



Insuring the legal liabilities of carriers for loss or damage to goods they carry for reward.

Presented to Sheffield Local CII Institute

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May 31st 2017.

HAULAGE CONTRACTOR'S LIABILITY POLICIES APPLY ONLY TO:

GOODS WHICH ARE IN THE ACTUAL OR THE LEGAL CUSTODY OF THE HAULAGE CONTRACTOR.

'LEGAL CUSTODY' – WHEN THE GOODS ARE BAILED TO A SUB-CONTRACTOR, OR A SUCCESSIVE CARRIER, AS UNDER CMR.

SECTION 1 – RISKS AND GOODS



Risks associated with selected vehicles and the
goods they carry

The articulated curtainsider, Tautliner™ or Euroliner

The most flexible method of carrying large tonnage on a variety of roads.



Used for the carriage of dry cargo, liquid cargo in bottle and similar form, usually in cases or crates. Not to be used for highly theft attractive goods except for direct attended journeys from A – B and not overnight.

Temperature Controlled Articulated Reefer



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High risk for refrigeration breakdown, wrong setting, failure to set, damage to reefer unit following RTA, theft & malicious damage. An average risk for RTAs & natural perils.

Chilled & Ambient Temperature Controlled Reefer



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The highest of the reefer risks because chilled goods deteriorate quickly if the refrigerant unit fails, is damaged, or set wrongly.

Forty foot container on articulated skeletal semi-trailer



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Average risk for insurance except that the contents of the container may influence the theft risk.



Articulated bulk carrier



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High risk for mis-delivery and contamination – below average for theft

Articulated step frame low loader



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Plant & machinery are above average for theft. mobile plant must never be delivered to unattended sites.



Loading and unloading is usually done by the driver. Higher risk for the insurer compared to most haulage risks, in which loading and/or unloading is done by consignors and/or consignees.

Articulated flat carrying steel in bar form



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High risk for theft, especially distraction thefts.

Significant overhead contact risk



Eleven cars are being carried! Loading and unloading is done by the driver. In some locations the cars will be driven short distances on the public highway

The haulage contractor as a bailee of goods



Bailees of goods – who are they?

Any person who takes charge of goods has a legal duty to take reasonable care of them whilst they are in their custody.

The shoe mender, the dry cleaner, the haulage contractor, are but three examples.





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A haulage contractor who is a bailee of goods may:

Carry the goods in accordance with the terms of the contract, including storing them during the **ordinary course of transit.**

Storage at the behest of the consignor or consignee is not storage during the ordinary course of transit.

It must be revealed to the haulage contractor's liability insurers and their agreement to provide cover must be secured before such goods are accepted for storage.



A bailee of goods may not:

- Sell the goods
- Give the goods away
- Dispose of them in any way
- The bailee of goods has possession of them for the purposes of the contract but does not have title in ownership.
- (NB: statutory/contractual powers of sale?)

LEGAL LIABILITY OF A BAILEE OF GOODS



The default position of a bailee of goods is set at common law. The bailee is required to take reasonable care in protecting them against loss or damage. In other words, the bailee must not be negligent.

So what is negligence?

“The omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something that a prudent and reasonable man would not do.”

BLYTH V BIRMINGHAM WATERWORKS CO. LTD. 1856

BLYTH V BIRMINGHAM WATERWORKS CO. LTD. 1856 (Segmented)

“The omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do,

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something that a prudent and *reasonable man would not do.”

BLYTH V BIRMINGHAM WATERWORKS CO. LTD. 1856

*** Sometimes referred to as, “the man on the Clapham omnibus.”**

The Common Law Carrier



A carrier who does not use conditions of contract is liable at Common Law. That is liability for negligence.

If negligent, he is liable for:

- the full value of any goods lost or damaged, and,
- any foreseeable consequential or indirect financial loss.

Telephone conversation between Shiny Machines Ltd (SM) and Always Ready Carriers Ltd (ARC)

SM. “I know you’ve been trying to get our business for a long time and we haven’t favoured you but now is your chance. Our usual carrier has let us down. We have a new machine, worth £250,000, that has to be delivered to our customers in Berkshire tomorrow, which is a Saturday, but we will pay you extra for this. If the machine doesn’t get there by Saturday afternoon our customers will lose a valuable contract for printing greetings cards, to a competitor. That contract alone is worth £1m. Can you do it?”

