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SUB-CONTRACTS FOR THE CARRIAGE OF GOODS UNDER THE CARRIAGE OF GOODS ACT 1979

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I. INTRODUCTION

The Carriage of Goods Act which emerged from Parliament late in 1979 is the product of a slow careful legislative process. It was first moted in April 1968 in the Report of the Contracts and Commercial Law Reform Committee on the Law Governing the Carriage of Goods.[1] The Carriage of Goods Bill was introduced in 1977 and was referred to the Statutes Revision Committee. The Committee set up a special Working Party[2] to comment and report on certain aspects of the Bill. After submissions from interested parties to both the Working Party and then to the Statutes Revision Committee on the Working Party's Report[3] the substantially amended Bill was reported back to the House in September 1979. On 30 October 1979 it received its third reading and on November 14 was given the Royal Assent. Section 1(2) delayed its commencement until June 1 1980 to allow the Transport Industry to readjust its rates of freight and insurance costs, and to re-educate its members as to the new regime of liability governing them.

The Long Title of the Act states that its purpose is "...To restate and reform the law relating to carriage of goods within New Zealand." The Working Party saw the intent of the Legislature in enacting this Statute was to replace the common law "...with a comprehensive and definitive code of liability applying to all persons who take part in the performance of contracts of carriage, and who for that purpose take custody of goods."[4] Thus the primary concern of the Act is to govern liability for loss of or damage to goods carried pursuant to a contract of carriage. Prior to the Act, contracts of carriage had been governed by different statutes for each of the different modes of transport; The Carriers Act 1948 (land), The Carriage by Air Act 1967 (air), The Government Railways

Act 1949 (railways) and The Sea Carriage of Goods Act 1940 (sea). These four Acts each provided different rules and more importantly different maximum limits of compensation, ranging from $40 under The Carriers Act[5] to $240[6] for carriage by air. The common law rules relating to the private carrier and the common carrier affected the liability of various carriers as well.[7] The Transport Act 1962 and regulations[8] made thereunder had the effect that, unless there were special terms in the Transport License or other special circumstances, all licensed road carriers were held out to the public as being common carriers for the majority of their business transactions.[9]

Section 28 of The Carriage of Goods Act abolishes the common law rules relating to private and common carriers and

> Every reference in any other enactment to the liability of common carriers as such shall be deemed to be a reference to the liability of carriers under this Act.

The Second Schedule to the Act repeals The Carriers Act 1948 and Part I of The Sea Carriage of Goods Act, while the First Schedule removes from The Government Railways Act and The Carriage By Air Act all the provisions concerning the carriage of goods.

The rules which the Act creates are intended to govern the distribution of liability among the sub-carriers who may be employed by the carrier to complete the contract, as well as to govern the relationship between the carrier and the consignor. The focus of this paper will be on the relationship between the carrier and the sub-carrier.

II. THE REGIMES OF LIABILITY

One of the objects of the Act is to ensure that there is fairness of dealing between a carrier and his customers when they

are negotiating the terms of their contract. In seeking to achieve this object the drafters of the Act have had to bear in mind the desirability of giving the parties to a contract for the carriage of goods sufficient freedom to vary the conditions of their contract to suit their particular circumstances.

Section 8(1) of the Act provides that:

> For the purpose of determining upon whom liability for the loss of or damage to any goods is to fall, every contract of carriage shall be one of the following kinds:

(a) a contract for carriage "at owner's risk." This is the simplest kind of contract. If any loss or damage occurs to the goods the carrier will not be liable at all unless the loss or damage is intentionally caused by the carrier. Unless the parties to this contract have placed terms in their contract to a different effect the rules in subsections (2) to (7) of section 9, which govern when a contracting carrier's liability begins and ends, will apply. If the parties have placed any express terms on these matters in their contract then the subsections will apply subject to those terms.

(b) a contract for carriage "at limited carrier's risk." Under this contract no carrier is liable for loss or damage in excess of $500 per unit of goods except where he has intentionally caused the loss or damage.[10] Such liability is strict, i.e. the carrier is liable "whether or not the loss or damage is caused wholly or partially by him."[11] Any contract not expressed to be one of the other three kinds will be deemed to be "at limited carrier's risk."[12] Should a contract purporting to be one of the other three kinds fail to fulfil the conditions for their creation then the contract will take effect as a contract "at limited carrier's risk."[13] Similarily

if the difference between the freight charged under contracts "at owner's risk" or "at declared value risk" and what the freight charged would have been for a contract "at limited carrier's risk", is not fair and reasonable having regard to the risk taken by the carrier under these contracts compared with what it would have been had the contract been "at limited carrier's risk", then the contract will take effect "at limited carrier's risk."[14] The rules governing the period of liability in subsections (2) to (7) of section 9 apply to contracts "at limited carrier's risk."

(c) a contract for carriage "at declared value risk." The maximum amount the carrier must pay for loss or damage is specified in the contract. Like a contract "at limited carrier's risk" the provisions of subsections (2) to (7) of section 9 will always apply. Liability is strict, and the maximum stipulated amount will not apply when the carrier intentionally causes the loss or damage.

(d) a contract for carriage "on declared terms." Under such a contract the parties are left completely free to specify the terms in accordance with which the carrier will be liable. The most important feature is that no maximum figure of liability is expected or implied in the contract by the Act. Liability under this contract is not strict, i.e. unless the parties have decided otherwise, a person claiming for loss or damage will have to show that the loss or damage was caused wholly or partially by the carrier. As with a contract "at owner's risk the provisions of subsections (2) to (7) of section 9 apply subject to the express terms of the contract.

