CARGO DISPUTES AND THE METRONOME SYNDROME
(Part 2)

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Having discussed phases one and two (in Volume 8, 233), in Part Two the author examines the relationship between phases two and three and phase three of the burden of proof.

PHASES 2 AND 3 LINKED

If, in Phase 1, the plaintiff can make out a prima facie case of bailment he need not affirmatively prove the carrier's negligence. In Phase 2 the issue shifts to the defendant to make out a prima facie defence. If unsuccessful, judgment must go against him without further proof of negligence or innocence. Should he succeed, the issue reverts to the plaintiffs in Phase 3 to establish a further cause based on the carrier's fault. Before proceeding to Phase 3 it is necessary to dispose of a topic which links both phases. We have proceeded on the assumption that to establish a prima facie defence the carrier must (i) prove a cause excepted by Article IV.2(a) to (p), or (ii) negative fault under Article IV.2(q), or (iii) negative the want of due diligence to make the ship seaworthy under Article IV.1. Though there can be no doubt about the role of negligence in the last two alternatives, a dictum about the first, dubbed as "Lord Wright's heresy",[215] asserts that the carrier should both satisfy the specified exception *and* prove the absence of negligence. Sitting as the trial court in *Gosse Millard* v. *Canadian Government Merchant Marine Ltd*, Wright J. said in the course of judgment:

> "I do not think that the terms of Art. III put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. *The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and* to bring himself . . . within the specified immunities."[216]

The issue, then, is whether the defendant must not only bring himself within one of the specific exceptions (a) to (p) but must also prove that fault did not contribute to the loss or damage.

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[215] R. Colinvaux, *Carver's Carriage By Sea* (12th ed., London, Stevens, 1971) Vol. I p. 233.

[216] [1927] 2 K.B. 432, 435-6 (Emphasis added).

Wright J. reasoned that because the Hague Rules reduce the carrier's strict liability to fault liability, the carrier bears the same burden of disproving negligence as the ordinary bailee. So much is true. The ordinary bailee can escape liability by proving that the loss or damage was not caused by his failure to exercise care.[217] For example, in *Port Swettenham Authority* v. *Wu and Co.*[218] a consignment of 93 cases of pharmaceutical products was shipped from Hong Kong to Port Swettenham, unloaded, stored and tallied. Ten days later only 29 cases remained—64 cases weighing over 5 tons had inexplicably disappeared! Of course the port authority was not a carrier and was not governed by the Hague Rules but owed a duty as an ordinary baliee. Delivering the opinion of the Judicial Committee, Lord Salmon said:

> "the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping."[219]

The assimilation of the carrier with the ordinary bailee is reflected in Article IV.2(q). But this comparison represents the bare responsibility of the defendant uncomplicated by specific exceptions. Lord Wright's conclusion would hold good only if the defendant were required to rebut negligence in addition to proving an excepted cause of loss or damage. This rather depends upon the exception. If an exemption clause is so construed as to exonerate the ordinary bailee from his negligence it is a complete defence.[220] On the other hand, if the exemption clause is expressed or is construed to relieve him from liability only for causes other than his negligence, the defendant could sustain his defence only by proving the cause *and* excluding negligence,[221] because the operation of the exception would hinge on proof of non-negligence as an intrinsic component of the defence. However, the exception in the nature of those itemized in Article IV.2(a) to (p) was not so construed. Historically, negligence was not perceived as a limitation on the scope of the exception but as a link in the chain of causation. If negligence were the effective cause of loss or damage it took priority over the excepted proximate cause.

In the development of causation concepts, and particularly under the influence of marine insurance law, the proximate cause of loss and damage was the principal concern of carriage law and the prime target for

217 *Joseph Travers & Sons Ltd* v. *Cooper* [1915] 1 K.B. 73; *The Ruapehu* (1925) 21 Ll.L.R. 310; *Frankhauser* v. *Mark Dykes Pty Ltd* [1960] V.R. 376; *Hobbs* v. *Petersham Transport Co. Pty Ltd* (1971) 45 A.L.J.R. 356.

218 [1979] 1 Lloyd's Rep. 11.

219 Ibid. 15.

220 *Rutter* v. *Palmer* [1922] 2 K.B. 87; *Alderslade* v. *Hendon Laundry* [1945] K.B. 189; *Canada Steamship Lines Ltd* v. *King* [1952] A.C. 192; *J. Spurling Ltd* v. *Bradshaw* [1956] 2 All E.R. 121.

221 *Firestone Tyre & Rubber Co. Ltd* v. *Volkins & Co. Ltd* [1951] 1 Lloyd's Rep. 32; *British Traders Ltd* v .*Ubique Transport Co. Ltd* [1952] 2 Lloyd's Rep. 236; *Hollier* v. *Rambler Motors (A.M.C.) Ltd* [1972] 1 All E.R. 399.

contractual exceptions. Even as the *causa causans* gained recognition,[222] the defendant was protected if the *causa proxima* fell within the terms of the exception. In *Hamilton Fraser & Co.* v. *Pandorf & Co.*,[223] seawater normally moved to and fro along a lead pipe which connected the bathroom to the hull exterior. When rats gnawed a hole in the pipe, seawater escaped into the hold and damaged the cargo of rice. Although the effective cause of damage was the activity of the rats, the House of Lords held that the damage proximately caused by the seawater in a fortuitous accident was a "danger or accident of the seas" within the meaning of the exception in the bill of lading and the carrier, therefore, was not liable.

At common law, if the carrier were not excused by an exception, the absence of negligence was irrelevant because his primary liability was strict.[224] But if an exception excused the proximate cause of the loss or damage, the carrier was absolved from primary liability. Yet common law would not allow the carrier so readily to escape from strict liability where the effective cause of the loss or damage was the fault of the carrier or his servants. Accordingly, common law subjected the carrier to two overriding obligations: personally, to furnish a seaworthy ship at the commencement of the voyage, and vicariously, to exercise care in the custody of the cargo.[225] These overriding obligations imposed on the carrier a secondary liability for loss or damage caused by his negligence[226] or the ship's unseaworthiness,[227] where an exception exculpated him from primary liability. Courts readily applied exceptions which relieved the carrier from primary liability but displayed more caution with the exemption clauses inserted to relieve the carrier from his secondary obligations.[228] English jurisprudence permitted the carrier to escape secondary liability for negligence,[229] but courts would

[222] See *Lloyd* v. *General Iron Screw Collier Co.* (1864) 3 H. & C. 284; *Chartered Bank* v. *Netherlands India Steam Nav. Co.* (1883) 10 Q.B.D. 521; *Thomas Wilson Sons & Co.* v. *The Xantho* (1887) 12 App. Cas. 503.

