THE FUTURE OF DEVIATION

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Abstract

The deviation doctrine provides that in cases of termination for breach by deviation a contract of carriage will be rendered entirely unenforceable. It follows that a deviating carrier will be deprived of the benefit of all exemption and limitation clauses contained within that contract, even in cases where the deviation is minor. This approach is unduly harsh on the deviating carrier. The deviation doctrine, although a longstanding feature of maritime law, has been subjected to considerable judicial and academic criticism. Although the need for reform is clear, there is significant disagreement as to what the future of deviation ought to look like.

This thesis makes the case for reforming the deviation doctrine in line with the principles of general contract law. The thesis builds upon existing scholarship by dissecting the view that deviation is inherently special. The thesis contends that there are no justifications for the deviation doctrine existing as a body of law *sui generis.* Whilst historical explanations for such treatment can be found in the law of marine insurance and bailment, changing commercial practices have rendered a breach of the duty not to deviate comparable to breaches of other terms of a contract of carriage. It follows that alternative proposals for the future of deviation are misguided in so far as they presuppose the need for a special solution to what is now simply an ordinary contractual problem. With this notion dismantled, the thesis concludes by examining each stage of a claim for breach of a contract of carriage by deviation in turn, to demonstrate how the application of general contractual principles would clarify the existing law and provide doctrinal consistency.

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Introduction

This thesis is concerned with the doctrine of deviation, a feature of English maritime law for many centuries. The doctrine responds to the circumstance where a carrier, who has entered into a contract of carriage with a shipper, deviates from the usual or customary route without justification. The doctrine provides that where an unjustified deviation takes place, termination for breach will render all of the terms of the contract of carriage, including exculpatory terms such as exemption and limitation clauses, unenforceable. Termination for breach will also discharge all primary obligations falling due for future performance, such as any obligation to pay freight or demurrage. This approach to discharge by breach resembles the now-discredited doctrine of fundamental breach. In this respect, the modern deviation doctrine is 'hopelessly at odds with the general law of contract.'[1]

The arbitrariness and harshness of the modern deviation doctrine has been the subject of considerable judicial and academic criticism. In a recent High Court decision, *Dera Commercial Estate v Derya Inc (The Sur),* Carr J expressed significant dissatisfaction with the modern deviation doctrine.[2] Although noting that she was bound by the doctrine of precedent, she said that 'the issue is one that merits a full and comprehensive survey.'[3] The sentiment of Carr J's judgment, that the deviation

[1] Martin Dockray, 'Deviation: a Doctrine All at Sea?' [2000] LMCLQ 76, 76.

[2] *Dera Commerical Estate v Derya Inc (The Sur)* [2018] EWHC 1673 (Comm), [2019] 1 All ER 1147, [116]-[118] (Carr J).

[3] ibid [116] (Carr J).

doctrine is a problem persisting in the modern law, is echoed throughout the academic commentary.[4] The need to reform the deviation doctrine is uncontentious. However, the approach that ought to be taken is divisive.

This thesis offers a contractual solution to the deviation problem. The central claim made by this thesis is that the deviation doctrine should be reformed in line with the principles of general contract law. Although this is not a novel approach, this thesis contributes to existing thinking by taking aim at the proposition, taken as given in much of the existing scholarship, that there is something inherently special about a breach of a contract of carriage by deviation. This premise is the keystone of arguments that the deviation doctrine ought to exist *sui generis,* or that the deviation doctrine should be regulated differently from other comparable breaches, for instance through conceptualisation as a part of the law of bailment. Once the notion that deviation is inherently special is identified and rejected, it becomes clear that deviation ought to be dealt with by general contractual principles.

This thesis approaches the deviation problem in two stages. The first chapter examines the legal development of the deviation doctrine. It begins by tracing the historical origins of the doctrine, which lie in the law of marine insurance and the law of bailment. This chapter follows the development of the doctrine to the modern day. It sets out the circumstances which constitute an unjustified deviation, and the effect that an unjustified deviation will have on a contract of carriage.

[4] Dockray (n 1); *The Sur* (n 2); Kim Lewison, *Lewison on the Interpretation of Contracts* (7th edn, Sweet & Maxwell 2021) [12.142]; Stephen Girvin, *Carriage of Goods by Sea* (3rd edn, OUP 2022) 543; Francis Reynolds and Francis Rose, *Carver on Bills of Lading* (5th edn, Sweet & Maxwell 2022) [9-060]; Howard Bennett (ed), *Carver on Charterparties* (2nd edn, Sweet & Maxwell 2021) [4-384].

The second chapter makes the case for the future of the deviation doctrine. It begins by taking aim at the notion that the doctrine of deviation is a body of law *sui generis.* The thesis seeks to dismantle this notion by explaining that the areas of law which make up the historical provenance of the doctrine have changed significantly over the last few centuries. The reforms which have been taking place in these areas of law have largely removed the consequences which are unique to a breach of a contract of carriage by deviation. This chapter pays particular attention to arguments that the deviation doctrine is best conceived of as part of the law of bailment.[5] It demonstrates that although the law of bailment does recognise a doctrine of deviation, this has been subject to considerable criticism and reform in recent decades. It follows that relying on the principles of bailment to provide a solution to the deviation problem is an inappropriate response, which fails to address the criticisms made of the deviation doctrine. Further, this approach is inconsistent with the way that the deviation doctrine is approached in the jurisprudence: it is evident that deviation from a contract of carriage is viewed as a contractual problem, and in this sense, the application of a contractual solution is more doctrinally consistent.

Having argued that there is nothing inherently special about a breach of a contract of carriage by deviation, and that therefore the doctrine ought not to be viewed as *sui generis,* the thesis proceeds by identifying the conceptual problems which exist within the current regime. The thesis contends that applying the general principles of contract law to the circumstance of an unjustified deviation would resolve these conceptual challenges. In making this argument, the chapter takes each

[5] In particular, those advanced by both Brian Coote and Christopher Cashmore: see Brian Coote, 'The Effect of Discharge by breach on Exception Clauses' (1970) 28 CLJ 221 and Christopher MC Cashmore, 'The Legal Nature of the Doctrine of Deviation' [1989] JBL 492.

stage of a claim for breach of a contract of carriage by deviation in turn to demonstrate what the future of the deviation doctrine would then look like. It is explained that, at each of these stages, integration into general contract law would provide clarity, doctrinal consistency, and a better facilitation of the autonomy of the parties to the contract of carriage. Moreover, it is suggested that the central issue within the deviation doctrine is ultimately the effect of discharge for breach. Discharge for breach is an issue viewed in the contemporary case law as one of general contract law, rather than as an issue which forms part of the law of special contracts.[6] In this way, adopting a contractual solution to the deviation problem conforms to the jurisprudential trend in respect of general and special contracts.

[6] *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 523.

Chapter 1: Legal Development

1.1. Historical Origins

The deviation doctrine has been a recognised feature of the law since at least as early as the seventeenth century. Although the Admiralty Courts had given rulings on maritime disputes since the mid-fourteenth century, academic works on the development of maritime law did not emerge until the very late sixteenth century. The earliest known exposition of the laws of the sea in the United Kingdom was the work of William Welwod.[7] His 1590 work 'Sea Law of Scotland'[8] laid the foundation for the far more detailed and instructive 'Abridgement of All Sea-Lawes' (1613).[9]

In his 1613 work Welwod provides several instructive passages which demonstrate that deviation was a problem which had been provided for by law by the early seventeenth century. In one passage, Welwod directly addresses the circumstance where the Master of a vessel does not follow the correct route, instead navigating into danger to the detriment of the cargo or the ship. He writes that 'it is imputed for a fault to the Master, if he directs his course by waies either dangerous through Pirats, enemies, or other evill aventures, and holds not forth his due rout, and damage happen thereby.'[10]

[7] William Senior, 'Early Writers on Maritime Law' (1921) 37 LQR 323.

[8] John D Ford, 'William Welwod's Treatises on Maritime Law' [2013] JLH 34.

[9] William Welwod, *Abridgement of All Sea-Lawes* (1st edn, Humfrey Lownes 1613).

[10] ibid 25.

This passage outlines that the Master will be at fault should the vessel deviate. The language of 'due rout' signals that this result follows where the route has been deviated from. It remains ambiguous in this text whether a 'due rout' is a route which has been expressly agreed upon, or whether straying from a customary route will be sufficient to bring about this result.

