Topic Six
Measure of Damages

1) Restitutio in integrum

2) Arrived Sound Market Value

3) Direct and Foreseaable Damages

4) Civil Law and Common Rules on Damages

5) Invoice Value Clauses – art. 3 (8)

6) Per Package Limitation
7) Hague Rules – art. 4(5)
8) $500. 00
9) Visby – amended art. 4(5)
10) 10, 000 poincaré gold france or 30 p.g.f. per kilo.
11) (666.67 SDR per package or 2 SDR per kilo)
12) Hamburg – art. 6(1)(a) 835 SDR per package or 2.5 SDR per kilo.

References:

13) Tetley, *Marine Cargo Claims*, 3 Ed. c. 13, "Measure of Damages" or MCC IV at www.mcgill.ca/files/maritimelaw/ch13.pdf

14) Nabob Foods v. The Cape Corso [1954] Ex. C.R. 335; [1954] 2 Lloyd's Rep. 40 (re: invoice value clauses) (C.B. at p. 172)

15) Crelinsten Fruit Co. v. The Mormacsaga [1968] 2 Lloyd's Rep. 184; 1969 AMC 202 (Ex. Ct. of Canada) (C.B. at p. 174)

16) Vana Trading Co. Inc. v. S.S. Mette Skou 1977 AMC 702, 566 F 2d 100 (2 Cir 1977) (C.B. at p. 180)

17) Canastrand Industries Ltd. v. The Lara S. [1993] 2 F.C. 553, (1993) 60 F.T.R. 1 (C. B. at p. 120)

(MCC IV, Chap. 13 at www.mcgill.ca/files/maritimelaw/ch13.pdf)

Additional Reading

Direct and Foreseeable Damages: Bethleham Steel Corp. v. St. Lawrence Seaway Authority [1978] 1 F.C. 464
Marine Floridian Lim Proc 1980 AMC 974 (E.D. Va. 1980)
L & N.R.R. Co. v. Bayou Lacombe 597 F. 2d 469, 1980 AMC 2914 (5 Cir. 1979)

Rate of Exchange: Phillip Holzman v. Hellenic Sunbeam 1977 AMC 1731 (S.D. N.Y. 1977)

Interest: Yeramex International v. S.S. Tendo 1977 AMC 1807. (E.D. Va. 1977) (C.B. at p. 109)
ETS Gustave Brunet v. M.V. Nedlloyd Rosario 929 F. Supp. 694, 1997 AMC 803 (S.D. N.Y. 1996) (C.B. at p. 306)

Invoice Value Clauses: A.L. Holden v. S.S. Kendall Fish 1968 AMC 2080; 395 F. 2d 910 (5 Cir. 1968) in first instance 1967 AMC 327, 262 F Supp. 862 (E.D. La. 1966)

Per Package Limitation: Pannell v. U.S. Lines 263 F. 2d 497, 1959 AMC 935 (2 Cir. 1959), cert. denied 359 US 1013, 1959 AMC 1604 (1959)
Mediterranean Marine v. Clark 485 F. Supp. 1330, 1980 AMC 1731 (D. Md. 1980)
The "Aegis Spirit" [1977] 1 Llody's 92, 1976 AMC 779 (D. Wash. 1976)
General Electric v. Lady Sophie 1979 AMC 724; 458 F Supp. 620 (S.D. N.Y. 1978)
American Express v. U.S. Lines 1979 AMC 218 (NY Supreme Court 1978)

Questions

1) Is an invoice value clause valid?

2) Is a clause which forces the carrier to pay more than arrived sound market value valid?

3) What is the utility of the Visby Rules' and the Hamburg Rules' changes in respect to per package limitation?

4) Should delay be covered by damages awarded by a Court?

5) Should interest be awarded? From when?

6) Should inflationary loss be awarded?

7) Should court costs be awarded?

NABOB FOODS, LTD. v. "CAPE CORSO" (OWNERS).EXCHEQUER COURT OF CANADA (BRITISH COLUMBIA ADMIRALTY DISTRICT)

[1954] 2 Lloyd's Rep 40

HEARING-DATES: 8 June 1954

8 June 1954

CATCHWORDS:
Bill of lading - Valuation clause - Clause "lessening liability" - Repugnancy - Carriage of Goods by Sea Act, 1924, Schedule, Art. III(8).

HEADNOTE:
Damage to cargo of pepper shipped in defendants' steamship Cape Corso from Liverpool to Vancouver (B.C.) - Shipment under bill of lading providing by Clause 9 that the value of the cargo in the calculation and adjustment of claims for which the carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the carrier's liability shall in no case exceed £ 100 per package or other freight unit or pro rata in case of partial loss or damage.

Sound market value greater than invoice value plus freight and insurance but less than £ 100 per package - Right of shipowners to apply Clause 9 - Plea by plaintiff cargo-owners that Clause 9 was void as contravening Art. III(8) of the Carriage of Goods by Sea Act, 1924, which provided:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article for lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. - Held, that Clause 9 was a clause "lessening" defendant shipowners' liability and was accordingly null and void; and that plaintiffs were entitled to recover as damages the difference between the arrived sound market value and the arrived damaged market value.

CASES-REF-TO:

Australasian United Steam Navigation Company, Ltd. v. Hiskens, (1914) 18 C.L.R. 646;
Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company, (1920) 253 U.S. 97;
Pan-Am. Trade & Credit Corporation v. The Campfire, (1946) 156 Fed. (2nd) 603;
Smith v. The Ferncliff, (1939) 306 U.S. 444;
Steel Inventor, (1940) 35 Fed.Supp. 986.

INTRODUCTION:
This was an action in which Nabob Foods, Ltd., as bill of lading holders, claimed in respect of damage to a cargo of pepper shipped in defendants' steamship Cape Corso from Liverpool to Vancouver, B.C. The defendants sought to apply a valuation clause in the bill of lading, but the plaintiffs contended that such clause was void as contravening Rule 8 of Art. III of the Carriage of Goods by Sea Act, 1924, which governed the shipment. The valuation clause in the bill of lading, Clause 9, provided that the value of the cargo in the calculation and adjustment of claims for which the carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the carrier's liability shall in no case exceed £ 100 per package or other freight unit or pro rata in case of partial loss or damage.

Art. III (8) of the Schedule to the Act of 1924 provided:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

The parties agreed that the value of the pepper was less than £ 100 per package, and that the sound market value was greater than the invoice value plus freight and insurance.

The further facts and arguments are sufficiently set out in his Lordship's judgment.

COUNSEL:
Fred H. H. Parkes appeared for the plaintiffs; Paul Daniels represented the defendants.

PANEL: Before Mr. Justice SIDNEY SMITH.

JUDGMENTBY-1: Mr. Justice SIDNEY SMITH

JUDGMENT-1:
Mr. Justice SIDNEY SMITH: This is an action by the holder of a bill of lading against a shipowner for damage to a shipment of black pepper in the course of a voyage from Liverpool to Vancouver (B.C.). The bill of lading was issued in England, and it is common ground that the English Carriage of Goods by Sea Act, 1924, applies. The Schedule to that Act governs bills of lading, and Rule 8 of Art. III of the Schedule provides:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

Clause 9 of the bill of lading provides that the value of the cargo in the calculation and adjustment of claims for which the carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the carrier's liability shall in no case exceed £ 100 per package or other freight unit or pro rata in case of partial loss or damage.

The neat question in this case is whether this clause governs or whether it is void as contravening Rule 8 of Art. III of the Schedule to the Act.

I may mention here, though its relevance is in dispute, that Rule 5 of Art. IV of the Schedule to the Act provides:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £ 100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

It is agreed that the value of the goods in question is less than £ 100 per package, and that the sound market value of the goods was greater than their invoice value plus freight and insurance. It seems to be also agreed that the rule, apart from contractual modifications, is that the measure of compensation for goods damaged in transit is the arrived sound market value. The question then is whether Clause 9 of the bill of lading effectively modifies this rule.