As well as creating rules governing liability the Act stipulates:

(a) certain matters which the consignor is held to warrant concerning the packaging and condition of the goods,[15]

(b) the time limits within which an action for loss of or damage to goods must be brought,[16]

(c) in what circumstances a person apart from the consignor of the goods may sue for their loss or damage,[17]

(d) when the right to sue for freight arises,[18]

(e) when an action for the recovery of freight may be brought against the consignee,[19]

(f) at what time the right to a lien on the goods carried arises,[20]

(g) the conditions for the storage and disposal of unclaimed or rejected goods,[21]

(h) the circumstances in which a carrier may dispose of dangerous or offensive goods.[22]

III. THE ACTUAL CARRIER

The basic scheme of the Act is to create a two tier system of liability. The first covers the relationship between the "contracting party", that is

> ...the consignor or (as the case may require) the consignee of the goods who enters or who has entered into the contract with the contracting carrier:,[23]

and the "contracting carrier", the carrier that is who,

> as a principal or as the agent of any other carrier enters or has entered into the contract with the contracting party:[24]

Between the contracting party and the actual carrier there can, except in two circumstances, be no action for the recovery of loss of or damage to goods. If the goods are lost or damaged then the contracting party must seek full compensation from the contracting carrier.

The second tier of liability exists between the contracting carrier and the actual carrier. When he is obliged to compensate

the contracting party the contracting carrier will, not unnaturally, wish to be recompensed by his actual carriers.

It is now mis-leading to think of actual carriers as sub-carriers. Under the definition of "actual carrier" found in section 2, they can be any

> ...carrier who, at any material time, is or was in possession of the goods, ..., for the purpose of performing the carriage or any stage of it or any incidental service; and includes the contracting carrier where he performs any part of the contract:

The definition of "carrier" itself is,

> ...a person who in the ordinary course of his business, carries or procures to be carried goods owned by any other person, whether or not as an incident of the carriage of passengers; and, except in sections 21 to 24 of this Act, includes a person who in the ordinary course of his business, performs or procures to be performed any incidental service in respect of any such goods:25

As well as including the ordinary conveyer of goods, both these definitions refer to persons performing an "incidental service", which is defined in section 2 as

> ...any service (such as that performed by consolidators, packers, stevedores, and warehousemen) the performance of which is to be undertaken to facilitate the carriage of goods pursuant to a contract of carriage:

By these three definitions a wide range of people and contracts are brought within the scope of the Act. The result is that anyone who in the normal course of his business in any way handles goods which are in the process of being carried becomes an actual carrier for the purposes of the Act.[26]

IV. WHO CAN BE A CONTRACTING CARRIER?

When exactly is a carrier an actual carrier or a contracting carrier? The answer to this question will depend on the nature of the contract in each case. For example suppose that a contracting party, P, wants to get goods from Wellington to a

consignee's premises in Auckland. To achieve this three carriers, X, Y and Z must handle the goods. If P tells carrier X to get the goods to Auckland, X becomes a contracting carrier and Y and Z his actual carriers. Should P tell X to "take these goods to carrier Y and get him to consign them to carrier Z", then X is the contracting carrier only for the contract of carriage as far as Y's premises. Y is then the contracting carrier for the new contract of carriage to get the goods from his premises to Z's. Similarily Z will be the contracting carrier for the third contract to get the goods from his premises to the consignee.

The definition of "contracting carrier" in section 2 includes carriers who act "as the agent of any other carrier", but not carriers who act as agents of the consignee or consignor. The definition also requires that the contracting carrier should have entered into "the contract with the contracting party." Each of the carriers above has entered into a contract with the contracting party, and each is as a result a contracting carrier. Whether or not in any given contract the provisions regarding actual carriers will have effect will depend upon how the contracting party chooses to arrange the transport of his goods.

V. SUB-CARRIERS PRIOR TO THE ACT

To understand the purpose of the provisions relating to actual carriers it is useful to look at the problems which the law prior to the Act was creating.

The source of the move to legislate for the actual carrier is found in paragraph 20 of the 1968 Report of the Contracts and Commercial Law Reform Committee. There the problems relating to claims procedure faced by a consignor who sends goods on a journey

which may involve several different carriers and modes of carriage were high-lighted. Where goods arrived in a damaged condition it was often impossible to isolate the carrier in whose care the goods were when the damage occurred. Whether the owner was able to recover would often depend upon the kind of contract he had and with whom he had it.[27]

Before the Act if a consignor wished to have goods transported by means that involved more than one carrier he could either enter into a contract with each separate carrier, in person or through a forwarding agent,[28] or, he could contract with only one carrier, which carrier would enter into the other contracts of carriage on his own behalf, and not as agent of the consignor. In New Zealand contracts for carriage of goods over any distance will often require more than one carrier and mode of carriage. By virtue of the Transport Act 1963, Part VII, there exists a system of licensing of goods services which creates in favour of the Government Railways a monopoly on the transport of goods over any distance exceeding 150 kilometres. Regulation 24 of the Transport Licensing Regulations 1963 provides that unless it is specifically excluded there is an unwritten condition in every Transport License that -

> If there is an available route for the carriage of goods that includes at least 150 kilometres of open Government Railway ... the goods shall be carried only as far as is necessary to permit the carriage by railways.

So a person wanting to get goods from his factory in Wellington to a consignee's premises in Auckland will probably have to use three different carriers. One carrier to take his goods from his factory to the Railway consignment point, he will then employ the Railways to ship the goods to Auckland, and then there will be a third carrier who will carry the goods from the Auckland railhead to the consignee's premises.

On the arrival of the goods at their destination the consignor's chances of recovering any partial loss or damage would depend upon who he was contractually bound with. If he had contracted separately with each of the carriers he would be faced with the task of identifying the carrier in whose care the goods were when the loss or damage occurred. Where the goods had been shipped in sealed containers, which none of the carriers should have had occasion to open during the course of the carriage, this was extremely difficult. To be able to identify the responsible carrier was important, because if he could not, the consignor could not look to any one carrier to recompense him for a loss which may have occurred at any stage of the journey.