[223] (1887) 12 App. Cas. 518 explained in *Leyland Shipping Co.* v. *Norwich Union Ins.* [1918] A.C. 350.

[224] *The Freedom* v. *Simmonds Hunt & Co.* (1871) L.R. 3 P.C. 594; *Taylor* v. *Liverpool & Great Western Steam Co.* (1874) L.R. 9 Q.B. 546; *Sutton Co.* v. *Cicero & Co.* (1890) 15 App. Cas. 144; *Steinman & Co.* v. *Angier Line Ltd* [1891] 1 Q.B. 619; *Smith & Co.* v. *The Bedouin Steam Nav. Co. Ltd* [1896] A.C. 70.

[225] *Paterson Steamships Ltd* v. *Canadian Co-op. Wheat Producers Ltd* [1934] A.C. 538, 545; *Smith, Hogg & Co. Ltd* v. *Black Sea & Baltic Gen Ins. Co.* [1940] A.C. 997, 1004.

[226] *Phillips* v. *Clark* (1857) 2 C.B. (N.S.) 156; *Grill* v. *The General Iron Screw Colliery Co. Ltd* (1868) L.R. 3 C.P. 476; *Notara* v. *Henderson* (1872) L.R. 7 Q.B. 225; *Thomas Wilson Sons & Co.* v. *The Xantho* (1887) 12 App. Cas. 503.

[227] *Kopitoff* v. *Wilson* (1876) 1 Q.B.D. 377; *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Gilroy, Sons & Co.* v. *W.R. Price & Co.* [1893] A.C. 56; *Bank of Australasia* v. *Clan Line Steamers Ltd* [1916] 1 K.B. 39.

[228] *Elderslie Steamship Co. Ltd* v. *Borthwick* [1905] A.C. 93; *Wade* v. *Cockerline* (1905) 10 Com. Cas. 115; *C. Wilh Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* [1932] 1 K.B. 490; *The Stranna* [1938] P. 69.

[229] *The Duero* (1869) L.R. 2 A. & E. 393; *The Southgate* [1893] P. 329; *Westport Coal Co.* v. *McPhail* [1898] 2 Q.B. 130; *Blackburn* v. *Liverpool, Brazil & River Plate Steam Nav. Co.* [1902] 1 K.B. 290; *The Torbryan* [1903] P. 35.

apply an exemption from negligence[230] and unseaworthiness[231] only if the clause warranted such a construction.

At common law, the carrier answered the prima facie case against him by proving an excepted causes of loss or damage. Conceptually, negligence did not become relevant until the plaintiff, in replication, alleged the secondary cause of action that negligence displaced the excepted cause as the effective cause of the loss or damage. Because negligence was averred in the plaintiff's reply, it was the plaintiff who assumed the burden of proving the carrier's negligence and its causal connection to the loss or damage.[232]

The common law process is best explained in *The Glendarroch*.[233] The plaintiff sued for the non-delivery of cargo under a bill of lading which excepted the carrier from responsibility for loss caused by, *inter alia*, perils of the sea. At first instance the court ruled that the defendant had to show not only that a peril of the sea had caused the loss but also that the peril of the sea had not been induced by the carrier's negligence. The Court of Appeal reversed the decision and ordered a new trial. Several passages from the judgment of Lord Esher M.R. are instructive:

> "Before you come to the exceptions the liability of the shipowner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions, it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no negligence whatever he would be liable. . . . When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew'. . . . That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. The defendants' answer is, 'Yes; but the case was brought within the exception—within its ordinary meaning'. That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception."[234]

In the United States also, the public carrier's liability was strict unless excused by an exception[235] which in turn was subjected to the overriding

230 *The Pearlmoor* [1904] P. 286; *Price & Co.* v. *Union Lighterage Co.* [1904] 1 K.B. 412; *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* [1908] 2 K.B. 626; *Thomas Wilson Sons & Co. Ltd* v. *The Galileo* [1915] A.C. 199.

231 *The Maori King* v. *Hughes* [1895] 2 Q.B. 550; *Rathbone Bros. & Co.* v. *D. MacIver Sons & Co.* [1903] 2 K.B. 378; *Nelson Line (Liverpool) Ltd* v. *James Nelson & Sons Ltd* [1908] A.C. 16; *The Christel Vinnen* [1924] P. 208; *Petrofina* v. *Compagnia Italiana Transporto* (1937) 42 Com. Cas. 286.

232 *Wyld* v. *Pickford* (1841) 8 M. & W. 444; *Ohrloff* v. *Briscall* (1866) L.R. 1 P.C. 231; *Czech* v. *The General Steam Nav. Co.* (1867) L.R. 3 C.P. 14; *The Freedom* v. *Simmonds, Hunt & Co.* (1871) L.R. 3 P.C. 594; *The Northumbria* [1906] P. 292; *The Europa* [1908] P. 84.

233 [1894] P. 226.

234 Ibid. 230-1.

235 *The Niagara* v. *Cordec* 62 U.S. 7 (1859); *Howland* v. *Greenway* 63 U.S. 491

obligations to furnish a seaworthy ship[236] and to exercise care in the custody of cargo.[237] Unlike English law, the carrier could not contract out of his secondary responsibilities.[238] As with English law, negligence was irrelevant until the plaintiff sought to upset a successful exception with proof of negligence as the effective cause of loss or damage.[239]

In 1893, the *Harter Act*[240] conferred statutory immunity on the carrier from loss or damage caused by itemized exceptions. If the carrier could sustain a statutory exception the issue would revert to the plaintiff to prove negligence.[241] If the carrier could not sustain a defence he was *ipso facto* liable unless his primary liability were reduced from strict to fault standard. The *Harter Act* would not permit the carrier to relieve himself from his secondary obligations but it did permit him to reduce his primary liability from strict to fault standard.[242] It became the practice for the carrier to insert a general exemption clause which relieved him of all cause of liability other than negligence. The carrier then had two avenues of defence open to him: either to prove a statutory exception *or* to prove the absence of negligence. By this means the *Harter Act* introduced a process equivalent to Article IV.2.

