The liability of a public carrier of goods by land and water

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Abstract

The author discusses the liability of a public carrier by land and water. Earlier, cases that dealt with the liability of carriers by land extended the strict liability that applied to carriers by water only to carriers by land, by way of analogy and not as a matter of law. The Supreme Court of Appeal corrected these decisions in the case of Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd 1995 (3) SA 42. The author submits that with regard to the strict liability of the public carriers by water for reward, the Anderson decision is authority for the proposition that strict liability does not apply to carriers by land. He submits, therefore, that the liability of public carriers is similar to that of private carriers, which is based on fault. As regards carriers by water, the author submits that the common law rule that strict liability applies is considerably modified by the Carriage of Goods by Sea Act 1 of 1986, in terms of which liability is fault based. He concludes that statutory liability applies to public carriers by water.

Umbhali uxoxa ngesibopho esisemthethweni sezinto ezisetshenziselwa ukuthwala ezingezikawonkewonke ezihamba emgwageni nasemanzini. Amacala avela esikhathini esingaphambilini ayebhekene nesibopho esisemthethweni salezo zinto zokuthwala zasemgwageni, yiwona ayebeka isinqumo ngesibopho esisemthethweni esiqinile ebombonelwe ezihamba emgwageni nasemanzini kulezo zinto zokuthwala zasemgwageni, yiwona ayebeka isinqumo ngesibopho esisemthethweni esiqinile kubwisa kwemgwageni kusumvelo ukuthi kube kwenziwa njengodaba lomthetho. INkantolo eNkululeyeziKhalo yabe seyizilungisa lezi zinqumo ecaleni lika-Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd 1995 (3) SA 42. Umbhali uveza ukuthi mayelana nokusetshenziswa kwesibopho esisemthethweni ngalokho kokuthwala kukawonkewonke ukuse kubhe khona okuzuwayo, isinqumo sika-Anderson siyigunya leisiphakamiso sokuthi isibopho esisemthethweni esiqinile
asisebenzi kulezo zinto zokuthwala engqwaqeni. Ube esesho ngenxa yalokho ukuthi isibopho esisemthethweni sezinto zokuthwala engqwaqeni siyafana naleso sezinto zokuthwala zangasese esesekelwe phezu kwephutha. Mayelana nezinto zokuthwala zasemanzini, umbhani uveza ukuthi umtheshwana womthetho oweshekile wokuthi makusebenze isibopho esisemthethweni esiqinile uguqulwe ngokuthi xaxa nguMthetho 1 ka-1986 wokuThwalwa kweziMpahla oLwandle, okuthi ngawo isibopho esi-

1 Introduction

According to the common law, when a consignor consigns goods to a carrier he or she entrusts the goods to the care of the carrier from the place of departure to the place of destination. This also represents what the carrier would in any event have undertaken to do under the contract of carriage. Even so, the goods may still be lost or damaged before reaching their destination. The praetor’s edict (de nautis cauponibus et stabulariis) imposes a strict liability on public carriers by water, innkeepers and stablekeepers for loss of or damage to the goods over which they have custody, should such an event (loss or damage) occur, unless liability is excluded by contract. The only exception is when the loss or damage is caused by casus fortuitus, damnum fatale or vis maior. In discussing the liability of a public carrier by land and water at common law, the aim is to demonstrate that strict liability has been significantly modified with regard to both types of carrier. Since the main focus of the discussion is on the liability of the public carrier, it is important to distinguish it from the liability of a private carrier. It should be clear to the reader that a different set of rules applies to each.

The main distinction between public and private carriers is the manner in which they conduct the business of carriage. Private carriers are those who carry goods casually. They may agree to carry the goods either for remuneration or gratuitously.1 When the goods are carried for remuneration, a private carrier is regarded as having carried them as a depositary. While the goods are entrusted to the private carrier (depositary), he or she will be liable for negligence or wilful wrong only.2 The parties to a contract of carriage may contractually limit or expand the common law liability of the private carrier for remuneration. A private carrier who carries the goods gratuitously (free of charge) is bound to demonstrate ordinary diligence and is liable only for gross negligence. A gratuitous carrier is not liable for loss caused by accident or negligence.

2 Dönges The Liability for Safe Carriage of Goods in Roman-Dutch Law (1928) 22.
In contrast, a public carrier is a carrier that carries goods by profession. Public carriers can be divided into two categories, namely (1) a public carrier by water and (2) a public carrier by land. Their liability is primarily based on fault, whereas previously the liability was strict or absolute. In what follows, case law is used to indicate how strict liability of a carrier by land was abolished and how it was weakened with regard to a carrier by water.