The goods owner was in a much stronger position if he was bound contractually to just one carrier, which carrier had himself sub-contracted on his own behalf with the other carriers. The goods owner could claim directly against the carrier with whom he had contracted, notwithstanding that he could not identify where exactly the loss or damage had occurred. It was then left to the contracting carrier to identify where the loss or damage had occurred and then claim off the responsible sub-carrier.

As well as being liable to the contracting carrier the responsible sub-carrier was also open to an action by the owner of the goods. The sub-carrier might be liable to the owner of the goods on three different grounds. First he was under the ordinary common law duty not to do any act which he knew could injure his neighbour,[29] in this case the owner of the goods. Thus in Campbell v. Russell[30] the plaintiff sued the servant of the railways for his negligence in losing a suitcase instead of suing the Railways itself. In doing so the plaintiff avoided the statutary

$40 per package or unit of goods limitation figure[31] which was the maximum amount that could be claimed off the Railways.

The owner's second cause of action against the sub-carrier arose out of the owner's status as bailor. Ever since Nicholls v. Bastard[32] the law has allowed the bailor as well as the bailee to recover from someone who has harmed the goods. The bailor's right did not detract from the bailee's own right to sue any person who has interfered with the goods.[33] Where the bailee recovered from the sub-carrier the bailee was obliged to account for the money recovered to the bailor.[34] To have allowed him to keep the money would have been to compensate him for a loss he had never suffered.[35] Furthermore if either the bailor or the bailee recovered the loss from the wrong-doer, then the other could not bring a separate action for the same loss or damage.[36]

The owner's third cause of action arose when there was established between the owner of the goods and the sub-carrier a relationship of bailment. Morris v. C.W. Martins & Sons Ltd.[37] held there could be a relationship of bailment independent of contract, such as when the possession of goods was entrusted by the bailee to the sub-bailee. Salmon L.J. at page 738 said this placed upon the sub-bailee the duty, (a) to take reasonable care to keep the goods safe, and (b) not to do any intentional act inconsistent with the bailor's right in the goods, e.g. not to convert them. The sub-carrier being a sub-bailee entrusted with the possession of the goods was thus open to an action by either the bailor or the principal bailee if he failed to fulfil either of the two duties imposed on him.

Section 6 of The Carriage of Goods Act abolishes these various actions for loss or damage.

> Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except -
> (a) In accordance with the terms of the contract of carriage and the provisions of this Act, or;
> (b) Where he intentionally causes the loss or damage;

For the purposes of recovering loss or damage the effect of the Act is to permit an action by a contracting party against an actual carrier only if,

(i) the actual carrier intentionally causes the loss or damage; or

(ii) the contracting carrier is insolvent or cannot be found.[38]

It is important to note that the Act deals only with loss or damage. Actions to recover damages consequential upon the loss of or damage to goods are still to be brought according to the law prior to the Act, and are not subject to the figure of maximum liability in section 15.

VI. THE BASIS OF LIABILITY

Section 3 of the Act contains an extensive definition of the terms "unit" or "unit of goods". This was included to overcome the uncertainty surrounding the meaning of the term "package or unit" in The Carriers Act. This term which that Act had left undefined had been the cause of much litigation. A notable example was Drinkrow v. Hammond & McIntyre[39] where a bulldozer was held to be a "package or unit".

Section 3(2) of The Carriage of Goods Act provides that for the

> ... liability of any carrier, the limit of liability prescribed by section 15 of this Act in respect of each unit of goods relates to the unit of goods as accepted for carriage by the actual carrier or, ... by the first actual carrier ...

The obvious practical effect of this is that if the first actual carrier takes possession of twenty units of goods and passes them

on to the next actual carrier who consolidates them into one single container, then if there is any loss or damage the carriers will all be liable on the basis of twenty units and not one. It is the number of goods that is physically accepted that will count. The carrier who conducts a service of packing and shipping goods, such as a furniture remover, will be liable for every item that he places in his vehicle because section 3(1) (g) provides

> In relation to goods (other than baggage) not referred to in any of the preceding paragraphs of this subsection ... ["unit of goods"]... means each item of goods.

The law as stated in the Act differs very little from that in Geering v. Stewart Transport[40] and the Drinkrow[41] case. There is now however much more certainty for the consignor, and, as was noted in the Working Party Report, the description of the goods as found in the Bill of Lading will in most cases correspond with the number of units tendered to the first actual carrier. Because of this, and because there should be no difficulty in ascertaining the relevant number of units from their contracting carrier, actual carriers should have no problems in knowing how many units they are responsible for.

VII. APPLICATION OF SECTION 8 TO ACTUAL CARRIERS

Every contract of carriage, including contracts with actual carriers, must be one of the four kinds provided in this Act. However section 8(11) provides that:

> Any contract of carriage entered into by a contracting carrier with an actual carrier, or between actual carriers, may be of any kind, regardless of the kind of contract that subsists between the contracting carrier and the contracting party;...