There is no English or Canadian decision directly in point; but there are at least two English decisions and many American decisions on the American Harter Act, 1893, which have resemblances to the 1924 English Act, and there is a decision of the Australian Supreme Court on the Australian Sea-Carriage of Goods Act, 1904 which is founded on the Harter Act. More recently, both the United States and Australia have Acts which incorporate the same provisions as the Schedule to the English Act; and on these there is a decision by the Supreme Court of Australia, decisions by American Federal Courts, and a dictum in point by the American Supreme Court. There is no direct decision.

The relevant parts of the Harter Act read:

1. It shall not be lawful . . . to insert in any bill of lading any clause, covenant or agreement whereby [the manager, agent, master or owner of any vessel] shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading. . . . Any and all words or clauses of such import inserted in bills of lading . . . shall be null and void and of no effect.

2. It shall not be lawful . . . to insert in any bill of lading . . . any covenant or agreement whereby the obligations of the owner or owners of [the] vessel to exercise due diligence . . . or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo . . . shall in any wise be lessened, weakened, or avoided.

And one matter for consideration is whether the differences between that Act and the English Act of 1924 are material enough to make decisions on the Harter Act distinguishable.

A number of decisions under the Harter Act and the decision of the Supreme Court of Australia in Australasian United Steam Navigation Company, Ltd. v. Hiskens, (1914) 18 C.L.R. 646, held that a clause agreeing on the value of the cargo did not "relieve" the shipper "from liability" and should be upheld. In the Australian case and in several of the earlier cases in the American Supreme Court, valuation clauses were upheld largely because the valuation declared by the shipper was made the basis for computing the freight payable.Apart from any express agreement that the declared value should govern damage claims, it would be difficult to see how the shipper could avoid an estoppel and claim a larger amount after inducing the carrier to act on the agreed value to his detriment.

But apart from this the American Supreme Court held that an agreement as to value was not an agreement that the carrier should "be relieved from liability." It was pointed out that the carrier's liability might be modified, but was not removed, and that if prices fell during the voyage the liability might be increased rather than lessened. This principle was carried so far that in Smith v. The Ferncliff, (1939) 306 U.S. 444, the American Supreme Court held that a clause almost identical with Clause 9 in the present case should be upheld, even though the declared value in that case had no bearing on the freight payable. I was at first inclined to doubt the validity of this conclusion, but further reflection has persuaded me that there is much to be said for it, having regard to the language of the Harter Act. I do not, however, agree with one reason suggested, namely, that the clause here was a "valuation" clause. The true reason would seem to be that the clause did not purport to "relieve" the carrier from liability.

The Harter Act, it may be noted, did forbid the "lessening" of the carrier's "obligations," but these obligations were confined to obligations to carefully handle and stow cargo, and did not extend to the general obligation to pay for damage to cargo. The importance of the phraseology is shown by the case of Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company, (1920) 253 U.S. 97. This was a decision on the Cummins Amendment Act of 1915, which dealt with Inter-State railway traffic. Before the amendment the governing Act was construed to permit a clause like that upheld in Smith v. The Ferncliff, sup., i.e., one fixing the value of the goods for adjustment purposes. But the amendment made carriers liable for the actual loss, notwithstanding any agreement. Under this Act a clause similar to our Clause 9 was held to be invalid, and the Court refused to support the clause merely because it was reasonable; nor on the further ground that it did not necessarily lessen the carrier's liability but might even increase it. The Cummins Amendment Act, it is true, expressly invalidated an "agreement as to value" which would affect liability for actual loss; whereas the 1924 Act does not do this in terms. However, the McCaull-Dinsmore case is still important as showing that any clause within the literal prohibition of the statute cannot be supported merely because it is reasonable. Moreover the statute is not to be construed as forbidding only clauses that necessarily lessen liability; a clause is bad whenever in the particular case it operates against the language of the statute.

The statute of 1924 goes considerably further than the Harter Act. Unlike the Harter Act, it not only nullifies any clause that "relieves" the carrier "from liability," but also any clause "lessening such liability." This covers liability to pay, as well as obligations to handle goods properly. Such language, I think, makes the McCaull-Dinsmore decision applicable. That is, a clause such as we have in Clause 9 is void whenever it would operate to lessen what would otherwise be the carrier's liability, regardless of the fact that under other circumstances the effect would be to increase the liability. That, I think, is the effect of the American decisions on the new Act, * which is essentially the same as the English Act. I refer to The Steel Inventor, (1940) 35 Fed.Supp. 986, and Pan-Am. Trade & Credit Corporation v. The Campfire, (1946) 156 Fed. (2nd) 603. Even Smith v. The Ferncliff, sup., which is the most favourable case

to the defendant, is small comfort, because the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new Act.

* U.S. Carriage of Goods by Sea Act. 1936.

The defendant argued that it would be unreasonable to prevent a pre-estimate of damage when the parties (say, two minutes after a claim for damages had arisen) had it in their power to make an agreement as to the valuation which should form the basis of an adjustment of the loss.

But the McCaull-Dinsmore case shows that the mere reasonableness of a clause is not enough to support it if it goes against the language of the statute. Furthermore, after a loss the parties are on a parity; but at the time of shipment the carrier is often in a position to dictate to the shipper what terms the bill of lading shall contain. The Act presumably strikes at such potential dictation.

But all that aside and apart from authority, looking at Clause 9 of our bill of lading, I find it impossible to say that this clause is not directed to liability, and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this bill of lading declared that the arrived sound market value was to be taken at £ 900, that would govern, even though I might conclude that the real market value was £ 1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something entirely different; in other words, an entirely new measure of damages for the common law measure.In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to.

Rule 5 of Art. IV of the Schedule seems to have no bearing here, since the plaintiff is not claiming £ 100 for any package. If the declared value had been less than £ 100 and the arrived market value more than that sum, a nice question might have arisen.

The damages will go to the learned Registrar for assessment, the measure being the difference between the arrived sound market value and the arrived damaged market value.

SOLICITORS: McMaster, Boyle & Parkes; Lawson, Lundell, Lawson & McIntosh.

[The Mormacsaga]
CRELINSTEN FRUIT COMPANY v. THE "MORMACSAGA"(THE "MORMACSAGA")

CANADA EXCHEQUER COURT (QUEBEC ADMIRALTY DISTRICT)

[1968] 2 Lloyd's Rep 184

HEARING-DATES: 19 July 1968

19 July 1968

CATCHWORDS:
Carriage by sea - Damage to cargo - Delivery delayed by strike - Vessel ordered to strike-bound port by owners - Damage to cargo due to delay when vessel became strike-bound - Effect of exemption clause in bill of lading - Whether owners had exercised due care to protect and safely carry cargo - U.S. Carriage of Goods by Sea Act, 1936.

HEADNOTE:
On June 26, 1965, plaintiff's oranges were loaded at Santos, Brazil, for delivery at Montreal on defendants' steamship Mormacsaga (an American vessel) under bills of lading which provided that defendants should not be liable for loss or damage arising or resulting from strikes or lock outs. Bills contained a liberty clause entitling defendants to deviate. Vessel was scheduled to call at (inter alia) Jacksonville, Fla. On June 26, 1965, it was common knowledge that Jacksonville was strike-bound for all American ships. Mormacsaga arrived at Jacksonville on July 14, 1965, and was strike-bound until Sept. 2, 1965. On arrival at Montreal plaintiff's oranges were found to be damaged due to delay while Mormacsaga was strike-bound. Plaintiff claimed against defendants contending that defendants did not exercise due diligence to make vessel seaworthy and fit to carry oranges. Defendants denied liability, pleading bill of lading clause and contending that at time vessel entered Jacksonville there was a strong possibility that strike would end without delay. - Held, by ARTHUR I. SMITH, J., (1) that test was whether defendants acted with proper regard for rights of consignees as well as with reasonable care for those

rights; that defendants' allegation that there appeared to be a possibility that strike might end at time vessel entered Jacksonville was not established by proof; that, accordingly, defendants, by entering Jacksonville rather than proceeding directly to Montreal, failed to act with reasonable care and prudence and with proper regard to preservation of plaintiff's cargo; and that, therefore, defendants were liable; (2) that an allowance of 15 per cent. as compensation for loss of profit would be reasonable and just. Judgment for plaintiff.

