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Duty of Care

A carrier must operate under 'Conditions' and, amongst these, there will be established a level of 'Duty of Care'. In the case of SAS Logistics, although their basic Terms and Conditions are those of the RHA, they carry continental cargoes under CMR. The duty of care imposed by CMR is more stringent than that under RHA conditions and it is therefore the CMR standards which should govern all of SAS operations.

Under CMR, in the event of a loss, the CMR limitation of liability holds unless the case moves to litigation in which case it can be set aside under two grounds. Firstly, it can be set aside should the claimant allege Wilful Misconduct on the part of the Carrier (Art 29.1). In these circumstances, it is for the Claimant to prove the Wilful Misconduct. Secondly, the Defendant can plead that the loss was occasioned through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent (Art 17.2). In the case of a '17.2 defence,' it is not for the Claimant to disprove, it is for the Defendant to prove (Art 18.1). It is therefore on this aspect of liability and burden of proof that this Report concentrates.

The benchmark decision on which all later considerations of a 17.2 defence have been based is that of J.J. Silber and Others –v– Island Trucking Ltd heard before Mr Justice Mustill in the Queen's Bench Division of the Commercial Court in November 1984. The case is reported in Lloyds Law Reports 1985 Vol 2. The following extracts are taken from the judgement in order that the requirements placed on a carrier can be understood,

A. " ... (1). Art 17 (2) set a standard somewhere between a requirement to take every conceivable precaution, however extreme, within the limits of law and a duty to do no more than act reasonably in accordance with prudent current practice; the words 'could not avoid' were to be treated as comprising the rider 'even with the utmost care'; and in deciding whether this criterion was satisfied in the individual case the Court would need to look at all the circumstances and not simply at any constraints which might be imposed by the criminal law on steps which would have prevented the loss.

(2) in art 18 it was for the plaintiffs (claimants) to suggest (although not prove) what the carrier ought to have done and it was then for the carrier to rebut if he could the specific complaints thus put forward."

B. "Thus I conclude that art 17 (2) sets a standard which is somewhere between, on the one hand, a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on the other hand a duty to do not more than act reasonably in accordance with prudent current practice. To decide just where the standard is located and how to express it in words, is a more difficult problem. In the end I have come to the conclusion that the concept is best expressed by treating the words "could not avoid" as comprising the rider "even with the utmost care" ... The circumstances could, as it appears to me, in an appropriate case, include the financial practicability of the suggested precautions. Some balance will therefore have to be struck ..."

C. " ... The carrier is not required to formulate a list of all the steps which could conceivably have been thought appropriate and then methodically demonstrate, one by one, either that they were not called for even by a requirement of the utmost care or that, if they had been taken it

would have made no difference. Instead, it is for the plaintiff (claimant) to suggest (although not to prove) what the carrier ought to have done and it is then for the carrier to rebut, if he can, the specific complaints thus put forward."

Later in the judgement the term 'utmost care' having been introduced, this concept of totality is claused in this way ... "The Court must first do the best it can to ask itself whether there were precautions which could have been taken, subject to the constraints that they must have been: (i) not extravagant beyond the bounds of commonsense, (ii) not illegal, and (iii) not obviously useless ... " It will be noticed that provision for commercial expedience and excessive cost is not mentioned save for a mention by the Court of 'financial practicability.' The only way in which commercial expedience could form any part of a defence would be in those circumstances where there was overwhelming insistence by the claimant for a certain course of action and under the provisions of art 17.1 the loss could be argued to have been the result of the actions of the claimant himself.

It is in this whole context that the term 'utmost care' is used in the Report.