Thus section 8 leaves the contracting carrier and the actual carrier free to distribute prospective liability in any manner which suits them. A change in the kind of contract the contracting carrier has with the contracting party will not automatically alter the

actual carriers' contract with the contracting carrier. For example suppose X, the contracting carrier, has negotiated to carry goods for P, the contracting party, "at owner's risk". X arranges for A, an actual carrier, to undertake part of the carriage, also "at owner's risk". The contract between X and P fails to fulfil the criteria in section 8(5) for contracts "at owner's risk", and is therefore deemed by section 8(5) to be a contract for carriage "at limited carrier's risk". The contract between X and A is valid and will continue to be "at owner's risk" despite the change in X's contract with P. If P's claim against X, which can now be to a maximum of $500 per unit, is large, X, being unable to recover from A any compensation he has had to pay to P, could be in a disastrous situation.[42]

Section 8(11) also exempts contracts between actual carriers and contracting carriers from complying with the provisions of sub-sections 5 to 8 of section 8. These sub-sections contain the criteria that have to be fulfilled to form a valid contract "at owner's risk", "at declared value risk" or "on declared terms". All three types of contract are required to be in writing and the latter two must be signed by the parties or their agents. For a contract to be "at owner's risk" it must be clearly expressed to be so, or, the contracting party may sign a statement, separately or in the consignment note, signifying his understanding of the effect of the contract he is entering into. For a contract to be "on declared terms" section 8(7) stipulates that it must be "freely negotiated between the parties". Section 8(8) provides the various matters a court shall consider in deciding whether or not the contract is freely negotiated. Since section 8(11) exempts contracts with actual carriers from these provisions, it seems that the only requirement to be complied with in creating a contract of a kind

apart from "at limited carrier's risk" is that it "purport to be of a particular kind".[43]

Suppose that X, the contracting carrier, contracts with P, the contracting party, "at declared value risk" of $1000 per unit of goods. X then employs A, an actual carrier, to carry the goods. The above provisions, plus the freedom given for contracts with actual carriers to be of any kind regardless of the kind of contract the contracting carrier has with the contracting party, makes it important that X ensures A knows and accepts that their contract is also "at declared value risk" of $1,000 per unit of goods, and not "at limited carrier's risk". X can not rely on the terms of his contract with P to govern A's liability to him in the event of loss or damage occurring to the goods. Even if a statement declaring that the contract with P is "at declared value risk" of $1000 per unit of goods is included in the consignment note that travels with the goods, X's contract with A will be "at limited carrier's risk" unless X has made it clear to A that their contract is "at declared value risk" of $1000 per unit of goods. If X does not do this he may be faced with claims of up to $1000 per unit of goods from P while only being able to recover $500 per unit of goods off A.

If the above situation were to occur disputes between actual carriers and contracting carriers may arise as to whether or not the actual carrier had been clearly notified that his contract with the contracting carrier was one other than "at limited carrier's risk". These disputes would be aggravated by the fact that contracts with actual carriers can be made orally. Naturally while the actual carrier will want to apply the lower limit of liability the contracting carrier will wish to impose the higher

limit.

If the Act had contained a provision that, unless the parties had expressly provided otherwise, the contracting carrier's contract with the actual carrier would be deemed to be the same as that which the contracting carrier has with the contracting party, there would have been more certainty as to the kind of contract between the actual carrier and the contracting carrier. However this would have placed an onus on the actual carrier to find out what kind of contract the contracting carrier had entered into with the contracting party. As the Act stands at present the onus lies on the contracting carrier to negotiate with the actual carrier as to the type of contract between them. Clearly one party must have some sort of onus placed on it to communicate or to ascertain the terms of the contract between them and the Act appears to have placed it correctly. The contracting carrier, as the party who is responsible for negotiating any sub-contracts, will in nearly every case be in contact with each actual carrier. Whether or not he makes the required notification of the kind of contract involved will in the end depend upon his own administrative efficiency.

Section 8(9) deems contracts "at declared value risk" and "at owner's risk" to be "at limited carrier's risk" if the difference between the freight charged by the contracting carrier under these contracts, and what would have been charged had the contract been "at limited carrier's risk", is not fair and reasonable having regard to the risk taken by the carrier compared with the risk undertaken had the contract been "at limited carrier's risk". Section 8(9) only refers to freight charged by the contracting carrier, and does not contain a provision similar to that found in section 17(3) which duplicates certain obligations that exist between

the contracting carrier and the contracting party in the contract between the contracting carrier and the actual carrier. It would seem that section 8(9) is another of the consumer protection provisions of the Act which is exempted from relationships between actual carriers and contracting carriers.

This is typical of the attitude inherent in the Act that carriers, being professionals, should be able to take care of themselves in their relations with each other. In theory this may be so, but does it really reflect the actual situation? Carriers can range from one truck firms to national or even multi-national companies, and there is certainly not going to be equality of bargaining power in all situations. Under subsections 7 and 9 of section 8 the contracting carrier as well as the contracting party is protected from the effects of either party having superior bargaining power. Would it have caused too much disruption and hardship within the industry to have extended some portion of the protection given in other areas of the transport industry to the small carrier in his inter-carrier relationships?[44]

VIII. JOINT AND SEPARATE LIABILITY

When the contracting carrier seeks to recover loss or damage from his actual carriers, he will normally do so in accordance with section 10. Section 10 however is one which can be contracted out of. Section 7 provides that parties to a contract of carriage may

> ... make their own terms in respect of any matter to which any of sections 10 and 18 to 27 of this Act apply; and, where they do so, the relevant section or sections shall, in relation to that matter, have effect subject to those express terms.

