Contracts for the carriage of goods by sea: onus of proof – is it contractual or bailment?

Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)[1]

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PART 2

This article is the second half of an article which discusses the Supreme Court's decision in *Volcafe*. In this part, it considers the *travaux préparatoires* of the Hague Rules; the Rotterdam Rules; the later decision of Lord Wright in *Joseph Constantine*, in which he apparently changed his opinion from that expressed in *Gosse Millard* on the question of burden of proof in contract of carriage by sea cases (and Lord Simon LC in that case); the later decision of the House of Lords in *The Albacora*, as well as the Australian cases that have applied the decision in *The Glendarroch* and explains why, with reference to a number of other judgments by judges of great repute, the bailment approach is inappropriate.

Part 1 can be found in the previous issue of this journal (2019) 25 *JIML* 2 at 105–117 and at www.lawtext.com

The manner in which the Hague Rules came to be agreed: the influence of the UK and the *travaux préparatoires*

It is instructive to consider what was said at some of the debates leading up to the negotiation of the Hague Rules Convention. In his masterful work on the legislative history of the Carriage of Goods by Sea Act and the *travaux préparatoires,*[2] Professor Michael Sturley has reproduced the discussions of the International Law Association Maritime Law Committee meetings in London in 1921, the International Conference on Maritime Law held in Brussels in 1922 and the Sous-Commission meetings in Brussels in 1923, where some interesting commentary on the inter-relationship of Articles III and IV took place and, in particular, the difference between the approach of the common law lawyers and the civil law lawyers to drafting legislation.

[1] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* [2018] UKSC 61, [2019] 1 Lloyd's Rep 21, [2018] 3 WLR 2087.

[2] M F Sturley (ed) *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules, vol II* (FB Rothman 1990).

The significance for the UK of the Hague Rules and how their content was fashioned by British interests and influenced by the strength and power of the British merchant marine (but also influenced by its dominions who were not shipowners and bore the brunt of the wide exemption clauses relied on by carriers) and insurance, can be seen in the legislation which had been introduced in New Zealand, Australia and Canada following the US lead with its Harter Act 1893; the work done by the Dominions Royal Commission and then the Imperial Shipping Committee (which included the prime ministers of England, Canada, Australia, South Africa and New Zealand (Lloyd George, Arthur Merglen, W M Hughes, J Smith and W F Massey, as well as Winston Churchill); the high quality representation which was sent to the International Law Committee and CMI meetings – such as Sir Henry Duke (President of the Probate, Divorce and Admiralty Division, who chaired many of the Maritime Law Committee meetings in 1921, later Lord Merrivale); Sir Norman Hill (later Baronet Hill); Lord Phillimore[3] (who also attended the earlier CMI meeting in Hamburg in 1910 that drafted the Collision and Salvage Conventions); Sir Leslie Scott (Solicitor General); the work done by the Joint Committee,[4] which was chaired by Lord Sterndale (Master of the Rolls, previously William Pickford); and the number of bodies and persons that were involved and consulted at various stages who are referred to in the records of those meetings.

The Harter Act was the forerunner to the Hague Rules. Should anyone be in any doubt on that point it is worth recalling what was said by Sir Norman Hill in connection with the list of exceptions in Article IV rule 2 at one of the 1921 meetings of the Maritime Law Committee of the International Law Association in Scheveningen:

> We are all now working on the lines of Mr Harter. He is the founder of this system. In his Act he details them all. It has been followed in the Canadian Act; they are detailed. There is a grave risk that if we draft a set of rules in which we have not detailed all these exceptions, but use general words, some Courts will say: 'They cannot have meant to state the same things as the Harter Act or they would have used the same language'. Well, Sir, to sum up I could not represent to the Association that there would be any chance of getting the Hague Rules accepted by the British shipowners unless we had in detail such exemptions as are agreed to be fair and proper.[5]

Sir Norman and his opposite number, Andrew Jackson, representing the Association of British Chambers of Commerce, explained how significant the Canadian version of the Harter Act had been in their negotiations. Jackson explained to the Joint Committee[6] that he could not justify the inclusion of provisions in the Hague Rules if they were not in the Canadian Act.

Section 1 of the Harter Act made it unlawful for a carrier to seek to absolve itself from any liability for loss or damage arising from negligence or fault in the proper loading, stowage, custody, care or proper delivery of the cargo. Section 2, similarly, made it unlawful for a carrier to seek to lessen, weaken or avoid its obligations to exercise due diligence to equip, man, provision and outfit the vessel properly, and to make it seaworthy to perform the voyage or the obligations of the master and crew to handle and stow the cargo carefully, and to care for and properly deliver the cargo. However, by section 3, the Harter Act also provided that if the carrier exercises due diligence to make the vessel seaworthy and be properly manned, equipped and supplied, it shall not be responsible for damage or loss arising from most of the same circumstances now contained in Article IV rule 2 of the Hague Rules, but did not refer specifically to fire, latent defect, war, arrest or restraint of princes etc, strikes or riots, quarantine or marks. Section 4 required carriers to issue bills of lading and identified the minimum information they must contain and provided penalties in section 5 for non-compliance. Section 6 excluded the carriage of live animals from certain provisions.

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[3] As Sir Walter Phillimore, he had appeared for the losing cargo owners in the Court of Appeal in *The Glendarroch*, and for the owners in *The Xantho* in both the Court of Appeal and in the House of Lords; he became a High Court judge in 1897, a Lord Justice of Appeal in 1913 (and Privy Councillor); and became Baron Phillimore in 1918.

[4] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill together with the Proceedings of the Committee Minutes of Evidence and Appendices' (London 1923).

[5] Sturley (n 2) 132.

[6] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill' (n 4).

It is apparent from the *travaux préparatoires*[7] that the provisions of the Harter Act (and its similar legislation elsewhere in the world) had repeated the broad exclusion clause that had started to appear in bills of lading in the 19th century and it was the desire of many nations to bring uniformity to international shipping.

By August 1921, a draft of a suggested International Code, which is very similar to the Hague Rules, had been finalised as a result of a meeting of the Maritime Law Committee in London in May 1921, where a drafting Committee was formed followed by widespread dissemination of the draft which had been prepared by June.

Perhaps the most dominant figure at the meetings amongst those who were responsible for its preparation was Sir Norman Hill, who represented British shipowners. He was senior partner of Hill Dickinson and Co of Liverpool, secretary of the Liverpool Steamship Owners Association since 1893 and manager of the Liverpool and London Steamship Owners P&I club since 1914, representing 6 million gross register tonnage (GRT) and 26 per cent of British tonnage, as he told the Joint Committee.[8]

What is apparent from those discussions is that the precedent for the Hague Rules was the Harter Act and the Canadian version in particular of that Act. Civil lawyers were unhappy about the long list of exceptions in the proposed Hague Rules as they were unnecessary in their view. As explained by a French delegate, Mr Dor, the exceptions could simply be expressed by saying (something to the effect) that the carrier has no liability for events outside its control (*force majeure*). Article III represented the wishes of the shippers and Article IV those of the shipowners; however, there was some confusion about the list of exceptions in that some of them specifically identified who had the burden of proving certain matters and others did not, but the explanation given was that was how they had appeared in bills of lading for many years, and there was considerable pressure to adopt them in the same historical format in the Convention.