This structure was explained by the Supreme Court of the United States in *Schnell* v. *The Vallescura*.[243] The cargo plaintiff made out a prima facie case in bailment to recover compensation for a cargo of onions which was delivered in a damaged condition. The carrier pleaded *inter alia* perils of the seas and an exemption in the bill of lading which excused him from damage "not due to any cause or event arising through any negligence on the part of the vessel, her master, owner or agents." Stone J. delivered the opinion of the court. In relation to the peril of seas defence which was specifically excepted by the *Harter Act*, he said:

(1860); *The Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U.S. 397 (1889).

236 *The Caledonia* 157 U.S. 124 (1890); *The Carib Prince* 170 U.S. 655 (1897); *Flint, Eddy & Co.* v. *Christall* 171 U.S. 187 (1898); *Martin* v. *S.S. Southwark* 191 U.S. 1 (1903).

237 *The New Jersey Steam Nav. Co.* v. *The Merchants' Bank of Boston* 47 U.S. 342 (1848); *The Titania* 19 F. 101 (1883); *The Bradley Fertilizer Co.* v. *Lavender* 153 U.S. 199 (1894); *Compania de Navigacion La Flecha* v. *Brauer* 168 U.S. 104 (1897).

238 *The Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U.S. 397 (1889); *The Iowa* 50 F. 561 (1892); *The Energia* 56 F. 124 (1893); *The Guildhall* 64 F. 867 (1894).

239 *Clark* v. *Barnwell* 53 U.S. 272 (1851); *The New Orleans* 26 F. 44 (1885); *The Timor* 67 F. 356 (1895); *Jahn* v. *S.S. Folmina* 212 U.S. 354 (1908).

240 46 U.S.C.A. 192.

241 *The Musselcrag* 125 F. 786 (1903); *The Westminster* 127 F. 680 (1904); *Lazarus* v. *Barber* 136 F. 534 (1905); *United States* v. *Los Angeles Soap Co.* 83 F. 2d 875 (1936); *The Naples Maru* 20 F. Supp. 258 (1937).

242 *The Seaboard* 119 F. 375 (1902); *The Skipton Castle* 243 F. 523 (1917); *Dietrich* v. *United States Shipping Board* 9 F. 2d 733 (1925; *S.S. Ansaldo San Giorgio I.* v. *Rheinstrom Bros. Co.* 294 U.S. 494 (1934).

243 293 U.S. 296 (1934).

> "When the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it."[244]

Later, in relation to the general exemption, he said:

> "It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage."[245]

The combined effect was expressed in the following passage:

> "Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent."[246]

Under the *Harter Act*, not even the carrier whose general exemption reduced him to the position of the ordinary bailee was required to prove *both* a statutory exception *and* the absence of negligence. There is legislation in the United States which does impose the dual burden on inland carriers[247] but it has been expressly dissociated from the Hague Rules.[248] The only situation in which it could have been argued that the carrier shouldered the dual burden is where the carrier relied upon a *contractual* exception as distinct from a *statutory* exception. Because the *Harter Act* validated contractual exceptions only when they did not relieve the carrier from negligence, it was arguable that the contractual exception should be read as though it were limited in scope to non-negligent causes. If so, the carrier would have been obliged to prove the excepted cause and negative negligence to sustain the contractual defence. Yet a plethora of authorities under the *Harter Act* reject the argument, holding that, the carrier having proven the contractual exception, the burden of proving negligence reverts to the plaintiff.[249]

The importance of the *Harter Act* structure is revealed in the origins of "Lord Wright's heresy". In the *Gosse Millard* case, Wright J. relied upon a passage from *F.C. Bradley and Sons Ltd* v. *Federal Steam Navigation Company Ltd.*[250] A consignment of apples was shipped from Hobart to London and Liverpool under a bill of lading which contained a number of

244 Ibid. 304-5.
245 Ibid. 305.
246 Ibid. 306.
247 49 U.S.C.A. 11707. *Galveston H.S.A.R. Co.* v. *Wallace* 223 U.S. 481 (1911); *Chesapeake O.R. Co.* v. *Thompson Mfg. Co.* 270 U.S. 416 (1926); *Missouri P.R. Co.* v. *Elmore & Stahl* 377 U.S. 134 (1964); *Martin Imports* v. *Courier-Newsom Express Inc.* 580 F. 2d 240 (1978).
248 *Gordon H. Mooney Ltd* v. *Farrell Lines Inc.* 616 F. 2d 619, 625 (1980).
249 *The Patria* 132 F. 971 (1904); *The Isla de Panay* 292 F. 723 (1923), 267 U.S. 260 (1925); *The Breedijk* 22 F. 2d 328 (1927); *Thomas Roberts & Co.* v. *Calmar Steamship Corp.* 59 F. Supp. 203 (1945); *The Monte Iciar* 167 F. 2d 334 (1948).
250 (1927) 27 Ll.L.R. 395.

exceptions and which contained a clause paramount incorporating the Australian *Sea-Carriage of Goods Act* 1904 (Cth.). A portion of the consignment was outturned with internal browning and the carrier successfully resisted the cargo claim under section 8(2) of the Act which excused him from inherent defect quality or vice in the goods. In all material respects the Australian Act was identical with the *Harter Act*, yet, delivering the judgment of the House of Lords, Viscount Sumner said:

> "On proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability . . . *and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage* and the discharge in this country."[251]

There was nothing in the Australian Act to annex the burden of disproving negligence to a *statutory* exception. The quoted extract may have been applicable to a *contractual* exception under this Harter-type legislation, but Viscount Sumner seems to have confined his comments to the statutory exception. Atkin L.J., in his dissenting judgment in the Court of Appeal, also assumed that the carrier's negligence was material to the statutory defence.[252] If so, it is difficult to reconcile the succeeding paragraph of the judgment in the House of Lords where Viscount Sumner questioned whether the *plaintiff* bore the burden of proving negligence initially or in rebuttal.[253]

