

# TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the  
Transportation Industry in Canada

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## Liability for On Deck Cargo

Under the *Hague-Visby Rules* (which are incorporated into Canadian law as Schedule 3 of the *Marine Liability Act*) an ocean carrier is not permitted to exclude its liability for damage to “goods” where the damage is caused by the fault of the carrier. However, the word “goods” is defined to exclude cargo carried on deck. A decision of the Court of Appeal for British Columbia released in December, 2006, considers two issues of interest: How might the description of cargo in a bill of lading affect the availability of an exclusion defense? If such a defense fails because of inadequate description, should the ultimate responsibility rest with the carrier or with its shipping agent?

The participants in the relevant transactions were the vessel owner and charterer, (for simplicity we will refer to these collectively as “Gearbulk”), the shipping agent (Seaboard International) the shipper (Timberwest) and two consignees in Europe. The essential contractual documents were a Contract of Affreightment (COA) between Gearbulk and Seaboard, a master bill of lading issued by Gearbulk and two bills of lading issued by Seaboard to its customers.

Gearbulk carried a cargo of lumber from British Columbia to Antwerp. The greater part of the shipment was stowed on deck and was damaged as a result of the negligence of persons for whom Gearbulk was responsible. Accordingly the question was whether

Gearbulk should have the benefit of a clause excluding its liability.

The Seaboard bills contained the notations: “Stowage: 86% OD 14% UD” and “ALL CARGO CARRIED ON DECK AT CARGO OWNER’S SOLE RISK AS STATED ON THE REVERSE IN CLAUSE 6 OF THE CONDITIONS.” It was common ground that the contracts allowed the lumber to be carried on deck, at the carrier’s option.

The shipper prevailed in an earlier action against Gearbulk. The trial judge (upheld by the Court of Appeal) found that the description of the cargo carried on deck was not adequate. He reasoned that the reference in the Seaboard bills of lading to a volume of lumber stowed on deck was a rough estimate which was inadequate for a number of reasons. He was impressed by the fact that the shipment contained a range of packages, the values of which varied considerably. He concluded that even a precise volume calculation “would not, without more, have helped the consignees determine their respective risks in relation to the carriage of the cargo”. This conclusion, which will turn out to be crucial for the disposition of the litigation, appears to assume that the consignees (or more realistically their insurers) would care. This is not likely the case.

Having been found liable for damages of \$550,000, Gear-

bulk made a claim for indemnity as against Seaboard. It advanced a number of grounds for the claim, including one under the terms of the COA. In particular, it argued that it was entitled to an indemnity because Seaboard issued two bills of lading and that this constituted a variance from the Gearbulk bill. Clause 16 of the COA imposed on Seaboard an obligation to indemnify in the event of losses resulting from such a variance. Although the Seaboard bills undoubtedly differed from the Gearbulk bill, that difference was not the cause of the liability imposed by the court. Given the court’s analysis of what is required by way of description of the cargo, the Gearbulk bill would not have afforded any greater protection.

Gearbulk also argued for indemnity on the basis of the common law which recognizes that an indemnity may be appropriate where an agent fails to achieve a result within the reasonable contemplation of principal and agent. Again this failed. Although the court did not say so, one might argue, on behalf of the agent, that to hold it liable on this basis would be to require it to foresee the construction the court would place on the bills of lading. The foreseeability of that construction might be clear to one learned in the law (although certainly not to this author) but would hardly be expected in the world of commerce.

*Gearbulk Pool v. Seaboard Shipping*  
B.C.C.A., Docket CA033620

## BULLETIN BOARD

- *Government announces “Blue Sky” international air transportation policy;*
- *Raymon Kaduck appointed member of Canadian Transportation Agency;*
- *Winnipeg International Airport renamed in honour of James Armstrong Richardson;*
- *Tom Calkin appointed as chair of the board of directors of the Atlantic Pilotage Authority;*
- *André Demers and Robert Emigh, QC, appointed to the Transportation Appeal Tribunal;*
- *Canada concludes first air transport agreements with Croatia and Serbia for scheduled air service;*
- *Air Canada/United receive indication from US DOT of probable extension of antitrust immunity;*
- *Porter begins scheduled service to Montreal.*

## Attornment and Canadian Maritime Law

In a decision arising out of a contract for the construction of an ocean fishing vessel, the Federal Court of Appeal has clarified the impact of attornment on the issue of enforceability of foreign judgments.