ARC. “Yes, no problem. Is £1,000 okay for the carriage?”

SM. “Yes.”

ARC, “Okay, it’s agreed. We’ll be at your place in one hour.” (‘Phone put down.)



.....cont'd from previous slide. Saturday afternoon telephone call from ARC to SM



ARC. “I have a problem for you. I’m sorry to say that our driver has been involved in an accident, his vehicle rolled over on the motorway. Your machine is a write-off. It was his fault, and we’ll be compensating you with the usual £1,300 per tonne. Your machine weighed 8 tonnes, so that’s £10,400.00, and we refund the haulage charge but you’ll have to wait until our insurer pays up.

SM. “I haven’t got a problem. You have the problem. You’re liable for the lot – the machine and our customer’s consequential loss. We explained the total values involved in our conversation yesterday. You didn’t mention any conditions of carriage or limited compensation. If you can’t pay up we’ll have to take your business.”

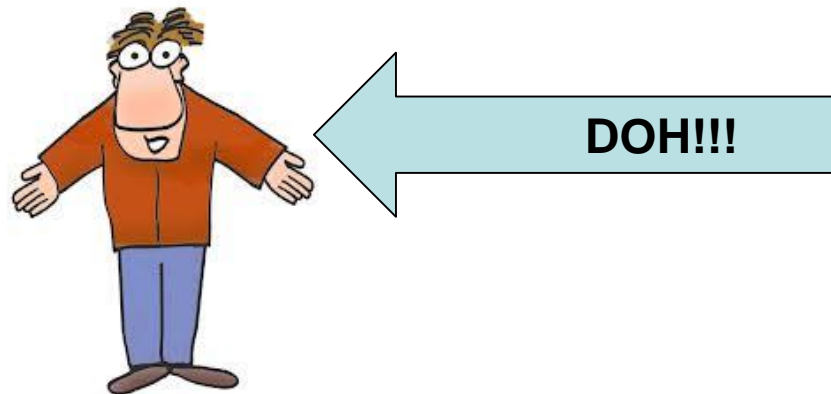
- This case highlights the potentially heavy financial pitfalls involved in being a bailee of goods at Common Law.



- It also emphasises the absolute importance of all carriers using agreed conditions of carriage.
- Sub-bailment on terms

MATRIX v Uniserve – the circumstances!

Matrix instructed a carrier to deliver a consignment of Bluetooth sets to Manchester Airport, for subsequent carriage to Hong Kong. The sub-contractor delivered them by mistake to a freight forwarder in Wythenshawe, Manchester.



Matrix - continued

- A fork lift truck driver signed for the goods and placed them in the warehouse. He did not tell anyone that he had signed for those goods.
- No-one from the freight forwarders contacted Matrix to advise of the mis-delivery.
- No communication = no contract!
- There cannot be a contract without a *consensus ad idem* – a meeting of the minds!



Matrix - continued



- As there was no contract, the freight forwarders were bailees at Common Law.
- They would be liable for loss or damage caused by their negligence.

Matrix – what happened?



- Goods mistakenly accepted by the FLT driver were stolen the following day.
- Freight forwarders subsequently held liable in court for the full value of the goods?
- *Why?*

Matrix – the finding of the court



The court found that the freight forwarders were negligent in failing to provide adequate security whilst the premises were closed? The sin of ‘omission’ in *Blyth v Birmingham Waterworks Co.*

What was the negligence?



The directors, as key holders, were supposed to be contactable by 'phone if the alarm at the warehouse operated. Their mobiles were switched off. They could not be contacted.

The thieves were able to steal the goods with ease.

Matrix – the Judgement



Matrix were awarded the full value of their goods - £371,100, plus interest.

Matrix and insurance

Haulage Contractor's Liability policies contain a Common Law Contingency cover. It operates if the conditions of carriage are set aside by Court Ruling.

In **Matrix** no contract had been agreed, so there was none to set aside.

Common Law Contingency cover would not operate. The Insured stands alone!



Ingredients of a contract in English law.

Contracts for carriage of goods.

Incorporation of contractual terms.

