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COMMON CARRIER'S NEGLIGENT DELAY PLUS ACT OF GOD

A common carrier negligently delays freight in transit, thus subjecting it to a force of nature known in the law as the act of God. If the owner of the goods sues for damages for consequent deterioration or destruction of the goods, where the act of God set up in defense by the carrier is of so unusual a type in the locality as to be totally unexpected, there arises the troublesome question whether the loss has been caused by the act of God so as to cause it to come within the exceptions to the common carrier's liability as insurer of goods. On this question, the majority rule treats the common carrier as being liable for such loss;¹ but the minority is respectable,² including the federal courts.

¹ *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882 (1906); *Pittsburg, C. C. & St. L. Ry. Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. Rep. 316. (1909).

Held, that, where a common carrier relies upon the defense that the loss was occasioned by the act of God, to bring himself within the defense, he must negative his own fault contributing to the loss. *Bugg v. Perry & Faircloth*, 156 S. E. 708 (Ga. App. 1931).

Defendant carrier negligently furnished a defective car for plaintiff's corn, in consequence of which the shipment was delayed in transit for reloading. The corn was thus subjected to a flood, which destroyed it. Defendant was held liable, the court saying: "The great weight of authority is to the effect that the act of God, in order to constitute a defense for the carrier, must be the exclusive cause of the injury." *Cincinnati, H. & D. Ry. Co. v. Myers & Patty Co.*, 4 Ohio App. 493 (1915).

That there is nothing new in the general principle of these cases is indicated by the following quotation, to which I am referred by my colleague, Professor John W. Curran: "Accident Connected with Negligence.—For damages which commenced through negligence, and ended through accident, one is responsible."—*Legal Maxims and Fundamental Laws of the Civil and Criminal Code of the Talmud*, by Moses Mielziner, comprising a chapter of "Moses Mielziner, a Biography" (1931), p. 131, at p. 136.

² *Missouri Pacific R. Co. v. United States*, 47 S. Ct. 266 (1912); *Continental Paper Bag Co. v. Maine Central R. Co.*, 115 Me. 449, 99 A. 259 (1916); *Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co.*, 135 Minn. 363, 160 N. W. 1028 (1917), certiorari denied, 246 U. S. 644, 64 L. Ed. 528, 38 S. Ct. 8 (1917); *Rodgers v. Missouri Pacific R. Co.*, 75 Kan. 222, 88 P. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441 (1907).

Where the force of nature is of a kind actually known to be coming at the time of the carrier's negligent delay, probably any jurisdiction will hold the common carrier liable as insurer against loss to which it submits the goods by its negligence.³ It seems also that there is a general tendency

³ "Where the carrier, as in the instant case, had warning of the oncoming flood, ample time after such warning to protect the shipment, and did not take reasonable precautions to protect the same after such notice, he is not exonerated from liability upon the principles laid down in the delay cases." *Ithaca Roller Mills v. Ann Arbor R. Co.*, 217 Mich. 348, 186 N. W. 516 (1922).

New Orleans & N. E. R. Co. v. National Rice Milling Co., 234 U. S. 80, 58 L. Ed. 1223, 34 S. Ct. 726 (1914), was an action to recover the value of two cars of rice destroyed by fire while being transported over connecting railroads from New Orleans, Louisiana, to Charleston, South Carolina. The rice, which was shipped on through bills of lading issued by the initial carrier, was destroyed while in custody of the second carrier. The two cars, with others containing quick-lime, were side-tracked en route, awaiting further movement. The yards in which the cars were side-tracked adjoined the Savannah river, which was then almost out of its banks and was steadily rising as a result of extraordinary rains and cloudbursts extending up the river and its tributaries one hundred miles. The waters continued to rise, spread over the yards to a considerable depth, and ultimately reached the quick-lime, thereby causing the cars to burn thus destroying the rice. The cars had been in the yards about sixteen hours when the fire started. The action was against both carriers, and it was alleged in the petition, which based the right of recovery upon the Carmack amendment to the Interstate Commerce Act (34 Stat. at L. 584, 595, C. 3591, § 7, U. S. Comp. St., Supp. 1911, p. 1307, U. S. C. A., Title 49, C. 1, § 20 (11)) that the loss of the rice was caused by the negligence of the second carrier, and that the two carriers were jointly liable. (The above statement is abridged from the opinion of Mr. Justice Van Devanter.) Judgment was for the plaintiff in the trial court, and was affirmed by the supreme court of Louisiana, in 132 La. 615, 61 So. 708, Ann. Cas. 1914D, 1099 (1913). Writ of error was dismissed by the supreme court of the United States. The supreme court of Louisiana, quoted by Mr. Justice Van Devanter, said: "These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away. From all this evidence, we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to defend itself."