The case of *Morgan v. Guimond Boats Limited* arose from a contract under the terms of which the defendant, a New Brunswick corporation, agreed to construct a 50-foot ocean vessel for the plaintiff, a resident of the State of Hawaii. The boat was intended for use in the waters off Hawaii.

The boat was built, paid for and delivered in New Brunswick. After the plaintiff had taken the boat to Hawaii, a dispute arose over the boat's seaworthiness.

The purchaser commenced action in the District Court of the State of Hawaii. The defendant brought a motion to challenge the jurisdiction of the District Court and was unsuccessful. No appeal was taken from this decision. The defendant then filed a defence to the claim and did not make any further explicit reference to jurisdiction. This defence was filed in April of 2003 and the matter proceeded for approximately a year, during which time the defendant participated in a number of interim proceedings including a scheduling conference, a settlement conference and a final pre-trial conference. Then in March of 2004, counsel for the defendant filed a motion for leave to withdraw. Counsel advised the court that he was instructed to withdraw and that his client would contest any attempt to enforce judgment in Canada.

The District Court granted the request to withdraw and proceeded to enter judgment against the defendant for approximately \$400,000.

In the fall of 2004, the successful plaintiff commenced an action in the Federal Court of Canada in order to enforce the District Court's judgment.

In resisting a claim for summary judgment, the defendant raised two main objections. In the first place, it argued that there was no federal statutory basis for the claim and that the Federal Court accordingly lacked jurisdiction to exe-

cute the foreign judgment. The summary judgment Judge had little difficulty with this aspect of the case. Paragraph 22(2)(n) of the *Federal Courts Act* assigns jurisdiction to the Federal Court in respect of "any claim arising out of a contract relating to the construction, repairs or equipment of a ship". This provision plus the Supreme Court of Canada's definition of Canadian maritime law in a string of cases from *ITO-International Terminal Operators Ltd. v. Meda Electronics Inc.*, to *Ordon Estate v. Grail* puts it beyond serious doubt that the Federal Court did have jurisdiction.

The Judge at first instance did, however, err in his disposition of the second issue raised by the defendant which he described as "much more troubling". Here the question was whether the District Court had personal jurisdiction over the defendant. The Judge began by correctly observing that Canadian courts should, when considering whether a foreign judgment is enforceable, apply the "real and substantial connection" test. That test has been applied to inter-provincial disputes for 15 years and was clearly extended to foreign judgments by the Supreme Court of Canada in the case of *Beals v. Saldanha*, decided in 2003.

The Judge, applying the test, found that the connection of the defendant with Hawaii was "fleeting and relatively unimportant". He then turned his attention to the significance of the fact that the defendant had actively participated in the proceedings before the District Court. Here he found two difficulties. In the first place, he was of the view that the law of Hawaii with respect to raising and preserving an objection to jurisdiction was not clear. While the defendant was unsuccessful in his motion to oust the jurisdiction of the District Court, the Judge of first instance in the Federal Court was doubtful concerning the effect of the filing of a defence and the subsequent withdrawal of counsel. He concluded that it was not clear whether the defendant successfully preserved his objection to jurisdiction.

The Judge then turned to the more important part of his decision, namely the

impact of the "real and substantial connection" test to the law of attornment. Whereas attornment is a well known and traditional source of jurisdiction, the Judge thought that it could not be applied alone, without reference to the examination of connections to the jurisdiction. He expressed the view that a party could, by appearing and participating in a proceeding in a way which would give rise to attornment, "bolster" the connections between itself and the jurisdiction. However, in his view of the matter, the ultimate question should still be answered by considering the extent of those connections. If they turn out to be essentially non-existent, there is nothing to "bolster".

Applying these considerations to the facts at hand, the motion Judge concluded that the test for summary judgment had not been met. There were, he thought, complex questions of law which could not be answered without "a clear picture of the underlying jurisdictional facts".