The ingredients of a contract in English law



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- Offer
- Acceptance
- Consideration
- Intention to create legal relations
- Possibility
- Capacity
- Legality

Making a Contract of Carriage

Carrier **offers** a price and terms for carrying goods from A to B.

Customer **accepts** that **offer**.

Consideration: the price for which the promise is brought → in other words, the carriage charges.



Making a Contract of Carriage. 2

Customer and Carrier **intend to enter legal relations.**

Possibility of performance exists in the form of the goods and the courier's vehicle being available.

Both carrier and customer have legal **capacity** to make a contract.

A contract of carriage has **legality.**



Conditions of carriage are only of use if they are incorporated into a contract. How is this done?



- Key elements: **communication, timing, evidence.**
- The party relying on the terms must be able to **evidence** that the terms were **communicated** to the other party **before or at the time** the contract was made.

Ways of incorporating (1)

Possible...but risky

- Telephone call before agreement reached
- Pre-recorded message at the start of each conversation
- Meeting with customer to discuss terms and conditions
- NB: evidence?



Ways of incorporating (2) Better!

- Bespoke contract/service level agreement
- Express written/signed acknowledgement by customer (e.g. credit application/other pre-contractual documents)
- Written notice on pre-contractual documentation (e.g. quotations)
- Notices on stationery (invoices, letterhead) etc
- Prior course of dealings
- Keyword: evidence!

Ways of incorporating (3)



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- Principal's conditions of carriage
- Sub-bailment on terms
- Copyright issues?



AN OVERVIEW OF RHA© & CMR, INsofar AS THEY AFFECT THE LIABILITY OF THE HAULAGE CONTRACTOR

Liability is for physical loss, mis-delivery of or damage to goods without negligence except when carrying living creatures, bullion, money, securities, stamps precious metals or precious stones.

Effectively, the liability is akin to 'All Risks', with few worthwhile defences, but with limited compensation for the owner of the goods.

Standard compensation is limited to £1,300 per tonne on the weight of the goods lost or damaged. May be increased by mutual agreement before contracting but the agreement of the haulage contractors' liability insurers must be secured before committal to increased limits.

Time limits for notifying and making claims:

7 days to notify and 14 to make a claim for damage to the whole or part of the consignment, or physical loss, mis-delivery or non-delivery of part of the consignment.

28 days to notify and 42 days to make a claim for any other loss.

12 months time-bar.

- Include a facility to carry at more than £1,300 per tonne provided agreed by carrier and customer before or at the time of contracting.
- RHA Conditions of carriage are the leading ones in the UK, are tried and tested.

- Enacted in the United Kingdom by the Carriage of Goods by Road Act 1965.
- Applies to the contract on the carriage of goods for reward across the frontier of two countries, at least one of which must be a signatory to the Convention.
- The UK is a signatory, as is most of Europe.

- **C**arrier liable from time he takes the goods over until the time of delivery. (CMR – Article 17.1).
- **C**arrier expected to display the utmost care of the goods.
- **C**arrier can escape liability altogether if he can prove that the loss or damage was due to circumstances he could not avoid, the consequences of which he was unable to prevent. (CMR – Article 17.2).
- **A** different liability regime operates when the lorry carrying the goods is on a RO/RO vessel and the loss/damage is attributable to that other method of transit. This also applies if the lorry is carried on a train. (Article 2 of CMR).
- **W**ilful misconduct by the carrier defeats any defence or limitation of liability and extends the time bar to 3 years (from 1 year).



CMR – reliefs from liability

Carrier is relieved from liability if he can show that the loss or damage arose from one of the special risks inherent in:

- Unsheeted vehicles where agreed
- Bad packing
- Handling goods by someone else
- Inherent vice
- Inadequate marks/numbers
- Livestock

NB: The claimant has the right of rebuttal but must prove that the carrier is not entitled to rely on any claimed relief.

Wilful Misconduct (1)



Difficult to achieve a WM decision in England, due to the reluctance of the courts to grant it in all but a few cases.

WM described in *Horabin v BOAC* (1954). Must involve a recognition of the danger by the party accused of wilful misconduct together with that party's willingness to undertake the dangerous act.

Wilful Misconduct (2)



Negligence or wilful misconduct?