INTRODUCTION:
In this case, the plaintiff, Crelinsten Fruit Company, claimed against the steamship Mormacsaga in respect of damage to a shipment of oranges while carried on board the Mormacsaga on a voyage from Santos, Brazil, to Montreal, Canada. The damage was due to delay in delivery while the vessel was strike-bound at Jacksonville, Florida.

The further facts and arguments are sufficiently stated in the judgment of Mr. Justice Arthur I. Smith.

COUNSEL:
William Tetley, Q.C., and Claude A. Sheppard appeared on behalf of the plaintiff; Charles Alexander represented the defendant.
PANEL: Before Mr. Justice ARTHUR I. SMITH

JUDGMENTBY-1: Mr. Justice ARTHUR I. SMITH

JUDGMENT-1:
Mr. Justice ARTHUR I. SMITH: The plaintiff claims in respect of damage to a shipment of oranges which the defendants contracted (in accordance with 12 bills of lading, Exhibit P-1) to transport in the defendants' vessel from Santos, Brazil, to Montreal.

Since the allegations contained in the statement of claim and statement of defence respectively concerning the commencement of the voyage at Montevideo, the progress of the vessel from that port to Buenos Aires to Paranagua, Santos, Angra dos Reis, Rio de Janeiro, and hence to Jacksonville, Florida, are substantially in accord with the facts proven at the trial it would seem desirable to set out the respective allegations of the statement of claim and statement of defence as follows:

STATEMENT OF CLAIM
Plaintiff brings suit and declares:

1. THAT under twelve clean bills of lading being Nos. 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510 and 511 dated at Santos on June 26, 1965, 9,520 standard cases and 16,000 half cases of oranges were received on board the S.S. MORMACSAGA at Santos, Brazil, in good order and condition, stowed in refrigerated space by Defendant owners of the S.S. MORMACSAGA**,** who contracted to care for and carry the said cargo to Plaintiff in Montreal, in the same good order and condition, the whole as more fully appears from originals of the said bills of lading produced together as Exhibit P-1 to form part hereof.

2. THAT in fact on June 26, 1965 when said oranges were loaded on board the S.S. MORMACSAGA at Santos, Brazil, Defendants knew and it was common knowledge that the MORMACSAGA, a United States Flag Vessel and its American unionized crew, if it put into an American East Coast port, would be subject to a strike which involved all American deck officers, radio operators and crews who had walked off all ships at American east coast ports on June 15, 1965.

3. THAT in fact, on June 26, 1965, Jacksonville, Florida, United States of America was strikebound for all American Flag Ships and crews and had been since June 15, 1965, and this was common knowledge and was known to Defendants.

4. THAT despite the foregoing the MORMACSAGA sailed to Jacksonville, Florida, arriving on or about July 14, 1965, the crew immediately left the ship, and the ship and its cargo were strikebound for 50 days until September 2, 1965 when the strike terminated.

5. THAT Defendants and other ocean carriers diverted other ships from East Coast American ports to avoid the strike but Defendants did not divert the MORMACSAGA.

6. THAT at Toronto, Defendants' local agent admitted to William D. Branson that Defendants took a calculated risk in ordering the MORMACSAGA into Jacksonville and did so for their own benefit because they hoped the strike would terminate soon.
. THAT the proceeding of the MORMACSAGA to Jacksonville, Florida, by Defendants was an intentional act, breaching and nullifying the contract and Defendants have no rights under the law, the contract or otherwise and Defendants are thus in the position, place and stead of insurers of the contract to carry.

8. THAT before the arrival of the MORMACSAGA at Montreal, Plaintiff advised Defendants of the probable effects of the delay and of the steps they intended to take to mitigate damages, the whole as more fully appears from a copy of Plaintiff's letter dated September 14, 1965, produced as Exhibit P-2 to form part hereof; Defendants being called upon to produce the original, otherwise secondary proof will be made.

9. THAT the MORMACSAGA arrived at Montreal on or about September 22, 1965;

10. THAT surveyors and experts visited the ship at time of discharge, tested the cargo and found that the long delay had affected the quality of the oranges, and more particularly the oranges were dried out, juice sacks and cells were dry, the oranges were no longer marketable, the remaining juice was flat and insipid and unuseable even for orange juice, the whole as more fully appears from:

a) Preliminary report of Professor H. R. Murray and Associate Professor J. David;

b) Final Report of Professor H. R. Murray and Associate Professor J. David;

c) Survey Report of Hayes, Stuart & Co. Limited, dated December 15, 1965;

the whole as more fully appears from said reports produced together as Exhibit P-3 to form part thereof.

11. THAT the arrival of the S.S. MORMACSAGA at Montreal, on or about September 22, 1965, glutted the market with other oranges, the value of the said shipment had fallen and said oranges were short whilst others were damaged, refused entry and ordered destroyed by Government Inspectors, the whole as appears from the following Certificates;

a) Proces-Verbal No. 6979 dated October 6, 1965, Department of Agriculture of the Province of Quebec dumping certificate with trucking receipts attached;

b) Proces-Verbaux Nos. 5849 and 5850 dated October 7, 1965 of the Department of Agriculture of the Province of Quebec;

c) Proces-Verbal No. 7018 dated November 12, 1965 of the Department of Agriculture of the Province of Quebec;

d) Inspection Certificate Department of Agriculture of Canada, No. 367675-S-6.

produced together as Exhibit P-4 to form part hereof.

12. THAT at the time of discharge and delivery of the oranges, Plaintiff gave formal notice of the delay in delivery, the loss, damage and shortage, the whole as more fully appears from a copy of a letter dated September 24, 1965 of Plaintiff's Attorneys to Defendants and their Attorneys, which letter was delivered by hand September 24, 1965, and which letter is produced as Exhibit P-5 to form part hereof, Defendants being called upon to produce the original, otherwise secondary proof will be made.

13. THAT at the time of discharge and delivery, Defendants, their agents and preposes were advised of the delay in delivery, the shortage and damage, admitted same, received bad order and short landing receipts, and yet were unable to find the lost oranges nor were they able to repair the damage, and Defendants are called upon to produce bad order receipts and tallies, otherwise secondary proof will be made.

14. THAT Plaintiff kept Defendants informed of its efforts to mitigate damages, the whole as more fully appears from a copy of a letter of Plaintiff's Attorneys of October 15, 1965 to Defendants' Attorneys produced herewith as Exhibit P-6 to form part hereof, Defendants being called upon to produce the original, otherwise secondary proof will be made.

15. THAT on or about January 19, 1966 Plaintiff, through its Attorney, fyled a claim on Defendants by a letter dated January 19, 1966 (with attachments including copies of all the documents already fyled herein as Exhibits P-3 and P-4), the whole as more fully appears from a copy of said letter with attachments produced as Exhibit P-7 to form part hereof, Defendants being called upon to produce the original and attachments, otherwise secondary proof will be made.

16. THAT plaintiff is entitled to penal damages in the amount of twenty thousand dollars ($20,000.00) against Defendants due to Defendants' intentional breach of the contract and intentional sailing to a strike bound port and refusal to pay although duly called upon so to do.

17.THAT, as a direct result of the foregoing, Plaintiff suffered a direct loss of $95,721.27 as follows: -

Loss relating to Montreal oranges	$35,000.05
Loss relating to Toronto oranges	39,707.22
Expenses	1,014.00
	$75,721.27
Penal damages	20,000.00
	$95,721.27

the whole as more fully appears from statements already produced herewith as Exhibit P-7 to form part hereof.

18. THAT at all material times herein, Plantiff Crelinsten Fruit Co. was the owner and consignee of the shipment of oranges, was the holder, owner and endorsee for value of the bills of lading and all rights thereunder and was named as ultimate consignee on the bill of lading.