It is possible that the contracting carrier will, to keep down the amount of freight he has to pay to the actual carrier, negotiate not to claim any recompense, or only a small amount, off the

actual carrier, preferring to run the whole risk himself.[45]

By virtue of section 10 every carrier is either separately liable or jointly liable to the contracting carrier. Where there is only one actual carrier he will be separately liable to the contracting carrier for damage done during the period when he personally has possession of the goods.[46] Where there is more than one actual carrier then they are all jointly liable to the contracting carrier for loss or damage occurring while the goods are in the possession of any one of them.[47] However each actual carrier is separately liable for any loss or damage that happens while he personally has the goods in his possession.[48]

Joint liability is distinguishable from joint and several liability which arises under section 13 for contracts of successive carriage by air.[49] When two or more persons are jointly and severally liable a joint action can be brought against them all, as well as a separate action against each one. Being "jointly liable" has several legal consequences. Generally an action for the debt must be brought against all the debtors, and where a joint debtor is sued alone he is entitled to request the court to join his co-debtors in the action.[50] If the other debtor is out of the country, or can not be found, then the court has a discretion not to require him to be joined in the action.[51] The reason the missing party need not be joined is that to require his joinder would place a heavy burden on the plaintiff in finding him and joining him in the action. If one of the debtors is bankrupt then the contribution of each of the solvent debtors will be the amount of the debt divided by the number of solvent debtors.[52] In New Zealand if any one debtor, who does not plead

the joinder of his fellow debtors, is sued, and he is unable to satisfy all or part of the judgement debt, the creditor may still bring an action for the balance of the debt against the remaining debtors.[53] Where one debtor has paid the entire debt he is entitled to recover contribution from his co-debtors.[54] The last noteworthy feature of joint liability is that if the creditor releases one debtor the courts have held that the cause of action against all the debtors is lost. A creditor who covenants not to sue one particular debtor will not lose his cause of action against the other debtors however.[55]

IX. JOINT AND SEPARATE RESPONSIBILITY

The actual carriers' joint responsibility begins when

> ...the goods (or the container, package, pallet, item of baggage, or any other thing in or on which the goods are believed to be) are accepted for carriage...[56]

Responsibility for the goods ends at the same time as does that of the contracting carrier. Generally this is when the goods have been delivered to the consignee, or are at the place where the consignee can take delivery of them.[57] The actual carriers' responsibility commences at a different time to that of the contracting carrier, which is "...[w]hen the goods are accepted for carriage <u>in accordance with the contract</u>."[58] It seems the legislature contemplates that goods can be accepted for carriage at some point in time prior to their physical acceptance.

Under section 10(4) if the actual carrier can prove the damage occurred otherwise than while he was separately responsible for the goods he will not be jointly liable. It may be difficult to invoke this means of escaping joint liability, especially in an age of sealed containers. An actual carrier should in most cases

be able to prove that the goods were not lost while in his care by showing that he had delivered the goods intact to the consignee, or, that he had never received the goods in the first place. To detect damage done to goods prior to his receiving them, or to show no damage had occurred while he had them, an actual carrier will have to devise a more effective method of checking goods in and out than he may have had before. Few methods however, will be of any practical value when the carrier is faced with a large sealed container which he should have had no occasion to look inside while he had it in his care.

A carrier will of course not be jointly liable if another carrier is separately liable under section 10(3)(b). A carrier is separately liable for loss of or damage to goods if this occurs while he is separately responsible for them according to section 10(6). By section 10(6) separate responsibility commences at the time the goods are accepted for carriage by the actual carrier, and ends when the actual carrier tenders the goods to the next actual carrier, or to the consignee if he is the last actual carrier.

The Act is unclear on what the position is if goods are partially damaged by one actual carrier, and then in this condition are tendered to the next actual carrier who loses them altogether. Should the first actual carrier still be liable for that damage occurring while he was responsible for the goods? Where goods have been sold or destroyed by a carrier pursuant to sections 23-26, section 27 provides that the carrier will still be liable for any loss of or damage to the goods prior to their destruction or sale. Section 10 does not contain a provision similar to that found in section 27, but section 10(3)(b) clearly states that an actual carrier shall be liable for the "loss of or damage to any goods occurring while he is separately responsible for the goods..." It may still be open

to argument that an overwhelming later loss will relieve an actual carrier of liability for a lesser loss that has occurred during his period of separate responsibility earlier in the carriage.

An interesting feature of section 10(6) is that it can extend the period of responsibility of one actual carrier into that of another. Suppose for example an actual carrier, A, is shipping goods by truck to the premises of a consolidator of goods. The consolidator, C, is to consolidate the goods for the purposes of further carriage and he will therefore be an actual carrier for the purposes of the Act.[59] Not far from C's premises, where the contract requires A to deliver the goods, A's truck breaks down. C sends out his own vehicle to pick up the goods and thereby accepts them. On the journey to his premises C crashes his truck and the goods are totally lost. Who is liable for this identifiable loss?

It appears from the language of section 10(6), that an actual carrier who accepts goods at a time earlier than that contemplated by his contract, becomes liable from the time of acceptance. If on the other hand he should deliver them to the next actual carrier in a way or at a place not in accordance with the contract, he will remain separately responsible.[60] In the example above the consolidator, having accepted the goods, has become separately responsible according to section 10(6) and is therefore separately liable for the loss by virtue of section 10(3)(b). However A has not tendered the goods to C in accordance with the terms of his contract. The contract required the goods to be shipped to C's premises and as a result A remains separately responsible for the goods even though C has taken delivery of them.

Should both carriers be liable in equal shares? Since both are separately liable the apportioning provisions of section 7, which apply to joint liability only, do not operate. Should A be liable at all for a loss he has not caused? C on the other hand may not be insured for this type of loss which normally he would not run the risk of. Since C has accepted the goods pursuant to his contract with the contracting carrier and not as part of a sub-contract with A, the provisions of section 10(9)[61] can not apply. It seems the Act has given the contracting carrier a choice as to which actual carrier he can sue. He may even choose to sue both.[62] Which carrier the contracting carrier recovers off would probably depend upon which is the more capable of paying. Since they are not joint debtors the actual carrier off whom the contracting carrier does recover will not have the right to recover a contribution off the other actual carrier.

X. APPORTIONING THE LOSS

When actual carriers are jointly liable in accordance with section 10(3)(a), section 10(7) provides the rules for apportioning liability.

