit for the application of the Sale of Goods legislation is still "ten pounds or upwards", notwithstanding the switch to decimal currency, and important cases which have been decided since the appearance of the third edition are announced principally in the footnotes. For example, *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] 1 All E.R. 556 albeit an English decision, deserves more space than has been allotted. It surfaces in the text for about two-thirds of a page and most of that is devoted to the facts of the case. No discussion is given to Lord Diplock's sophisticated analysis of legal obligations. The Privy Council decision in *Port Jackson Stevedoring Pty Ltd* v. *Salmond and Spraggon (Australia) Pty Ltd* [1980] 3 All E.R. 257 manages a whole paragraph and quite unbelievably, the case of *B.P. Refinery* v. *Shire of Hastings* (1978) 16 A.L.R. 363 does not even rate a mention!

One could go on and on. In the area of Remedies, one deficiency in the past edition which still remains unremedied has been the omission of "Action for an Agreed Sum", such as "Action for the Price", which, as most lawyers brought up on other Contract books well know, is quite separate and generically different from damages. If this trend persists into the next edition, one can envisage a whole generation of readers of this book growing up with no knowledge of the alternative monetary claim.

Why then do we continue to prescribe this book? The answer is simple and lies in the dearth of books on Australian Contract law. It is still the only Australian text offering an in-depth treatment of Contract law and unfortunate experience has shown that Australian students are generally incapable of using the better English texts sensibly. But one thing is clear: this is not a suitable text for students in their early years at law school and it is hoped that a more appropriate book will soon make its appearance.

Having said all that, the new edition does have one feature to commend it. It is presented in new pinkey-orange covers which carry that interesting advertisement featured so prominently in one of the most famous cases of all time.

You guessed it—*Carlill* v. *Carbolic Smoke Ball Company!* [1893] 1 Q.B. 256.

*Collinge: Tutorials in Contract*

This is altogether a different book, succinct and to the point. It is really a mini-casebook cum work-manual and is organised along these lines: concise statements of the law are amplified by short extracts from cases and articles, and these in turn are followed by questions formulated with the object of making the student think. In the questions posed, good use has been made of the facts of decided cases to drive home basic principles. The author has also thoughtfully provided case names and citations so that students are enabled to check their answers with the actual judgments.

While the general tone of this review is laudatory, however, like *Cheshire and Fifoot, Tutorials in Contract* is not up-to-date. The latest decisions cited or referred to are of 1976 vintage, and these do not improve with age. Not only the *B.P. Refinery* [1978] 16 A.L.R. 367 case, but *Securicor* [1980] 1 All E.R. 556 and indeed a whole host of others, are conspicuous by their absence.

The book could possibly be improved by the inclusion of some multi-issue problems designed to force students to range across the spectrum of contractual topics so that the contract is looked at as a whole. There should also be problems which test and develop the ability to sort out relevant facts and red herrings. After all, the facts of life are not usually distilled and served on silver platters for easy assimilation.

In summary, *Collinge* is a useful supplement to lectures and is what it claims to be—nothing more than a basic tutorial aid. Tutors who use the book, however, should not just sit back. The book does not, for the reasons given, satisfy all tutorial needs.

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# BOOK NOTES

*A Modern Legal History of England and Wales 1750-1950*, by A. H. MANCHESTER, (London, Butterworths, 1980), pp. xxv and 419.

Carlyle maintained that history is no more than the biographies of famous men. This work has made the luminaries of the modern period come to life—the reactionary Blackstone, the fiery Brougham, the staid Bramwell and many others whose judgments are famous but whose personalities were previously vague to most of us.

This wide-ranging work concentrates on efforts, usually unavailing, at reform. Manchester makes the telling point that nineteenth century England lacked the impetus to codify given to France and Germany by revolution and national union respectively. Thus English law and procedure remained hopelessly fragmented and amorphous. It is only men of extraordinary vitality and courage that have succeeded in making even the smallest improvements to English law. The extremely original chapter on lawyers and judges and especially the part on legal education highlight the conservatism of the profession. There is nothing novel about that observation. What is striking, however, is the sheer consistency of it, in the face of manifestly ameliorative proposals.