Cotton shipped over defendant's line arrived at destination. Defendant gave no notice to the shipper's agent at destination until eleven days after the arrival, although the bill of lading required such notice to be given to the agent. One day before notice was given, the cotton was struck by lightning and burned. Held, that defendant is liable. *Missouri & N. A. R. Co. v. United Farmers of America*, 173 Ark. 577, 292 S. W. 990 (1927).

Pecan trees arrived at defendant's station Friday morning and were damaged by cold Sunday. Consignee was not notified of arrival until Monday morning.

to hold the carrier liable where the goods are destroyed in the carrier's possession in an interval during which the goods would have been in the consignee's possession if the carrier had not wilfully refused to deliver the goods or had not negligently or wilfully failed to give the consignee or the shipper a notice required by law or by the contract.⁴

The majority view is well stated by Chief Justice McClain, a well known authority in the field of Carriers at that time, in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*,⁵ decided in 1906:

"Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by

Held, that defendant must acquit itself of blame as common carrier. Judgment for plaintiff was affirmed. *American Railway Express Co. v. Judd*, 213 Ala. 242, 104 So. 418 (1925).

Just as properly, and perhaps *a fortiori*, where the carrier has wilfully subjected the goods to the action of the elements, thereby damaging them, it is liable. So, where a carrier unloaded perishable goods in the mud and rain, on the facts in the particular case, the carrier was held to have been grossly negligent and liable for the resulting loss. *Annese v. Baltimore & Ohio R. Co.*, 87 W. Va. 588, 105 S. E. 807, 22 A. L. R. 869 (1921).

So also, the carrier was held liable for loss by deterioration of watermelons during a delay caused by floods and washouts, where the carrier knew of such floods and washouts and neither stipulated against liability for losses from such causes nor even notified the shipper of such conditions. *Gray v. Seaboard Air Line*, 113 S. Car. 345, 102 S. E. 512 (1918). *Certiorari* was dismissed after settlement, 251 U. S. 566, 64 L. Ed. 417, 40 S. Ct. 218 (1920).

⁴ In *Henry v. Atchison, Topeka, & Santa Fe Ry. Co.*, 83 Kan. 104, 109 P. 1005, 28 L. R. A. (N. S.) 1088 (1910), a common carrier was held liable for damage to goods consequent upon wilful refusal to deliver and act of God. The carrier had transported the goods to destination and notified the owner to get them. The owner called, tendered freight charges due, and demanded delivery to him, which the carrier wrongfully refused. On the next day, the goods were damaged by an unprecedented flood. The court held that wrongful detention was at the risk of the carrier. This case is of especial interest, as it was decided by the same court that had held that, for loss consequent upon mere negligent delay and act of God, the common carrier was not liable, in *Rodgers v. Missouri Pacific Ry. Co.*, *supra* note 2, where the mere negligent delay of the carrier had subjected the goods to an unexpected flood.

⁵ *Op. cit. supra* note 1.

some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation."

The minority view is stated by Justice Burch in *Rodgers v. Mo. Pac. Ry. Co.*,⁶ in a lengthy opinion, in which are reviewed many authorities varying considerably in their relevancy and in their apparent soundness even as to abstract propositions.