- Driver approaching traffic lights at red fails to see them and drives past them – driver negligent!

- Driver see traffic lights at red but chooses to cross them, aware of the danger – driver guilty of wilful misconduct!

Horabin v BOAC (1954)

Wilful Misconduct – case law



Few phrases have been more fully considered in decisions of the Courts than "wilful misconduct". The definition most usually adopted is that put forward by Lord Alverstone, C.J. in *Forder v. Great Western Railway Co.*, [1905] 2 K.B. 532 where, with an addition, he adopted the definition of "wilful misconduct" given by Mr. Justice Johnson in *Graham v. Belfast and Northern Counties Railway Co.*, [1901] 2 I.R. 13:

“Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing and yet intentionally does or fails or omits to do it, or persists in the act, failure or omission regardless of the consequences.”



Wilful Misconduct – segmented definition

WM far removed from:

- Accident;
- Negligence;
- Gross or culpable negligence

WM requires:

- Knowledge of the danger;
- Willingness to accept the danger, regardless of likely consequences.

In layman's terms it might be described as being:

“as far removed as a raging torrent is from a gently flowing shallow stream.”

Wilful Misconduct – Denfleet International



Denfleet International v TNT 2007 involved a tired professional driver choosing to drive his lorry knowing he was tired. Crashed, vehicle caught fire, Denfleet's goods destroyed. WM judgement given in the Court of first instance but reversed on appeal.

Driver's admitted tiredness not sufficient to prove WM. There needed to be another event to wake him to the danger. In other words:

“he was too tired to realise that he was too tired....to drive!

Wilful Misconduct – Lacey's Footwear v Bowler Int'l



Bowler held liable in the Court of First Instance for the wilful misconduct of the driver, with this decision being supported in the Court of Appeal. The judge said:

“Notwithstanding that very clear and precise command, the driver seems to have taken it upon himself to have followed a complete stranger who was not in possession of a copy of the CMR note for a distance of about three or four kilometres and allowed the consignment to be offloaded from his trailer onto another or other vehicle. *This he did despite having telephoned Mr. O’Kerwin (the driver’s boss) again and yet again being instructed to return to the plaintiff’s premises.*”

It is difficult to envisage a more deliberate disregard of positive instructions. In these circumstances I hold that the driver was guilty of wilful misconduct and that as a consequence the defendants cannot avail themselves of the limitation of liability contained in Article 23.”

SETTLING CLAIMS UNDER CMR



Special Drawing Right (SDR) used to settle CMR claims.

8.33 SDRs per kilo is the basic rate of compensation.

Typical rate of an SDR is 1.11 to the £, so the £ is worth 90.09%

$8.33 \times 90.09\% = 7.504 \times 1,000 = \text{£}7,504.00$ per tonne.

Special Drawing Rights (SDRs)



- A financial instrument of the International Monetary Fund.
- Not issued as a currency.
- Used for calculating rates of exchange between different currencies throughout the world.

In addition, the carrier is liable to :

- pay interest at 5% per annum,
- refund the carriage charges,
- Refund Customs Duties and other charges incurred in the carriage of the goods, in whole for total loss, or pro rata for partially damaged or lost loads.

A BRIEF OVERVIEW OF UKWA © AND BIFA © TERMS OF BUSINESS FOR WAREHOUSE KEEPING & FREIGHT FORWARDING

The United Kingdom Warehousing Association Contract Conditions for Logistics 2006 - Storage of goods for reward



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Liability attaches to the warehouse keeper if the loss is caused directly by negligence or wilful act or default of the warehouse keeper, his employees, sub-contractors or agents, *all acting in furtherance of their respective duties as employees, sub-contractors or agents.*

The default compensation is still £100 per tonne of weight lost, or a higher amount if agreed by the owner of the goods and the warehouse keeper prior to storage.

No specific mention of liability for wilful misconduct but *wilful act*, might be construed in context as wilful misconduct.

UKWA case decision – Sonicare v East Anglia Freight 1997



Sonicare tried to persuade the court to overturn the limitation of liability at £100 per tonne, claiming the benefit of the Unfair Contract Terms Act 1977.

The judge declined to do so because the parties to the contract were of equal bargaining power.

He expressed the view that in another court, and upon different evidence, a different decision might be reached.