> For the purposes of sub-section 3(a) of this section, the actual carriers shall be liable in proportion to the amount of freight or other consideration payable to each of the actual carriers for the carriage performed by him.

This is a variation of the normal rules of joint liability which divide the joint debt by the number of debtors. Section 10(8) provides that where the contracting carrier has performed some of the carriage himself, and is then by virtue of section 2 an actual carrier himself, his proportion of freight is the difference between the total amount of freight payable under the contract of carriage, and the aggregate amount payable to the actual carriers. If the

contracting carrier is to receive $500 for the contract but he employs actual carriers for a total freight of $450, then his proportion of freight for the section of carrying he does himself will be calculated as $50 or 10%. He will therefore not be able to recover 10% of the loss or damage off the actual carriers but will have to bear it himself.

In some respects the operation of section 10(7) gives rise to difficulties of interpretation. The subsection fails to take into account in its wording the different kinds of contract that may exist between the parties. If the section is read in isolation then the different types of contract between the actual carriers and the contracting carrier will only be reflected in the proportion of liability of each, i.e. a carrier contracting "at declared value risk" should be receiving proportionately more freight than another carrier contracting "at owner's risk" or "at limited carrier's risk", because of the extra risk he is taking. Therefore if his proportion of freight is higher, he will be liable for more of the loss or damage. Such a method of calculation would be manifestly unfair to a carrier "at owner's risk". He has charged and negotiated on the basis that he will not be liable for any loss or damage, but he would now be obliged to pay some compensation.

Section 10(7) was devised to apportion liability under section 10(3)(a). Under section 10(3)(a) joint liability occurs subject to the terms of the carriers' respective contracts, so a carrier "at owner's risk" should not have to pay any part of the liability. Suppose that a contracting carrier, X, employs actual carrier A "at limited carrier's risk" for a freight of $150, and actual carrier B "at owner's risk" for a freight of $100. X, who is

to receive a total freight of $500, is to perform part of the carriage himself and accordingly his proportion of freight is calculated as $250 or 50%. Should any loss or damage occur for which no single carrier can be identified as separately liable, there arises the question as to how actual carrier B's proportion of liability is to be calculated and distributed.

One solution would be to calculate the aggregate liability and determine each carriers portion of liability as if all the carriers were liable to pay compensation. The exempted carrier's portion would then be borne by the actual carrier. If this method is applied to the fact situation above the proportions of liability would be calculated as X 50 per cent, A 30 per cent and B 20 per cent. Since B has contracted "at owner's risk" he will not have to pay his portion which will be borne by X whose total share of the loss will be 70 per cent.

An alternative method would be to omit the consideration payable to the carrier "at owner's risk" when calculating the aggregate consideration. This would have the effect of spreading the liability which the carrier "at owner's risk" would be expected to pay had he accepted some degree of risk amongst all the other carriers. Thus in the example above if B's freight of $100 is ignored, X and A's respective portions of the total consideration paid, will be calculated out of $400. X will be liable for 62.5 per cent of the loss while A will have to pay 37.5 per cent of it.

Unfortunately the Working Party in its report did not deal with the merits of upon whom the loss should fall. However they did clearly intend that if one carrier is "at owner's risk" the full burden of the unpaid portion of loss should fall on those

carriers who have accepted some degree of liability. The Working Party's reasoning seems to be that if an actual carrier has contracted "at owner's risk", then in the event of loss or damage occurring he is to be treated as if he never at any time was liable, not as if he is exempted from his portion of the liability. The contracting carrier is left to recover the whole debt from those carriers who are liable to him, i.e. the carriers who are liable, are liable for the whole debt and not just part of it.

It is equally unclear under section 10(7) how loss is to be apportioned where there are several different kinds of contract with the contracting carrier. X, the contracting carrier, has contracted "at declared value risk" of $2000 per unit of goods with the contracting party, P. X has sub-contracted with actual carrier A on the same basis, but his contract with actual carrier B is "at limited carrier's risk". The goods are completely lost and no carrier is identifiable as separately responsible for the goods when the loss occurred. P recovers the full $2000 per unit of goods off X. For the purposes of this example the actual carriers are liable in proportions of A 60 per cent, and B 40 per cent and accordingly owe $1200 and $800 respectively. But B by his contract "at limited carrier's risk" is liable to pay only up to $500 per unit of goods. Can X recover the extra $300 per unit of goods from A that he can not recover off B? Does the reference in section 10(3)(a) to carriers being jointly liable "...subject to the terms of their respective contracts,..." allow X to do this? Could section 10(3)(a) simply be read to mean that the contracting carrier is limited in the amount he can recover off each person by the relevant figure of maximum liability in each contract?

In the fact situation above the position should B be insolvent is fairly clear. The ordinary rules of joint liability would require A to pay the full amount of the debt to X, and it would then be left to A to recover as much as he could off the insolvent B. In drafting these provisions it may have been felt that a carrier "at owner's risk" is to be treated similarily to an insolvent one, and that the other carriers who have accepted some degree of risk should bear the burden of the "at owner's risk" carrier's portion of liability. While in the case of an insolvent debtor the creditor has not been responsible for the debtor's inability to pay, in the case of a carrier "at owner's risk" this is not so. The insolvent debtors co-debtors have agreed to run the risk of him not being able to pay by becoming contractually bound with him, but jointly liable actual carriers have not contracted to run the risk of one of their fellow carrier's contract being "at owner's risk". The contracting carrier has created the contract "at owner's risk" or "at limited carrier's risk" himself, and it seems fair that he and not the other actual carriers should bear the burden of the unpaid portion.