Whilst Welwod's work provides the earliest description of the doctrine, the deviation rule is articulated more explicitly in a later seventeenth century maritime law text. The second edition of Godolphin's *Admiral Jurisdiction* (1685) provides the following:

> [T]he master… may not deviate in his course without just cause or steer a dangerous or unusual way when he may have a more secure passage, yet to avoid illegal impositions, he may somewhat change his course and be excusable.[11]

It is evident that from the seventeenth century the law recognised that deviation was not permissible under a contract of carriage, save in limited circumstances (namely, where it was necessary to deviate to avoid danger). Whilst only addressed briefly by Godolphin, the foundations of the deviation doctrine are visible in these early maritime texts.

Following the pioneering works of Welwod and Godolphin, maritime texts from the seventeenth century onwards contained references to the doctrine of

[11] John Godolphin, *A View of the Admiral Jurisdiction* (2nd edn, G Dawes 1685).

deviation.[12] These texts incorporate the work of the earlier writers, adding details of the specific dangers which must be avoided.[13] Clear reference to deviation appears in the case law shortly thereafter, with cases from the early eighteenth century casting light on these rules. Many of these early cases are marine insurance cases, predominantly involving a dispute over whether an insurance policy relating to cargo has been set aside as a result of a master's decision to deviate. The application of the deviation doctrine is clear, for instance, in the case of *Green v Young* (1702), in which the Court of King's Bench held that a policy of insurance will be set aside from the moment a deviation occurs. [14]

1.2. When is there a breach of the obligation not to deviate?

1.2.1. *A general duty not to deviate*

At the beginning of the nineteenth century, the case law suggested that a duty not to deviate in a contract of carriage did not arise by implication. Contemporary admiralty texts such as Abbott's *A Treatise of the Law Relative to Merchant Ships and Seamen* reported that there was a duty not to deviate but did not provide detail on when this duty would arise.[15]

[12] For instance, Gerard Malynes, *Lex Mercatoria* (4th edn, Basset 1686) and Charles Molloy, *De Jure Maritimo et Navali* (1st edn, G Dawes 1676).

[13] Molloy (n 12) 200 '[a master may not] sail by places infested with pirates, enemies or other places notoriously known to be unsafe; nor engage his vessel among rocks or remarkable sands, being thereto not necessitated by violence of wind and weather, or deluded by false lights.'

[14] *Green v Young* (1702) 2 Salk 444, 91 ER 385 (KBD).

[15] Charles Abbott, *A Treatise of the Law Relative to Merchant Ships and Seamen* (2nd edn, Hanfard 1802) 194.

This position was evident in *Max v Roberts.*[16] In this case a carrier, on a journey from Liverpool to Waterford, deviated from the direct route by calling into Portwilliam Bay. Whilst in Portwilliam Bay the ship and cargo sank. The claimant had taken out a policy of insurance on the goods, under which the claimant had stipulated the voyage the goods were to undertake. The deviation from the stipulated route annulled the claimant's insurance policy, causing the claimant to suffer a loss when the claimant could not redeem this policy against the lost goods. The claimant argued that it was the duty of the defendant carrier to make the voyage by the 'direct, usual and customary way and passage without deviation.'[17] Giving judgment, Lord Ellenborough CJ held that there had been no express undertaking to carry the goods directly from Liverpool to Waterford, and that this was fatal to the claimant's case as:

> Independently of any restraint upon the ship-owner, arising from agreement on the subject, the ship may make as many intermediate rests and stages in the course of its voyage…as the ordinary convenience of its employers and nature of its service may require.[18]

This position changed in the nineteenth century case of *Davis v Garrett* (1830) in which the Court of Common Pleas recognised the existence of a general duty not to deviate, which arose by implication. [19]

[16] *Max v Roberts* (1810) 12 East 89 (Court of Exchequer Chamber).

[17] ibid 90.

[18] ibid 95.

[19] *Davis v Garrett* (1830) 6 Bing 716, 130 ER 1456.

In *Davis v Garrett*, the claimant shipper entered into an agreement for the shipment of a cargo of lime from the Bewly Cliff to the Regent's Canal upon the defendant's barge the *Safety*.[20] Whilst making the journey, the master voluntarily deviated from the usual route to a 'certain place called the East Swale, and to a certain place called Whitstable Bay.'[21] During the course of the deviation a storm set alight the lime. The barge and the cargo were destroyed in the fire. The claimant brought an action against the defendant for the lost cargo.

The defendant contended that there had been no allegation of any specific undertaking on the part of the defendant to carry the lime directly from Bewly Cliff to the Regent's Canal. The claimant contended that the obligation not to deviate was an 'implied condition' which dictated that for the purpose of avoiding unnecessary delay the ship should have proceeded via the usual and direct course.[22] An analogy was drawn to the law governing policies of insurance.

The claimant had contended that 'there [was] no ground in this case for the objections taken to the declaration taken in *Max v Roberts.*'[23] The defendant, in contrast, had suggested that *Max v Roberts* was sufficient to discharge the case. The defendant argued that the material declaration in the present case was 'ill because it did not aver an express undertaking by the defendant to carry the goods directly to

[20] The law reports do not give detail as to the type of agreement that the parties had made: see Dockray (n 1) 77.

[21] *Davis v Garrett* (n 19) 1457.

[22] ibid 1458.

[23] ibid.

Waterford,' and that following *Max v Roberts,* in the absence of such an undertaking a deviation would have no consequences for the contract of carriage.[24]

Finding for the claimant, Tindal CJ held that there was an obligation not to deviate from the customary route implied into contracts of carriage. He said that 'the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.'[25] Tindal CJ's judgment made clear, contrary to the submissions of the defendant, that an express undertaking not to deviate was not required.[26] A shipper would be able to recover the value of the goods which were damaged or lost during the deviation without the burden of proving that this loss was caused by the deviation.[27] Tindal CJ distinguished *Max v Roberts* on the basis that:

> [T]here [was] a distinction between the language of this record and that of [*Max v Roberts*]…in [*Max v Roberts*] the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford ; but here the allegation is, 'that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure.'[28]

[24] ibid 1459.

[25] ibid 1460 (Tindal CJ).

[26] ibid.

[27] ibid 1459 (Tindal CJ).

[28] ibid 1460 (Tindal CJ).

This point of distinction is fine and has been noted in academic commentary. Dockray, for instance, writes that 'the decision in *Max v Roberts* was distinguished on a point of pleading so slight that it is difficult to be sure that it was not a mistake.'[29] Although the decision in *Davis v Garrett* appears to break from previous case law with little justification, the judgment is consistent with the admiralty texts and marine insurance case law which existed by this time; in this way, the decision represents an 'acknowledgement and elaboration of the status quo.'[30]

1.2.2. *The usual and customary course*

The deviation rule as articulated in *Davis* was the subject of several later cases which provided elucidation as to the meaning of 'usual and customary course.' In *Leduc v Ward* (1888) the claimant purchased goods which were to be shipped on the defendant's ship, the *Austria*.[31] The bill of lading indorsed to them stated that the goods were shipped for delivery at Dunkirk from Fiume. Rather than proceeding to Dunkirk, the defendant's ship sailed for Glasgow. The ship and its cargo were lost at the mouth of the Clyde. The claimant brought a claim against the shipowners for non-delivery. The defendant sought to rely on the excepted perils clause contained within the bill of lading. The claimant argued that the bill of lading had been set aside because of the deviation.

[29] Dockray (n 1) 84.

[30] ibid 83.

[31] *Leduc v Ward* (1888) 20 QBD 475 (CA).

Lord Esher held that a bill of lading refers to only one voyage, 'from the port of shipment to the port of destination;' this voyage 'must be a voyage on the ordinary track by sea of the voyage from the one place to the other.'[32] Any departure from this track will constitute a deviation. Lord Esher emphasised that the track is not necessarily an exact line from the one port to the other; concessions will be made for the conditions, for instance; but the test to be applied is the 'ordinary track of such a voyage according to a reasonable construction of the term.'[33] This position was also taken by Fry LJ, who, prior to expressing his agreement with Lord Esher, added that one of the most important terms of the contract is the course by which the goods are to be carried to their destination.[34]

Despite the clarification provided in *Leduc v Ward,* the application of this test continued to be contentious. In *Evans v Cunard Company,* the claimant shipped goods from Bari, in the Adriatic, to Liverpool on the defendant's ship the *Veria*.[35] The bill of lading stipulated that the *Veria* was at liberty to proceed to Liverpool, via any port or ports in a variety of named places, including the Adriatic, the Black Sea, and the Mediterranean, in any order, even where these ports were out of the customary or advertised routes. The vessel proceeded around Constantinople. Wills J described the description of the particular voyage as the 'keynote to which the bill of lading must conform.'[36]

[32] ibid 481 (Lord Esher MR).

[33] ibid.

[34] ibid 483-484 (Fry LJ).

[35] *Evans v Cunard Company* (1902) 18 TLR 374 (Compensation Court, Australia).