The Federal Court of Appeal, in a unanimous decision released early in December, did not agree that there are such difficulties. With respect to the first of the issues, it found the evidence clear enough: the defendant did not succeed in preserving a jurisdictional objection under the law of Hawaii. As to the second, the Justices on appeal found that the imagined legal complexity rested on a faulty assumption. While it is clear that the "real and substantial connection" test must be applied to determine enforceability, this test does not diminish the force of attornment. The latter takes its effect, ultimately, from the choice of the party. By participating in a proceeding, a party expresses his willingness to be bound by the resulting determination. Indeed, the Supreme Court makes particular reference to this issue in *Beals*, where Justice Major, when speaking of the importance of connection to the jurisdiction, notes: "Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court."

## Ontario Court of Appeal Refuses to Add Party after Expiry of Limitation Period

A recent decision of the Ontario Court of Appeal provides an example of circumstances in which plaintiffs who fail to add a party to proceedings before the expiry of a limitation period will not necessarily be able to avail themselves of the generous “discoverability” rule to cure their defect.

Mary Louise Pepper alleges that she suffered harm because her pharmacy mislabeled her medication. The pharmacy operated under the Zellers name and Pepper notified Zellers within days of the alleged problem. Zellers in turn notified the pharmacists who operated the pharmacy and these notified the dispensing pharmacist.

An action was commenced against Zellers, which informed the plaintiffs of the involvement of the operating pharmacists. Two years later a second action was commenced against the operating pharmacists. Counsel for the latter informed the plaintiffs’ lawyer of the identity of the dispensing pharmacist

and of the fact that the pharmacy was actually owned by a numbered company.

At this point, counsel for the plaintiffs brought a motion for permission to add the numbered company and the dispensing pharmacist as defendants. The motion ultimately succeeded as against the company, but failed as against the individual pharmacist.

The legislation in question provided a limitation period of one year which commenced when the plaintiff “knew or ought to have known the fact or facts upon which the negligence or malpractice is alleged”. This limitation period was available to professionals regulated by the legislation as well as to “health profession corporations”. One of the facts determined by the Court of Appeal is that while the dispensing pharmacist clearly could claim the protection of the limitation period, the numbered company in question could not. This followed from the fact that the incorpora-

tors had failed to obtain a certificate of authorization which is necessary to attain the status of “health profession corporation”.

Courts in Canada have often shown themselves disposed to come to the aid of plaintiffs who fail to name the proper parties in litigation before the expiry of a limitation period. Various devices such as discoverability and special circumstances have been relied upon to allow the late addition of defendants. This case illustrates however that there is a threshold to be met. Because the plaintiffs’ counsel failed to introduce any evidence of steps taken to obtain the necessary information within the limitation period, the Court refused to intervene. It concluded that this failure prevented the plaintiffs from discharging their onus of showing that they had exercised due diligence in attempting to learn the identity of the dispensing pharmacist.

*Pepper v. Zellers*  
Ont. C.A. Docket C44508

## Canadian Transportation Agency Accessibility Hearing

The Canadian Transportation Agency recently conducted a public hearing into an issue which has agitated various committees and agencies for more than 20 years. At stake is whether individuals with disabilities who require extra seating while travelling by air should be entitled to any required extra seats without paying an additional fare. All individuals who require an attendant to allow them to travel as well as individuals who require extra seats because of any special disability or because of body size would qualify under the putative principle of “one person/one fare”.

The hearing commenced on November 14 and final argument concluded on December 12. Under the applicable law, the air carriers involved (Air Canada, Jazz and WestJet) are obliged to accommodate unless able to demonstrate that the cost of accommodation would be unreasonable.

In the course of the proceedings the Agency heard from employees and officers of the carriers as well as from economists, accountants, business

valuators, medical practitioners, a rehabilitation therapist, a biostatistician and a long-time industry observer. The most hotly disputed issue concerns the number of individuals who would qualify under “one person/one fare”.

There are a number of facts which are not in dispute, such as the number of persons in Canada, with disabilities, who travel by air each year (about 830,000) and the percentage of the population with disabilities who travel with attendants (about 18.5%). The big dispute concerns the percentage of persons with disabilities who would require an attendant under the proposed rule. Here estimates range from a low of about 3.5% to a high of 22%. There is also a keen debate concerning the number of persons who would not “fit” in an aircraft seat because of their body size. Considering seats in the range of 17” to 18”, measured between the armrests, the evidence indicates that something like 1% to 2.6% of the total Canadian population would be obese and would have a body dimension exceeding the size of the seat. However, there is also signifi-

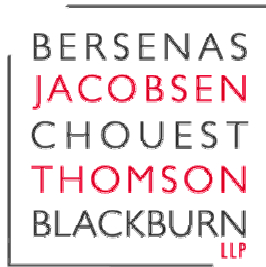
cant disagreement respecting whether the number who would be found not to fit would be greater or lesser than this percentage suggests.