It seems there would be very few occasions on which a carrier would want to have a sub-contract with an actual carrier on a basis of liability different from that either with the contracting party or, with other actual carriers. If he chooses to negotiate a different kind of contract with one carrier to that which he has with other actual carriers the contracting carrier will probably have done so in order to gain some kind of benefit for himself. A contract "at owner's risk" may have been negotiated so that the contracting carrier would have to pay a lower rate of freight for a particular part of the journey. Since the contracting carrier has

run the risk of not being able to recover for loss or damage it seems only fair that the burden of the risk should fall on him. If the actual carrier "at owner's risk" is separately liable for any loss or damage, then the contracting carrier will have to bear the whole of the loss himself. The fact that no carrier can be identified as separately liable should not relieve the contracting carrier of the burden of his contract and place it on those carriers who have chosen to bear some degree of risk. By doing so the Act would in effect be making these other actual carriers bear more risk than they have contracted to bear.

Construing the Act as a whole, it seems the legislature intends that the burden of actual carrier's contracts "at owner's risk" should fall on any other actual carriers who have contracted to bear some degree of risk, in the event of there being no separately liable actual carrier. The definition of a contract "at owner's risk" in section 8(1) provides that, "The carrier shall not be liable for the loss of or damage to any goods". Section 10(3)(a) creates joint liability subject to the terms of the respective contracts of carriage. As a result an actual carrier "at owner's risk" will never be liable for loss or damage, so he can not be jointly liable, or liable at all under section 10(3)(a). Since he has not at any stage been liable he can not be included in the section 10(7) computation of the individual liability of each jointly liable actual carrier.

Similar considerations apply to the other three kinds of contract. Each actual carrier's portion of joint liability will be governed by section 10(7) up to the figure of maximum liability specified for each carrier's contract by section 8(1). So a jointly liable actual carrier "at limited carrier's risk" is jointly liable

for his portion of liability as computed by section 10(7) up to a maximum of $500.[63]

Since each actual carrier's portion of liability is governed by his contract as to the maximum amount he can pay, this will also act as a limitation on actions between actual carriers. If A, in the example above, were to pay X the full $2000 per unit of goods, he could not then claim in excess of $500 off B, even though section 15 does not extend the $500 figure of maximum liability to contracts between actual carriers. A is only entitled to claim off B the portion of liability attributed to B by the section 10(7) calculation up to the maximum figure specified in section 15.

The same reasoning is applicable when determining the relationship between section 10(4) and section 10(7). Section 10(4) exempts a carrier from liability under section 10(3)(a) if he can prove the loss or damage occurred other than while he was separately responsible for the goods. A carrier who can avail himself of section 10(4) is not jointly liable so he should not be considered when calculating the proportions of liability under section 10(7). This seems the fairest result. If one carrier can prove that he was not responsible for the goods when they were damaged, then the chances of any one of the remaining carriers being the one who should be separately liable are increased, and the burden of the loss is to some extent falling more fully in the right place. If a method of calculation were used whereby a carrier who has satisfied section 10(4) is still included in the calculation of the various portions of liability, the contracting carrier would then be left to absorb the exempted carrier's portion himself. This would be unfair as the contracting carrier, unless he has done some of the carrying himself, has definitely not been responsible for the loss.

The problems of discerning the relationship between section 10(7) and various other provisions of the statute could have been avoided if the words "jointly liable" had been included in section 10(7) so that it read,

> ...or other consideration payable to each of the jointly liable actual carriers for the carriage performed by him.

These words would have made it clear just who should be included in the calculation of liability under section 10(7).[64]

XI. CONTRACTING PARTY RIGHTS AGAINST ACTUAL CARRIERS

As has been stated already in this paper one object of the Act is to restrict actions by contracting parties against actual carriers to two situations. These are when the actual carrier has wilfully or intentionally caused the loss or damage, and, when the contracting carrier is insolvent or cannot be found. This latter right of action is restricted by section 11(1) to when the actual carrier is separately liable for loss or damage occurring while he was separately responsible for the goods according to section 10(3)(b) and section 10(6). Liability under section 10(3)(b) arises only when a carrier is separately responsible for the goods when the loss or damage happens. Therefore it can not be argued that each actual carrier is separately liable for his portion of joint liability, since joint liability arises only from loss or damage occurring while the actual carriers are jointly responsible for the goods.

This restriction seems most odd. It in effect sends the contracting party back to the pre-Act situation of having to find the carrier in whose possession the goods were when they were lost or damaged. Why was the contracting party not given the right to recover off the actual carriers when they are jointly liable? If

in fact situations above the contracting carrier X were insolvent then the contracting party P, can only sue the actual carriers A and B if he knows which one of them is separately liable under section 10(3)(b). If he cannot then he will have to join the other unsecured creditors and hope to recover some part of his loss from X's liquidator or assignee in bankruptcy.

Subsection 2 of section 11 seems similarily unfair. This section provides that when a liquidator or assignee in bankruptcy of an insolvent contracting carrier brings an action against an actual carrier for separate liability under section 10(3)(b), he is to hold any money recovered firstly for the contracting party, and then as an asset in liquidation or bankruptcy. It seems any money the liquidator or assignee in bankruptcy recovers off actual carriers under section 10(3)(a) will go into the general pool of assets, the contracting party being left to claim as an unsecured creditor. This is extremely unjust. It is more in the interests of the liquidator or assignee in bankruptcy to recover off carriers jointly liable rather than off any one separately liable actual carrier.

XII. CONCLUSION

The effects of the Act are more extensive than was envisaged by the report that originated this piece of reforming legislation.[65] In including the provisions relating to the actual carrier the Act has taken a positive step towards dealing with the problems of modern containerised transport. These provisions are somewhat complex, but they are certainly workable. Some of the flaws in the wording that seem to me to be a likely course of confusion are the inevitable result of attempting to draft such an intricate piece of legislation. These flaws do not make section 10 and

the related provisions unworkable, but it may require some judicial interpretation to determine the inter-relationship of the various provisions. The slight alteration in the wording of the Act suggested in the course of the paper may have helped clarify certain aspects of it.