The judgment was again cited with approval by Lord Wright in *Paterson Steamships Ltd* v. *Canadian Co-operative Wheat Producers Ltd*,[254] when the Privy Council dealt with the corresponding Canadian Act of 1910. There was even less reason to apply it to the Canadian Act which itemized specific exceptions without reference to negligence (like the Hague Rules exceptions (a) to (p)) but expressly required the carrier to dispel fault for any other cause (as with clause (q)). In the meantime Wright J. had applied it to the Hague Rules in *Gosse Millard* upon which several decisions[255] have since relied,[256] including one[257] which applied it to a *Harter*-type New Zealand Act[258] as though it were identical to the Hague

[251] Ibid. 396.
[252] (1926) 24 Ll.L.R. 446, 466. At trial the defendant had pleaded a contractual defence but this, save for a limitation on damages, seems to have been discarded in the Court of Appeal: (1925) 22 Ll.L.R. 336, 336-7, (1926) 24 Ll.L.R. 446, 463.
[253] (1927) 27 Ll.L.R. 395, 396. In fact the plaintiff undertook the proof of negligence in his case but the courts did not regard this as significant. (1926) 24 Ll.L.R. 446, 463; (1927) 27 Ll.L.R. 395, 396.
[254] [1934] A.C. 538.
[255] See *Blackwood Hodge (India) Pty Ltd* v. *Ellerman Lines Ltd* [1963] 1 Lloyd's Rep. 454, 456.
[256] *Phillips & Co. (Smithfield) Ltd* v. *Clan Line Steamers Ltd* (1943) 76 Ll.L.R. 58; 61; *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton) Ltd* [1953] 2 Q.B. 295; *Cargill Grain Co. Ltd* v. *N.M. Paterson & Sons* [1966] 1 Ex. C.R. 22, 23, [1968] 1 Ex. C.R. 199.
[257] *Borthwick & Sons Ltd* v. *New Zealand Shipping Co. Ltd* (1934) 49 Ll.L.R. 19, 24.
[258] *Sea Carriage of Goods Act* 1922 (N.Z.).

Rules. Therein lies the weakness in the heresy. Before the Hague Rules, the only carrier who could have been required to prove both elements was the carrier whose primary liability was strict and who, having no general exemption to fall back on, relied upon a contractual exception which was limited to a cause without negligence. Yet, it was this very category which the Hague Rules eliminated by converting the carrier's strict liability to fault liability. And the statutory exceptions retained by the Hague Rules were not those which had hitherto qualified the defence but those which had cast the burden of proving negligence on the plaintiff as a secondary source of liability. The Hague Rules placed the carrier on the same footing as the ordinary bailee[259]—*either* to prove an excepted cause under Article IV.2(a) to (p), *or* to prove the absence of negligence under Article IV.2(q).

Lord Wright's heresy has been disapproved of in England[260] and Australia.[261] In *Albacora S.R.L.* v. *Westcott & Laurance Line Ltd*[262] on appeal to the House of Lords, Lord Pearson remarked:

> "There is no express provision, and in my opinion there is no implied provision in the Hague Rules that the shipowner is debarred as a matter of law from relying on an exception unless he proves absence of negligence on his part. But he does have to prove that the damage was caused by an excepted peril or excepted cause, and in order to do that he may in a particular case have to give evidence excluding causation by his negligence."[263]

From the High Court of Australia in *Shipping Corporation of India* v. *Gamlen Chemical Co. (Australasia) Pty Ltd*,[264] Mason and Wilson JJ. said in a joint judgment:

> "We may say, in passing, that we agree with Samuels J.A. in the Court of Appeal when he points out that the correct sequence of pleading is set out in the judgment of Lord Esher in *The Glendarroch*."[265]

The conclusion is compelling that the immunities in Article IV.2(a) to (p) are not conditional upon the absence of negligence and that the carrier need not plead the absence of negligence in addition to the excepted cause of the loss or damage. If he be impelled to negative negligence in the course of his defence, it is not to satisfy an additional legal component but to present sufficient evidence of the factual content of the exception and its causal relationship to the loss or damage. Consequently, the general

259 *Leesh River Tea Co. Ltd* v. *British India Steam Nav. Co. Ltd* [1966] 2 Lloyd's Rep. 193, 202.
260 *S.S. Matheos* v. *Louis Dreyfus & Co.* [1925] A.C. 654, 666; *W.R. Varnish & Co. Ltd* v. *Kheti* (1949) 82 Ll.L.R. 525, 527; *Albacora S.R.L.* v. *Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53, 61; *Jahn* v. *Turnbull Scott Shipping Co. Ltd* [1967] 1 Lloyd's Rep. 1, 8.
261 *Vacuum Oil Co. Pty Ltd* v. *Commonwealth & Dominion Line Ltd* [1922] V.L.R. 693.
262 [1966] 2 Lloyd's Rep. 53.
263 Ibid. 64.
264 (1981) 55 A.L.J.R. 88.
265 Ibid. 96.

proposition remains valid that the carrier is not obliged to dispel negligence in addition to proving the excepted cause (a) to (p).

Finally, the very framework of Article IV.2 militates against the heresy, as the United States Court of Appeals explained in *Lekas and Drivas Inc.* v. *Goulandris*.[266] In that case the ship docked in Greece in wartime intending to proceed via Gibraltar to the United States. The Greek government ordered the ship to sail in convoy to Port Said and, under British Admiralty orders, it then proceeded to Aden. Necessary repairs could not be completed for a prolonged period and the voyage had to proceed via the Cape of Good Hope. Owing to the excessive delays and inadequate storage facilities, the cargo spoiled in the hot climate and to the consignee's claim the carrier pleaded Article IV.2(g)—restraint of princes. The Court acknowledged that the plaintiff makes out a prima facie case on proof that cargo is not delivered or delivered in a deteriorated condition, whereupon the burden shifts to the carrier to prove either that negligence did not contribute to the loss or damage—(q), or that the cause of the loss or damage was excepted by (a) to (p). The plaintiff contended that, in the latter case, the carrier must further dispel negligence, to which the Court said:

> "Such a contention gives inadequate weight to the division, made in [Article IV.2 of the Hague Rules] between the specifically excepted causes (a)—(p) and the 'catch-all' (q). . . . To hold that when a carrier has shown that the loss arose as a consequence of restraint of princes [Art. 4.2(g)], it still has the burden of negating any other fault or neglect of its agents or servants would be to read the qualification of (q) into (a)—(p), although Congress did not put it there."[267]

On proof of an excepted cause, the issue reverts to the plaintiff to rebut the defence by proving that negligence or unseaworthiness, not the excepted cause, was the effective cause of the loss or damage; or that negligence or unseaworthiness, concurrently with the excepted cause, was an effective cause of the loss or damage. In other words, 'if a possibly applicable exception is established, the next move in this maritime minuet is the shipper's."[268]

PHASE 3

This phase represents the modern version of common law's overriding obligations. It comes into play on the assumption that the carrier's defence is sustained, in which case the plaintiff can no longer rely upon the presumptions of bailment. The nature of the plaintiff's reply will depend upon the carrier's defence. Where the carrier pleads a specific exception under Article IV.2(a) to (p), the plaintiff may reply with a breach of Article III.1, a breach of Article III.2 or both. Where the defendant relies

[266] 306 F. 2d 426 (1962).
[267] Ibid. 432.
[268] *U.S.A.* v. *Eastmount Shipping Corp.* 1974 A.M.C. 1183, 1188.

upon an Article IV.2(q) defence the plaintiff's only possible reply is a breach of Article III.1. Where the carrier pleads Article IV.1 the plaintiff can counter with a breach of Article III.2. A reply under Article III.1 rejoins the carrier to prove the exercise of due diligence under Article IV.1.

The plaintiff's burden to prove an overriding causation, about which he may have scant direct evidence, may be facilitated by evidentiary inferences of negligence and unseaworthiness. In Anglo-Australian[269] and American[270] law, the court is entitled to draw inferences from the nature of the cargo loss or damage. The inference does not alter the burden of proof and carries no particular weight in the face of evidence explaining the loss or damage. But for practical purposes, it does induce the carrier to lead evidence in the course of his defence[271] which is exposed to cross-examination by the plaintiff. The burden, however, remains with the plaintiff seeking to dislodge the defence to prove that the loss or damage was caused by a breach of an overriding duty. From the House of Lords in *S.S. Matheos* v. *Louis Dreyfus & Co.*, Viscount Sumner said:

> "It has been decided that, when a *prima facie* case of excepted perils is met by an allegation of negligence . . . or unseaworthiness . . . the burden of proof shifts to the party interested in establishing this allegation affirmatively. . . ."[272]

The inescapable consequence of rejecting the Wright heresy is that the plaintiff in reply must bear the burden of proving the carrier's negligent custody of cargo under Article III.2. The boldest statement to the contrary appears in *Tri-Valley Packing Association* v. *States Marine Corporation of Delaware*[273] but being a sweat case it should be treated either as an exception to the rule or as a (q) defence where the burden is expressly borne by the carrier. In the course of judgment the United States Court of Appeals said:

> "Appellees also contend that the burden of showing carrier negligence was on libelants. This is simply not the law."[274]

In fact, the same Court in the same year explained the general principle in *Daido Line* v. *Thomas P. Gonzales Corporation* when it observed:

> "But although the carrier demonstrates that the damage is in part attributable to a cause for the effects of which the carrier is exonerated

269 *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co. Ltd* [1901] A.C. 362; *Union of India* v. *N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223; *Skandia Ins. Co. Ltd* v. *Skoljarev* (1979) 53 A.L.J.R. 683.

270 *Caterpillar Overseas S.A.* v. *S.S. Expeditor* 318 F. 2d 720 (1963); *Federazione Italiana* v. *Mandask Compania* 388 F. 2d 434 (1968); *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.

271 See *Dow Chemical Co. (U.K.) Ltd* v. *S.S. Giovannella D'Amico* 297 F. Supp. 699 (1970); *U.S.A.* v. *Central Gulf Steamship Corp.* 321 F. Supp. 945 (1971).

272 [1925] A.C. 654, 666 affirmed in *J. & E. Kish* v. *Charles Taylor Sons & Co.* [1912] A.C. 604, applied to Hague Rules in *Minister of Food* v. *Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265.

273 310 F. 2d 891 (1962).

274 Ibid. 893.

> by [the Hague Rules], the shipper may nonetheless recover if it can show that the carrier's negligence contributed to the result."[275]

For example, in *Lekas and Drivas Inc* v. *Goulandris*,[276] the carrier made out a defence under Article IV.2(g) proving a causal link between the restraint of princes and damage to the cargo of cheese. The Court of Appeals held that the plaintiff shouldered the burden of proving the carrier's negligence under Article III.2 but had failed to discharge that burden. In *Vana Trading Co. Inc.* v. *S.S. "Metter Skou"*[277] a cargo of yams was delivered in a damaged condition and the carrier invoked the Article IV.2(m) exception—insufficiency of packing. The cargo plaintiff successfully replied with the allegation that negligent stowage exposing the cargo to heat contributed to the damage. The Court of Appeals said:

> "When the consignee has proved its *prima facie* case, the burden shifts to the carrier to show that the loss or damage falls within one of the [Hague Rules] exceptions set forth in [Article IV.2]. . . . Once a [Hague Rules] exception is established, the burden then returns to the shipper or consignee to 'show that there were . . . concurrent causes of loss in the fault and neglect of the carrier'."[278]

At common law the carrier's duty to supply a seaworthy vessel was a strict warranty,[279] unless modified by exemption,[280] and the burden of proving unseaworthiness as the effective cause of loss or damage was borne by the plaintiff.[281] The *Harter Act* and its progeny permitted the contract to reduce the strict warranty to a duty to exercise due diligence but it also rendered the duty a condition precedent to a defence mounted on the specific exceptions.[282] Consequently, the burden fell on the defendant under the *Harter*-type legislation to prove that the ship was seaworthy or that he had exercised due diligence to render it seaworthy.[283] The Hague Rules, Article III.1, requires only that the carrier exercise due diligence,[284] before