At the International Law Association (Maritime Law Committee) meeting at the Palace of Peace in The Hague on 31 August 1921, Sir Norman Hill and Sir Henry Duke, the chairman, made the following interventions:

> Sir Norman Hill: When this was drafted, I think all of the interests clearly agreed that the obligation, and the only obligation, they wanted to put on the shipowner was the ship shall be seaworthy when she starts loading, and that she shall be seaworthy when she starts on the voyage. If he has done that, he has done his duty, and then the voyage is made under the conditions set out in No 2, and with the exemption set out in Article IV. [The reference to 'No number 2' being a reference to Article III rule 2.]
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> Sir Henry Duke: That is evidently the intent of the draft; and the cargo interests by whom the draft Article III was considered had before them the Harter Act and the Canadian Act, and various other statutes and recommendations, and they came to the conclusion that the right point of time in which to begin to relieve the shipowner from responsibility for negligence during the voyage was satisfied by framing Article III.1 in the way in which it stands.
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> Sir Norman Hill: And, Sir, you notice that in No 2 we were very careful in drafting this. No 1 is 'to exercise due diligence' – that is taken from all the existing laws on this subject of all nations. Then in 2 it is positive. It is not a question of the carrier exercising due diligence under 2. It is 'the carrier shall be bound to provide proper and careful handling, loading, stowage, carriage, custody, care and unloading of the goods carried'. That is an absolute obligation on the carrier during the voyage, and it is only qualified by the exceptions in Article IV…'.[9]
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> Sir Norman Hill: This clause, Article IV, is the shipowner's clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clauses in Article III, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted, Article III(2),

[7] Sturley (n 2).

[8] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill' (n 4).

[9] Sturley (n 2) 82, 83.

> which says that 'the carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care and unloading of the goods carried. We have not sought to weaken those or qualify those in any way. When we come to Article IV(2) our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading, 'Faults or errors' have not appeared. They have been added. Our old words were: 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship', and we would ask, Sir, in our clause to have our old words; leave out 'faults or errors' and put in our old words instead.[10]

There was considerable discussion between delegates concerning Article IV. Delegates were concerned that the list of exclusions, such as peril of the seas, would exempt a carrier even if unseaworthiness had been proved. Mr Rudolf, the chairman of the Council of the Liverpool Chamber of Commerce, had suggested a situation in which a vessel had gone 'to sea in an unseaworthy condition, and the operation of the sea on that vessel leads to a loss, and apparently under that section 2 that is a loss which the shipowner is exempt from'. Lord Phillimore had then said:

> No; the law is well settled the other way. If the ship sinks from being unseaworthy, though she sinks from the waves washing over her and she would not have sunk in calm weather, it is not a peril of the sea. She is unseaworthy … These are old and well settled exceptions.[11]

On the Third Plenary Session (Sunday 7 October 1923) Louis Franck (the chairman and president of the CMI) made some general observations about Article 4(2). He explained as follows: '[T]he text should be taken at face value and, in case of doubt, with reference to origins, customs and prior decisions … Finally, general law would remain applicable notwithstanding these provisions in so far as there was no derogation from it. It resolved several of the questions raised'.[12] Mr Ripert (professor of the Faculty of Laws Paris) had responded to that to the effect that 'the text did present the greatest difficulties from a practical point of view'. Mr Loder (president of the International Court of Justice) in contrast 'believed that everyone was basically in agreement, but that Mr Ripert found the text obscure. In his opinion it seemed clear that in all cases the shipowner would have to prove that the act exonerating him from his liability had occurred. In contrast, the shipper could prove that if the act had happened it was the fault of the captain, and in this case the captain would not be able to exonerate himself'.[13] At the seventh Plenary Session (Tuesday 9 October 1923), in his concluding remarks to the delegates Louis Franck made a report. He commented generally that:

> What was wanted was to give the bill of lading a stable basis from a legislative point of view … it was important for the law governing the bill of lading to be the same everywhere … To achieve this purpose, it had been necessary to reach a compromise between the two great interests involved-the cargoes and the vessels And when the convention was applied, it would be necessary to take inspiration from its origins because they alone would explain the form of certain clauses that a normal drafter would not have inserted in a legal text.

He then commented on each of the Articles and, in relation to Article IV, said:

> The principles enumerated in Article IV were simple. The first provision applied to seaworthiness and the resultant liability. It was the application of the rule of 'due diligence' as provided for in English custom. It was therefore a fairly sensible extension of what was customary under another Anglo Saxon jurisprudence.

Franck then referred to a Commentary which had been prepared on Article IV on the proposal of the British delegation. It identified the Article as comprising three major subdivisions. They were described by him as follows:

> The first included the case dealing with the actual faults of the captain or the agents of the shipowning interests in the navigation or management of the ship, that is to say, the technical and nautical

[10] ibid 142, 143.
[11] ibid 144, 145.
[12] ibid 459.
[13] ibid.

> management. In such a case there was no liability on the part of the shipowner for these faults. That was compensation for the obligation imposed on the shipowner always to accept liability in matters of the care of the cargo.
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> The second category included a series of occurrences that could be deemed *force majeure* where the shipowner was not liable. These were cases (c) to (p). In all these cases there was debate as to what would happen if a fault had been committed that was the true cause of the damage produced. If it were a fault relevant to what was said in item (a) (actual fault or privity of the captain or his agents in the technical or nautical management of the ship) it could not be used against the shipowning interests. If, however, it was another fault arising from such cases it could be used against the shipowner just as in his own personal fault. But these damages were conditioned by the rule of causality and it was up to each national legislation to determine what the real cause of the damage was if it were the occurrence or if it were the fault.
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> Finally, the third category: cases other than those listed already, resulting neither from the actual fault or privity of the carrier or his agents. In such cases, the shipowner was exempt from liability on condition that he prove there was neither fault not privity on his part. At that juncture the principle of general law was recalled where the burden of proof would fall on the person claiming benefit from this exemption.[14]

To similar effect are parts of the Report from the Joint Committee (of the Houses of Commons and Lords), which accepted that there was much force in the legal objections to the Hague Rules which had been made by Lord Justice Scrutton and Mr Mackinnon KC, who had appeared before it, but said:

> The drafting, as was to be expected when it represented compromises and concessions necessarily made in order to secure an agreement has ambiguities and may give rise to difficult questions. It is not the language of a skilled draughtsman who was drafting a bill with a free hand untrammelled by the necessity of making it conform to an agreement of the parties affected. The Rules are drafted in what one witness called Bill of Lading English, and Bill of Lading English does not always conduce to clarity.[15]

In not considering the greater background to the Hague Rules and, in particular, the British interests which were sought to be protected at the time, as well as what was actually said at the meetings, the *travaux préparatoires*, the Supreme Court has failed to take account of how it was sought to apply both the expectations and experience of the common law and civil law legal systems. To treat the Hague Rules as simply replicating the position of a carrier in a bailment (on terms) scenario ignores how cargo claims had been litigated prior to the Hague Rules, both before and after the Harter Act and other national legislation, the complex inter-relationship between Articles III and IV and the overall intentions behind the compromises that were reached by the competing interests and legal systems. It does not seem to be helpful to this writer to say that all the bill of lading cases are simply examples of bailment cases in which the carrier has the burden of proving that it exercised reasonable care and therefore there is no onus on the plaintiff to prove negligence.