EAF's liability was limited to £54.01. The value of the stolen goods was in excess of £30,000.

Cargo owners be warned! Insure your goods yourselves, for their full value, against All Risks.

Freight Forwarder must/is:

Perform its duties with a reasonable degree of care, diligence, skill and judgement.

Relieved of liability for loss or damage caused by strike, lock-out, stoppage etc which it is unable to avoid by exercise of reasonable diligence.

Not liable for any event the forwarder was unable to avoid and the consequences of which he was unable to prevent by exercising reasonable diligence.

Accept that BIFA© terms stand subordinate to liability under legislation (such as CMR) but only to the extent that BIFA© terms are repugnant to such legislative liability.

Standard liability under BIFA© is:

For loss or damage to goods, the lower of the value of those goods or 2 SDRs per kilo of weight lost or damaged;

For all other claims, the value of the goods lost or damaged, or 2 SDRs of gross weight lost or damaged, or 75,000 SDRs any one transaction, whichever shall be the least.

In the case of claims for Errors and Omissions, the lower of the value of the loss incurred or 75,000 SDRs in the aggregate in any one trading year, dating from the time of the making of the original error or omission.

Time limit for making claims – 14 days.

Time bar – 9 months.



Customer liable to indemnify the forwarder for any claims made upon him for any breach of warranty by the customer, or due to the negligence of the customer, claims, costs and expenses made on the forwarder in excess of the forwarder's liability under the conditions or, any claims of a general average nature made on the forwarder.

Loss or profit, consequential loss etc – excluded.

Three alternative ways of
providing indemnity for haulage
contractors' legal liabilities

Haulage contractor's liability policies:

- pay
- defend
- defend & pay



Three bases – cont'd...

If the carrier is liable for loss or damage to goods in its custody, insurers pay up to the limit of that liability. This is the usual position under RHA.

If insurers consider there is a defence to liability, they put that defence forward. Defence to liability is the starting point with CMR claims.

If the owners of the goods challenge the defence, insurers may continue the defence or pay up, and will also pay their legal costs, plus any costs awarded in the judgement of a Court.

Issues to consider in defending claims....

The Indemnified Party



The Haulage Contractor's Liability policy is for the benefit of the carrier.

Payment is in respect only of the carrier's legal liability.

If the owner of the goods did not effect cargo insurance, it is of no concern to the carrier's insurer, who will not make up any shortfall between the amount of the carrier's legal liability and the actual value of the goods.

All Risks covers



Not a solution!

Carrier's legal liability can only be protected in a properly incorporated contract of carriage and protected by insurance for those liabilities.

Carriers should not be expected to pay full compensation for lost or damaged goods.

Owners of goods should insure them for their full values and with the widest cover available.

So you still think carrying under All Risks terms is a good idea!



Okay, then consider the following risk details for an All Risks carrier:

Vehicle load limit £250,000 – 5 vehicles – annual charges £450,000.

Assume the £250,000 limit is regularly reached, here's a way of calculating the annual values of the goods carried to a reasonable degree of accuracy:

Vehicle load limit x 5 vehicles x 5 days use per week x 50 weeks use of vehicles per year.

$£250,000 \times 5 \times 50 = £62,500,000 \times 5 = £312,500,000$ maximum annual exposed limit

Assume the maximum is exposed for 80% of the time – actual annual exposed limit is £250,000,000

Annual cargo premium on £250m @ 0.01% would be £25,000.

Haulage contractor's liability premium – probably a half or less than half this figure – and no subrogation!

- Haulage Contractors, Warehouse Keepers, Freight Forwarders are/can be bailees of goods.
- They have a liability at Common Law unless they use agreed contract conditions.
- There must be a contract between carrier and customer.
- The terms of carriage must be incorporated into the contract of carriage.

Wrapping up – cont'd...



- Insuring liability against “All Risks” is entirely possible but there are still drawbacks that could be prejudicial to the carrier.
- Haulage Contractor’s Liability risks are assessed on the main types of goods carried.
- The best-known conditions of carriage are RHA and CMR.



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Wrapping up – last slide but one!

- Haulage Contractor's Liability policies contain three alternative bases of indemnity:

- PAY



- DEFEND



- DEFEND & PAY





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THANK YOU!