[275] 299 F. 2d 669, 671 (1962).
[276] 306 F. 2d 426 (1962).
[277] 556 F. 2d 100 (1977).
[278] Ibid. 105.
[279] *Kopitoff* v. *Wilson* (1876) 1 Q.B.D. 377; *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *New Jersey Steam Nav. Co.* v. *The Merchants' Bank of Boston* 47 U.S. 344 (1848); *The Caledonia* 157 U.S. 124 (1890).
[280] See *Cargo ex Laertes* (1877) 12 P.D. 187; *Rathbone Bros. & Co.* v. *D. MacIver Sons & Co.* [1903] 2 K.B. 378; *Elderslie Steamship Co. Ltd* v. *Borthwick* [1905] A.C. 93; *Bond, Connolly & Co.* v. *Federal Steam Nav. Co.* (1905) 21 T.L.R. 438.
[281] *The Northumbria* [1906] P. 292; *The Europa* [1908] P. 84; *Lindsay* v. *Klein* [1911] A.C. 194.
[282] *McGregor* v. *Huddart Parker Ltd* (1919) 26 C.L.R. 336; *May* v. *Hamburg* 290 U.S. 690 (1933); *The Framlington Court* 69 F. 2d 300 (1934); *Blanchard Lumber Co.* v. *S.S. Anthony II* 259 F. Supp. 857 (1966).
[283] *Royal Exchange Ass.* v. *Kingsley Nav. Co.* [1923] A.C. 235, *Martin* v. *S.S. Southwark* 191 U.S. 1 (1903); *McCahan Sugar Refining Co.* v. *S.S. Wildcroft* 201 U.S. 378 (1906).
[284] *Sea-Carriage of Goods Act* 1924 (Cth.) s. 5; *Carriage of Goods By Sea Act* 1971 (U.K.) s. 3.

and at the beginning of the voyage,[285] to make the ship seaworthy. Article IV.1 expresses the burden of proving the exercise of due diligence to be on the carrier as would be the burden of negating unseaworthiness where Article IV.1 is pleaded as a defence. But if Article III.1 is averred by the plaintiff in reply, the burden of proving the ship unseaworthy and that unseaworthiness was the cause of the loss or damage rests with the plaintiff in British[286] and American[287] law.

In *Minister of Food* v. *Reardon Smith Line Ltd*[288] after a voyage from Fremantle to Hull, under a charterparty which incorporated the Australian Hague Rules, cargo was discharged damaged. Upon a special case from arbitration the carrier relied upon Article IV.2(a)— error in the management of the ship. The cargo plaintiff argued the exception could not stand in the face of a finding of the failure to exercise due diligence to supply a seaworthy ship unless the carrier could prove that it did not contribute to the damage. McNair J. found that unseaworthiness had not caused the damage and held that the common law order of proof applied to the Hague Rules. He said:

> "The burden of proof shifts from time to time: the cargo-owner first has to make out a *prima facie* case of liability which is sufficient to cast upon the ship the obligation of shifting that onus by proving that the damage was caused by some matter falling within the exceptions, and then if the cargo-owner in turn wishes to deprive the shipowners of that protection, it is for the cargo-owner to establish affirmatively (a) that the ship was unseaworthy, and (b) that that unseaworthiness caused the damage."[289]

In *Firestone Synthetic Fibers Company* v. *M.S. Black Heron*,[290] the chief officer was unable to introduce water through one vent of the ballast-tank because it was blocked. Instead he attempted to feed the water through an alternate vent only to admit the water into the cargo tank by mistake. The carrier successfully denied liability under Article IV.2(a) but the plaintiff argued that the ship's unseaworthiness was a concurrent cause of damage. In finding against the plaintiff on the facts, the United States Court of Appeals said:

285 See *The Makedonia* [1962] P. 190; *Maxine Footwear Co.* v. *Canadian Govt. Merchant Marine* [1959] A.C. 589; *Isbrandtsen Co.* v. *Federal Ins. Co.* 113 F. Supp 357 (1952); *Horn* v. *Cia de Navegacion* 404 F. 2d 422 (1968).

286 *Hiram Walker & Sons Ltd* v. *Dover Nav. Co. Ltd* (1950) 83 Ll.L.R. 84; *Robin Hood Flour Mills Ltd* v. *N.M. Patterson & Sons Ltd* [1967] 2 Lloyd's Rep. 276. In *W. Angliss & Co. (Aust.) Pty Ltd* v. *P. & O. Steam Nav. Co.* the report at [1927] 2 K.B. 456 would suggest that unseaworthiness was contested in the initial pleadings whereas the report at (1927) 28 Ll.L.R. 202 discloses that it arose in reply. However, if the defence—peril of the sea—were unsuccessful, judgment should have gone against the defendant without reference to unseaworthiness.

287 *American Tobacco Co.* v. *Goulandris* 173 F. Supp. 140 (1959); *Director-General of India Supply Mission* v. *S.S. Maru* 459 F. 2d 1370 (1972); *Yawata Iron & Steel Co. Ltd* v. *Anthony Shipping Co. Ltd* 396 F. Supp. 619 (1975); *General Cocoa Co.* v. *S.S. Lindenbank* 1979 A.M.C. 283.

288 [1951] 2 Lloyd's Rep. 265.

289 Ibid. 271.

290 324 F. 2d 845 (1963.

"Once the carrier has brought forth evidence establishing the defense of error in management the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness."[291]

In *Maxine Footwear Co. Ltd* v. *Canadian Government Merchant Marine Ltd*,[292] the carrier sustained a defence under Article IV.2(b) by proving that fire was the proximate cause of the cargo loss. However, the fire had started from an acetylene torch used by carrier's servants to thaw out frozen pipes. The plaintiff satisfied the court that the ship's unseaworthiness was an effective cause of the loss and the burden reverted to the carrier to prove the exercise of due diligence which, before the Privy Council, he could not do. In *Asbestos Corporation Ltd* v. *Compagnie De Navigation Fraissinet Et Cyprien Fabre*[293] a fire broke out in the engine room and eventually spread to the cargo hold. However, the United States Court of Appeals held that the overriding cause of damage was the failure to extinguish the fire due to the inadequacy of the fire-fighting equipment. The plaintiff therefore discharged his burden of proving unseaworthiness as the cause of damage and the defendant was unable to establish the exercise of due diligence.[294]