Taking into account what was said by Sir Norman Hill at the Palace of Peace, in the Hague, in 1921 and what Lord Phillimore explained,[16] especially in the light of the experience which he had had as counsel in both *The Xantho*[17] and *The Glendarroch*, it does not seem to be unrealistic to suggest that the position which the respective carrier and cargo interests had in mind with the drafting of the Hague Rules was no more and no less than what the common law had developed at least since the middle of the 19th century and during the early part of the 20th century leading up to the Hague Rules Convention. Sir Norman Hill and other members of the British delegation to the meetings at which the Hague Rules were drafted and discussed, as I have sought to show would, I think, have been aghast at Wright J's assertion that the status of carriers by sea had been radically changed by

[14] ibid 505, 508.
[15] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill (n 4) [18].
[16] Sturley (n 2).
[17] *Thomas Wilson Sons & Co v Owners of the Cargo of the Xantho (The Xantho)* (1887) 12 App Cas 503 (HL).

those Rules. Similarly, I think, Scrutton LJ would have been surprised to have been singled out by Lord Sumption (together with Wright J and Hobhouse J) as having carried out an analysis of the burden of proof under the Hague Rules which was supportive of that contended for in this judgment by the Supreme Court.[18]

Retreat from *Gosse Millard*

A change of heart by Wright J?

Wright J, some years later (as Flaux J suggested in the Court of Appeal in *Volcafe*),[19] as Lord Wright in *Joseph Constantine*,[20] appears to have had a change of heart (16 years after *Gosse Millard*).[21] This was a charterparty case in which the charterer sued the owner for damages for failure to load the intended cargo when the ship had sustained an explosion whilst at anchor in the roads at Port Pirie whilst waiting to berth. The owners argued that the contract had been frustrated and the question was whether the burden of proof fell on the owner to establish that the explosion had occurred without its fault or on the charterer to establish there was fault by the owner. At first instance it had been held that charterers had the onus to prove there had not been frustration but the Court of Appeal reversed that decision. This was in circumstances in which a board of trade inquiry and an arbitration had failed to identify the cause of the explosion.

Lord Simon LC, in his judgment in the House of Lords in this case, cited *The Glendarroch*, when he referred to an analogous position of carriage of goods cases in saying:

> If a ship sails and is never heard of again, the shipowner can claim protection for loss of the cargo under the express exception of perils of the seas. To establish that must he go on to prove (a) that the perils were *not* caused by negligence of his servants, and (b) were *not* caused by any unseaworthiness? I think clearly not. He proves a prima facie case of loss by sea perils, and that he is within the exception. If the cargo owner wants to defeat that plea it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in *The Glendarroch*, is *plain authority for this*.[22]

Lord Simon then cited both *Scrutton on Charterparties* (14th edn) and *Carver on Carriage by Sea* (8th edn), as well as the decisions in *The Northumbria*[23] *and Jackson v Union Marine Insurance Co Ltd*.[24] In relation to both cases he commented: 'But it never occurred to anyone in either court to suggest that one essential question that ought to be left to the jury was: "Have the shipowners proved that the stranding took place without negligence or default on the part of themselves or their servants?" '[25]

In similar vein, Lord Wright said:

> The appeal can, I think, be decided according to the generally accepted view that frustration involves as one of its elements absence of fault, by applying the ordinary rules as to onus of proof. If frustration is viewed (as I think it can be) as analogous to an exception, since it is generally relied on as a defence to a claim for failure to perform a contract, the same rule will properly be applied to it as to the ordinary type of exceptions. *The defence may be rebutted by proof of fault, but the onus of proving fault will rest on the plaintiff*. This is merely to apply the familiar rule which is applied, for instance, where a carrier by sea relies on the exception of perils of the seas. If the goods owner then desires to rebut that prima facie defence on the ground of negligence or other fault on the part of the shipowner, it rests on the goods owner to establish the negligence or fault.[26]

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[18] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [24].
[19] ibid [40].
[20] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.
[21] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* [1927] 2 KB 432.
[22] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (n 20) 164 (emphasis added).
[23] *The Northumbria* [1906] P 292.
[24] *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP 125 (Ex).
[25] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (n 20) 166 (emphasis added).
[26] ibid 192 (emphasis added).

Later in the judgment, Lord Wright also said:

> An illustration, perhaps more germane, is afforded by the rules as to onus of proof in cases of unseaworthiness. If at the end of the case it is not ascertainable on the evidence that the real cause of the loss was unseaworthiness, the defence must fail. The maxim *respice finem* applies, though there may be provisional presumptions, shifting the onus of proof from time to time during the progress of the case …[27]

He then continued after discussing a marine insurance case in which underwriters had alleged unseaworthiness in defence of a claim involving the loss of a ship through unexplained circumstances and said:

> In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively. If the matter is left in doubt when all the evidence has been heard, the party who takes on himself to affirm fault must fail. If what Scott LJ meant was that the failure to tender the *Kingswood* to the charterers in time for the agreed adventure was a fundamental breach such that it could only be excused by affirmative proof of absence of fault, I cannot agree with him.[28]

He also added:

> There may be many maritime losses in which evidence how they happened is impossible. If a ship is torpedoed with all hands, must the shipowner prove affirmatively absence of fault, such as that a light was not shown on the ship or that the ship obeyed the convoy regulations? In any case of unexplained sinking it may be impossible to exclude the possibility of fault on the part of the owner … But, indeed, the present is *a sufficiently good illustration of an unprecedented and unexplained casualty* where the real cause cannot be ascertained even after prolonged and exhaustive inquiry.
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> On the ruling of the Court of Appeal the shipowners have placed on them the unusual task of proving a negative. It is sought to say that the rule is not anomalous because of some other cases in which a party is required to prove a negative., but what are cited as parallels are so different and are so few in number as to emphasize the general rule. Thus the law as to the liability of a bailee depends on the special obligation which the law has imposed on him from ancient times … If the bailee fails duly to redeliver the goods, he must, in the absence of exceptions show that he has taken reasonable care in keeping them. Similarly, the liability of a common carrier depends, according to the old law on the custom of the realm, like that of the innkeeper. Under this special rule a carrier is an insurer who is absolutely liable for the safe carriage of the goods unless he can explain the loss as due to an act of God, the King's enemies, or inherent vice. In modern times the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, *the goods owner may counter by pleading the fault of the carrier*, but the onus of proving that, as also of proving an allegation of seaworthiness, is, as I have already explained, on the goods owner who makes it.[29]

On close examination, the cases relied upon by the Supreme Court for rejecting *The Glendarroch* are not, with respect, supportive of the decision. They are decisions dealing with bailment cases which either did not involve bills of lading exception clauses or were judgments which were delivered by judges who were or subsequently became highly regarded but who expressed somewhat contradictory views in other decisions. They were not in any event applying their minds (except Lord Wright in the *Gosse Millard* decision) to onus issues involving consideration of the Hague Rules. In none of the three courts that heard *Gosse Millard* was *The Glendarroch*, or the older cases dealing with bill of lading exceptions, or any commentary on the negotiations leading up to the Hague Rules referred to. (Neither the Sturley compilation of the *travaux préparatoires*[30] (nor that of Francesco Berlingieri) were available until years later.) As has been shown, since the 1850s at least, cargo claims litigation had been considered in the light of contract law and procedure and not bailment.

