



Subrogation: Ringo Starr Was Right - It Don't Come Easy!

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Topics

- Subrogation Principles
- Aviation Claims
- Rail Claims
- Trucking Claims
- Marine Claims
- Forwarders, Load Brokers, Warehouse
- Recent Developments on Freedom of Contract and Waiver of Subrogation



Uneconomics of Subrogation

- \$120,000 Claim: 25% Contingency: Recovery \$100,000

Phase	Cost	Spent	What Lawyer Earns
Claim Letter	350	350	24,650
Pleading	1000	1350	23,650
Exchange of Documents	2000	3,350	21,650
Examinations for Dis.	6000	9,350	15,650
Mediation	3000	12,350	12,650
Pre-Trial	3000	15,350	9,650
Trial	25,000	40,350	-15,350



Uneconomics of Subrogation

- \$120,000 Claim: 25% Contingency: Recovery \$60,000

Phase	Cost	Spent	What Lawyer Earns
Claim Letter	350	350	14,650
Pleading	1000	1350	13,650
Exchange of Documents	2000	3,350	12,650
Examinations for Dis.	6000	9,350	6,650
Mediation	3000	12,350	2650
Pre-Trial	3000	15,350	-350
Trial	25,000	40,350	-25,350



Subrogation

- An insurer who has paid the insured is entitled to exercise rights at law against a third person liable to the insured in respect of the events giving rise to the insurance claim. The insurer is “subrogated” to the rights of the insured



Subrogation

- Legal Basis of Subrogation
 - Equity
 - Implied Term of the Contract of Insurance
 - Express Term of the Contract



Subrogation

- Rights of Insurer
 - The insurer “steps into the shoes of the insured”



Subrogation

- Limits on Insurer's Rights
 - Contractual Exemption or Limitation
 - Estoppel
 - Time Bar
 - Windfalls
 - No Rights Against the Insured or Co-insured
 - Public policy



Subrogation

- Duties of Insured
- An insured is obliged to assist the insurer to exercise the rights of subrogation. An insured may be required to protect suit time (especially if the claim is presented to the insurer near the end of the time for suit). An insured should not prejudice the right of subrogation of the insurer.



Subrogation

- Waiver of Subrogation
 - An agreement by an insurer (or insured) that the insurer will not pursue a third party to recover damages



Subrogation

- Allocation of Expenses & Recoveries
 - At Common Law
 - Statutory Allocation – Ont. Insurance Act
 - Contract



Subrogation

- Control of Litigation
 - At common law the insured has the right to carriage and control of the litigation until it is fully indemnified.
 - A subrogation clause can alter this right



Aviation Claims

- Montreal Convention governs most carriages – applies only to international travel – Limit 19 SDR per kilo (\$32 per kilo)
- Domestic Carriage – AC: \$1.10 per kilo but not less than \$50. Written intent within 14 days of receiving goods, 21 days for delay, or 120 days if lost. 2 years to sue



Rail Claims

- Domestic carriage is subject to Railway Traffic Liability Regulations SOR/91-488
- Subject to rail carrier tariffs and to confidential contracts
- Example CP Rail: \$2 per lb with cap of \$50,000 – Tariff item 200
- Different rules from USA



Truck Claims

- Canada – Domestic Law
- USA – between states – Carmack Amendment



Use of Bills of Lading

- Law Governing Carriage of Goods
 - Statutes
 - Contract – such as a bill of lading
 - Common Law – law developed by judges through decisions of the courts and similar tribunals – case law or precedent



Use of Bills of Lading

- If no statute applies or not contract applies, then as a carrier – common law applies – you are the insurer of the goods
- No limitation of liability
- No statutory defenses
- Valuation of Loss is affected



Use of Bills of Lading

- In Canada – federal statute – *Motor Vehicle Transport Act* and Conditions of Carriage Regulations, SOR/2005-404:
- s. 1 - the conditions of carriage and limitations of liability that apply to transport by an extra-provincial truck undertaking are those set out in the **laws of the province in which the transport originates**



Use of Bills of Lading

- In Canada – federal statute – *Motor Vehicle Transport Act* and Conditions of Carriage Regulations, SOR/2005-404:
- s. 2 in the absence of a provincial enactment the conditions of carriage and limitations of liability that apply to transport by an extra-provincial truck undertaking are those agreed to by the undertaking



Statute That Applies

- Law that applies is the law of the province where the shipment originates
- Yukon Territories – no legislation
- PEI – no legislation
- Nfld. & Labrador - no legislation
- Northwest Territories & Nunavut – no legislation.