[36] ibid 374 (Wills J).

Wills J found for the defendant. He accepted the defendant's evidence that vessels of this line invariably called at Bari on the outward leg of the Adriatic round, not the homeward leg. As such, on a journey between Bari and Liverpool on the defendant's line, it was customary to proceed via Constantinople. This meant that the vessel proceeding to Constantinople was not a deviation capable of setting aside the bill of lading. *Evans v Cunard Company* demonstrated that external evidence could be adduced to demonstrate what the usual and customary route under the circumstances was, reaffirming that this route would not necessarily be the direct, geographical course.

The difficulties inherent in the application of the 'usual and customary course' test were articulated in the case of *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd.*[37] When determining whether a ship calling at the port of Havre during the course of a direct service between New Zealand and London was a deviation, Swinfen Eady LJ noted that the question to be asked following *Leduc v Ward* was whether the place of the purported deviation was 'substantially a port which will be passed on the named voyage.'[38] However, after laying out this rule, he said that 'I am of opinion that it is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an intermediate port within the meaning of a bill of lading.'[39] The absence of 'hard and fast' rules in this area is well demonstrated by the series of cases decided on the application of this test. The next such case of note was *Frenkel*

[37] *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* [1916] 2 KB 783 (CA).

[38] ibid 794 (Swinfen Eady LJ).

[39] ibid 795 (Swinfen Eady LJ).

v MacAndrews & Co Ltd.[40] In this case the claimant was the owner and shipper of 134 barrels of olive oil shipped at Malaga for Liverpool on the defendant's steamship the *Cervantes*. During the voyage from Malaga to Cartagena, the *Cervantes* was struck by a gale and the barrels containing the olive oil were broken, causing the contents to spill and be lost. At the time of the loss the *Cervantes* was proceeding in the opposite direction to Liverpool, her destination. The *Cervantes* was not on any route between the termini of the voyage specified in the bill of lading. The claimant brought an action for the value of the barrels against the defendant.

The claimant's case was that the defendant had deviated by proceeding via Levante rather than sailing directly for Liverpool. The claimant argued that the rule was that the route meant the direct geographical route. The defendant, conversely, alleged that the route that the *Cervantes* had proceeded on was the 'usual customary route by which this voyage had been for many years performed by vessels of the [defendant's] line.'[41] In any event, the bill of lading gave them 'liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation'[42] such that the vessel calling at Cartagena was within the wording of the deviation clause.[43]

A unanimous House of Lords held that proceeding via Levante was no deviation, and as such, the exceptions contained within the bill of lading covered the

[40] *Frenkel v MacAndrews & Co Ltd* [1929] AC 545 (HL).

[41] ibid 547.

[42] ibid 545.

[43] ibid 548.

loss sued for. The bill of lading had stated simply that the ship was headed for Liverpool. This was consistent with either the direct route or the non-direct route via Levante. The Lords affirmed that in cases where a bill of lading was ambiguous, external evidence could be adduced to demonstrate whether a route was customary.[44] Contrary to the argument pursued by the claimant, the House of Lords held that in cases such as the present there may be 'either alternative routes or a customary route which in either case might displace the geographical route.'[45] The defendant was successful in adducing evidence to the effect that the regular customary route for a ship which touched at Malaga on the outward leg of a round voyage was to continue in precisely the way that the *Cervantes* did.[46] Because the bill of lading included both routes, there was no reason to examine the effect of the deviation clause, as there was no deviation. Significantly, the House of Lords recognised that there may be several routes which meet the description of the 'usual and customary' route, and that a defendant could successfully establish that there had not been deviation by adducing evidence as to the existence of any of these routes.

The House of Lords dealt with the application of 'usual and customary route' again in the case of *Reardon Smith Line v Black Sea and Baltic General Insurance* ('*The Indian City*').[47] In *The Indian City*, an oil-burning vessel was chartered to carry a cargo from Poti to the United States. The vessel left Poti and proceeded to Constantza to bunker. Constantza was not on the direct geographical route. The vessel

[44] ibid 557 (Lord Dunedin), 561 (Lord Sumner), and 567 (Lord Warrington).

[45] ibid 577 (Lord Dunedin).

[46] ibid 561 (Lord Sumner).

[47] *Reardon Smith Line v Black Sea and Baltic General Insurance* [1939] AC 562 (HL).

was stranded off Constantza, suffering damage. Salvage services were rendered, and a part of the ship's cargo was jettisoned. The claimant sued the defendant insurance company claiming contribution to general average in addition to a contribution to the expenditure incurred by the stranding itself. The defendant insurance company accepted that if the charterers were liable to contribute to the respective expenditures claimed by the claimant then they too would be liable under the underwriters' guarantee that they had signed. However, the defendant contested liability on the ground that, by proceeding to Constantza, the vessel had deviated. The claimant argued that oil-burning vessels such as theirs were in the habit of bunkering at Constantza due to the large supply of cheap fuel which was available there.

Giving judgment in the House of Lords, Lord Porter described the law on deviation as 'reasonably plain, though its application may from time to time give rise to difficulties.'[48] He affirmed that the route will be presumed to be the direct geographical route in cases where no evidence was given.[49] Lord Porter noted that the usual route will be specific to the particular case, such that a route may be customary for a particular line although that route may not be customary for other individuals or lines.[50] He said that the type of vessel may even be relevant when identifying the usual route, with the usual route for a bunker varying from that taken by a sailed ship.[51] He

[48] ibid 584 (Lord Porter).

[49] ibid.

[50] ibid 585 (Lord Porter).

[51] ibid 584 (Lord Porter).

expressed those principles as consistent with both the judgment in *Frenkel v MacAndrews* and *Evans v Cunard Steamship Co.*[52]

1.2.3. *Permissible deviation at common law*

Deviation was frequently the subject of litigation in the insurance context throughout the late eighteenth and early nineteenth centuries, with the reported cases often turning on whether the circumstances of the case warranted the master taking the ship off course. [53] If the circumstances did warrant the master taking the ship off course, the deviation would be permissible, and would have no consequences for the contractual arrangements between the parties. These circumstances were, broadly, situations in which the 'safety of the maritime adventure' required the carrier to take action.[54]

Lavabre v Wilson (1779) demonstrates early judicial recognition of the permissible deviation doctrine.[55] In this case, the claimant brought an action on an insurance policy on a voyage from 'Port L'Orient to Pondicherry, Madras and China, and at and from thence back to the ship's port, or ports of discharge in France.'[56] The captain of the ship had taken the decision, outside of the wording of the insurance policy, to travel to Bengal for the ship to be careened. The shipowner sought to claim on the policy of insurance when the ship was later lost when it was captured by a

[52] ibid 585 (Lord Porter).

[53] James Allan Park, *Law of Marine Insurance* (7th edn, Strahan 1817) 437–475.

[54] Bennett (n 4) [4-363].

[55] *Lavabre v Wilson* (1779) 1 Doug 284, 99 ER 185 (KBD).

[56] ibid 185.

privateer. The claimant argued that, although the vessel had deviated from the stipulated route, the deviation had been necessary to ensure the safety of the ship. Lord Mansfield directed the jury that 'for that going to any port, though out of the course of the voyage, is, in the eye of the law, no deviation, if necessary for the safety of the ship.'[57]

Lavabre v Wilson recognised that the law of marine insurance permitted deviation where this deviation was compelled by the need to ensure the safety of the vessel. Where this was the case, the policy would remain actionable by the policy holder, although deviation from the insured voyage would usually have the effect of invalidating the insurance policy.

A similar approach was taken in *Lawrence v Sydebotham* (1805), another case in which the claimant brought an action on a policy of insurance on a ship.[58] The court held that the master of the ship had deviated by conveying a captured ship into port, an act which the liberty clause contained within the insurance policy did not permit him to do. Lord Ellenborough held that the ruling on whether conveying the vessel into port was a deviation did not affect the question of when a ship may slacken its sail for the purpose of succouring another vessel in distress, continuing that it 'may be found to be for the general benefit of all insurers, (and amongst others consequently for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship.'[59] As the present case did

[57] ibid 187 (Lord Mansfield CJ).

[58] *Lawrence v Sydebotham* (1805) 6 East 45, 102 ER 1204 (KBD).

[59] ibid 1207 (Lord Ellenborough CJ).

not fall within such a circumstance, the deviation was one 'which [annulled] the policy.'[60] Giving a concurring judgment, Lawrence J held that 'as to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress.'[61] Similarly, Le Blanc J emphasised that 'this is not a case where two ships kept in company with each other for the sake of mutual protection, or where the one stood in need of humane assistance from the other.'[62]

These cases speak to the limited circumstances in which a deviation from a stipulated voyage will be found to be permissible. Although the permissible deviation doctrine was formed in the marine insurance context, a series of cases in the late nineteenth century made clear that these developments in the law of insurance were applicable in the context of contracts for the carriage of goods by sea.[63] Crucially, these cases made clear that a permissible deviation at common law is one which responds to an imminent peril which threatens the vessel, crew, or cargo itself, or the life of any other person.[64]

[60] ibid.