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[27] ibid 192, 193.
[28] ibid 193.
[29] ibid 194 (emphasis added).
[30] Sturley (n 2).

Criticisms of *Gosse Millard*

Lord Sumption recognised the criticisms made previously in the House of Lords of the *Gosse Millard* decision in the *Albacora Srl v Westcott & Laurence Line Limited* case.[31] In particular, Lord Sumption disapproved in *Volcafe* of the dicta of Lord Pearson.[32] This case involved the shipment of a cargo of wet salted fish from Glasgow to Genoa, where the fish arrived suffering from 'reddening'. The cargo interests alleged that the stowage and ventilation had been inadequate. Lord Sumption also referred to Lord Pearce in that case as having 'expressed doubt about the correctness of Wright J's view (in *Gosse Millard*) that the burden of disproving negligence lay upon the carrier, without giving reasons'. What Lord Pearce said was:

> The Lord Ordinary (at first instance) held that the pursuers had failed to make out their allegations of negligence. The pursuers contend, however, that this does not amount to an affirmative disproof of negligence; and that even assuming the cargo has been shown by the defenders to have suffered damage arising from inherent vice within Article IV rule 2 (m), there yet remains an additional onus on the defenders to disprove negligence which they have failed to discharge. *I have doubt whether Mr Justice Wright was correct in saying (in Gosse Millard) that such an additional onus lies on the defenders*. Assuming, however, that the defenders must satisfy the additional onus of disproving negligence, they have satisfied it.[33]

Lord Pearson's speech in the House of Lords in that case contained the following (and the most often repeated passage is in the last three sentences in his judgment below):

> Article III rule 2 is expressly made subject to the provisions of Article IV. The scheme is therefore that there is a prima facie obligation under Article III rule 2 which may be displaced or modified by some provision of Article IV. Article IV contains many and various provisions which may have different effects on the prima facie obligation arising under Article III rule 2. The convenient first step is to ascertain what is the prima facie obligation under Article III rule 2.
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> It is not an obligation to achieve the desired result, ie, the arrival of the goods in an undamaged condition at their destination. It is an obligation to carry out certain operations properly and carefully. The fact that goods, acknowledged in the bill of lading to have been received on board in apparent good order and condition, arrived at the destination in a damaged condition does not in itself constitute a breach of the obligation, though it may well be in many cases sufficient to raise an inference of a breach of the obligation. The cargo owner is not expected to know what happened on the voyage, and, if he shows that the goods arrived in a damaged condition and there is no evidence from the shipowner showing that the goods were duly cared for on the voyage, the Court may well infer that the goods were not properly cared for on the voyage.
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> In *Gosse Millard* Wright J said: The words 'properly discharge' in Article III rule 2 mean, I think, 'deliver from the ship's tackle in the same apparent order and condition as on shipment' unless the carrier can excuse himself under Article IV'. In my view that is not the right construction of Article III rule 2. Rightly construed, that rule only provides that the operations referred to, including the operation of discharging the goods, shall be carried out properly and carefully …
>
> In my opinion there was no breach of the prima facie obligation under Article III rule 2, so that the respondents do not need to rely on any immunity under Article IV. But if they did need such immunity, they could establish it under rule 2 (m) of Article IV. *There is no express provision*, and in my opinion there is no implied provision in the Hague Rules *that the shipowner is debarred as a matter of law from relying on an exception unless he proves absence of negligence on his part*. But he does have to prove that the damage was caused by an excepted peril or excepted cause, and in order to do that he may, in a particular case have to give evidence excluding causation by his negligence. It was proved in this case that the shipowner was not negligent.[34]

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[31] *Albacora Srl v Westcott & Laurence Line Limited* [1966] 2 Lloyd's Rep 53.
[32] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [27].
[33] *The Albacora* (n 31) 61 (emphasis added).
[34] ibid.

Lord Sumption is critical in *Volcafe* of these comments by Lords Pearce and Pearson in this decision, principally, because they do not characterise the contract of carriage as one of bailment. He says they involve:

> [a]n unexplained departure from the basic principles governing the burden of proof borne by a bailee for carriage by sea and are out of line with English authority of long standing. In my view, so far as they suggest that the cargo owner has the legal burden of proving a breach of Article rule 2, they are mistaken.[35]

Lord Sumption mentions *Joseph Constantine*[36] and Lord Wright's judgment, as well as *The Matheos*,[37] *The Albacora*[38] and *Gamlen Chemical Co (A/Asia) Pty Ltd v Shipping Corporation of India Limited*[39] as providing some support for the *Glendarroch* but he dismisses them all in part as they did not discuss the relevant authorities on the burden of proof.[40] The obvious counter to that criticism is that the Hague Rules are predicated on a 'contract of carriage covered by a bill of lading' (Article 1(a)), which is undertaken by sea (Article 2) and any bailment is upon the terms of that contract.

Australian cases

Another Australian judgment that was disapproved by Lord Sumption's judgment in *Volcafe* was that of Michael McHugh J in the Australian High Court in *The Bunga Seroja*.[41] Lord Sumption cited the following from what McHugh J had said in his judgment in that case:[42]

> The delivery of the goods in a damaged state is evidence of a breach of Article III and imposes an evidentiary burden on the carrier to show that no breach of Article III has occurred. But unlike the common law, failure to deliver the goods in the state received does not cast a legal onus on the carrier to prove that the state of, or non-delivery of the goods, was not due to the carrier's fault.[43]

His Lordship dismissed that judgment and the decision of the House of Lords in *The Albacora*[44] as in neither *The Bunga Seroja*[45] nor *The Albacora*[46] case was the burden of proof in issue because the trial judges had found that the carriers were not negligent; and that in neither case were the relevant authorities on the burden of proof cited. *The Bunga Seroja*[47] certainly discusses *The Glendarroch* and many of the other cases referred to in *Volcafe* (as the list of citations shows), as well as the case of *Gamlen*,[48] which itself considered *The Glendarroch* and *The Albacora*.[49]

Before discussing *The Bunga Seroja*,[50] reference needs to be made to the earlier *Gamlen*[51] case, where the plaintiff's cargo was shipped in drums from Sydney to Indonesia under a clean bill of lading and had broken adrift from its lashings in the hold during heavy weather. The trial judge, Yeldham J, had found that one of the causes was heavy weather but the cargo could have been stowed better to meet the weather that was encountered. Hence, there were concurrent causes, and

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35 *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [27].
36 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (n 20).
37 *Owners of Steamship Matheos v Louis Dreyfus & Co* [1925] AC 654 (HL).
38 *The Albacora* (n 31).
39 *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* [1980] HCA 51, 147 CLR 142 (Aust HC).
40 *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [27].
41 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)* [1998] HCA 65, [1999] 1 Lloyd's Rep 512, 196 CLR 161 (Aust HC).
42 *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [27].
43 *The Bunga Seroja* (n 41) [98].
44 *The Albacora* (n 31).
45 *The Bunga Seroja* (n 41).
46 *The Albacora* (n 31).
47 *The Bunga Seroja* (n 41).
48 *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39).
49 *The Albacora* (n 31).
50 *The Bunga Seroja* (n 41).
51 *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39).

he held that it was not necessary for the peril of the sea defence to be the sole cause of the loss; the carrier was successful. This was overturned by the Court of Appeal, whose decision was upheld in the High Court.