19. THAT at all material times herein, Moore-McCormack Lines Inc. was the owner of the S.S. MORMACSAGA, the carrier of the shipment in question, and is jointly and severally responsible with the ship to Plaintiff for the loss of $95,721.27 and has admitted its responsibility, the whole as appears from a letter of the President dated September 2, 1965 and produced herewith as Exhibit P-8 to form part hereof.

20. THAT Defendants, prior to or upon the departure of the S.S. MORMACSAGA from Santos, did not exercise due diligence to make said vessel in all respects seaworthy and fit to carry the said oranges and the ship was at the time of her departure and at various stages of the voyage unseaworthy and as a result Defendants are entitled to none of the rights or immunities of which they might otherwise benefit under the provisions of the law, the bill of lading or any contract.

21. THAT although duly called upon, Defendants refuse to pay the said sum of $95,721.27, although indebted for that amount to Plaintiff.

22. THAT Plaintiff's action is well founded in fact and in law.

23. THAT Plaintiff reiterates that it invokes and particularly pleads the Carriage of Goods by Sea Act of the United States of America as the law of carriage applicable in the present case which Act has already been invoked and pleaded in Paragraph 1 of each of the bills of lading already produced together as Exhibit P-1 and which Act is set out in detail in Exhibit P-9 produced herewith to form part hereof.

STATEMENT OF DEFENCE

For Defence to Plaintiffs' Amended Statement of Claim the Defendants state:

1) THAT as to paragraph 1 of Plaintiffs' amended Statement of Claim the twelve bills of lading produced together as Plaintiffs' Exhibit P-1 speak for themselves and any allegation not in conformity therewith is denied.

2) THAT as to paragraph 2 thereof they admit that on June 26th, 1965, when the MORMACSAGA was at Santos, they knew that if the vessel had put into a port on the East Coast of the United States of America on June 26th, 1965 she would have become strike-bound, but they deny the implication which Plaintiffs seek to draw that they knew the

strike would still be in progress when the vessel arrived at a port on the East Coast of the United States;

3) THAT they admit paragraph 3 thereof;
4) THAT they admit paragraph 4 thereof with the following corrections:

(a) the vessel arrived on July 13th, 1965;

(b) the strike lasted until August 31st, 1965;

5) THAT as to paragraph 5 thereof they admit that they did not divert the MORMACSAGA; they also admit that they subsequently did divert some other vessels belonging to them but add that this allegation is irrelevant and illegally pleaded; they are ignorant of what was done by other ocean carriers and add that this allegation is also irrelevant and illegally pleaded;

6) THAT they are ignorant of the allegations contained in paragraph 6 thereof and further state that these allegations are irrelevant and illegally pleaded;

7) THAT as to paragraph 7 thereof they admit ordering the MORMACSAGA to proceed, as scheduled, to Jacksonville, Florida, but deny the remaining allegations contained in the said paragraph including the implications which the Plaintiffs seek to draw from the fact that the MORMACSAGA was ordered to proceed to Jacksonville;

8) THAT as to paragraph [8] thereof they admit the existence of the letter produced as Plaintiffs' Exhibit P-2, which letter speaks for itself, but they do not admit the truth of the statements and allegations contained therein except to the extent that they correspond to the statements and allegations contained in this Statement of Defence, and further state that the said letter and the contents thereof are in any event irrelevant and illegally pleaded;

9) THAT they admit paragraph 9 thereof;

10) THAT as to paragraph 10 thereof they admit that surveyors and experts visited the MORMACSAGA during discharging operations at Montreal; they further state that the reports produced together as Plaintiffs' Exhibit P-3 speak for themselves and deny any allegations not in conformity therewith;

11) THAT as to paragraph 11 thereof the certificates produced together as Plaintiffs' Exhibit P-4 speak for themselves; they deny that any shortage existed at the time of discharge and deny the remaining allegations contained in the said paragraph;

12) THAT as to paragraph 12 thereof they admit the existence of the letter produced as Plaintiffs' Exhibit P-5, which letter speaks for itself, but they deny the truth of the statements and allegations contained therein except to the extent that they correspond to the statements and allegations contained in this Statement of Defence;

13) THAT paragraph 13 thereof, as drawn, is denied.

14) THAT as to paragraph 14 thereof they admit the existence of the letter produced as Plaintiffs' Exhibit P-6, which letter speaks for itself, but they deny the truth of the statements and allegations contained therein except to the extent that they correspond to the statements and allegations contained in this Statement of Defence;

15) THAT as to paragraph 15 thereof they admit the existence of the letter and documents therein referred to produced as Plaintiffs' Exhibit P-7, but deny the truth of the statements and allegations contained therein and deny that they are in any way liable to Plaintiffs for the alleged loss and damage;

16) THAT they deny paragraphs 16 and 17 thereof;

17) THAT they are ignorant of the allegations contained in paragraph 18 thereof;

18) THAT as to paragraph 19 thereof they admit that Moore-McCormack Lines Inc. was the Owner of the MORMACSAGA and the carrier of the shipment in question; they deny any responsibility to Plaintiffs for the alleged loss of $95,721.27; they admit the existence of the letter produced as Plaintiffs' Exhibit P-8, which letter speaks for itself, but deny that the said letter in any way whatsoever constitutes an admission of liability for the damages allegedly incurred by the Plaintiffs;

19) THAT they deny paragraph 20 thereof;
20) THAT as to paragraph 21 thereof they admit their refusal to pay the said sum of $95,721.27 and deny that they are indebted either for that amount or any other amount to Plaintiffs;

21) THAT they deny paragraph 22 thereof;

AND WITHOUT PREJUDICE TO THE FOREGOING BUT FOR FURTHER DEFENCE TO PLAINTIFFS' AMENDED STATEMENT OF CLAIM DEFENDANTS STATE:

22) THAT the voyage in question commenced in Montevideo, Uruguay, on or about June 7th, 1965;

23) THAT from Montevideo the MORMACSAGA proceeded to her other scheduled ports of loading in the following order, namely, Buenos Aires in Argentina and Paranagua, Santos, Angras Dos Ries and Rio de Janeiro in Brazil, the whole as advertised and in accordance with the usual and customary route taken by the vessel;

24) THAT the vessel loaded general cargo in all the said ports for discharge at the following scheduled ports in the following order, namely, Jacksonville in Florida, Charleston in South Carolina, Norfolk in Virginia, Baltimore in Maryland, Philadelphia in Pennsylvania, New York in New York, Boston in Massachusets (all on the East Coast of the United States of America) and Montreal, P.Q., Canada, the whole in accordance with the usual and customary route taken by the vessel;

25) THAT whilst the vessel was loading cargo in Buenos Aires, which she reached on or about June 12th, 1965, and left on or about June 19th, 1965, the strike referred to in Plaintiffs' Statement of Claim broke out at midnight on June 15th, 1965, affecting all the vessel's scheduled ports of call on the East Coast of the United States of America;

26) THAT at the time the said strike broke out Defendants had no way of knowing how long it might last;

27) THAT after the vessel had completed loading at Rio de Janeiro on or about June 29th, 1965, she departed for Jacksonville with a total general cargo of approximately 6758 tons of which approximately 1,276 tons were destined for Montreal;

28) THAT of the tonnage destined for Montreal approximately 700 tons consisted of the cases of oranges referred to in paragraph 1 of Plaintiffs' Statement of Claim and the remaining tonnage consisted of other general cargo;

29) THAT when the vessel sailed from Rio de Janeiro the cargo was stowed in such a manner that the cargo destined for Montreal (being the last scheduled port of discharge) could not have been discharged without first removing cargo destined for the intermediate ports on the East Coast of the United States of America;

30) THAT as the vessel approached Jacksonville the Defendants cabled her Master on at least two occasions instructing him to reduce speed;

31) THAT the last such cable was sent on July 9th, 1965 and read as follows:

FURTHER REDUCE SPEED MAKE ARRIVAL JACKSONVILLE 0600 HOURS TUESDAY 13TH. ACKNOWLEDGE.