[61] ibid 1207 (Lawrence J).

[62] ibid 1207 (Le Blanc J).

[63] *Duncan v Koster (The Teutonia)* [1872] 2 WLUK 72 (PC); *Phelps, James & Co v Hill* [1891] 1 QB 605 (CA).

[64] *Scaramanga & Co v Stamp* (1880) 5 CPD 295, 4 WLUK 39 (CA).

1.2.4. *Permissible deviation under the Hague Rules*

A separate set of rules governing permissible deviation were introduced by Article IV Rule 4 of the Hague Rules.[65] Article IV Rule 4 provides as follows:

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

Article IV Rule 4 permits deviation for the purpose of saving life or property at sea. Outside of these two situations, 'reasonable[ness]' is the standard for assessing when a deviation will be permissible. In *Stag Line v Foscolo,* the House of Lords determined the meaning of 'reasonable' within the Hague Rules. [66] In this case, the claimant had chartered a ship, the *Ixia*, owned by the defendant, Stag Line, for the shipment of a cargo of coal from Swansea to Constantinople. Two engineers were on board the ship, who were intended to be landed at Lundy. However, the defendant wanted the engineers to remain on board beyond this point, and so they were landed later, in St Ives Bay. After landing the engineers, the *Ixia* hugged the Cornish coast, off the course of her voyage. Shortly after departing from St Ives Bay, the ship was stranded, and both the ship and the cargo were lost. The claimant, Foscolo, brought an action for the value of the lost cargo.

[65] Schedule to the Carriage of Goods by Sea Act 1971. For detail on the Hague Rules generally, see Anthony Diamond QC, 'The Hague Visby Rules' [1978] LMCLQ 225.

[66] *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328 (HL).

The defendant argued that the meaning of 'reasonable deviation' under paragraph 4 of Article IV of the Hague Rules should not be confined to what was reasonably necessary or required in the interest of both parties, but ought to include any deviation which was reasonable in the circumstances. Therefore, the defendant contended that the immunity given to the ship by paragraph 2 of the same provision from loss resulting from 'perils of the sea' applied. Conversely, counsel for the claimant contended that landing the engineers at St Ives Bay was not necessary such that the deviation was one which was not reasonable. A reasonable deviation must be so in accordance with the interests of both the carrier and the shipper.

A unanimous House of Lords held that the decision to land the engineers at St Ives Bay was a permissible deviation. However, the *Ixia* continuing to hug the Cornish coast afterwards was an unreasonable deviation. Lord Atkin stated that the Hague Rules were intended to extend the permissible limits of deviation.[67] He continued that a reasonable deviation may be a deviation which is only in the interest of one contractual party, or where the deviation was in the contemplation of neither party at the time of contract.[68] He articulated the test for whether a deviation would be held to be reasonable in the following terms:

> [T]he true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and

[67] ibid 343 (Lord Atkin).

[68] ibid.

> the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.[69]

As the *Ixia* hugging the coast after landing the engineers was held to be an unreasonable deviation, the immunity of the carrier under Article IV rule 2(c), from loss or damage arising from perils of the sea, did not apply.

Stag Line v Foscolo remains good law on the reasonable deviation doctrine. Later cases have added to this authority by demonstrating that in assessing whether a deviation would be held to be reasonable, the courts will consider the relative weighting of the competing interests of all relevant parties,[70] but will be deferential to decisions taken by 'a master of competent skill and knowledge, acting bona fide in the interest of all concerned.'[71]

1.2.5. *Liberty clauses permitting deviation*

The approach to be taken to liberty clauses in instances of deviation was originally developed through the law of marine insurance. *Lawrence v Sydebotham* (1805) is one example of a marine insurance case which dealt with the construction of a liberty clause in an instance of deviation.[72] In this case, the claimant brought an action on a

[69] ibid 344 (Lord Atkin).

[70] *Thiess Bros (Queensland) Pty Ltd v Australian Steamships Pty Ltd* [1955] 1 Lloyd's Rep 459 (NSWSC).

[71] *Danae Shipping Corp v TPAO and Guven Turkish Insurance Co Ltd (The Daffodil B)* [1983] 1 Lloyd's Rep 498 (QBD) 502.

[72] *Lawrence v Sydebotham* (n 58).

policy of insurance on a ship. The policy included a liberty clause, which authorised the master of the ship *The Tamer* to 'chase, capture and man prizes.'[73] The master of the ship captured the French trading vessel *La Braave*. Contrary to the terms of the insurance policy, *The Tamer* itself conveyed the ship *La Braave* into port, the custom being that the capturing ship would put a sufficient number of men on board to bring the ship in. The ship then proceeded from the coast of Africa to the West Indies with *La Braave* in company. During this stretch of the voyage the ship leaked considerably, eventually sinking. The defendant argued that the insurance policy was 'avoided' by a deviation in the course of the voyage, the material deviation being *The Tamer* sailing in convoy.[74] In finding for the defendant, the court affirmed the rule that a deviation of this type had the effect of invalidating the contract of insurance. On the interpretation of the liberty clause, Lord Ellenborough held that the clause could not be expanded beyond the contemplation of the parties by 'expanding the plain meaning of the words.'[75]

In *Leduc v Ward* the Court of Appeal dealt with the precise duty which is upon a shipowner where liberty clauses purported to permit any deviation.[76] The bill of lading in *Leduc v Ward* gave the shipowners liberty 'to call at any ports in any order.'[77] The claimant argued that, literally construed, this term of the bill of lading would give shipowners liberty to proceed to any port in the world, defeating the entire purpose of

[73] ibid 1204.

[74] ibid 1204.

[75] ibid 1206 (Lord Ellenborough CJ).

[76] *Leduc v Ward* (n 31).

[77] ibid 475.

the contract. Lord Esher, in finding for the claimant, emphasised that the form of bills of lading necessarily 'provides for a particular voyage.'[78] Lord Esher held that this was crucial to both the business efficacy of contracts of carriage, which must necessarily allow the shipper to calculate the date at which he should have his goods, and for contracts of insurance, which necessarily vary in response to the hazards implicit in a particular voyage.[79]

The scope of the judgment in *Leduc v Ward* was the main issue before the Court of Appeal in *Glynn v Margetson*, another case concerning a liberty clause.[80] The claimant brought an action for damage to a cargo of oranges against the defendant shipowner. The oranges were shipped from Malaga to Liverpool upon the steamship *Zena.* Upon leaving Malaga, rather than proceeding directly for Liverpool, the steamship went first to Burriana, on the east coast of Spain. This journey took several additional days, and when the oranges arrived at Liverpool they had rotted. The bill of lading contained a clause granting the defendant 'liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever.'[81] The defendant sought to rely on this clause of the bill of lading to justify the ship taking an indirect route via Burriana. They contended that the object of this liberty clause was to enable the shipowner to collect enough cargo to fill the

[78] ibid 480 (Lord Esher MR).

[79] ibid 480-481 (Lord Esher MR).

[80] *Glynn v Margetson* [1892] 1 QB 337 (CA).

[81] ibid 337.

vessel, and to this end, the liberty clause extended to the ports at which ships engaged in the Mediterranean trade habitually called. At first instance Hawkins J found for the claimant. He held that the 'general words in the bill of lading did not authorise such a deviation from the direct voyage from Malaga to Liverpool.'[82] The defendant appealed the decision.

The Court of Appeal upheld the finding of Hawkins J. In giving judgment for the claimant, Lord Esher followed the principles he had recently set out in *Leduc v Ward.* Lord Esher said that the 'first thing that the shipper and shipowner must agree upon is the voyage.'[83] Where a bill of lading contains a liberty clause to call at any ports, *Leduc v Ward* provides instruction on how this clause is to be constructed. The clause is to be read to give liberty to the shipowner to call at the ports which are on the course of the voyage, although this may not be the precise course which the ship would otherwise take.[84] Although the wording of the liberty clause in the present case differed slightly from that in *Leduc,* Lord Esher held that the result was the same; that liberty could not be granted to proceed on an 'absolutely different voyage.'[85] Rather, shipowners may only proceed to and stay at ports which are 'substantially on the course of the voyage.'[86] Fry LJ and Bowen LJ gave concurring judgments. Bowen LJ emphasised that constructing the clause other than in the present manner would 'make

[82] ibid 338 (Hawkins J).