Samuels JA wrote the leading judgment in the Court of Appeal,[52] with which Moffitt P and Reynolds J agreed. The first argument he dealt with in his judgment was whether the Hague Rules was an exhaustive code whose construction was not subject to the preceding cases, as was argued by counsel for the carrier. Having referred to various judicial statements that might support such an argument, Samuels JA said:

> I can see nothing in these statements which would preclude reference to the established principles of the common law at the time the 1924 Act came into force; and there is to my mind the clearest authority in support of the proposition that the Hague Rules, once enacted by municipal legislation are not to be interpreted divorced from the law as it had previously been understood.[53]

He then went on to consider how Articles III and IV should be interpreted, in particular in the light of the *Gosse Millard* and *Albacora*[54] decisions. He said:

> It may very well be, of course, that what was said by Wright J in the *Gosse Millard* case concerning the onus of proof is inaccurate. The correct sequence of pleading is set out in the *Glendarroch* in the judgment of Lord Esher M.R. where his Lordship makes it plain that the plaintiffs must first prove the contract and non-delivery or the delivery in a damaged condition, to which the defendants may plead an exception, leaving it then to the plaintiffs to reply: 'there are exceptional circumstances viz that the damage was brought about by the negligence of the defendants' servants and it seems to me that it is for the plaintiffs to make out that second exception'.' And his Lordship re-emphasises that the proper sequence of pleading must follow the burden of proof.[55]

In the High Court in the *Gamlen*[56] case the leading judgment was given jointly by Mason and Wilson JJ, with whom Aickin and Gibbs JJ agreed, who responded to counsel for the shipowner who had sought to rely on what Lord Pearson had said in the *Albacora* case[57] in saying:

> With respect we think that the appellant misconceives the thrust of the observation of Lord Pearson. The key to the statement is to be found in the phrase 'unless he proves absence of negligence on his part'. His Lordship in our opinion is dealing with the question of onus of proof and taking up a position in opposition to the much debated statement of Wright J in *Gosse Millard*, which is described in one of the texts as 'heresy' (Carver Carriage by Sea, 12 ed. Vol 1, par 266A). The point was of no relevance in *Albacora* because as his Lordship observes it was proved in the case that the shipowner was not negligent: nor is it relevant in this case because it has been proved that the shipowner was negligent. We may say, in passing, that we agree with Samuels JA in the Court of Appeal when he points out that the correct sequence of pleading is set out in the judgment of Lord Esher in the *Glendarroch*.[58]

Stephen J also said about Lord Pearson's comments:

> This passage is manifestly concerned with onus of proof. It does not say that if the carrier is negligent, he may nevertheless rely on an exception: rather the contrary, it stresses that the carrier must prove that the damage was caused by an excepted peril so that where it was negligence that caused the damage the exception will be of no avail.[59]

In the later High Court decision of *The Bunga Seroja*,[60] the joint judgment of Gaudron, Gummow and Hayne JJ contained the following:

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[52] *Gamlen Chemical Co (A/Asia) Pty Ltd v Shipping Corporation of India Ltd* (1978) 2 NSWLR 12 (NSW CA).
[53] ibid 18.
[54] *The Albacora* (n 31).
[55] *Gamlen Chemical Co (A/Asia) Pty Ltd v Shipping Corporation of India Ltd* (n 52) 23.
[56] *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39) 167.
[57] *The Albacora* (n 31).
[58] *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39) 167, 168.
[59] ibid 151.
[60] *The Bunga Seroja* (n 41).

> In understanding the operation of the Hague Rules there are three important considerations. The Rules must be read as a whole, they must be read in the light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems. It is convenient to begin by touching upon some matters of history …
>
> It is necessary to recall that the Hague Rules were reached as a matter of international agreement. Several things follow from their origin …
>
> Thirdly, while any action brought in a national court on a contract of carriage governed by the nation's law will be formed in a way that reflects that law, it cannot be assumed that the Hague Rules take the form that they do to reflect some particular cause of action or body of learning that is derived from, say, the common law. Thus questions of burden of proof and the like are questions that may well arise in any action brought in a common law court but it cannot be assumed that the Hague Rules reflect, say, the rules about burden of proof as between a bailor and bailee for reward at common law. For this reason we very much doubt that principles established in cases such as the *Glendarroch* can be used as an aid in construing the Hague Rules. They are principles which apply in common law actions between bailor and bailee but that is very different from using them as some guide to understanding what the Hague Rules mean.[61]

In his judgment in *The Bunga Seroja*,[62] McHugh J discussed the 'History of the Rules' and then went on to agree with the reasoning of Mason and Wilson JJ in *Gamlen*[63] concerning the interaction between the obligations in Article III rule 2 and the exceptions in Article IV rule 2. In particular, he quoted that part of their judgment in which they pointed out that:

> There is a more persuasive answer ready to hand to explain why Article IV rule 2 does not expressly preserve liability for negligence in all cases. It is that paras (c) to (o) inclusive, with the exception of (l), are all matters which in themselves are beyond the control of the carrier or his servants. Any reference in that context to negligence is inappropriate, because they are events which of their nature occur independently of negligence on the part of the carrier. For example, one would not expect to see the rule relieve the carrier from responsibility for damage resulting from 'act of God unless caused by the fault or neglect of the carrier, his agents or servants'. The remaining paragraphs of rule 2 carry their own explanation. Para (a) has its origin in section 3 of the *Harter Act*, and has attracted a particular history (cf. *Gosse Millard*). Paragraph (b) relates to fire and reflects its own particular statutory history (see the *Merchant Shipping Act* 1894 (UK), section 502). Paragraph (l) deals with deviation to save life and property, and receives fuller treatment in Article IV rule 4. Paragraph (q) is of the greatest assistance in the task of construction, because in in our opinion it expresses the fundamental scheme of the Hague Rules. That scheme is to impose certain responsibilities and liabilities on the carrier of the goods by sea, from which he cannot contract out (cf. Article III rule 8) but to give him immunity in respect of loss or damage caused otherwise than by negligence for which he is responsible, save in the special cases to which we have referred.[64]

As Flaux J remarked in *Volcafe* in the Court of Appeal,[65] the two other members of the High Court (Kirby J and Callinan J) had approved the application of the principles in *The Glendarroch* to Hague Rules cases, and accordingly held 'that case cannot be viewed as an authority for the application of a different approach to the order of burden of proof in cases under the Hague Rules than at common law'.