The plaintiff having discharged his burden of proving that the loss or damage was caused by the ship's unseaworthiness under Article III.1, the burden lies on the carrier under Article IV.1 to prove the exercise of due diligence at the material time.[295] In *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Co. Ltd*,[296] a cargo of tinned food was shipped from Sydney to London under bills of lading incorporating the Australian Hague Rules. The cargo was damaged by seawater entering the hold through inspection covers which had not been securely replaced by a contractor after a survey inspection before the voyage commenced. The House of Lords held that the carrier had not discharged the burden of proving that due diligence had been exercised. However, the carrier was successful before the House of Lords in *Union of India* v. *N.V. Reederij Amsterdam*[297] although surveyors had failed to detect a fatigue crack in gear which ultimately caused the engines to break down. Lord Devlin explained that in the absence of evidence to the contrary, the engagement of skilled surveyors of good reputation entitled a court to conclude the exercise of due diligence. Should the judge be unable to make up his mind whether or not he has

[291] Ibid. 837.
[292] [1959] A.C.
[293] 480 F. 2d 669 (1973).
[294] Explained in *Sunkist Growers Inc.* v. *Adelaide Shipping Lines* 603 F. 2d 1327 (1979).
[295] See *Paterson Steamships* v. *Robin Hood Mills* (1937) 58 Ll.L.R. 33; *The Brabant* [1965] 2 Lloyd's Rep. 546; *Spencer Kellogg & Sons Inc.* v. *Great Lakes Transit Corp.* 32 F. Supp. 520 (1940); *United States* v. *M.V. Marilena P.* 433 F. 2d 164 (1969); *Sunkist Growers Inc.* v. *Adelaide Shipping Lines* 603 F. 2d 1327 (1979).
[296] [1961] A.C. 807.
[297] [1963] 2 Lloyd's Rep. 223.

confidence in the surveyors, the defendant would not have discharged his burden.[298]

The one remaining issue is the outcome of the cargo claim where the carrier sustains an immunity under Article IV and the plaintiff establishes a liability under Article III. In *Maxine Footwear Co. Ltd* v. *Canadian Government Merchant Marine Ltd*,[299] the carrier proved that fire was the proximate cause of damage and therefore succeeded with his defence under Article IV.2(b). In addition, the plaintiff established a breach of Article III.1 which the carrier could not refute under Article IV.1. Lord Somervell commented:

> "Art.III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of Art. IV cannot be relied on."[300]

In the light of the sequence of proof envisaged by the two Articles, the principle is preferably expressed[301] by saying that the Article III.1 liability prevails over the Article IV.2 immunity unless the carrier can apportion the loss or damage attributable to each.[302] In *Commonwealth of Australia* v. *Burns Philp & Co. Ltd*[303] when seawater damaged the cargo, the carrier invoked Article IV.2(a) and the plaintiff replied with breach of Article III.1. In the Supreme Court of New South Wales, Owen J. found that an error in the management of the ship and the failure to exercise due diligence to render the ship seaworthy were concurrent causes of the damage. His Honour held that the carrier was totally liable unless he could differentiate the damage resulting from the respective causes.

Certainly this approach obtains in the United States where an Article IV.2 exception is a concurrent cause with a breach of the seaworthy duty under Article III.1.[304]In *American Smelting and Refining Co.* v. *S.S. Irish Spruce*,[305] the carrying vessel became stranded on shoals and her cargo was lost. From the judgment of the District Court several passages explain the process:

298 Ibid. 235.
299 [1959] A.C. 589.
300 Ibid. 602-3.
301 In W. Tetley, *Marine Cargo Claims* (2nd ed., Toronto, Butterworths, 1978) 154-5 the passage seems to be misconstrued. Artcile III.1 is not a condition precedent to reliance on Article IV.2. If liability under Article III.1 is established by failure of a defence under Article IV.1 then of course reliance on Article IV.2 is futile. But this would not preclude a plea under Article IV.2 pending allegations of Article III.1 liability in replay, the liability of which is not finalized until rejoinder under Article IV.1. Then liability simply takes precedence over the prima facie immunity.
302 See *Gosse Millerd Ltd* v. *Canadian Government Merchant Marine Ltd* [1929] A.C. 223, 241.
303 (1946) 46 S.R. (N.S.W.) 307.
304 *The Otho* 49 F. Supp. 945 (1943); *Union Carbide & Carbon Corp.* v. *The Walter Raleigh* 109 F. Supp. 781 (1951); *Sunkist Growers Growers Inc.* v. *Adelaide Shipping Lines* 603 F. 2d 1327 (1979).
305 1975 A.M.C. 2559.

"The burden of proof rested initially on the owner to establish that the proximate cause of the loss was an error in the navigation or management of the ship. Owners have met this burden. Having established that the proximate cause of the loss was an excepted peril, the burden shifted to the cargo claimants to establish that the unseaworthiness caused the injury."[306]

"It must be found that the failure to exercise due diligence by the owner caused the unseaworthy condition. The burden is on the carrier to prove that it used due diligence to make the vessel seaworthy."[307]

"The law under the [Hague Rules] is clear that if both an 'excepted peril' under [Article IV.2] and unseaworthiness . . . concur in causing cargo damage, the shipowner is liable for the entire loss unless he can exonerate himself from part of the liability by showing that some portion is attributable solely to the 'excepted peril'."[308]

The burden on the carrier to segregate the loss or damage pertains equally to a competition between an Article IV.2 exception and liability under Article III.2, for negligence in the custody of the cargo.[309] The foundation was laid by the United States Supreme Court in *Schnell* v. *The Vallescura*[310] and was applied to the Hague Rules in *J. Gerber & Co.* v. *S.S. Sabine Howaldt*[311] where the Court of Appeals said:

"While in general the rule is that the carrier, to be exonerated, must prove that it comes within one of the exceptions 2(a-p) of [Article IV], once it has done so, the burden rests upon the shipper to show that there were, at least, concurrent causes of loss in the fault and neglect of the carrier. . . . If the shipper does so, then the carrier has the practically insuperable burden of proving the portion . . . caused by its negligence. If the carrier fails to do so, it loses all exoneration and must bear full liability for the loss."[312]