[83] ibid 339 (Lord Esher).

[84] ibid.

[85] ibid.

[86] ibid.

business impossible.'[87] Fry LJ added that the decision in *Leduc v Ward* was an example of 'a well-established and ancient principle' of construction, 'that the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties.'[88]

The authority to be drawn from the decision in *Glynn v Margetson* was summarised in *Frenkel v MacAndrews & Co Ltd*, in the judgment of Lord Sumner. He held that the described voyage and a liberty to deviate contained within a bill of lading must be 'read together and reconciled, and that a liberty, however generally worded, could not frustrate but must be subordinate to the described voyage.'[89]

1.2.6. *Unjustified deviation: a summary*

In sum, a breach of the obligation not to deviate will take place when the following conditions are met:

i) The ship has departed from the 'usual and customary course.' The contract of carriage does not need to include a term to this effect; rather, this duty arises by implication.[90] Evidence can be adduced by the parties to demonstrate what the usual and

[87] ibid 343 (Bowen LJ).

[88] ibid 344 (Fry LJ).

[89] *Frenkel v MacAndrews & Co Ltd* (n 40) 562 (Lord Sumner).

[90] *Davis v Garrett* (n 19).

customary course is.[91] This route is not necessarily the direct geographical route.[92]

ii) The deviation was not permissible at common law. The safety of the voyage did not necessitate the deviation; there was no immediate peril.[93]

iii) The deviation was not permissible under the Hague Rules. The vessel did not deviate for the purpose of saving 'life or property at sea.'[94] The decision to deviate was not reasonable: it would not have been made by a 'prudent person controlling the voyage…having in mind all the relevant circumstances existing at the time.'[95]

iv) There was no liberty clause which authorised the deviation. A wide liberty clause should be read so as not to permit the undertaking of an 'absolutely different voyage'[96] Rather, the clause must be read in a way which is 'subordinate to the described voyage.'[97]

[91] *Frenkel v MacAndrews & Co Ltd* (n 40).

[92] *Leduc v Ward* (n 31) 481 (Lord Esher MR).

[93] *Stag Line Ltd v Foscolo, Mango & Co Ltd* (n 66) 342 (Lord Atkin).

[94] Hague Rules, Article IV Rule 4.

[95] *Stag Line Ltd v Foscolo, Mango & Co Ltd* (n 66) 344 (Lord Atkin).

[96] *Glynn v Margetson* (n 80) 339 (Lord Esher).

[97] *Frenkel v MacAndrews & Co Ltd* (n 40) 562 (Lord Sumner).

1.3. What is the effect of deviation on a contract of carriage?

1.3.1. *Legal development prior to the decision in Hain Steamship*

Davis v Garrett appeared to be authority for the proposition that cargo-owners had to show that the loss was directly attributable to a deviation for that deviation to deprive a carrier of any exceptions or limitations contained within the contract of carriage.[98] This was a natural reading, given that in *Davis v Garrett* the loss had occurred after the moment of deviation. This position remained unchallenged until the case of *Balian v Joly, Victoria & Co*.[99] *Balian* was the 'first case on the point' that, from the moment of the deviation, 'the shipowner loses the benefit of any exempting clauses.'[100]

In *Balian*, the claimant had shipped bales of tobacco on board the defendant's ship for carriage from Lagos to London. The tobacco was carried by the defendant to Smyrna, where it was transhipped onboard a Cunard steamer to Liverpool before being taken to London via rail. Upon arrival in London, a number of the bales of tobacco had been damaged. The claimant brought an action against the defendant in respect of the damage. The bill of lading contained clauses which excepted certain perils and a clause which limited the liability in respect of each package to 5l in cases where a package with a value of over 5l had not had its value declared before

[98] Jerry Hubbard, 'Deviation in Contracts of Sea Carriage: After the Demise of Fundamental Breach' (1986) 16 VUWLR 147.

[99] *Balian v Joly, Victoria & Co* [1890] 6 TLR 345 (CA).

[100] Girvin (n 4) 539.

shipment. The bales of tobacco had a value of higher than 5l. The defendant sought to rely on this limitation clause. The Court of Appeal found for the claimant.

A unanimous court of Lord Esher, Fry LJ, and Lopes LJ held that the fact of deviation set aside the contract of carriage completely, such that the defendant could not rely on the limitation clauses contained within the bill of lading. Lord Esher held that:

> [I]t was sufficient to say that the cases showed that if the master deviated from the voyage contracted for in the bill of lading the ship-owner would be deprived of all stipulations in the bill of lading which limited his liability as a carrier by water.[101]

The judgment in *Balian* made a significant contribution to the development of the deviation doctrine, as in previous cases such as *Davis v Garrett,* the material loss or damage had occurred during the deviation itself. *Balian* demonstrated that the deviation doctrine applied even when the damage did not occur during the course of the deviation; rather, the deviation prevented the contract of carriage from applying to loss occurring after the deviation. The deviation doctrine applied in the *Balian* case was 'broader and more general than the law applied in *Davis*,' one of the earliest demonstrations of the seriousness with which the courts regard unjustified deviation.[102]

[101] *Balian v Joly, Victoria & Co* (n 99) 345 (Lord Esher).

[102] Dockray (n 1) 87.

The literature on the consequences of deviation in the early twentieth century reports that 'the shipowner will be liable to the charterer or any cargo-owner for any damage which occurs during or results from the deviation.'[103] The proposition that the loss must result from the deviation in order for the doctrine to apply was tested in the case of *Joseph Thorley Ltd v Orchis Steamship Co Ltd.*[104] In this case, 897 tonnes of locust beans were shipped from Limassol to London on the *Orchis,* a steamship owned by the defendant. The steamship, rather than proceeding directly to London, proceeded first to 'a port in Asia Minor, and thence to a place in the North of Palestine, and thence to Malta, and so to London.'[105] On arrival in London, once the beans had been unloaded, it was found that they had been damaged. This damage had occurred through admixture with terra umber, a poisonous soil, a large quantity of which had also been carried on the ship as ballast. The bill of lading contained an exception clause exempting the shipowners from liability for loss arising from the negligence of the 'pilot, master, officers, engineers, crew, stevedores, servants, or agents of the owners, in the management, loading, stowing, discharging, or navigation of the ship, or otherwise.'[106] The claimant brought an action claiming damages for the loss which had been occasioned. The defendant alleged that the damage had been caused by the stevedores during unloading, and as such fell within the exception clause within the bill of lading. The claimant argued that the deviation had set aside the contract of carriage, and as such the defendant was not entitled to rely on the provisions of the

[103] Thomas Edward Scrutton and Frank Douglas MacKinnon, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (5th edn, W Clowes and Sons 1904). The summary of the consequences of a deviation was the same throughout the first 5 editions of the text: (1886), (1890), (1893), (1899) and (1904) respectively.

[104] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660 (CA).

[105] ibid 661.

[106] ibid 661.

exception clause. The defendant contended that this case was distinct from the previous cases on deviation, as here the damage had not been caused by or during the deviation.

The Court of Appeal found for the claimant. Collins MR held that the ruling in *Balian v Joly, Victoria and Company*[107] 'conclude[d] the present case.'[108] He held that the principle underlying *Balian* was that the undertaking not to deviate had the effect of a condition; breach of this undertaking would discharge the 'special contract expressed in the bill of lading.'[109] He held that it was therefore immaterial that there was no causal connection between the deviation and the loss; the defendant could not rely on the exclusion clause within the bill of lading by reason of the deviation.[110] Collins MR characterised the implied duty not to deviate as a 'condition precedent upon which [the defendant's] right to rely on [the exclusions contained within the contract of carriage] depends.'[111] Cozens-Hardy LJ gave a concurring judgment, and held that *Balian v Joly, Victoria and Company* was indistinguishable from the present case.[112] Fletcher Moulton LJ emphasised that deviation is 'such a serious matter' which 'changes the character of the contemplated voyage so essentially' that the guilty shipowner cannot rely upon the bill of lading.[113]

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[107] *Balian v Joly, Victoria and Company* (n 99).

[108] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 666 (Collins MR).

[109] ibid 667 (Collins MR).

[110] ibid 668 (Collins MR).

[111] ibid 667 (Collins MR).

[112] ibid 668 (Cozens-Hardy LJ).

[113] ibid 669 (Fletcher Moulton LJ).