2 Liability of a carrier by land

The praetor’s edict, which originated in Roman law, was received in Holland and was later also received in South African common law. In earlier times in South Africa, the praetor’s edict applied to carriers by water, innkeepers and stablekeepers, but not to public carriers by land. The main reason the praetor’s edict was introduced to govern the liability of such public carriers was that, in the past, carriers by water were notoriously untrustworthy people who collaborated with thieves in order to defraud their customers. The carrier would, for instance, collude with thieves to have the goods he carried stolen, only to claim later that the goods had been stolen. A customer whose goods were allegedly stolen in transit was often unable to prove that the carrier had in fact defrauded him by collaborating with the thieves, as he would not have witnessed the fraud. The customer’s goods were exposed to dangers only the carrier was able to limit and control. These reasons were enough to introduce strict liability for the carriers by water through the praetor’s edict.

However, over the years the strict liability was extended by analogy to carriers by land. The introduction of strict liability for public carriers by land was not, however, based on any notorious behaviour on their part. Consequently, the basis of

3 Dönges op cit (n 3) at 21.
this extension of liability was doubted in a number of decisions.\textsuperscript{5} The question was often considered to be whether the praetor’s edict had indeed been extended to carriers by land.

Let us examine how this extension was made possible. A dictum that introduced the extension of the praetor’s edict to public carriers by land is to be found in \textit{Tregidga \\& Co v Siverwright NO},\textsuperscript{6} in which De Villiers CJ said:

In this colony the liability of common law carriers is not quite as wide as in England. It has never yet been expressly decided whether the Praetor’s Edict relating to innkeepers, ship masters and stableskeepers applies in this colony to carriers by land as well as by water . . . The Edict of the Roman Praetor extended in its terms to carriers by water only, but for the reasons stated the rules which it lays down are equally applicable to carriers by land . . . Voet does not mention the case of carriers by land, but in the Utrechtsche Consultatien vol 1 c 21, such carriers appear to be placed in the same footing as carriers by water.

In his concurring judgment, Buchanan J said that contracts with carriers are governed by the same principles of law\textsuperscript{7} whether the carriers are carriers by land or by water. It would appear, therefore, that he agreed that the praetor’s edict applies to carriers by land as well. No particular evidence in law is mentioned in the dictum, other than analogy, which vindicates decision for extension. This decision was followed in a number of subsequent cases in which it was held that a carrier by land is liable to the owner of the goods for loss or damage without fault on his part. In \textit{Colonial Government v Nathan Bros},\textsuperscript{8} for instance, the court said that the praetor’s edict did not extend to carriers by land, but in most, if not all modern countries the rule has been extended to include them. In this case no attempt was made to find support for the view that the edict should be extended either. In \textit{Essa v Divaris}\textsuperscript{9} doubts as to whether the praetor’s edict had been extended to carriers by land as matter of law intensified. The court said the following:

We were presented with the argument that the Edict has been held to cover the liability of common carriers by land because their functions were regarded as sufficiently closely analogous to those of mariners. Well, I am prepared to assume that what I have no reason to doubt is the well-established extended liability of common carriers in our law, is founded rather upon the enlargement, by analogy, of the scope of the Edict than upon an appreciation of the advantages of assimilating our law in this respect to the English common law.

\textsuperscript{5} \textit{Essa v Divaris} 1947 (1) SA 753 (A) at 775.
\textsuperscript{6} 14 SC 76 at 80 81.
\textsuperscript{7} At 84.
\textsuperscript{8} 1892 13 NLR 101.
\textsuperscript{9} 1947 (1) SA 753 (A) at 775.
This decision clearly demonstrates that, in fact, the praetor’s edict was applied to carriers by land because the nature of the business of carriers by water was similar to that of carriers by land. In *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd*\(^{10}\) an opportunity arose for the Appellate Division to reconsider the correctness of the extension of the praetor’s edict to carriers by land, but the court left the question open. In *Hall-Thermotank Africa Ltd v Prinsloo*\(^{11}\) the plaintiff sued the defendant for damage to the goods the defendant carried for reward. Holding the defendant liable, the court decided that there is strict liability against a carrier by land in South African law. The court furthermore stated that this liability arose from the praetor’s edict if the carriage is for reward.

In *International Combustion Africa Ltd v Billy’s Transport*,\(^{12}\) however, Cilliers AJ, after a thorough review of cases and authorities, expressed doubt as to whether the praetor’s edict applied to carriers by land, but felt bound by the precedent set in *Hall-Thermotak*.\(^{13}\) In *Histor Boerdery (Edms) Bpk v Barnard*\(^{14}\) Viljoen JA indicated that the question of whether the praetor’s edict had been extended to carriers by land had not been fully argued before the court and assumed for the purpose of his decision that it did apply to carriers by land.