32) THAT Defendants instructed the Master to reduce speed in the hopes that the strike would be over by the time the vessel reached Jacksonville;

33) THAT after the vessel became strike-bound in Jacksonville the Defendants had no way of knowing how long the strike might last;

34) THAT all twelve bills of lading produced together as Plaintiffs' Exhibit P-1 provide that the carrier shall be exempt from liability for loss or damage arising or resulting from strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

35) THAT even if the Defendants might have been justified in ordering the MORMACSAGA to proceed directly to Montreal, bypassing the scheduled intermediate ports of call on the East Coast of the United States of America, which is not admitted but on the contrary expressly denied, they were not bound to do so;

36) THAT in arriving at the decision not to divert the MORMACSAGA the Defendants were bound to consider and did in fact consider the adventure as a whole and the interests of and their responsibilities to all shippers and/or consignees of the cargo on board as well as the interests of and their responsibilities to the shippers and/or consignees of the cargo here in question;

37) THAT at the time the vessel reached Jacksonville the strike had been in progress for almost one month;

38) THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay;

39) THAT the cases of oranges referred to in paragraph 1 of Plaintiffs' Statement of Claim were properly and carefully loaded, handled, stowed, carried, kept, cared for and discharged;

40) THAT more particularly, the said cases of oranges were stowed in refrigerated space at the temperatures required and the said temperatures were maintained throughout the whole period that the cargo remained on board the vessel including the period during which she lay strike-bound in Jacksonville, namely from July 13th to August 31st, 1965;

41) THAT if the Plaintiffs suffered the damages alleged which is not admitted but on the contrary expressly denied such damages were due solely to the inevitable deterioration which oranges suffer with the passage of time, even when stored at low temperatures;

42) THAT Defendants are not responsible for the delay of approximately seven weeks which occurred whilst the vessel lay strike-bound in Jacksonville nor for any deterioration which the said oranges may have suffered as a result of the said delay, either under the terms of the bills of lading produced together as Plaintiffs' Exhibit P-1 or under the law governing the contract of carriage;

43) THAT Plaintiffs' action is unfounded in fact and in law;
The parties filed admissions as follows:

1. That Crelinsten Fruit Company became the owner of the oranges referred to in the twelve (12) bills of lading produced as Plaintiffs' Exhibit P-1, is the party that suffered the damages claimed and is the party entitled to institute the present proceedings, the whole without any admission whatsoever as to the quantum of damages or as to the responsibility of the Defendants for such damages;

2. That Moore - McCormack Lines, Incorporated, were the Owners of the vessel MORMACSAGA and the carriers of the said oranges under the twelve (12) bills of lading produced as Plaintiffs' Exhibit P-1;

3. That the contract of carriage is subject to the Carriage of Goods by Sea Act of the United States of America;

4. That the full quantity of oranges loaded under the twelve (12) bills of lading produced as Plaintiffs' Exhibit P-1 were discharged from the MORMACSAGA at Montreal on September 22nd, 1965, and subsequently, and were duly delivered to the Plaintiff or its authorized representative;

5. That the oranges referred to in the twelve (12) bills of lading produced as Plaintiffs' Exhibit P-1 were, upon arrival at Montreal on or about September 22nd, 1965, in the condition and state described in the reports of Professor H. R. Murray and Associate Professor J. David and in the report of Hayes, Stuart & Co. Limited, said reports being produced together as Plaintiffs' Exhibit P-3, and that the boxes of oranges, referred to in the Proces Verbaux produced as Plaintiffs' Exhibit P-4 (being part of the shipment carried under the twelve (12) bills of lading produced as Plaintiff's

Exhibit P-1) were dumped as appears from the said Proces-verbaux;

6. That the deterioration in the condition and state of the oranges, carried under the twelve (12) bills of lading produced as Plaintiffs' Exhibit P-1 and as appears from the reports produced together as Plaintiffs' Exhibit P-3, was due solely to the extra passage of time during which the MORMACSAGA (with the said oranges on board) lay strike-bound in Jacksonville from July 13th 1965 to August 31st, 1965.
The bills of lading provide that they will be subject to the provisions of the Water Carriage of Goods Act of the United States of America. Sect. 4(2)(j) of that statute provides that:

Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

It is noteworthy that this section is identical with the corresponding section of the Canadian Water Carriage of Goods Act except that the last clause thereof is not included in the Canadian Act.

Included also in the said bills of lading is the usual liberty clause and it appears to be common ground that the defendants would, in virtue of this clause, have been entitled to deviate to proceed direct to Montreal instead of entering the port of Jacksonville.

Expert evidence as to the law of the United States was presented on behalf of both parties with jurisprudence in support thereof.

The following is an excerpt from the testimony of Mr. Bissell, a New York attorney, heard on behalf of the defendants (at p. 212) and referring to the exception relating to strikes:

Well, this exception is treated by the Courts as other similar exceptions in this section of the Act. That it will give the carrier, if he can bring himself within the exception, exemption from liability; provided he can show that no negligence or fault of his contributed to the loss.

The witness referred particularly to the case of Budewar v. Colorado Fuel, [1955] A.M.C. 2139.

After considering the testimony of the experts and examining the cases cited the Court is of the opinion that the test of whether the entry of the Mormacsaga into the port of Jacksonville on July 13, 1965, amounted to failure on the part of the defendants to carry out their contract and exercise due care to protect and safely carry the plaintiff's shipment in accordance with its obligations under the contract of carriage is whether in so doing, rather than proceeding direct to Montreal, those in charge of the said vessel acted with proper regard for the rights of the consignees as well as with reasonable care for those rights.

Having regard to the fact that, to the knowledge of the defendants and their representatives, a strike was in progress at Jacksonville and that when the plaintiff's shipment was loaded at Santos and at all times thereafter, right up until the vessel entered the port at Jacksonville, the defendants or their representatives knew or ought to have known that the strike was still in effect, did they not fail to act reasonably by entering the port of Jacksonville rather than deviating to and proceeding directly to Montreal, which they were entitled to do in virtue of the liberty clause above quoted?

As noted above, the statement of defence contains inter alia the following paragraph:

38) THAT at the time the vessel entered Jacksonville there appeared to be a strong possibility that the strike might end without further undue delay;

This is an allegation which, if proven (and the burden of proof rested upon the defendants) might have constituted a valid defence to the plaintiff's action.

However in the opinion of the Court it was not established by the proof. The only evidence offered in support of the allegation that the defendants had reason to believe that the strike would be over "without further undue delay" was the testimony of Mr. Glennon who stated that it was so expected. His testimony in this respect however was not corroborated or supported by any other evidence. Moreover from the newspaper clippings produced it would appear that there was no real basis for the expectation, or even the hope, that an early settlement of the strike would ensue.

In the Court's view the defendants failed to establish that there was any real reason to expect an early end to the strike which at the time the vessel entered Jacksonville had been in progress for almost a month and as things turned out, persisted until Aug. 31, 1965. In the circumstances the Court finds that the defendants and their representatives, by entering Jacksonville rather than proceeding directly to Montreal failed to act with reasonable care and prudence and with proper regard to the preservation of the plaintiff's shipment of oranges.

There is moreover no evidence that had the vessel continued on to Montreal, instead of entering Jacksonville, the plaintiff's shipment would not have been saved undamaged nor is there proof to justify the conclusion that this could not have been done with due regard to the interests of the owners of other cargo.

In the circumstances the Court considers that the plaintiff has established his right to recover the damages sustained by it as the consequence of the failure of the defendants and its representatives to carry out their obligations under the said contract of carriage.

It remains to determine what these damages are.

There is evidence (and it is common ground) that, if there existed any local market in which the plaintiff could have purchased oranges to replace those damaged, the proper measure of the plaintiff's damages would be the cost to them of the oranges damaged, plus the expense of having them laid down in Montreal and plus a reasonable profit, and of course, less whatever was realized from the sale of the damaged fruit.

Although it was suggested that there did exist such a local market the proof satisfies the Court that such was not the case.