The decision in *Joseph Thorley* went further than *Balian* by holding that a deviation deprives the shipowner of the benefit of all exception clauses contained within the contract of carriage.[114] The ruling in *Joseph Thorley* appeared to suggest that in the event of a deviation, a contract of carriage would be displaced not only automatically but also *ab initio*, as though the contract had never existed.[115] This result 'produces extreme consequences for the shipowner,' a position Girvin has deemed 'particularly problematic.'[116] However, the decision in *Joseph Thorley* left 'uncertainty about the nature of the rights and common law defences still open to a carrier after a deviation,'[117] and so the scope of the Court of Appeal decision in *Joseph Thorley* was at issue in *Internationale Guano en Superphosphaatwerken v MacAndrew & Co*.[118]

In *Internationale Guano*, the claimant shipped a cargo of superphosphates in bags on board the defendant's ship the *Cid* for delivery at Algeciras and Alicante, with liberty to call at Corunna. Upon arrival at Algeciras, the shipowner proceeded for Seville, rather than Alicante. The voyage was subject to delay at various points, which resulted in the journey taking thirty-four days, as opposed to the anticipated time of fourteen to twenty days. When the ship reached Alicante, the cargo had been damaged. The delays had resulted in the sulphuric acid in the superphosphates eating

[114] Girvin (n 4) 540.

[115] Francis Reynolds, *The Implementation of Private Law Conventions in English Law: The Example of the Hague Rules* (Butterworth Lectures 1990-1991) 29, 36.

[116] Girvin (n 4) 540.

[117] Dockray (n 1) 94.

[118] *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* [1909] 2 KB 360 (KBD).

away at the bags the superphosphates had been packaged in.[119] Claims were made for this damage by the consignees against the claimant, which the claimant settled for 310l. They claimed this sum from the defendant.

The claimant and defendant had advanced different views of the effect that the deviation had on the contract of carriage. The claimant contended that the deviation set aside the contract of carriage from the moment the voyage began, such that it could not be relied upon by the defendant for loss which had occurred either prior to or after the deviation. The defendant argued that deviation set aside the contract of carriage from the moment of deviation onwards, such that the exceptions contained in the bill of lading could be relied upon by the defendant for damage to the cargo which had occurred prior to the deviation. The defendant also argued that, after the deviation, they would be in the position of a common carrier, and so would be able to rely on the exception of inherent vice.[120]

Pickford J, addressing the effect that a deviation would have on a contract of carriage, held that the case turned upon what the 'true effect' of the decision in *Joseph Thorley Ltd v Orchis Steamship Co* was.[121] On the correct interpretation of *Joseph Thorley,* he held that:

[119] ibid 363. Superphosphates are treated through a cooling process. This cooling process lowers the quantity of free sulphuric acid which is present in the superphosphate. Free sulphuric acid is necessary for the manufacturing process but has a corrosive quality. The longer the journey the superphosphate is going on, the lower the quantity of free sulphuric acid present in the superphosphate must be, and therefore the longer the cooling process must be prior to shipment. Where there is extensive delay, it is likely that the cooling process a shipment of superphosphates has been through will be inadequate to prevent the corrosion of the superphosphate packaging by the free sulphuric acid.

[120] ibid 362.

[121] ibid 365 (Pickford J).

> The conclusion I have come to is that it does decide that where there is a deviation the special contract by charterparty ceases to exist...I think, therefore, on the authority of that case, I must hold that [the defendant] cannot rely on the terms of the charterparty and must be treated in this case as common carriers.[122]

Pickford J affirmed the claimant's interpretation of the *Joseph Thorley* case, that the deviation sets aside the contract of carriage *ab initio.* For this reason, he held that the defendant could not rely on the exceptions contained within the contract of carriage to limit their liability for loss caused prior to the moment of deviation. On the contractual position of the shipowner where the contract of carriage has been set aside, Pickford J held that '[the defendant] cannot rely on the terms of the charterparty and must be treated in this case as [a] common carrier.'[123] He expressed doubt as to the decision of the court on this point in *Joseph Thorley,* and said that:

> It was suggested by one of the learned judges in the case of *Joseph Thorley, Ltd. v. Orchis Steamship Co*. that they might have been in a less favourable position than even common carriers, but his Lordship did not point out in what way. I do not think for the purposes of this case that they can be in a worse position than that of common carriers.[124]

Consequently, Pickford J accepted the defendant's case that they would be in the position of a common carrier, and therefore the defendant was able to rely on the

[122] ibid.

[123] ibid.

[124] ibid 365-366 (Pickford J).

inherent vice exception.[125] As the deviation resulted in a delay which led to the packaging being eroded, Pickford J found for the claimant in so far as the damage was aggravated by this breach of contract.

The contemporary texts on charterparties immediately following the *International Guano* case summarised the consequences of deviation as displacing the contract of carriage, removing protection for loss caused not only during or as a result of a deviation but also before the deviation.[126] However, despite commentators noting a change in the legal consequences following breach, the effect a deviation would have on the contractual position of a shipowner was brought before the Court of Appeal again in the case of *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd.*[127]

In this case, the claimant was the indorsee of two bills of lading, under which bales of wool were shipped from Napier (New Zealand) for London in the defendant's steamship *Tokomaru*. The bill of lading exempted the defendant from liability for damage caused by the King's enemies. The steamship sailed for London, proceeding via Havre. No steamship operated by the defendant's line had ever called at Havre. The steamship was torpedoed by a German submarine when it was eight miles from Havre, and both the ship and the cargo were lost. The claimant brought an action for breach of the contract contained in the bill of lading against the defendant. The

[125] ibid 366 (Pickford J).

[126] Thomas Edward Scrutton and Frank Douglas MacKinnon, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (6th edn, Sweet & Maxwell 1910) 234.

[127] *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37).

defendant contended that proceeding via Havre was not a deviation, but argued that in any event, the effect of the alleged deviation was that they would be in the position of a common carrier, following *International Guano.* As a common carrier, they would have the protection of the common law exception of acts of the King's enemies.[128] In contrast, the claimant suggested that the correct approach was Tindal CJ's proposition in *Davis v Garrett* that in order to rely on this exception, the defendant must show that the loss '*must* have happened if the act complained of had not been done.'[129] The defendant had not shown that the ship *must* have been torpedoed if she had not deviated.

The Court of Appeal found for the claimant. Swinfen Eady LJ held that the *Tokomaru* proceeding to Havre was a deviation, and as such, the defendant had lost the benefit of the contract of carriage.[130] He affirmed that the defendant's contractual position in the event of a deviation which discharged the contract of carriage was that of a common carrier.[131] Swinfen Eady LJ applied the test in *Davis v Garrett,* that to escape liability the defendant must show that the loss must have occurred anyway, whether the ship had deviated or not.[132] On the facts, the defendant could not do this,

[128] ibid 787.

[129] ibid 790. This proposition appears to have also been drawn from the bailment doctrine, as the claimant relied on the case of *Lilley v Doubleday* (1881) 7 QBD 510. In *Lilley,* the defendant had contracted to warehouse the plaintiff's goods at a particular place, but contrary to the agreement, had warehoused them somewhere else. The goods were destroyed in a fire. The plaintiff had insured the goods, but lost the benefit of the insurance policy, as the place where the goods were deposited had changed. The plaintiff sued the defendant for the loss. Grove J found for the plaintiff, and said that the only exception to the general rule would be if 'the destruction of the goods must take place as inevitably at one place as the other' (511). Grove J expressed this position as 'fully supported by' *Davis v Garrett* (511).

[130] ibid 795 (Swinfen Eady LJ).

[131] ibid.

[132] ibid 796 (Swinfen Eady LJ).

and therefore the defendant could not rely on the common law exception of the King's enemies.[133] Phillimore LJ gave a concurring judgment, and emphasised that *Davis v Garrett* was authoritative on this point.[134] The shipowner would be liable for the loss caused following a deviation unless they could show that the loss or damage must have occurred had the ship been on the proper course.[135] Bankes LJ, in a very short concurring judgment on this point, noted that the authorities were 'distinctly against' the defendant's case.[136]

1.3.2. *The decision in Hain Steamship*

In *Hain Steamship v Tate & Lyle,*[137] the defendant was the purchaser of sugar, to be delivered in instalments. The sellers of the sugar had chartered a ship, the *Tregenna*, from Hain Steamship, the claimant, for the carriage of the sugar. The *Tregenna* was loaded in Cuba and San Domingo for carriage to Queenstown. There were two ports in San Domingo at which the ship was taking on cargo. Due to a miscommunication between the shipowners and the master, the ship proceeded past the port in San Domingo at which the sugar was meant to be loaded, docking at the second port to complete the cargo. The ship was recalled by radio the following day, and duly returned to collect the cargo of sugar before continuing with the onwards voyage. The *Tregenna* went aground after leaving the second port on San Domingo and was

[133] ibid.

[134] ibid 800 (Phillimore LJ).

[135] ibid.

[136] ibid 802 (Bankes LJ).