This controversial question was laid to rest by the Supreme Court of Appeal in the case of *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd*.\(^{15}\) The appellant (Anderson) was a company which transported cases of machinery parts from Durban Harbour to Leedooorn Mine on behalf of the respondent company (Polysius). Anderson took custody of the cases in Durban Harbour but failed to deliver them, or delivered them in a damaged condition to Polysius.\(^{16}\) Consequently, Polysius sued Anderson for damages in the amount of R415 765,38. In its special plea Anderson stated that it was a public carrier by land and was therefore not obliged to pay any amount to Polysius. Anderson further stated that the claim raised by Polysius was based on absolute liability regulated by the praetor’s edict de nautis, cauponibus et stabulariis, which applies to public carriers by water and not by land. Polysius in turn excepted to the special plea on the grounds that the praetor’s edict formed part and parcel of modern South African law and that it has been extended to carriers by land.

The court was asked to decide the question of whether or not the praetor’s edict is applicable to public carriers by land in South Africa. In order to answer this question, the court reviewed Roman law,\(^{17}\) Roman-Dutch law\(^{18}\) and the South African law.\(^{19}\) The praetor’s edict originated in Roman law, and it was quite logical,

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\(^{10}\) 1979 (3) SA 754 (A).
\(^{11}\) 1979 (4) SA 91 (T).
\(^{12}\) 1981 (1) SA 599 (W).
\(^{13}\) Supra (n 12).
\(^{14}\) 1983 (1) SA 1091 (A).
\(^{15}\) 1995 (3) SA 42.
\(^{16}\) At 451 J.
\(^{17}\) At 46C 47G.
\(^{18}\) At 47H 49B.
\(^{19}\) At 49C 50H.
therefore, to start any enquiry there. As far as Roman law was concerned, the court reached the conclusion that the Romans never extended the principles of the praetor’s edict to carriers by land.20 A review of the Roman-Dutch authorities led the court to conclude that they were silent on the matter: ‘I have made a careful study of the works of the leading Dutch jurists, which compels me to agree with the conclusion reached by Dr Donges . . . viz. that the Dutch jurists are silent on the question of extension of the Edict to carriers by land.’

The respondent argued that, although the matter was left open by the Appellate Division (as it was then called), there was a long line of decisions delivered by South African courts in favour of the extension of the praetor’s edict to carriers by land. In addition, the respondents argued that it would be undesirable for the court at that stage to disturb what had become the accepted legal position. However, the court stated as follows: 21 ‘While it is indisputable that the liability of public carriers by land was considered in a few decisions of the Court, the fact remains that such decisions were not based upon a proper investigation of such liability according to the principles of Roman-Dutch law as was applied in the province of Holland and West Friesland.’

The court further considered the Zimbabwean law, which also applies the Roman-Dutch law as its common law, in order to determine if any useful solution could be found. The courts in that country have held that the praetor’s edict applies to a carrier by land.22 In Cotton Marketing Board,23 the leading case, the court held that having regard to the fact that Zimbabwe is a landlocked country, where the principal mode of transport was by land, the principle of the edict had to be applied to public carriers by land. In Anderson Shipping this ratio decidendi was considered, but the court felt that it would not apply to South Africa as the country has a long coastline and several harbours. The court then went on to conclude that under Roman-Dutch law the praetor’s edict was never extended to carriers by land.24 Consequently, the praetor’s edict is also not extended to public carriers by land in South African law.

3 Carriers by water

Since the Anderson decision ruled only on the strict liability of the carrier by land, the praetor’s edict still imposes strict liability on public carriers by water, innkeepers and stablekeepers for loss of or damage to the goods they carry. As stated, the reasoning that gave rise to the strict-liability rule was that public

20 At 47F G.
21 At 49E F.
23 Supra (n 23).
24 At 50E F.
carriers by water were notorious for collusion with thieves in order to defraud the consignor. Nowadays, however, that reason does not seem to carry much weight, if at all, because today’s public carriers by water are not notorious for collusion. This casts doubt on the relevancy of the reason. Furthermore, if carriers by water no longer collude with thieves, there is no reason for treating public carriers by water differently from carriers by land.

My own view is that strict liability, or absolute liability as it is sometimes called, is neither strict nor absolute, because in cases of vis maior, for example, the carrier may not be liable. Liability would be strict if, in the event of vis maior, the carrier would still be liable despite his inability to control the event. However, since the Carriage of Goods by Sea Act of 1986, which incorporates the Hague-Visby rules, took effect, the common law liability will only be applicable if the legislation is silent on a given matter. The liability of a public carrier by water under the Carriage of Goods by Sea Act of 1986, substitutes liability based on fault for strict liability.

4 Conclusion

Two observations may be made. First, as regards the application of strict liability to public carriers for reward, the Anderson decision serves as authority for the proposition that strict liability does not apply to these lenders. Their liability, although governed by common law, is like that of private carriers and is based on fault. Secondly, as regards the strict liability of a carrier by water for reward, it is clear that the Carriage of Goods by Sea Act of 1986, in terms of which liability is based on fault, now applies. The statute has modified common law considerably. In the case of both these types of public carrier, therefore, it may be said that strict liability hardly applies when the goods entrusted to them are lost or destroyed while in their possession.

25 Dönges op cit (n 3) at 21.
27 Act 1 of 1986.