Mr. Crelinsten, when examined on this subject, testified as follows, at p. 58:

Q.: Now Mr. Crelinsten, was there any market at which the oranges which you were unable to sell could have been replaced - any local market in which the oranges could be replaced? A.: I am sorry, I don't understand.

Q.: There was no place in Canada, was there, where you could get oranges to replace the ones you lost? A.: No.
It appears from Exhibit P-54 that the laid down cost at Montreal of the said oranges amounted to $86,217.60.
The question of what in the circumstances should be considered a reasonable profit is one which is not without difficulty.

Although Counsel for the plaintiff in his written argument suggested (basing this on Mr. Crelinsten's testimony) that a profit of 30 per cent. to 35 per cent. is normal, a perusal of this witness's testimony satisfies the Court that it does not support this suggestion.

At p. 229 Mr. Crelinsten, in reply to a question as to the percentage of profit normally obtained in such cases testified in part as follows:

. . . the percentages sometimes vary as high as 30% to 35% because of the element of risk on arrival, the amount of competing fruit on the market . . .

Q.: Does this figure of 30% to 35% take into account your cost once the goods are delivered? A.: Yes.

Q.: So you are talking about the gross profit, not the net profit. A.: Yes, that is correct.

Q.: On domestic imports? A.: On domestic - I have seen where we made as high as 40% or as low as 10% or as low as 5%, it varies depending on the market.

In the Court's opinion there is no proof to support the suggestion that it would be normal for even a gross profit to run as high as 30 per cent. and none which would justify the allowance of such a percentage in the present instance.

After giving the matter careful consideration the Court considers that an allowance of 15 per cent. as compensation for loss of profit would in the present case be both reasonable and just.

Therefore to the "laid down cost" at Montreal which amounted to $86,217.60 should be added 15 per cent. or the sum of $12,932.64 making a total of $99,150.24 from which must be deducted the sum of $46,000.00 which was the net amount realized from the sale of the fruit which was damaged but saleable.

This leaves an amount of $53,150.24 which is the measure of the plaintiff's damage and which amount it is entitled to recover from the defendants.

WHEREFORE THE COURT

DOTH MAINTAIN the plaintiff's action and DOTH CONDEMN the defendants to pay to the plaintiff the sum of $53,150.24 with interest from the date of the institution of the action and costs; and DOTH CONDEMN the defendant ship, the Mormacsaga, and any bail furnished to the payment of the said condemnation; reserving to the plaintiff such other and further relief as the case may require.

SOLICITORS:
Martineau, Walker, Allison, Beaulieu, Tetley & Phelan; McMaster, Meighen, Minnion, Patch & Cordeau.

VANA TRADING CO. INC.
v.
S.S. METTE SKOU

VANA TRADING CO., INC., Plaintiff-Appellee-Cross-Appellant, v. S.S. METTE SKOU, HER ENGINES, ETC., AND FLOTA MERCANTE GRANCOLOMBIANA, S.A., Defendant-Third-Party Plaintiff-Appellant-Appelee. v. OVE SKOU AND INTERNATIONAL TERMINAL OPERATING CO., INC., Third-Party Defendants-Appellees-Cross-Appellants.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

1977 AMC 702

May 20, 1977

JUDGES:
SMITH and FEINBERG, CT. JJ. and TENNEY, D.J., United States District Judge for the Southern District of New York, sitting by designation.

HEADNOTES:
BILLS OF LADING - 1931. Faults of Shipper - 21. Damages - DAMAGES - Apportionment of Liability in Cargo Cases.

The Supreme Court's 1934 decision in *Schnell* v.. *The Vallescura,* not its 1975 decision in *U.S.* v.. *Reliable Transfer,* governs the apportionment of damages in maritime cargo cases: the ocean carrier must bear the entire loss unless it can show what percentage is allocable to occurrences for which it is excpected from liability. Where the district judge was unable to make any exact apportionment as between the faults of carrier and cargo, he erred in dividing the damages 50-50, as would be done in maritime personal injury and collision cases.

BILLS OF LADING - 19. Defenses, Exceptions and Burden of Proof - 193. Inherent Vice, Decay.

Under COGSA "inherent vice" means any existing defect, disease, decay or inherent nature of the cargo which will cause it to

deteriorate with a lapse of time. District judge's finding that cargo of yams was "susceptible" to damage in transit does not satisfy this criterion.

Whether, under COGSA, the carrier has the burden of proving inherent vice, or the shipper must establish the contrary as part of its proof of good condition at the time of shipment, *not decided.*

BILLS OF LADING - 174. Delivery, Shortage and Misdelivery - 193. Inherent Vice, Decay - 22. Actions.

A cargo plaintiff need not always introduce direct evidence of the cargo's good condition at the time of shipment; alternatively, plaintiff can show that the condition of cargo on delivery was caused by the ocean carrier's negligence and not by any inherent vice in the goods.

BILLS OF LADING - 143. Exceptions and Bad Order Notations, "Clean B/L" - 194. Insufficient Package, Breakage - 22. Actions.

Where (1) cargo plaintiff established delivery in good order and damage on outturn, (2) defendant carrier proved insufficiency of packing, and (3) plaintiff proved improper stowage, defendant must then prove what percentage of the damage was due to the improper packing in order to escape liability.

COUNSEL:
PURLINGTON & McCONNELL (JOHN HAY McCONNELL and STEPHEN A. AGUS), for Plaintiff-Appellee-Cross-Appellant, Vana Trading Co., Inc.

RENATO C. GIALLORENZI, for Defendant-Third-Party Plaintiff-Appellant-Appellee, Flota Mercante Grancolombiana, S.A.

HAIGHT, GARDNER, POOR & HAVENS (CHESTER D. HOOPER, VINCENT M. DeORCHIS and M. E. DeORCHIS), for Defendant-Appelle Ove Skou.

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN (MARTIN B. MULROY and BRUCE J. HECTOR), for Third-Party Defendant-Cross-Appellant-Appelle, International Terminal Operating Co. Inc.

APPEAL-STATEMENT:
Previous proceedings reported at 1976 AMC 1521.

Appeal from judgments of the United States District Court for the Southern District of New York (MILTON POLLACK, D.J.). 1976 AMC 1521, 415 F. Supp. 884. Reversed and remanded.

OPINIONBY: TENNEY

OPINION:
CHARLES H. TENNEY, D.J.:

This admiralty cargo suit involves the damage and loss to a shipment of yams.It also represents an invitation to apply to cargo suits the doctrine of proportionate fault recently made applicable to collision and stranding cases by *United States* v.. *Reliable Transfer Co.,* 421 U.S. 397, 1975 AMC 541 (1975), an invitation which we decline.[1]

Suit was brought by Vana Trading Co., Inc. ("Vana"), the consignee of the yams, against the *S.S. Mette Skou* and her time-charterer, Flota Mercante Grancolombiana, S.A. ("Flota"). Flota impleaded the owner of the vessel, Ove Skou ("Skou"), and the stevedoring company at New York, International Terminal Operating Co. Inc. ("I.T.O.") as third-party defendants.[2] After trial District Judge Milton Pollack held on the evidence that the loss was caused by a combination of circumstances attributable to Vana, the consignee, to Flota, the time-charterer, and to I.T.O., the stevedore. *Vana Trading Co., Inc.* v. *S.S. Mette Skou,* 1976 AMC 1521, 415 F. Supp. 884, 887 (S.D.N.Y., 1976). He further held that allocation of liability for damages proportionate to each party's comparative degree of fault was appropriate. Accepting the parties' agreement "that the degree of fault cannot be determined to a mathmatical certainty," *id.* 1976 AMC at 1526, 415 F. Supp. at 888, Judge POLLACK confirmed the allocation of damages contained in that agreement without prejudice to their rights of appeal with respect to such allocation.[3] Finding the allocation between Vana and Flota improper, we reverse.