If one takes the lowest estimates supported by any of the testimony given, the annual costs to Air Canada and WestJet would be in the neighbourhood of \$9 million. This figure does not take into account the additional costs of providing accommodation to the obese and does not allow for any growth in the population of persons with disabilities who might be expected to take advantage of the proposed rule. It also assumes that the rule would be introduced for domestic transportation only and would not extend to transborder or international carriage by air.

The higher estimates suggest annual losses many times greater than the base figure of \$9 million.

As expected, the Agency has taken the matter under advisement.

Canadian Transportation Agency  
File # U3570/02-50



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*“... the test ... is whether it is reasonably foreseeable that a person of normal fortitude or sensibility is likely to suffer some type of psychiatric harm as a consequence of the defendant’s careless conduct. That is what reasonable foreseeability means.”*

*Mustapha*, para 49.

*Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.*

*These Transportation Notes are intended to provide general information and do not constitute legal advice. Readers should consult legal counsel on matters of interest or concern raised by anything in this publication.*

*We welcome your comments and suggestions.*

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## End of the Line

We have previously commented on decisions involving the concepts of mental distress or psychiatric damages as these elements of claim are often found in cases involving the transportation sector. Most recently we described (*Transportation Notes*, Volume 2, Issue 8) an important development in the law affecting mental distress claims in the law of contract. The Court of Appeal for Ontario has now brought much needed clarity to the way in which such claims should be dealt with in the law of tort.

The story in *Mustapha v. Culligan* is about a dead fly in a bottle of water and the extreme sensitivity of Mr. Mustapha, who had relied upon Culligan for drinking water. In the fall of 2001 he and his wife were placing a bottle in the home dispenser. Before the bottle was opened they both noted the presence of a foreign body which, on inspection, turned out to be a dead fly. Both had immediate reactions of revulsion and nausea, but only Mr. Mustapha went on to develop more significant problems.

Although no one actually drank any of the water, Mr. Mustapha became obsessed

with the idea that he and his family were, or might be, threatened with serious harm. The trial judge accepted that Mustapha “pictures flies walking on animal feces . . . and then being in his supposedly pure water”. As a result he had nightmares, slept poorly, became unable to drink water, experienced great difficulty taking showers, became argumentative, edgy and constipated. His work suffered and he lost his sexual drive. The trial judge awarded damages for psychiatric injury of approximately \$350,000.

The Ontario Court of Appeal set aside this judgment and required Mustapha to pay costs of the appeal. In doing so, the Court formulated a clear statement of the law. The central issues are with respect to foreseeability and policy considerations. What type of harm must be foreseeable? How are very extreme reactions which are peculiar to an individual to be viewed?

In the United Kingdom, a distinction has been made between “primary” and “secondary” victims with regard to nervous shock cases. The first are those who are involved in the actions which cause the

harm while the second are passive witnesses. Significantly, the courts of the UK have found that foreseeability of physical (as opposed to psychiatric) injury is sufficient for the first category. In respect of the second category it is necessary to show that some form of psychiatric illness in a person of normal fortitude was reasonably foreseeable.

The Ontario Court of Appeal rejected the distinction between primary and secondary victims. This it found to be a “mechanism constructed and deployed by the courts to put limits, for policy reasons, on the scope of recovery in psychiatric harm cases”. However, having rejected the distinction, the Court explicitly stated that the approach to liability must involve a consideration of policy issues in addition to foreseeability. The Court concluded that, as a matter of policy, it is not appropriate to impose liability for psychiatric injury where the harm suffered is significantly disproportionate to the relatively inconsequential nature of the incident and where the victim is not “a person of normal fortitude and robustness”. Thus the claim failed.

*Mustapha v. Culligan*,  
Ontario C.A. Docket C43429