Statutory Effects

- Carriage inside a province – provincial legislation applies (except PEI, Nfld. & Lab, NWT, Nunavit)
- Between provinces – law of province of origin
- Origin in PEI, Nfld. & Lab, NWT, Nunavit – contract of carriage if any



Provinces with Laws

- Nova Scotia – Carriage of Freight by Vehicle Regulations s. 10 – **bills of lading shall** be issued in triplicate
- Manitoba–*Highway Traffic Act*, s. 313(1) **a bill of lading** shall be issued by the carrier
- Quebec– *Transport Act*, Transport Regulation 1198/99– an operator of heavy vehicles must **issue a bill of lading**
- New Brunswick – Commercial Vehicle Bill of Lading and Cargo Insurance Reg. – **bill of lading is required**
- British Columbia –*Motor Vehicle Act*, Motor Vehicle Act Regulations: s. 37.39 **a bill of lading** must be issued by the carrier
- Saskatchewan – *Motor Carrier Act*, S.S. 1986 s. 16 – carrier must **use bills of lading or other documents** relating to the transportation of goods as required
- Ontario – A **contract of carriage** must contain certain information



If Statute Doesn't Apply

- Need a stand alone contract of carriage – typically a bill of lading is issued or an overall contract that governs the relationship of the shipper and carrier and deals with defences (Act of God..), exclusions from liability (shipper's failure to properly pack, limits of liability (i.e. \$4.40 per kilo)



In Transit v. Bailment

- Most carriers use an uniform bill of lading entitling the carrier to limit liability to \$2 per pound.
- If cargo is stolen or damaged while at a storage or distribution terminal awaiting further on carriage the argument is made that the bill of lading (or legislation) doesn't apply as the cargo is not in transit.



In Transit v. Bailment

- Argument is made that the loss at a terminal has to be paid in full since the goods are not in transit.
- New Brunswick Court of Appeal in *Pro Transport Ltd. v. Day & Ross Inc.* 2011 NBCA 104 has laid the argument to rest



In Transit v. Bailment

- “There is no logical reason or legal support for the proposition that the contractual relationship between the parties was transformed from a contract for the carriage of goods to a bailment contract once the goods arrived [at a destination]”



Marine Claims

- Carriage by Water to and from Canada, inside Canada - Marine Liability Act
- Hague Visby Rules
- Applies only to bills of lading
- Marine Liability Act – Limitation of Liability



Through Transport Carriage & Himalaya Clauses

- Himalaya Clause – a contractual clause expressed to be for the benefit of a third party who is not a party to the contract.
- Typical – a stevedore unloading a ship may be given the benefit of the defences under an ocean bill of lading by a Himalaya clause in the bill of lading which extends the contract to sub contractors, agents etc.



Through Transport Carriage & Himalaya Clauses

- In Canada the Supreme Court of Canada accepted the Himalaya clause as valid in *ITO International Terminal Operators v. Miida Electronics*.
- 2 elements necessary
 - A) a clause in a bill of lading extending the benefit
 - B) an agreement in writing between the carrier and sub-contractor



Through Transport Carriage & Himalaya Clauses

- The Federal Court of Appeal has held that a rail carrier is entitled to benefit from the ocean carrier's bill of lading terms
 - *Boutique Jacob Inc. v. Canadian Pacific Railway Co.*
 - *Cami Automotive, Inc. v. Westwood Shipping Lines Inc.*
- In both cases there was a confidential contract between the rail carrier & ocean carrier.



More Conservative Courts: Siemens

- *Siemens Canada Limited v. J.D. Irving, Ltd.* 2012 FCA 225.
- in the course of being loaded upon a barge, two valuable steam turbine rotors worth forty million dollars fell into the waters of Saint John Harbour



Limitation: Siemens

- Barge operator brought limitation proceeding to limit liability to \$500,000 per the 1976 Limitation Convention
- [O]ne of the goals of the Convention was to reduce the amount of litigation as far as actions for limitations of liability were concerned, explaining that to achieve that goal, the signatories to the Convention had agreed to increase the limitation fund and to create “a virtually unbreakable right to limit liability”.



Limitation: Siemens

- Conduct barring limitation
- A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.



Freight Forwarders

- Many forwarders have terms and conditions applicable to their business i.e. Canadian International Freight Forwarders Association – will be applied by courts
- Agent or Principal?
- Time Limit to Sue – 9 months
- Limitation Amount – 2 SDR per kilo (\$3.36) or 75,000 SDR (\$126,000)



Load Brokers

- *Tripair Transportation LP v. U.S. Consolidators Inc., Linda Earle-Barron and Jonathan Turner* August 23, 2012 Court file SC-1100001987-0000 (Brampton) a carrier sued a load broker and its three officers and directors for a number of unpaid invoices



Load Brokers

- *Tripur Transportation* : Load broker said “we are incorporated and we are bankrupt – go away – you can’t sue us.
- Court: directors and officers of a corporation can be held personally liable for the corporation's breach of trust where they either knowingly directed or knowingly assisted in the corporation's breach of trust



Load Brokers

- To prove "knowing assistance", the directors and officers must have actual knowledge (or be reckless or willfully blind) of the corporation's breach of trust and that the disbursement of trust funds is in breach of trust. If the trust is imposed by statute (as it was in this case, as per s. 191.0.1 (3) of the *Highway Traffic Act*), then the person will be deemed to have knowledge of it, as persons are deemed to have knowledge of the law



