INSIGHT

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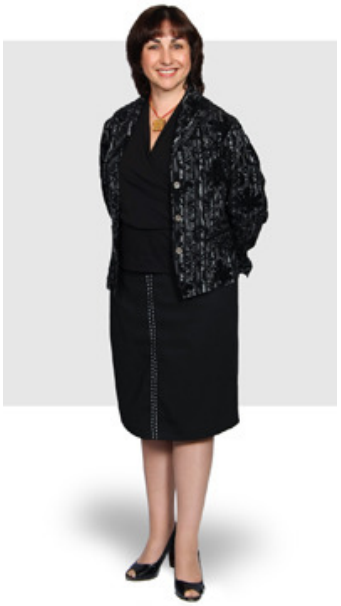

Waterfront Dodgems—A Dissenting View

In a newsletter in November 2006 we commented on the High Court decision in *Ports of Auckland Limited v Southpac Trucks Limited.* That case has the rare distinction of having now been heard at all four levels of the judicial system, having started life in the District Court and with the Supreme Court last October delivering the final word. Along the way there have been significant differences of judicial opinion with the District Court and Court of Appeal finding in favour of Southpac, and the High and Supreme Courts determining the matter in favour of POAL. Commentary subsequently has mainly been supportive of the Supreme Court's position, which has been said to remove the uncertainties perceived to have been created by the alternative view. We, however, do not agree that uncertainty was created, or that the Supreme Court got it right.

The facts of the case are now relatively well known. Southpac imported six Kenworth trucks into New Zealand, and those travelled to New Zealand from Australia on a CP Ships vessel, under a CP Ships bill of lading. CP Ships contracted POAL to discharge the trucks from the ship and deliver them to a storage area on the wharf. POAL subcontracted that work to Southern Cross Stevedores Ltd, which in its turn subcontracted it to Wallace Investments Ltd. After one of the trucks had been driven off the ship by a Wallace employee, it was hit by a forklift driven by an employee of POAL who was at the time engaged in business unrelated to the trucks. The cost to repair the damage to the truck was just over $60,000.

Southpac issued proceedings against POAL, asserting that it was vicariously liable for the damage caused by its negligent employee. POAL admitted liability but said that it was entitled to limit its liability to $1500 under the Carriage of Goods Act. The Supreme Court has now agreed.

It was clear that POAL, at the time of the incident, was neither the contracting carrier for the purposes of the Act (that being CP Ships) nor an actual carrier. The definition of "actual carrier" requires the particular carrier to be in possession of the goods for the purpose of performing some part of the carriage or a service incidental to carriage, and POAL never took possession.

POAL did however fall within the definition of "carrier". A "carrier" under the Act is anyone who, in the ordinary course of their business, carries or procures to be carried goods owned by any other person. In contracting with CP Ships for the movement of the truck and then subcontracting the performance of that obligation, POAL became a "carrier". That being so, section 6 applied. Section 6 (generally) says that no carrier shall be liable as such except in accordance with the provisions of the Act. The Supreme Court thus concluded that so long as POAL was a "carrier" it would almost always be protected by the limitation provisions of the Act where one of its employees was responsible for the damage.

There are a number of problems with this analysis. To begin with, section 6 says that no carrier shall be liable "as such" except in accordance with the provisions of the Act. The Act does not in fact have any provisions setting out the liability of a "carrier" – the liability sections govern the liability of contracting carriers and actual carriers. The Supreme Court did not address the question of how POAL could be given the benefit of a statutory limitation when the statute itself does not create one.

The even more fundamental question of whether it was correct to categorise POAL as a "carrier" at all, was not discussed, although the penultimate paragraph of the judgment suggests that it may have been raised on behalf of Southpac.

The correct position, as we see it, is that the definition of "carrier" in the Act performs no other function than to describe the types of activity that will, at a prima facie level, bring a person or entity within the scope of the Act. From there it is necessary to go further and determine what *type* of carrier is involved - whether the carrier is a contracting carrier or an actual carrier. The answer to that question will dictate how the rest of the Act will apply to the person or entity in question. The Act does of course use the single word "carrier" in numerous places, but once it is seen that this is just shorthand used instead of saying something like "the contracting carrier or any actual carrier, as the case may be" those references become clear.

In other words, our view is that the Act creates a liability framework for contracting carriers and actual carriers only. It does not create a third category of "carriers" who independently also have liability. If an entity who causes damage to goods is neither a contracting carrier nor an actual carrier, the Act does not apply to it at all.

That logic overcomes the tortuous reasoning by which the Supreme Court determined that POAL, being neither a contracting nor an actual carrier at the time of the damage, was nevertheless entitled to limit its liability for damage to the truck, caused by someone who was not undertaking any services in relation to the truck at the time.

In the Supreme Court's view, once an entity has the status of "carrier" in relation to particular cargo, the Act protects it in virtually all circumstances, the notable exception being intentional damage, even though the person who caused the damage was operating in a totally different capacity at the time and was not performing any carriage at all in relation to the damaged cargo. Interestingly though, it was accepted by the Supreme Court that if the damage to the truck had been caused by a forklift driver who was not POAL's employee, the employer of that forklift driver would not be able to secure the protection of the Act.

The elevation of *status* over *capacity* leads to extraordinary results, including the startling assertion by the Supreme Court that if the truck had been damaged in a collision with a car being driven on the wharf by a drunken hypothetical POAL chief executive, then provided the chief executive was on port business at the time, POAL would still be able to limit its liability. It follows that if the chief executive were merely the passenger in a car driven by someone not employed by POAL, that other person would not be entitled to limit. There is no good reason for the outcomes in these sorts of situations to be different. The Supreme Court said it wished to avoid "the need for factual determinations and the making of fine distinctions" – but has demonstrably failed to achieve that goal.

The Supreme Court decision makes references to the quality of the drafting of the Act, to the fact that over the years it has needed little amendment, and also to the very limited number of cases that have come before the courts, all of which it took as evidence that the Act works precisely as intended. Unfortunately that conclusion, while the superficially obvious one to be drawn, is not accurate. While the Act does indeed work well in most circumstances, those who work with it regularly will be more than aware of the very considerable number of fact situations that arise that don't "fit" comfortably at all. As a particular example, the Act does not adequately deal with some of the issues that can arise when goods are handled by combined logistics warehouse / distribution centres, those not being in contemplation back in 1979. The reason for the limited amount of litigation over the grey areas is that normally the amounts involved are not high enough to justify the cost of proceeding, and not because all are satisfied that the answer is obvious.

Ports of Auckland Limited v Southpac Trucks Limited [2009] NZSC 112

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