In an address on 1 April 2019 on 'The burden of proof under the Hague-Visby Rules' with reference to the Supreme Court's decision in *Volcafe*, the Chief Justice of the Federal Court of Australia, Allsop CJ, indicated that in light of that decision, the comments made by Gaudron, Gummow and Hayne JJ and McHugh J in *The Bunga Seroja*[66] and the reliance that has been placed on them by the joint

[61] *The Bunga Seroja* (n 41) [9], [19]–[22].
[62] ibid.
[63] *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39).
[64] ibid 164, 165; McHugh J's citation ended with 'cf. article 111 rule 8'.
[65] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [49].
[66] *The Bunga Seroja* (n 41).

judgment of Ryan and Dowsett JJ in the Federal Court cases of *Stemcor*[67] and Ryan J in *Seafood Imports Pty Ltd v ANL Singapore Pte Ltd*[68] it is necessary for an intermediate court to bring certainty and clarity to cargo litigation.

Davies and Dickey in *Shipping Law*[69] have discussed the pre-*Volcafe* cases and this writer agrees that the comments made by those authors in describing the approach taken by those judges in the High Court as being not only 'unorthodox' but also *obiter*, and also with their description of the application of those dicta by those judges in the Federal Court as being 'regrettable'.

Significantly, also in the NSW Court of Appeal in *The Bunga Seroja*,[70] Sheller JA (with whom Gleeson CJ and Clarke JA agreed), who all had considerable experience in cargo claims litigation at the Bar and on the bench, set out with approval two paragraphs of Lord Esher's judgment in *The Glendarroch* (including the portion quoted above); referred to what Samuels JA had said in the Court of Appeal in *Gamlen*; noted that Mason and Wilson JJ (with Aickin and Gibbs JJ concurring) in the High Court had approved what Samuels JA had said about the correct sequence of pleading; and rejected the submission by counsel for the cargo claimant that the onus lay on the carrier to disprove negligence.[71]

In *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)*,[72] Sheller JA (with whom Cripps JA agreed) discussed the 'onus of proof' in relation to an issue as to whether the employees of Glebe Island Terminals had cooperated in the theft of the cargo of scotch whiskey. That issue, as he explained, turned on 'the nature of the exemption principally relied upon' and quoted from Lord Esher MR's decision in which he explained the ordinary forensic sequence of proof. Sheller JA then said: 'These steps were in accordance with long-standing pleading practice. To like effect is the decision of the House of Lords in *Stag Line Ltd v Foscolo, Mango & Co Ltd*[73] and quoted from Lord Atkin's judgment'.[74]

Why the bailment approach is not appropriate

What I have hoped to show in the pre- and post-Hague Rules cases is that the judges were clearly conscious that the shipowners were bailees but treated the cases before them as being based in contract, and the carriers having duties akin to a bailee, without applying bailment principles to the onus issues in the cases before them, but contractual ones. Whilst Hobhouse J in *The Torenia*[75] says it is 'only' by reason of the bailment relationship that the cargo owner 'sets up a sustainable cause of action by proving the non-delivery of the goods', it would be equally appropriate to say, with respect, that the sustainable (or prima facie) case arises from a presumption that when goods are delivered at a destination otherwise than in the same good order and condition as when received there has been a breach of an implied promise, or of a duty of care in tort, to deliver the goods in such a condition.

It is unhelpful to seek to import into the conduct of cargo litigation based on the Hague Rules the principles of bailment when the Hague Rules are predicated on a 'contract of carriage covered by a bill of lading' (Article 1(a)), which is undertaken by sea (Article 2) and any bailment is upon the terms of that contract, which invariably incorporates the Hague Rules, or a version of them.

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[67] *CB Sheepvaartonderneming Ankergracht v Stemcore (A.SIA) Pty Ltd* (2007) FCAFC 77.
[68] (2010) FCA 702.
[69] M Davies and A Dickey *Shipping Law* (3rd edn 2004) 2012–13, Law Book Co also described in the 4th edition as an 'unorthodox approach' (p 250).
[70] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)* (1996) 39 NSWLR 683 (NSW CA).
[71] ibid 693, 694.
[72] *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)* (1993) 40 NSWLR 206, 227 (NSW CA).
[73] *Stag Line Ltd v Foscolo, Mango and Company* [1932] AC 328, 340.
[74] *The Antwerpen* (n 72) 227.
[75] *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* (1983) 2 Lloyd's Rep 210.

If it was not clear in the original Convention, regard can be had to Article 4 bis of the Hague Visby Rules, which says: '[t]he defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort'.

Perhaps when that was drafted a belt and braces approach might also have included bailment but whether it was thought unnecessary (perhaps rephrasing the words of Hobhouse J because it was thought that bailment is a species of contract and/or tort) or overlooked that provision, it does, in the writer's view, emphasise that the Hague Rules were designed with contracts in mind and liabilities were intended to be channelled to the contractual carrier so that claims outside the contract were not to be allowed to circumvent the Hague Rules, as was feared by Scrutton LJ in *Elder Dempster*[76] and, indeed, by Lord Hobhouse in *The Starsin*,[77] by bringing tortious claims.

The bailment approach, I have hoped to show, is contrary to the position that has been well-accepted in the UK since at least the mid-19th century, had been expressed in clear and simple terms by Lord Esher in *The Glendarroch*, accepted by Lord Sumner in *The Matheos*,[78] Lords Simon and Wright in *Joseph Constantine*,[79] Lords Pearce and Pearson in *Albacora*,[80] Lord Atkin in *Stag Line*[81] and the overwhelming majority of the Australian High Court and NSW Court of Appeal judges in *Gamlen*,[82] *The Bunga Seroja*[83] and *The Antwerpen*.[84]

To my mind it is particularly unrealistic to think that none of the following judges had bailment in mind in the following judgments:

- Lord Simon in *Joseph Constantine* expressly referred to a bailment situation when he referred to:

  > Another example, from the law of bailment, confirms this view. Assume a bailment of goods to be kept in a named warehouse with an express exception of loss by fire. Proof of destruction by fire would prima facie excuse the bailee. The bailor could counter by alleging either (a) fire caused by the negligence of the bailee or (b) goods when burnt were not stored in agreed warehouse. But it would be for the bailor not only to allege but prove (a) or (b). Though he might rely on facts proved or admitted by the bailee as establishing his proposition.[85]

  Whilst Hobhouse J in the *Torenia* sought to distinguish *Joseph Constantine* on the basis that it was a charterparty case and not a bailment case, Lord Simon was using a peril of the sea exception in such cases as analogous in their effect on burdens of proof as arguments in which a party seeks to rely on a frustration event. He not only cited examples to support the principles that he was propounding by way of analogy of a perils of the sea defence in a contract of carriage but also, as has been seen, a warehouse keeper seeking to rely on an exception for loss by fire.
- Baron Parke in *Wyld v Pickford*,[86] who referred to the case being: 'In an action on the case for breach of a duty arising *ex contractu*, upon a bailment'.
- Kennedy[87] and Phillimore LJ[88] in the Court of Appeal in *Joseph Travers*, who made a number of references to the defendant as being a bailee and, notwithstanding that they found that the bailee lighterman had not discharged the burden placed upon him as a bailee, held that he was entitled to rely on the exclusion in the bill of lading.