In some places the Act seems unfair to some of the parties to a contract of carriage, and it is difficult to understand why these provisions were included in the form that they were. Overall the provisions relating to actual carriers seem fair, and the Transport Industry should, without too much difficulty, be able to regulate its activities according to them.

FOOTNOTES

1 Wellington, 26 April 1968.

2 C.I. Patterson, I.M. McKay, R.L. Whyte.

3 Wellington, 14 November 1978.

4 Working Party Report, para. 12.

5 s.6.

6 The Carriage by Air Act 1967, s. 28.

7 For a description of the law under The Carriers Act 1948 refer to an article by D.P. O'Connell, Carriers: The Law of Common Carriage in New Zealand, [1955] N.Z.L.J. at p.26.

8 Regulation 23 of The Transport Licensing Regulations 1963 "...the licensee shall upon request for transport, as authorised by the license, the goods of all persons conveniently served by him without discrimination among the hirers or in the charges levied."

9 Geering v. Stewart Transport Ltd. [1967] N.Z.L.J. 802; Drinkrow v. Hammond & McIntyre Ltd. [1954] N.Z.L.J. 442, 449-450. In the latter case F.B. Adams J. noted that there may be provisions in the license to the contrary, or the licensee may act in breach of his license.

10 s.15.

11 s.9(1).

12 s.8(4).

13 subsections 5,6 and 7 of s.8.

14 s.8(9).

15 s.17.

16 ss.18 and 19.

17 s.20.

18 s.21.

19 s.22.

20 s.23.

22 ss.25,26 and 27.

23 s.2.

24 Ibid.

25 Ibid.

26 Any carriage of goods, including incidental services, performed by Harbour Boards was by the First Schedule to the Act made subject to it. The Harbour Boards objected most strenuously to their inclusion on the grounds that the majority of the services they provided in the way of storage of goods were gratuitous.

27 In practice it seems that recompense was often gained by placing pressure upon the last actual carrier through the threat of taking business elsewhere in future. The success of such a tactic might well have depended upon how much carrying of goods the consignor or consignee normally required in the course of his business.

28 Marston Excelsior v. Arbuckle Smith & Co.Ltd. (1971) 2 Ll L Rep 306 high-lighted the consequences of negotiating with a forwarding agent.

29 Donoghue v. Stevenson [1932] A.C. 379.

30 [1961] N.Z.L.R. 668; [1962] N.Z.L.R. 407.

31 The Government Railways Act 1949, s.23.

32 (1835) 2 C.M.& R. 659,660.

33 The Winkfield [1900-03] All E.R. 346.

34 Ibid.

35 Eastern Construction Co.Ltd. v. National Trust Company [1914] A.C. 197.

36 Ibid.

37 [1966] 1 Q.B. 716.

38 s.11.

39 [1954] N.Z.L.R. 442.

40 [1967] N.Z.L.R. 809.

41 Supra n.39.

42 Section 8(11) has the practical value of allowing a contracting carrier to have a blanket contract with actual carriers he often uses. This contract applies every time the actual carrier undertakes a carriage for him, notwithstanding the kind of contract he has on each occasion with the contracting party.

43 s.8(4).

44 In times of financial difficulty it appears small carriers are sometimes forced to accept onerous or even unfair terms just to get work. Some protection in this area would surely be justified.

45 It is understood that one freight forwarder has informed his actual carriers that they will not be claimed off in excess of $40, (The Carriers Act 1948 limit), so that he will not face any rise in his internal costs.

46 s.10(2).

47 s.10(3)(a).

48 s.10(3)(b).

49 In the original 1977 Bill clause 8 extended successive joint and several liability contracts of carriage to all modes of transport.

50 Norbury, Natzio & Co. v. Griffiths [1918] 2 K.B. 369. See also Code of Civil Procedure R.95.

51 Wilsons, Sons & Co.Ltd. v. Balcarres Brook S.S. Co.Ltd. [1893] 1 Q.B. 422.

52 Lowe v. Dixon (1885) 16 Q.B.D. 455, 458; Hitchman v. Stewart (1855) 3 Drew 271.

53 The Judicature Act 1908, s.94; T.H. Green & Co. v. Smythes (1912) 15 G.L.R.353; Lamb v. Thirkell [1932] N.Z.L.R. 1670.

54 The Judicature Act 1908, s.85.

55 Nicholson v. Revill (1836) 4 A.& E. 675; Jenkins v. Jenkins [1928] 2 K.B. 508. The term "covenant not to sue" was used to distinguish it from a release when it came to be recognised that effect should be given to a creditor's intention to release only one joint debtor: See Halsbury's Laws of England 4th ed. volume 9 para. 627 n.2.

56 s.10(5).

57 subsections 3 and 4 of s.9.

58 s.9(2).

59 s.2.

60 Presumably he would remain liable until that time when, had he acted in accordance with the contract, he should have delivered the goods.

61 Section 10(9) provides for contracts between actual carriers and secondary actual carriers to which the contracting carrier is not a party. The subsection also provides rules for distributing liability between the two actual carriers.

62 The Code of Civil Procedure R.64 allows a plaintiff to join two defendants if he is unsure who to sue.

63 Where one of the contracts is "on declared terms" then section 10(7) will operate to the extent it is consistent with the terms of the contract.

64 The Working Party at page 8 of the Appendix F of their report suggested the following words be included in a new sub-clause 5 of clause 8 of the Carriage of Goods Bill 1977.
"Actual carriers who are jointly liable under subsection (1) of this section shall contribute pro rata according to the freight charged by them respectively."

65 Supra n.1.

ADDENDUM

21 s.24