Manchester is gifted with a powerful and direct style, far removed from the aphoristic and precious prose of many legal historians.

If—as I do—you prefer Hardy to Meredith, Bennett to Virginia Woolf, Zola to Proust, you will prefer Manchester to Plucknett, Potter and the many others who have contrived to make legal history an esoteric study. Students will delight in a work as forthright and unpretentious as it is illuminating and scholarly. It is an outstanding contribution to the literature of legal history.

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*Law and Social Control*, edited by EUGENE KAMENKA and ALICE ERH-SOON TAY, (London, Edward Arnold, 1980), pp. ix and 198.

This collection of essays is the sixth in the series *Ideas and Ideologies* whose general editor is Professor Eugene Kamenka of the Institute of Advanced Studies at the Australian National University. Like its predecessors, it is an interdisciplinary work, based largely upon papers presented to a world congress of the International Association for Philosophy of Law and Social Philosophy held in Sydney and Canberra in August 1977. As a whole, the book is addressed to what its editors call a "fundamental conflict of our time": the emergence of new conceptions of law as an instrument of social engineering and progress; and the rejection of the traditional, external "law and order" conception of the function of law. The book consists of ten essays, and is divided into two parts. Part I, entitled "Law in Society", aims to critically re-examine some traditional conceptions of the role of law in society. Part II, "Law 'for' Society", is concerned with newer conceptions of that role, and it presents a number of "case studies" (e.g. Industrial Relations and Landlord and Tenant Law) which illustrate the ways in which specific problems of social control have been dealt with in recent times. While the questions raised by this book may not be of the kind to which definitive answers can be made, *Law and Social Control* certainly does constitute an

extremely worthwhile scholarly endeavour to promote an awareness of underlying conceptual issues which are crucial to an understanding of the function of law in modern society.

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## *The Law of Criminal Conspiracy*, by PETER GILLIES, (Sydney, The Law Book Co. Ltd, 1981), pp. xviii and 212.

This book by Peter Gillies provides a good, basic reference for the study of criminal conspiracy, particularly from a student's point of view. After a brief introduction to the topic, Gillies proceeds with an analysis of the elements of the crime itself, which is followed by a relatively detailed examination of the different heads of conspiracy. The book concludes with several chapters on the procedural and evidentiary rules governing the prosecution and trial of this crime which is, as Gillies notes, both broad and uncertain in its scope and which often presents difficulties in application.

Gillies focuses primarily on the statutes and case law of Australia, England and New Zealand (though fairly extensive reference is also made to Canadian decisions) as it was found in the latter months of 1980. As the author's aim is, by his own admission, largely limited to a statement of the doctrine of conspiracy as it stands, it is not surprising that scant attention is directed toward formulating proposals for its reform. Consequently those particularly interested in this aspect of conspiracy (or law in general) may be somewhat disappointed, though it should be noted that, in presenting the law as it stands, Gillies has had to consider—often in detail—some of the substantive and procedural anomalies with which any reform attempt would have to deal.

MICHAEL ROBERTS, B.A.

## *The Law of Education*, by BEN BOER and VICTOR GLEESON, (Butterworths, Pty Ltd, Sydney, 1982), pp. xix and 211.

This valuable book achieves its intended aim "of providing a systematic discussion of the more significant legal issues relevant to the various actors in Australian educational systems, with the welfare of students as its central theme." For all educators, it provides—in a clearly organized format and in readable style—an authoritative, balanced, worthwhile discussion of essential legal issues relevant to education in Australia today. Some may take issue with occasional elements in the necessarily encapsulated commentary upon the educational context, but this in no way lessens the worth of the book. All Australian parents will gain much from reading—and re-reading—*The Law of Education.*

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