[137] *Hain Steamship v Tate & Lyle* [1936] 2 All ER 597, [1936] 55 Lloyd's Rep 159 (HL).

seriously damaged, losing a part of the cargo. The remainder of the *Tregenna's* cargo had to be transhipped. Claims for both freight and general average were made by the claimant carrier against the defendant, who as the indorsee of the bills of lading, was subject to the liabilities contained within the bill of lading. The defendant argued that the deviation which occurred when the claimant carriers had to return to the first port in San Domingo freed them from liability for general average contribution. The claimant argued that this deviation had been waived by the defendant, and therefore did not relieve them from liability.

A unanimous House of Lords found for the claimant, holding that although there was a deviation, it had been waived by the charterers. Lord Atkin described unauthorised deviation as 'a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself as no longer bound by any of its terms.'[138] The innocent party, Lord Atkin continued, is able to elect to affirm the contract should they wish to do so.[139] The right of election, Lord Atkin said, was indicated by the fact that under the doctrine of automatic discharge, the shipowner would have the ability to terminate the contract unilaterally at a point of its choosing, a point also taken by Lord Wright.[140]

If the innocent party does elect to affirm, they will be bound by the terms of the contract. If the innocent party accepts the breach, they will not be bound by any of the

[138] ibid 173 (Lord Atkin).

[139] ibid 174 (Lord Atkin).

[140] ibid 174 (Lord Atkin), 178 (Lord Wright).

contract terms. On the facts of *Hain Steamship*, the charterer had recalled the *Tregenna* to the final load port and had subsequently loaded the remainder of the cargo, acts which were consistent only with continuation of the contract such that the right to discharge the contract was waived.

In explaining the effect of a deviation on a contract of carriage, Lord Atkin said that 'the event falls within the ordinary law of contract.'[141] In keeping with the serious view of deviation articulated in the earlier cases, Lord Atkin described a deviation as a 'fundamental breach' of the contract of carriage.[142] Lord Wright MR and Lord Maugham, with whom Lord Thankerton and Lord Macmillan agreed, each gave concurring judgments on the effect that a deviation would have on a contract of carriage. Both Lord Wright and Lord Maugham, mirroring the judgment of Lord Atkin, described a deviation as being a fundamental breach of the contract of carriage, the effect of which was to displace the contract. Lord Wright held that 'an unjustified deviation is a fundamental breach of a contract of affreightment'[143] which 'abrogates the special contract entirely.'[144] Lord Maugham similarly described the obligation not to deviate as 'fundamental,' with a breach of this condition '[abrogating] the contract.'[145]

[141] ibid 174 (Lord Atkin).

[142] ibid 175 (Lord Atkin).

[143] ibid 177 (Lord Wright).

[144] ibid 180 (Lord Wright).

[145] ibid 182 (Lord Maugham).

1.3.3. *Problems with the decision in Hain Steamship*

The decision in *Hain Steamship* marked a departure from the previous cases in three significant respects.

First, in *Hain Steamship* the House of Lords suggested that where there was a breach of the contract of carriage by unjustified deviation, the innocent party could elect as to whether it was bound by the contract.[146] Lord Atkin described deviation as 'a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself as no longer bound by any of its terms.'[147] Lord Atkin's description of deviation as an event triggering a power to terminate was inconsistent with the previous case law, which had applied a model of automatic discharge.[148]

Second, the rule prior to *Hain Steamship* was that a deviation terminated the contract of contract *ab initio*, depriving the defendant of the protection of any exclusion clauses for loss which occurred at any time in the voyage.[149] However, the judgments in *Hain Steamship* do not make clear from which point the contract will be taken to have terminated in the event that the innocent party accepts the breach.[150]

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[146] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 178 (Lord Wright), 182 (Lord Maugham).

[147] *Hain Steamship v Tate & Lyle* (n 137) 173 (Lord Atkin); see generally *The Sur* (n 2) [85] (Carr J); Dockray (n 1) 76.

[148] *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118).

[149] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 668 (Collins MR); *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118); *Kish v Taylor* [1912] AC 604, 618 (Lord Atkinson).

[150] Reynolds (n 115) 41.

The applicability of exclusion clauses where loss takes place prior to a deviation is therefore unclear.

Third, the House of Lords in *Hain Steamship* held that 'the event [of deviation] falls within the ordinary law of contract.'[151] Although the previous cases had applied a contractual framework to the deviation problem, this framework appeared to exist within the understanding that deviation was *sui generis,* such that conceptual consistency with the general law of contract was not necessary.[152] In this way, the approach taken in *Hain Steamship* left open the question of whether the deviation cases would be subject to developments in general contract law. The difficulties resulting from this position were brought to the fore in *Suisse Atlantique,* a case which concerned the fundamental breach doctrine.[153]

1.3.4. *Interpretation of the decision in Hain Steamship*

In *Suisse Atlantique,* the claimant vessel owners entered a two-year time charterparty with the defendant. The defendant failed to load and discharge the vessel with reasonable dispatch, resulting in fewer voyages being completed than expected under the charterparty. The claimant sued the defendant for breach of contract, contending that this was a 'fundamental breach' which prevented the defendant from relying on the demurrage clause to limit their liability.

[151] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin).

[152] *Balian v Joly, Victoria & Co* (n 99); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104); *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37).

[153] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL).

The House of Lords dismissed the claim. In so doing, each of their Lordships considered the law on fundamental breach. They were critical of the traditional understanding that a fundamental breach of a contract would set aside the contract. Instead, they emphasised that the correct view was that whether an exception clause was applicable depended on the construction of the contract. Viscount Dilhorne held that 'it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term' on the basis that it 'would involve a restriction on freedom of contract.'[154] This position was echoed in the judgments of the other Lords. Lord Reid held that 'it cannot be said as a matter of law that the resources of the English language are so limited that it is impossible to devise an exclusion clause which will apply to at least some cases of fundamental breach.'[155] Lord Hodson expressed the correct position as 'that as a matter of construction normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract.'[156] Lord Upjohn held that exception or limitation clauses were to be treated as any other clauses; an accepted breach would terminate the contract and disapply all contractual terms, otherwise all of the clauses would remain in place, including the exceptions clauses.[157] Lord Wilberforce held that 'it may be correct to say that there is a rule of law against the application of an exceptions

[154] ibid 392 (Viscount Dilhorne).

[155] ibid 399 (Lord Reid).

[156] ibid 410 (Lord Hodson).

[157] ibid 425-426 (Lord Upjohn).

clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not.'[158]

Although not a deviation case itself, the Lords considered the effect of this reasoning on the deviation cases. The law on deviation was summarised by Lord Upjohn as having:

> Established that unless the parties otherwise agree the usual and customary course on any voyage described in a charterparty is a fundamental term and therefore any breach of it (however for practical purposes irrelevant) is a fundamental breach. [159]

Lord Upjohn then continued to summarise the effect of the decision in *Hain Steamship* in the following terms:

> Lord Atkin made it clear that the rule that the owner cannot rely on an exception clause in such a case is not because of anything special about such a clause but it is the result of the application of the ordinary law of contract.[160]

The approach to fundamental breach taken in *Suisse Atlantique* appears to be at odds with the deviation cases prior to *Hain Steamship,* which had been clear that a deviation was a breach which set aside the contract of carriage *ab initio,* inclusive of the exceptions contained within it. Conversely, the approach to fundamental breach

[158] ibid 432 (Lord Wilberforce).

[159] ibid 423 (Lord Upjohn).

[160] ibid; see also, 399 (Lord Reid).

suggested by the House of Lords in *Suisse Atlantique* suggested that the enforceability of exclusion clauses after a breach would be a matter of the intention of the parties. However, as the House of Lords in *Suisse Atlantique* affirmed Lord Atkin's suggestion in *Hain Steamship* that 'there is no special rule applicable to deviation cases,' it was left implicit that this position would permeate through to the deviation doctrine. [161]

In *Photo Production Ltd v Securicor Transport Ltd,* the House of Lords again dealt with the doctrine of fundamental breach. [162] The question before the House of Lords was whether the breach of the contract prevented the defendant from relying upon an exception clause contained within the contract. The Lords held that the doctrine of fundamental breach was not good law.[163] Upholding the view of the House of Lords in *Suisse Atlantique,* the Lords expressed the correct position as being that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract.[164] On the facts of the case, the exclusion clause was clearly worded, and, as a matter of construction, extended to deliberate fires as well as those accidentally caused. It therefore exempted the defendant from liability for the breach.[165]

[161] ibid 399 (Lord Reid).

[162] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

[163] ibid 841-843 (Lord Wilberforce), 853 (Lord Salmon).

[164] ibid 841-842 (Lord Wilberforce), 848- 849 (Lord Diplock), 853 (Lord Salmon).