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[76] *Paterson Zochonis and Company Ltd v Elder Dempster and Company Ltd* [1923] KBD 420.
[77] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] HKHL 12; [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715.
[78] *Owners of Steamship Matheos v Louis Dreyfus & C*o (n 37).
[79] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (n 20).
[80] *The Albacora* (n 31).
[81] *Stag Line Ltd v Foscolo, Mango and Company* (n 73) 328, 340.
[82] *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (n 39) 151.
[83] *The Bunga Seroja* (n 41).
[84] *The Antwerpen* (n 72).
[85] *The Torenia* (n 72) 216.
[86] *Wyld v Pickford* (1841) 8 M & W 443, 151 ER 1113.
[87] *Joseph Travers & Sons Limited v Cooper* [1915] 1 KB 73, 90 (CA).
[88] ibid 97.

- Lords Sumner, and Dunedin and Carson who agreed with him, in *Elder Dempster*,[89] who were clearly dealing with a bailment claim against the shipowner, but especially Lord Sumner, who would not countenance an argument based on a 'bald bailment with unrestricted liability …'.[90]
- Greer LJ in *Silver's* case,[91] who expressly dealt with the case as if it could be in bailment when he said: 'Even if the liability of the shipowner be that of a common carrier'.

It is also noted that in the Davies and Dickey publication *Shipping Law*[92] the authors describe the 'order of proof in cargo claims: the relationship between the carrier's obligations and its immunities'. What follows in that work, is I hope, largely in line with what I have tried to set out here and they describe it as 'being followed in the United Kingdom and the United States'. In any event, it should be acknowledged that it will be rare that cases are decided on onus issues, as Flaux J said in his judgment in the Court of Appeal:

> Furthermore, it is worth pointing out that the number of cases where the result turns upon the shifting burden of proof in the three (or four) stage analysis, as opposed to the evidence demonstrating one way or the other whether the carrier is liable, must be limited. The burden of proof is only of significance in the present case because of what is, on one view, the failure of the judge to make findings of fact in relation to the issue of negligence. Accordingly, the question of whether the burden was on the carrier to disprove negligence, in order to establish an entitlement to rely upon the exception or upon the claimants to prove negligence of the carrier, in order to negative the application of the exception, became of critical relevance in this case in a way which is atypical.[93]

As I have sought to show, the Hague Rules are predicated on contract, as was the preceding state legislation such as the Harter Act, and before that the common law cases in which cargo owners sought damages for breach of their contracts of carriage evidenced by bills of lading. While bailment on terms is sometimes referred to as 'contractual bailment', that simply confuses the issue. It should not be forgotten that the Hague Rules also place responsibilities on and provide exemptions to the shipper. By Article III rule 5, the shipper guarantees the accuracy of the information provided to the carrier about the goods. By Article IV rule 3, it is provided that: 'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants'. By Article IV rule 6, the shipper is liable for all damages and expenses arising or resulting from the shipment of inflammable, explosive or dangerous cargo when the carrier has not consented with knowledge of their nature and character to ship.

Where do freight forwarders and time charterers who also issue bills of lading and rarely have actual possession of the cargo fit into the *Volcafe* analysis? (The Supreme Court in *Volcafe*, as Allsop CJ pointed out in his address in April 2019, seems to have assumed that all carriers are bailees). Leaving aside the issue referred to by Handley JA in *Carrington Slipways Pty Ltd v Pacific Austral P/L* in the Court of Appeal in NSW[94] as to whether a forwarder can issue a bill of lading in any event, the further question which *Volcafe* does not explore is whether an issuer of such a bill of lading (whether a freight forwarder or time charterer) can be sued as a bailee. In the New South Wales Court of Appeal case of *Matthew Short and Associates P/L v Riviera Marine (International) P/L*,[95] it was held that the forwarder (Matthew Short) who had booked space on a vessel for a Riviera motor cruiser and assisted with providing equipment and attending while it was transferred from a truck to a low loader for carriage to the wharf did not have possession of the cargo.

Similarly, will principles such as *res ipsa loquitur* (to which both the first instance judge and Lord Sumption referred in *Volcafe*) apply only to carriers who are easily identified as bailees or will that

[89] *Paterson Zochonis and Company Ltd v Elder Dempster and Company Ltd* (n 76).
[90] ibid and text to n 52 (see Part 1 of this article in the previous issue of *JIML* (2019) 105–117).
[91] *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, 435 (CA), and text to n 69 (see Part 1, ref ibid).
[92] Davies and Dickey (n 69) 247 ff.
[93] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [52].
[94] *Carrington Slipways Pty Ltd v Pacific Austral P/L* (1991) 24 NSWLR 745 (NSW CA).
[95] *Matthew Short and Associates P/L v Riviera Marine (International) P/L* [2001] NSWCA 281.

also apply to freight forwarders and time charterers, who it might reasonably be thought will certainly know less about the characteristics of the cargo and are highly unlikely to know much more, if at all, than the shipper about the characteristics of the ship, or indeed what has happened to the cargo.

In the brave new world of the Supreme Court, one asks rhetorically where this leaves these carriers? Does the traditional approach as explained by Lord Esher and explained graphically by senior counsel for the carrier in the Court of Appeal in *Volcafe* still apply? Does it still have life side by side with the new bailment approach? Is the position going to be that a carrier who is an owner or bareboat charterer and is a bailee will have the onus of a bailee to discharge (with all the problems foreshadowed by Lord Simon and Lord Wright in *Joseph Constantine*[96]), while the freight forwarder or time charterer issuer of a bill of lading has the possibility of litigation being conducted in the pre-*Volcafe* traditional manner, as described by Lord Esher in *The Glendarroch*?

It is noteworthy that, in Bullen & Leake *Precedents of Pleadings* (12th edn),[97] the precedents for bailment claims distinguish between what Lord Sumner referred to as a 'bald bailment' and a contractual bailment. In the former example, the precedent alleges that 'the plaintiff delivered to the defendant an oil painting by Constable called … in order that it might be taken proper care of by the defendant and cleaned and restored and returned in a proper condition to the plaintiff, and the plaintiff then orally agreed to pay the defendant a reasonable remuneration for his services'. The next paragraph simply asserts that on a subsequent occasion the defendant returned the painting to the plaintiff in a damaged and improper condition and then particularises the nature and extent of the damage.