The facts and findings as developed on the trial are as follows. The *S.S. Mette Skou* was time chartered from her owner, Skou, on a New York time charter form dated April 26, 1974. The form contained the usual clause 8 which made the captain and crew the borrowed servants of the charterer, Flota, and not servants of the shipowner, Skou, for the purpose of loading, stowing and discharging cargo on the ship.When the *Mette Skou* arrived at Cartagena, Colombia, in mid-June 1974, Flota advised the vessel's officers that Flota had booked 5,000 cartons of yams. These yams had matured in November or December 1973 but were allowed to remain in the ground from that time until they were harvested in March 1974, after which they remained in stowage sheds until June 15, 1974 when the shipper, Exportadora Andina Ltda. ("Andina") individually wrapped them in unprinted newspaper and packed them into cardboard boxes which contained only two hand holes and a slit for ventilation. They were then trucked to Cartagena, stored in a government warehouse and delivered to the pier on June 18 or 19, 1974, subsequent to the vessel's arrival. At that time only the deep tanks and several 'tween decks on the vessel were empty and available for cargo. The shipper, Andina, examined the deep tanks and the ventilation system servicing them and did not object to the storage of the yams in the deep tanks.

The shipment involved herein, together with two other shipments of yams, were loaded aboard the *Mette Skou* under deck and stowed in the port and starboard No. 3 hatch deep tanks at the direction of the Master. The cartons were stowed 10-13 tiers high with 2 X 4's between every third tier. The cartons were set out about eight to nine inches from the wings of the tanks with air channels both fore and aft and athwart ship, each about six to ten inches wide. Ventilation was provided by two six-inch service pipes which extended at the sides to the main deck. The electrically-operated ventilation for the deep tanks was run continuously through the entire voyage until the yams were discharged at New York.

---

[1] We declined a similar invitation in *Reliable Transfer Co., Inc.* v.. *United States,* 1974 AMC 756, 497 F.2d 1036 (2 Cir., 1974), *rev'd,* 421 U.S. 397, 1975 AMC 541 (1975), for reasons equally applicable to the instant case.

[2] Vana's complaint lay *in personam* against Flota under the bill of lading contract signed by Flota's Cartagena agents; the owner Skou appeared *in personam* in response to Flota's third-party complaint as did I.T.O. No *in rem* action or jurisdiction is involved herein.

[3] The total loss was stipulated as $78,358.50. The parties stipulated that these damages should be divided equally between Flota and Vana -- $39,179.25 each -- and that Flota was entitled to a recovery against I.T.O. of $1,000. Judge POLLACK confirmed this apportionment. 1976 AMC at 1526, 415 F. Supp. at 888.

At the time the yams left Cartagena, Flota delivered to Andina's forwarding agent a bill of lading dated June 19, 1974, executed by Flota's Cartagena agents both on behalf of Flota and for and on behalf of the Master of the vessel, which acknowledged receipt in Colombia of the 5,000 cartons of yams in apparent good order and condition and stated that they were consigned to the order of Vana at New York.[4] The Instituto Colombiano Agropecuario of the Republic of Colombia's Minsitry of Agriculture issued a certificate stating that the yams, to the best of the inspector's knowledge, were substantially free from injurious diseases and pests, and were believed to conform to the current phytosanitary regulations of the United States.

Although the *Mette Skou* arrived in New York on the morning of July 1, 1974, Flota and I.T.O. failed to begin discharge of the yams until July 2, 1974, despite a request by the vessel's officers that discharge begin immediately after arrival. Furthermore, after discharge, the cartons were placed in I.T.O.'s warehouse, which was not adequately ventilated. When the yams were delivered to Vana by I.T.O. on behalf of Flota, they were in a damaged and cooked condition, exhibiting excessive heat, moisture, sprouting and tissue breakdown.

Judge Pollack concluded on the basis of the foregoing that the third party claim of Flota against Ove Skou, the owner of the vessel, should be dismissed with costs assessed against Flota. We agree. The trial judge found that the officers of the vessel participated in the loading of the cartons of yams as agents for Flota, and not on behalf of the shipowner. He further found "that the ship was not unseaworthy; that ventilation was not warranted in the charter party but in fact existed and that the ventilation was appropriate in the deep tanks for the shipment of merchantable cargo delivered on board in good condition, properly packed and wrapped." 1976 AMC at 1523-24, 415 F. Supp. at 887.[5] On the record we find no reason to disturb these findings or his legal conclusion. *Nichimen Co.* v.. *M.V. Farland,* 1972 AMC 1573, 462 F.2d 319 (2 Cir., 1972); *International Produce, Inc.* v. *S.S. Frances Salman,* 1975 AMC 1521, 1544-45 (S.D.N.Y., 1975).

We cannot agree, however, with the trial court's allocation of liability between Vana and Flota. On this issue, we read Judge Pollack's opinion as holding that there was no inherent vice in the yams and that they were delivered to the vessel in good order and condition, free of latent pathological disease or injury. 1976 AMC at 1524, 415 F.Supp. at 887. Although Judge Pollack stated that "[t]he most that can be said is that the yams were in susceptible condition for the results which followed their shipment, stowage, transportation, delayed discharge, warehousing and delivery," *id.,* such a condition does not amount to an inherent vice. The Supreme Court has accepted a jury charge defining the latter term as "'any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time.'" *Missouri Pacific R.R.* v.. *Elmore & Stahl,* 377 U.S. 134, 136, 138-39 (1964).[6] By using the term "susceptible" in this context Judge Pollack would seem to have meant only that the yams were particularly able to be affected by the conditions under which they were packed, stowed and unloaded and not that their condition was such that they would have deteriorated merely through "a lapse of time." Moreover, Judge Pollack found that "the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, and not by any inherent defects," and that "the damage was due to a combination at least of the circumstances created or contributed to by the shipper and the Charterer and was enhanced by the manner of performance of I.T.O. of its obligations." 1976 AMC at 1525, 415 F.Supp. at 887.Specifically, the shipper's packing of the yams -- "which produced a cooking effect" -- and the charterer's stowage of the yams -- "which caused the yams to continue the cooking process and decay" -- combined, along with the conduct of I.T.O., to cause the damage. *Id.*

The primary problem concerns the trial court's reliance on the Supreme Court's recent decision in *United States* v.. *Reliable Transfer Co., supra,* which extended the doctrine of proportional fault to property damage in maritime collisions and stranding cases, and its failure to apply the correct rule for apportioning damages as determined by the Supreme Court over forty years ago in *Schnell* v.. *Vallescura,* 293 U.S. 296, 1934 AMC 1573 (1934).[7] As was stated in *Davis Crystal, Inc.* v. *Cunard S.S. Co.,* 1964 AMC 1292, 223 F. Supp. 273, 287 (S.D.N.Y., 1963), *aff'd,* 1965 AMC 39, 339 F.2d 295 (2 Cir., 1964):

"There is no rule in cargo damage cases which requires the damages to be either equally apportioned among the parties negligent as in mutual fault collision cases * * * or to be proportioned among the parties at fault as in maritime personal injury cases. * * *"

The Court's action in *Reliable Transfer Co.,* while bringing the rule in collision cases into line with that in personal injury cases, does not alter this situation.

Under Sections 3-4 of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S. Code, secs. 1303-04, a consignee or shipper such as Vana who wishes to recover against the carrier for damage to goods bears the initial burden of proving both delivery of the goods to the carrier, in this case Flota, in good condition, and outturn by the carrier or by the stevedore, for whose conduct the carrier is responsible, in damaged condition. *M.W. Zack Metal Co. v. S.S. Birmingham City,* 1963 AMC 737, 311 F. 2d 334, 337 (2 Cir., 1962), *cert. denied,* 375 U.S. 816, 1963 AMC 2698 (1963). The trial court found that Vana had sustained that burden, and we do not find this to be "clearly erroneous." *McAllister* v.. *United States,* 348 U.S. 19, 20, 1954 AMC 1999 (1954).[8]

---

[4] A clean bill of lading in the case of packaged goods merely attests to apparent good condition of cargo, based on external inspection. *United States* v. *Lykes Bros. Steamship Co., Inc.,* 1975 AMC 2244, 2250, 511 F. 2d 218, 223, (5 Cir., 1975).