Undoubtedly Chief Justice McClain's opinion gives more weight to the fact that, but for the negligent delay, the dam-

⁶ *Op. cit. supra* note 2. Burch, J., says: "He [the carrier] is obliged to anticipate that delay in transportation may result in the deterioration of perishable freight, and that the fluctuating markets may fall, but he cannot be charged with foreknowledge of floods like the one which devastated the railroad yards at Kansas City in 1903. He is under no duty to make provision against such phenomena. In the present case there is no causal relation between the negligence charged and the catastrophe which overtook the plaintiff's property. The carrier's delay did not produce the flood, and, for all the carrier could foresee, promptitude might have been as dangerous as delay. The delay was a mere incident to the destruction of the car of grain. The *causa causans* was the flood, the inevitableness of which could not be determined by anything which the carrier might do. As expressed by Mr. Justice Peters in the case of *O'Brien v. McGlinchy*, 68 Me. 552, 557, the negligence of the carrier had but a casual, while the flood had a causal, connection, with the ultimate event. Little can be added to the reasons given by Lord Bacon and Judge Cooley for resting responsibility upon the proximate cause." Justice Burch is here referring to Bacon's "*In jure, non causa remota sed proxima spectatur*," which would be considered by some as aiding in the solution of this case and by others as contributing nothing toward a determination of the real issue.

In the above statement, it is to be noted that Burch, J., indicates that the carrier is not to be charged with foreknowledge of so unusual a flood; but he does indicate that the carrier is to be charged with foreknowledge of falling markets. This is of course another way of saying that the rule that the carrier must carry the goods through within a reasonable time protects against no losses by unusual floods but does protect against losses through market fluctuations. If foreknowledge is to be the test, what about an unforeseen and unforeseeable falling of the price of the commodity carried, to the extent of ninety-five per cent within a few days, through a sudden and unprecedented influx of foreign goods of the same kind? Would this have been held to be "too remote"? Probably not.

age would not have occurred, than is usually given to this fact in a causation problem, for ordinarily, although the fact that but for defendant's act the damage would have occurred anyway, is regarded as eliminating defendant's act as a legal cause, the fact that but for defendant's act the damage would not have occurred, is not regarded as making defendant's act the legal cause. On the other hand, may it not be said that damage by an unusual flood was a damage to a slight chance of which the goods were submitted by the defendant's negligent delay, and that defendant, by delaying, consciously placed the goods in some danger of damage from natural causes, of which unusual, or even unprecedented, floods were one type? In the agreed statement of facts in the *Green-Wheeler* case, it was stipulated that the flood was "so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby."

Negligence problems include cases in which the probability of the resulting damage is great, other cases in which it is great but not quite so great, other cases in which it is a little more than moderate, other cases in which it is only moderate, other cases in which it is a little less than moderate, other cases in which it is small, other cases in which it is very small but hardly negligible, and other cases in which it is so small as to be negligible. Of course it would be utterly absurd to propose these eight classes of cases as a rigid classification of negligence cases, for we might equally well propose three or seven or ten or perhaps twenty-five classes. At best, in the field of negligence, classification of fact-patterns can be only very rough, for only standards of conduct, unfixed and uncertain, and not rules, are involved.

Returning to the rather inexact classes indicated above, where does the *Green-Wheeler* case belong? Is it a case in which the chance of damage by flood was very small but hardly negligible, or is it a case in which this chance was so

small as to be entirely negligible? Probably opinions on this point might well differ. If the chance of loss by flood was so small as to seem entirely negligible, probably it could be said that, under the usual foreseeability formula used in negligence cases, the carrier would be warranted in neglecting to take this chance into account at all; but, if the chance was very small but not so small as to be negligible, it would seem that there is some reason to hold the carrier liable for a loss occurring as in the *Green-Wheeler* case. The stipulation in the agreed statement of facts, that the flood was "so unusual and extraordinary as to constitute an act of God," does not throw much light upon the question whether the carrier may well have been warranted in neglecting to take this chance of loss into account. May it not be contended that, inasmuch as statistics indicate a certain percentage of loss from unusual floods and storms, and that the chance of such loss is increased by every day in transit, the carrier, by negligent delay, is failing in its duty to refrain from needlessly submitting the freight to a hazard of even so slight a nature? On the other hand, may it be said that the carrier, by its negligent delay, has taken an unreasonable risk of loss of the goods by an unusual flood or storm? ⁷