In Anglo-Australian jurisdictions, the contest between Article IV.2 and Article III.2 had not been resolved until the issue arose in New South Wales. The priority of Article III.2 over Article IV.2 would not have presented any difficulty had it not been for a significant difference between the legislation enacting the Hague Rules. In the British and Australian Acts,[313] Article III.2 is prefaced by the phrase "subject to the provisions of Article IV" whereas this phrase is omitted from the United States legislation.[314] So, in *Shipping Corporation of India Ltd* v. *Gamlen Chemical Co.*

306 Ibid. 2575.
307 Ibid. 2579.
308 Ibid. 2581.
309 *U.S.* v. *Apex Fish Co.* 177 F. 2d 364 (1949); *Daido Line* v. *Thomas P. Gonzales Corp.* 299 F. 2d 669 (1962); *Tri-Valley Packing Ass.* v. *States Marine Corp. of Delaware* 310 F. 2d 891 (1962); *Vana Trading Co. Inc.* v. *S.S. Mette Skou* 556 F. 2d 100 (1977).
310 293 U.S. 539 (1934).
311 437 F. 2d 580 (1971).
312 Ibid. 588.
313 *Sea-Carriage of Goods Act* 1924 (Cth.); *Carriage of Goods By Sea Act* 1971 (U.K.).
314 *Carriage of Goods By Sea Act* 1937 (U.S.); 46 U.S.C.A. 1300.

(Australasia) Pty Ltd[315] it was argued that, contrary to the United States, an Article IV.2 immunity prevailed over an Article III.2 liability.

In *Gamlen's Case* the ship encountered unusually though not unforeseeably severe weather in the Great Australian Bight on voyage from Sydney to Indonesia. Upon arrival in Fremantle it was discovered that drums of cleaning solvent had broken adrift from their rope lashings and had suffered extensive damage. The trial judge found two concurrent causes of damage —a peril of the sea, being an immunity under Article IV.2(c), and the carrier's negligent stowage, being a liability under Article III.2—but held that the Australian Hague Rules subordinated the liability to the immunity. The Court of Appeal reversed the priorities. Samuels J.A. said:

> "In my opinion, accepting as I do that the principles of common law have not, in any relevant respect, been excluded or varied by the Hague Rules, a plea of an exception under Art. IV is liable to be defeated by a reply of negligence made by the cargo owner. . . . The cargo owner makes out a *prima facie* case (as it was always open to him to do at common law) by proving the contract of carriage and the non-delivery of the goods, or their delivery in a damaged condition . . . proof of the kind I have mentioned is sufficient to call upon the carrier for an answer. This he may make by denying the facts upon which the cargo owner relies and, in addition, by raising and proving an exception within Art. IV of the Hague Rules. If, however, he takes the latter course, it is then open to the cargo owner to meet the exception by proving negligence on the part of the carrier, or of those for whose fault he is responsible."[316]

On appeal,[317] the High Court of Australia confirmed the decision of the Court of Appeal and approved the judgment of Samuels J.A. The High Court gave precedence to an Article III.2 liability over an Article IV.2 immunity and there is no reason to suppose an Article III.2 liability would not prevail over an Article IV.1 immunity. The opening phrase of Article III.1 "subject to the provisions of Article IV" can only be explained, albeit unsatisfactorily, as a reference to the burden of proof sequence, namely, that the overriding liability of Article III.2 need be resorted to only after the carrier has established a defence under Article IV. Such an interpretation does not explain why Article III.1 was not prefaced by a comparable phrase. The one difference with Article III.1 is that the sequence is not complete until the rejoinder is pleaded under Article IV.1 and consequently, the identical phrase would be inappropriate to that extent.

CONCLUSION

The Hague Rules do not simply express the maritime carrier's obligation as a duty to exercise care. Rather they devise a formula for fault liability which revolves around the burden of proof sequence. The two causes under

315 [1978] 2 N.S.W.L.R. 12, (1981) 55 A.L.J.R. 88.
316 [1978] 2 N.S.W.L.R. 12, 24.
317 (1981) 55 A.L.J.R. 88.

Article III are actionable without reference to Article IV if the plaintiff assumes the burden of proof. However, Article IV recognizes that the bailment process avails the plaintiff of presumptions which the defendant carrier must rebut. In turn, Article III enables the plaintiff to dislodge a successful defence by proving the causal link between the loss or damage and the breach of an overriding duty, save that the carrier must, by virtue of Article IV.1, prove the exercise of due diligence to defeat a proven cause under Article III.1. The burden of proof sequence is an integral feature of the carrier's substantive liability.

On 31st March 1978, the Hamburg Rules were opened for signature. When these Rules come into operation they will supersede the Hague Rules. Article 5.7 of the Hamburg Rules retains the approach of the Hague Rules toward concurrent causes, namely that the carrier bears total liability unless he can prove the extent of damage occasioned by a cause for which he is not liable. Article 5.4 renders the carrier liable for fire loss or damage but the burden is on the plaintiff to prove that the fire arose or was not mitigated by the fault or neglect of the carrier, his servants or agents. Article 5.1 renders the carrier liable for all loss or damage unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid it.

The Hamburg Rules abandon the more complex formula of the Hague Rules and, apart from fire loss or damage, adopt a format akin to Article IV.2(q). The plaintiff must assume the burden of proving that the occurrence which caused the loss or damage took place while the goods were in the carrier's charge. One assumes that he is not required to prove the "occurrence" causing the loss or damage but, as now, can simply prove that the loss or damage occurred during the carrier's custody. The law governing the bailment presumptions will continue to apply as will the evidentiary advantages of the clean bill of lading. Whether deletion of the specific defence of inherent vice under the new Rules will forge a uniform approach in British and American jurisdictions as to the burden of proving the latent condition of cargo remains to be seen. Apart from fire loss or damage, the issue of liability will be resolved with the carrier's defence. The plaintiff will be relieved of proving the breach of overriding duties but the law surrounding those duties will continue to govern the reversed burden of proof. The burden of proving causation by fire will remain with the carrier but the British plaintiff must, in reply, satisfy a heavier burden than he presently bears. Not only must he prove the negligence of servants, as he does now, but he must also prove any negligence of the carrier himself, which corresponds with the current position in the United States.

The burden of proof processes will continue to influence the maritime carrier's liability under the Hamburg Rules as it does now under the Hague Rules. But the revised format is much simpler and should do much to cure the maritime lawyer of his metronome syndrome.