[5] Had the trial court found the ship unseaworthy due to a faulty or improper ventilation system, there is authority for an equal division of damages as between the owner and the charterer. International Produce Inc. v. S.S. Frances Salman, 1975 AMC 1521, 1546-47 (S.D.N.Y., 1975).

[6] The *Missouri Pacific* case was decided under the Interstate Commerce Act rather than COGSA. Nevertheless, the fungibility of the definition of inherent vice is indicated by the *Missouri Pacific* Court's use of a quotation from *Schnell* v. *Vallescura* to support one part of its holding. 377 U.S. at 138 n. 7, *quoting* 293 U.S. 296, 305-06, 1934 AMC 1573, (1934).

[7] Although *Schnell* v.. *Vallescura* was decided before the passage of COGSA in 1936, the rule of the case has been restated and followed often in the Second Circuit since that time. J. Gerber & Co. v. S.S. Sabine Howaldt, 1971 AMC 539, 437 F. 2d 580, 588 (2 Cir., 1970); *Lekas & Drivas, Inc.* v.. *Goulandris,* 1962 AMC 2366, 306 F.2d 426, 431-32 (2 Cir., 1962); *Great Atlantic & Pacific Tea Co.* v.. *Lloyd Brasileiro,* 1947 AMC 306, 159 F.2d 661, 665 (2 Cir.), *cert. denied,* 331 U.S. 836, 1947 AMC 1015, (1947); *Armco Int'l Corp.* v.. *Rederi A/B Disa,* 1945 AMC 1064, 151 F.2d 5, 8 (2 Cir., 1945); *Edmond Weil, Inc.* v.. *American West African Line, Inc.,* 1945 AMC 191, 147 F.2d 363, 366-67 (2 Cir., 1945); *Pioneer Import Corp.* v.. *Lafcomo,* 1943 AMC 1349, 138 F.2d 907, 908 (2 Cir., 1943), *cert. denied,* 321 U.S. 766 (1944); *Wessels* v.. *Asturias,* 1942 AMC 360, 126 F.2d 999, 1001 (2 Cir., 1942).

[8] There was evidence in the form of the certificate by the Instituto Colombiano Agropecuario of the Republic of Colombia's Ministry of

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 COGSA exceptions set forth in 28 U.S. Code, sec. 1304(2).[9] n9 *J. Gerber & Co.* v. *S.S. Sabine Howaldt*, 1971 AMC 539, 548, 437 F. 2d 580, 588 (2 Cir., 1971); *see* *Schnell* v.. *Vallescura, supra,* 293 U.S. at 303, 1934 AMC 1573. Flota satisfied that burden according to the trial judge in that he found that the yams had been packed in "non-breathing" cartons in "unsuitable wrapping for such a commodity" thus establishing the section 1304(2)(m) exception, "insufficiency of packing." 1976 AMC at 1523, 415 F. Supp. at 887.

Once a COGSA 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." *J. Gerber & Co.* v. *S.S. Sabine Howaldt*, 1971 AMC 539, 548, 437 F. 2d 580, 588; *Lekas & Drivas, Inc.* v. *Goulandris*, 1962 AMC 2366, 306 F. 2d 426, 431-32 (2 Cir., 1962); *see* *Schnell* v.. *Vallescura, supra,* 293 U.S. at 305, 1934 AMC 1573. The court below found that Vana had sustained this further burden by showing that the stowage of the yams some thirteen tiers high within the deep tanks, subjecting them "to a measure of heat," was a concurrent cause of the loss.[10] 1976 AMC at 1523, 415 F.Supp. at 887. Defendant I.T.O. was also found to be at fault for its harsh handling of the cargo and for subjecting the yams to unventilated storage following discharge. *Id.* The negligence of I.T.O. is imputed to Flota but is recoverable by Flota in indemnity.

All the previous burdens being satisfied, the final burden rested with Flota to show what ascertainable amount of the damage was attributable to the packaging, from which it was excepted, and what was due to the improper stowage and negligent stevedoring, which were not excepted and for which Flota was chargeable. Failing this burden, Flota was chargeable with the entire loss *Schnell* v.. *Vallescura, supra,* 293 U.S. at 306, 1934 AMC 1573; *J. Gerber & Co.* v. *S.S. Sabine Howaldt*, 1971 AMC 539, 548, 437 F. 2d 580, 588.

Rather than determining ultimate liability according to Flota's success in satisfying this burden of separating the damage, however, the trial court stated:

"The rule is clear that when two or more parties have contributed by their fault to cause property damage in a maritime cargo situation, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault and that liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of fault." 1976 AMC at 1525, 415 F.Supp. at 888, *citing* United States v.. *Reliable Transfer Co., supra,* 421 U.S. at 411, 1975 AMC 541.

Except for the substitution of the words "cargo situation" for the words "collision or stranding" this is virtually the precise language of *Reliable Transfer Co.* In that case, the Court overruled the ancient and harsh maritime collision and stranding rule of equal apportionment regardless of actual degree of fault, a rule which did not apply in cargo cases such as that currently on appeal.Indeed, this area of maritime law has been governed for some forty years by a rule which does allow for apportionment according to relative degree of fault, although an occasional harsh result may arise, as when the carrier is unable to sustain its final burden of proving the relative degree of fault. In such a case the carrier must bear all the damages even though it has been established that those damages were in part caused by occurrences for which it is excepted from liability. Nevertheless, the rule of *Schnell* v.. *Vallescura,* clearly stated and frequently applied, must govern in this case.

The trial court was unable to make a finding as to the allocable percentages of the degree of fault, nor is there any support for such a finding in the record. *Cf.* *Tri-Valley Packing Ass'n* v.. *States Marine Corp.,* 1962 AMC 1965, 1970, 310 F.2d 891, 894 (9 Cir., 1962). The parties agreed as between themselves, and the trial court concurred, that an exact apportionment could not be made and that, in accordance with the *Reliable Transfer Co.* rule quoted above, Vana and Flota would divide the damages equally, with Flota entitled to indemnification in the amount of $1,000 from I.T.O. 1976 AMC at 1526, 415 F.Supp. at 888. The parties having reserved their right to appeal such allocation, we hold that, according to the rule of *Schnell* v.. *Vallescura,* Flota must bear the full amount of damages of $78,358.50, an amount for which we find adequate support in the record. We do not disturb the $1,000 indemnification award since it is unrelated to the trial court's application of a rule which we find to be in error in a maritime, noncollision cargo damage case.

Accordingly, the judgments against Flota and Vana must be reversed, and the causes are remanded to the district court with directions to enter judgment for plaintiff Vana against defendant Flota for the full amount of its damages, with costs to Vana and Skou against Flota both below and on this appeal.

Agriculture (stipulated to by both Vana and Flota) and testimony by the chief officer of the vessel and by the shipper, Andina's general manager, that the cargo at time of shipment was in good order and condition. However, the consignee's burden does not mean that it must always introduce direct evidence that the cargo was in good condition when shipped. It may additionally meet its burden by showing, as was also done here, from the condition of the cargo as delivered or otherwise, that the damage was caused by the carrier's negligence and not by any inherent vice in the cargo. *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind*, 1967 AMC 277, 279, 371 F. 2d 537, 539 (2 cir., 1967).

[9] It is not necessary for us to reconsider the question whether, under COGSA and circumstances such as those presented by this case, the carrier has the burden of proving inherent vice under 46 U.S. Code, sec. 1304(2)(m) or the shipper has the burden of disproving that exception as a part of the requirement that it must establish the good condition of the goods upon delivery of the carrier. *See, e.g.,* *Hecht, Levis & Kahn, Inc.* v. *S.S. Presidnet Buchanan*, 1956 AMC 1970, 1976, 236 F. 2d 627, 631 (2 Cir; 1956). As was discussed in the text above, we read the trial court's opinion as holding that it was established that the yams suffered from no inherent vice.

[10] This improper stowage, which was chargeable to Flota, is not a type of negligence by the carrier which is an excepted cause under COGSA. *See, e.g.,* 28 U.S. Code, sec. 1304(a)(2).