In *Rodgers v. Missouri Pacific R. Co.*⁸ Justice Burch sarcastically says:

"The case of *Green-Wheeler Shoe Company v. Chicago, R. I. & P. Ry. Co.* . . . contains the following remarkable statement as a new contribution to the law. [Here he quotes the same passage quoted on the first page of this article.] This principle makes the carrier responsible upon its hindsight rather than its foresight, or makes it bound to regulate its conduct with reference to that which is utterly beyond mortal ken."

Is this sarcasm warranted? Does the principle stated by Chief Justice McClain make the carrier responsible upon

⁷ "Negligence is any conduct, except conduct recklessly disregardful of the interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of injury." Restatement of the Law of Torts, of the American Law Institute, Sec. 166.

⁸ *Op. cit. supra* note 2.

its hindsight rather than its foresight? It seems too obvious for discussion that it does not. Does it make the carrier bound to regulate its conduct with reference to that which is utterly beyond mortal ken? Is it beyond mortal ken that, on the basis of general experience and of statistics as well, the carrier can expect that a certain extra hazard will be incurred by reason of each day that the goods have been delayed in transit? It would seem that the answer to this question depends upon the length to which we are willing to go in holding a negligent defendant liable for consequences. May it not be properly said that a carrier has assumed a duty of so high a degree of care of the goods that he may rightly be taken to have agreed that he will not unnecessarily submit the goods to even relatively slight hazards by reason of delay? On this question, it is probably not reasonable to expect that there will ever be even substantial agreement. There will probably always be those who believe it unreasonable to hold the carrier liable for any results except those which are of a considerable degree of probability, and there will probably always be those who believe that the carrier should be held liable for losses occasioned by the negligent submission of the goods to even relatively slight hazards.⁹

⁹ "Here the defendant is a wrongdoer, damages have resulted, and the delay has at least contributed something to the damage. But is the risk of encountering such phenomena one within the scope of the rule of law which makes delay a wrong? Prompt shipment is required to protect against the risks incurred by not unusual weather conditions, deterioration, market fluctuations and the like, but not against all risks and especially those which in the affairs of men are so unusual that they are ordinarily not guarded against at all and which are not thought of as sufficiently serious to take into account. Hence, the carrier is not required to fashion his conduct as to these unusual risks. The law affords the shipper no protection against them. The rule invoked is not designed to protect against a Galveston storm, while it might be held to afford protection against floods in the Mississippi Valley where even "unusual" floods are of more or less frequent occurrence. Different courts might well differ on the same facts. In fact, there is a tendency in some jurisdictions to extend protection against some of these risks, while in other jurisdictions protection is denied." Green's *Rationale of Proximate Cause*, pp. 28, 29.

Looking at the whole question from a practical standpoint, which solution works out the better? Probably the rule of the *Green-Wheeler* case gives an incentive to the maintenance of better railroad service, in that it spurs the carrier into expediting the carriage of the goods entrusted to it. On the other hand, it will probably be argued that many shippers today, especially the larger shippers, are more concerned with the procuring of low rates than with the imposition upon the carrier of extraordinary liabilities, and that the natural tendency of any considerable increase in liabilities is to increase freight rates; but it should be noticed that this very argument presupposes that the aggregate of losses from such unusual causes will mount into such a sum as to indicate that the risk has been, after all, not so negligible as the proponents of this argument would have us believe.

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