Warehouse Claims

- Typically, a warehouse is subject to provincial legislation – Warehouse Receipts Act – duty of care towards goods
- Warehouse Terms and Conditions may have terms limiting liability. If properly drafted will apply.
- Freedom of Contract vs. Statutory Requirements and Public Policy



Courts are more conservative

- Judges are becoming more conservative and less inclined to create new law, leaving it to government
- Recently, our newest nominee to the Supreme Court of Canada stated: “We’re not another Parliament,” “It’s not up to us to say this is not a good law, it ought to be changed.” – Justice Marc Nadon



Supreme Court of Canada

- The “Tercon” case set the trend for freedom of contract
- 2010 Decision – Deals with the application of the rules of fundamental breach and contractual exclusion clauses



S.C.C. – Tercon

- B.C. did a RFP for construction of a highway
- Tercon bid. Lost the contract and alleged that B.C. breached express provisions of the tendering contract by allowing a bid from an ineligible party
- RFP had an exclusion clause saying bidders could not sue province by participating
- Tercon: unfair, fundamental breach of K



S.C.C. – Tercon

- S.C.C. – fundamental breach of a contract is dead.
- A court has no discretion to refuse to enforce a valid and applicable clause in a contract
- Exception: must be contrary to public policy such that it overrides the public interest in freedom of contract



S.C.C. – Tercon

- Tercon application rules:
- A) Does the clause apply? Look at intention of the parties
- B) Is the Exclusion clause unconscionable at the time it was made?
- C) Does public policy override the enforcement of the clause? - burden on claimant – serious criminal or egregious fraud.



S.C.C. – Tercon

Freedom of contract is paramount.



Kruger Decision

- Kruger stored paper products at First Choice Logistics warehouse in Vancouver
- Fire originated in a forklift caused \$16 million in damages to the Kruger product
- At trial the judge found First Choice liable for the fire, did not allow them to limit liability and did not allow any part of warehouse agreement to apply to the defence



Kruger Decision

- Warehouse agreement was poorly drafted and done orally and in draft – never signed
- Warehouse receipt terms were in conflict with warehouse agreement terms
- The warehouse agreement provided for exclusion of liability for fire and limitation of liability in various ways: based on packages and based on storage rate – common to industry



Kruger Decision

- Warehouse agreement contained a clause stating that Kruger had to get insurance on the stored product and Kruger's insurer could not subrogate against First Choice logistics.
- Subrogation would allow Kruger's insurance company to pay Kruger for its loss and then bring a law suit in Kruger's name against First Choice to recover what it paid out.



Kruger Decision

- Warehouse agreement contained a clause stating that Kruger had to get insurance on the stored product.
- 17B: Scott [Kruger] shall, at its own cost and expense, insure and keep insured any of its own property in, on or about the Warehouse, in which Scott itself has an insurable interest, including, without limitation, Scott'[s] inventory, furniture, fixtures, and equipment.



Kruger Decision

- Warehouse agreement contained a clause stating that Kruger's insurer could not subrogate against First Choice logistics.
- “The Contractor and or Scott will indemnify and hold harmless (i) each to each other Scott, its affiliated, related, parent and subsidiary companies and their respective shareholders, directors, officers, employees, servants, agents, appointees, successors and assigns (collectively the “Indemnified Party”), from any and all losses, damages, expenses, claims, demands, causes of action, legal proceedings, fines, penalties, costs and fees, and any other liability or obligation whatsoever other than a liability that arises by virtue of the Indemnified Party's own misconduct, in connection with;



Kruger Decision

- Trial judge held that a waiver of subrogation clause was contrary to public policy and was contrary to the Warehouse Receipts Act which holds that a warehouseman must use reasonable care to store goods.
- Allowing exclusion clauses and waiver of subrogation clauses would take away the impetus for reasonable care.



Kruger Decision



- B.C. Court of Appeal – heard argument on two issues
- A) Was First Choice responsible for the fire
- B) Could First Choice avoid responsibility by the waiver of subrogation clause?

Kruger Decision

- B.C. Court of Appeal – Held:
- A) First Choice was negligent in its operations resulting in the fire = responsible
- B) First Choice could avoid having to pay anything to Kruger because the waiver of subrogation clause was a valid term of their contract. The clause did not reduce the standard of care



Kruger Decision

- B.C. Court of Appeal:
- A) A warehouse can limit its liability with a contractual limitation of liability clause.
- B) A warehouse can shift the responsibility to a loss by requiring a storer to have insurance and by having a contractual clause waiving subrogation by the storer's insurer.



Kruger Decision

- Lessons Learned:
- A) A properly drafted clause in a contract will protect the party who the clause was intended to protect
- B) The principle learned in the warehousing situation can be applied to carrier contracts transportation contracts, and freight forwarding contracts



THANK YOU

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