In contrast, under the heading 'Claim against bailee for breach of contract and negligent damage to goods bailed', a much more detailed pleading is set out. It asserts that 'the plaintiff delivered to the defendant his Rolls Royce motor car, registered number … to be safely kept and garaged and maintained for a period of three months, and the plaintiff then agreed to pay an exclusive charge of £… per week. The said agreement was made orally …', and then particularises the circumstances in which that oral contract came into existence. It then asserts various express or implied terms of the agreement, after which it asserted that: 'The defendant received the said motor car for the purpose and on the terms aforesaid, but negligently and in breach of the said contract and of the said terms thereof, the defendant failed to take proper care of the said motor car in that …' and then specifies the lack of protection provided to the vehicle in the garage, the roof of which was not watertight or rainproof and other specified failures.

In the case of a cargo claim, the alleged failure similarly requires particularisation from the cargo interests. Without that the carrier has to speculate as to all other possible alternatives that may have caused the damage to the cargo and then having to disprove each of them. A good expert might well go some way in that direction as part of his or her report in support of inherent vice, latent defect or whatever exception is relied upon, but it does add a layer of unnecessary difficulty and expense if cargo has not sought to identify what it says the carrier should have done. The concerns of Lords Simon[98] and Wright[99] would be well justified. And possibly, in the absence of any such particularisation by the cargo owner in the *Volcafe* world, the defence case provides ammunition for cargo which it can then investigate in circumstances when it may not have pleaded anything to suggest that the defence relied on is questionable. In the leading bailment case in the Australian High Court, *Pitt, Son and Badgery v Poulefco SA*,[100] evidence was called by the bailor which showed that the absence of a sprinkler system, CCTV, better fencing and/or security systems were breaches of the

[96] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (n 20) and text to nn 22, 25, 26, 27, 28 and 29 (see Part 1, ref n 89).
[97] Sweet and Maxwell 1975.
[98] Text to n 22 (see Part 1, ref n 89).
[99] Text to n 29 (see Part 1, ref n 89).
[100] (1984) 153 CLR 644.

store owner's duty, which failed to prevent a passing vagrant entering through gaps in the fence, lighting some paper and passing it through a hole in the side of the store and burning it down. As has been seen from the Bullen and Leake precedents, a bailor who brings a claim for breach of contract would usually, if not invariably, plead (and call evidence) to identify the bailee's alleged failings.

None of the above is to suggest that a cargo owner cannot sue a shipowner in negligence or bailment: quite the contrary. However, where there is also a contract between the parties it is the contract and its terms, particularly the Hague Rules or whatever Convention or hybrid is said to apply to it, which should govern the relationship, carrying with it the usual consequences that if you are alleging a breach of the contract you carry the onus to establish the allegations you make, subject to whatever presumptions the law might apply in the circumstances. In the writer's opinion, it needs to be interpreted in the light of precedent and, where there is doubt, in reliance on aids to interpretation, such as the *travaux préparatoires*.[101]

Rotterdam Rules

The language of the Hague Rules is largely retained in the Rotterdam Rules. They have avoided the expressions which have caused issues with the Hague Rules, such as 'Subject to the provisions of Article IV …' in Article 3 rule 2; and 'unless caused by the actual fault or privity of the carrier' and 'without the actual fault or privity of the carrier' in Article 4 rules 2(b) and (q). More significantly, by making it express in Article 17 that it is the claimant that has the burden of proving loss, damage or delay or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility, it is the claimant which has to prove that the carrier was at fault in order to defeat a defence based on one of the excepted circumstances in Article 17.3. Thus, the Rotterdam Rules follow the sequence of 'the ordinary course of practice' (to which Lord Esher referred in *The Glendarroch*) that this Article contends that parties have been giving effect to, at the very least, in the common law world since at least the mid-19th century in relation to contracts for the carriage of goods by sea where bills of lading and their exception clauses have been in use.

Conclusion

It does not appear from close consideration of the cases both before and since the Hague Rules or the *travaux préparatoires*[102] that what the Supreme Court has decided was within the contemplation of either the common lawyers or the civil lawyers who drafted the Hague Rules. Furthermore, it does not reflect the practice and procedure that had preceded the Hague Rules. I have sought to show that:

- During the 19th century, the parties to contracts of carriage determined the terms upon which their liabilities and responsibilities were based and the courts determined their disputes on the basis of their pleadings and in light of the common law. The owner of the goods would assert the good order and condition of the goods on shipment and either their loss or damage at destination, not by reason of any exclusionary event but by negligence, which the carrier would deny and assert reliance on an exclusionary event, to which the owner of the goods would then reply.
- The architecture or structure of cargo litigation was well established before the Hague Rules in both the practice and procedure which applied in the United Kingdom (UK), and its colonies before the intervention by statute and international convention.
- Lord Esher's decision was based on at least 40 years of cargo litigation in the UK, involving exceptions to bills of lading which had been adopted by British shipowners and accepted internationally.

[101] Sturley (n 2).
[102] ibid.

- That structure was then sought to be replicated in the Harter Act and other state legislation, such as Canada's and Australia's, and it is unrealistic to think that the judges who decided those cases were not alive to the duties of bailees.
- The Hague Rules were then drafted to replicate those statutory provisions in an international instrument.
- There was general acceptance in the deliberations that preceded the Hague Rules that each state would apply its own practices and procedures as to how they would be given effect.
- Wright J was in error in *Gosse Millard* (and appears to have subsequently moved away from it); Scrutton LJ cannot be said to have favoured the view that the Hague Rules had drastically altered the status of sea carriers as Lord Sumption has suggested; Lord Sumner (whilst seeming to have accepted Wright J's analysis) also seems to have moved away from it, and Lord Atkin has also recognised and accepted the traditional approach.
- Many judges of great repute have accepted Lord Esher's statements in *The Glendarroch* and not agreed with Wright J's approach in *Gosse Millard*.
- There would now seem to be different onus of proof issues applying to carriers who issue bills of lading who are bailees from those, like freight forwarders and time charterers, who are not.
- The Rotterdam Rules have largely replicated the common law approach to burden of proof issues, as was originally intended in the Hague Rules.

The Supreme Court has done, in *Volcafe*, what Lord Denning, and Scrutton LJ, in *Midland Silicones*[103] and *Elder Dempster*[104] respectively, warned against. That is to have permitted cargo owners to sue carriers in tort (or bailment) and thus water down the contractual provisions of the Hague Rules. Lord Denning was of course speaking before Himalaya clauses became effective and the Hague-Visby Rules had added Article IV bis in 1968. In treating the contract of carriage as a bailment of goods (albeit on terms), the Supreme Court has lightened the load of goods owners and made it easier to circumvent the Hague Rules, although, of course, not as completely as Lord Denning feared when he saw the possibility of stevedores being sued and not having the benefit of the contractual limitations of liability.

I would be surprised if the views previously expressed in the Australian cases to which I have referred and which support *The Glendarroch* would be varied when next the Australian High Court is faced with such an issue in a cargo case.

Perhaps this decision will awaken carriers and their insurers from their 10-year torpor and cause them to be proactive, as this writer has been urging them to be for many years, in having the Rotterdam Rules ratified.

[103] *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365 (HL(E)), [1962] AC 446.
[104] *Paterson Zochonis and Company Limited v Elder Dempster and Company Ltd* (n 76).