[165] ibid 846 (Lord Wilberforce), 851 (Lord Diplock), 852 (Lord Salmon).

The appellants before the House of Lords in *Photo Production* had sought to rely on the deviation cases as authority for the proposition that a fundamental breach would deprive the guilty party of the benefit of exception clauses. In responding to this reliance, Lord Wilberforce considered the *Suisse Atlantique* decision. He observed that:

> I suggested in the *Suisse Atlantique* that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz., that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e., a departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority *sui generis* with special rules derived from historical and commercial reasons. What on either view they cannot do is to lay down different rules as to contracts generally from those later stated by this House in *Heyman v Darwins Ltd* [1942] AC 356.[166]

In the decision Lord Wilberforce references, *Heyman v Darwins,* the House of Lords held that a repudiatory breach does not automatically discharge a contract.[167] Rather, the innocent party can accept the breach as terminating the contract or waive their right to do so and treat the contract as continuing. Lord Wilberforce's judgment appears to suggest that the deviation cases cannot be both governed by the general law of contract and the doctrine of fundamental breach; they must be either one or the other. However, Lord Wilberforce does not seem to make clear which of these two alternatives is the preferable legal position. Another significant problem with Lord

[166] ibid 845 (Lord Wilberforce).

[167] *Heyman v Darwins Ltd* [1942] AC 356 (HL) 361 (Viscount Simon).

Wilberforce's suggestion that deviation could be treated as a doctrine *sui generis* is that this approach is inconsistent with the view of the House of Lords in *Hain Steamship*.[168]

The developments in the law of fundamental breach which started in *Suisse Atlantique* and continued in *Photo Production* have been criticised as leaving 'the law relating to deviation in contracts for the carriage of goods in a ship…hopelessly at odds with the general law of contract.'[169] Debattista writes that the judgments 'threatened earlier certainties and brought into question the very nature of the relationship between the law relating to the carriage of goods by sea and the law of contract in general.'[170]

Several quasi-deviation[171] cases have been decided since *Photo Production v Securicor*.[172] However, these cases have not clarified which of Lord Wilberforce's suggestions in *Photo Production* should be followed.

In *The Antares,* cargo was stowed on deck in breach of the contract of carriage. This cargo was damaged during the voyage. Kenya Railways, as the holders of the

[168] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin); Reynolds (n 115) 43-44.

[169] Dockray (n 1) 76.

[170] Charles Debattista, 'Fundamental breach and deviation in the carriage of goods by sea' [1989] JBL 22, 29.

[171] Cases which deal with unauthorised deck stowage are commonly viewed as quasi-deviation cases, as the effect both a deviation and unauthorised deck stowage would have on a contract of carriage had historically been the same: see *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801 [10] (Longmore LJ); Reynolds and Rose (n 4) [9-037].

[172] *Kenya Railways v Antares Co Pte Ltd (The Antares) (Nos 1&2)* [1987] 1 Lloyd's Rep 424 (CA); *The Kapitan Petko Voivoda* (n 171); *The Sur* (n 2).

bill of lading, claimed in damages for the loss caused. Due to difficulties identifying who the shipowners were, a year and a half had passed before the claim was brought against the defendant. The defendant shipowners took the point that the claim put against them by the claimant was time barred, relying on Article III, Rule 6 of the Hague Visby Rules. The claimant contended that the deck stowage was a fundamental breach of the contract preventing reliance on exclusion clauses such that the defendant could not rely on the time bar. The Court of Appeal held that the time bar contained within the Hague-Visby Rules was applicable despite the breach.

Whilst the *Antares* did not itself concern geographical deviation, Lloyd LJ considered the deviation cases in his judgment. Lloyd LJ recognised that the doctrine of fundamental breach no longer exists in general contract law.[173] He held that the 'death knell sounded in *Suisse Atlantique*,' with the 'corpse…buried in *Photo Production*.'[174] Whilst seemingly affirming the view that the deviation cases had survived the abolition of the doctrine of fundamental breach, he restated the reasoning adopted in *Hain Steamship* that the deviation doctrine should be 'assimilated into the general law of contract.'[175] Commentators have stated that 'the whole tenor of [Lloyd LJ's] judgment…suggests that [the deviation] cases have not survived the elimination of the former doctrine of fundamental breach.'[176] Lloyd LJ repeated his view on the deviation doctrine in *State Trading Corporation of India v Golodetz,* in which he noted that 'with the advent of the held covered clause' in contracts of marine

[173] *The Antares* (n 172).

[174] ibid 429 (Lloyd LJ).

[175] ibid 430 (Lloyd LJ).

[176] Reynolds and Rose (n 4) [9-059].

insurance, there was no rationale for preserving the deviation doctrine as a body of law *sui generis*.[177]

Despite judicial commentary in favour of assimilating the deviation doctrine into general contract law, it was clear from academic commentators in the late twentieth century that the position was still unsettled. For instance, Reynolds said that:

> Loose deviation reasoning still lives. The general notion is however by no means dead. It is too tempting to have recourse to it when an exclusion is pleaded as a defence to a "very bad breach."[178]

Consistently with Reynolds' view, arguments premised on a deviation displacing the contract of carriage *ab initio* continued to feature in the case law. One example is *The Kapitan Petko Voivoda,* another unauthorised deck stowage case.[179] In this case, some excavators were lost overboard, and some were damaged by rusting as a result of being stowed on deck in breach of the terms contained within the bill of lading. The claimant cargo-owner sued for the loss caused by this breach of the contract of carriage. The defendant stated that the limitation on liability for loss or damage contained within Article IV Rule 5 of the Hague Visby Rules applied to the claim. The claimant argued that the unauthorised deck stowage was a fundamental breach of the contract which prevented the defendant from relying on this exclusion clause. The Court of Appeal found for the defendant by holding that the package limitation was

[177] *State Trading Corporation of India v Golodetz (The Sara D)* [1989] 2 Lloyd's Rep 277, 289 (Lloyd LJ).

[178] Reynolds (n 115) 47.

[179] *The Kapitan Petko Voivoda* (n 171).

applicable, applying the analysis of Lloyd LJ in *The Antares* as to the effect of unauthorised deck stowage on a contract of carriage.[180] Echoing the decision of Lloyd LJ, Longmore LJ characterised the doctrine of fundamental breach as being 'discredited in *Suisse Atlantique* …and given its formal burial in *Photo Production Ltd*.'[181] Longmore LJ identified the ongoing uncertainty as to the fate of the deviation doctrine by continuing that 'it has not yet been conclusively decided whether what I may call the deviation cases…must be regarded as dead and buried along with the doctrine of fundamental breach.'[182] The tenor of Longmore LJ's judgment suggests an underlying scepticism as to whether the deviation cases have survived, or in any event should survive, the decision in *Photo Production*, with paragraph [14] of his judgment terming the deviation authorities a 'very peculiar creature of the common law.'[183]

The decisions in *The Antares* and *The Kapitan Petko Voivoda* were seemingly also affirmed by Carr J in *The Sur.*[184] In *The Sur,* the claimant had chartered the defendant shipowner's vessel for the carriage of a cargo of maize. The maize was to be carried to Jordan. On arrival in Jordan, there were problems unloading the maize. The claimant began court proceedings for cargo damage. The defendant began arbitration proceedings with respect to the same claim, and the court proceedings were struck out. Two months later, the vessel sailed to Turkey without the consent of the

[180] *The Kapitan Petko Voivoda* (n 171) saw a unanimous Court of Appeal (Longmore LJ, Judge LJ, Aldous LJ). The deviation point was only taken by Longmore LJ.

[181] ibid [10] (Longmore LJ).

[182] ibid.

[183] ibid [14] (Longmore LJ).

[184] *The Sur* (n 2).

claimant, where the cargo was discharged and sold by the shipowner. Three and a half years later, the shipowner served its particulars of claim in the arbitration proceedings seeking a declaration of non-liability for the cargo claim. Three months later, the claimant served particulars of its cargo counterclaim. The shipowner sought to strike out the claimant cargo-owner's claim on the basis of delay. The tribunal had found for the defendant and held that the applicable limitation period was the one-year time limit in Article III Rule 6 of the Hague-Visby Rules. The claimant challenged this decision on the basis that the deviation caused when the vessel had sailed to Turkey prevented the defendant from relying on the one-year time limit.

The High Court considered the effect the deviation would have on the availability of exclusion clauses contained within the contract of carriage. Carr J stated that:

> I align myself with the view of Lloyd LJ in *The Antares* (at p. 430), with which Longmore LJ did not dissent in *The Kapitan Petko Voivoda*, to the effect that geographical deviation cases should now be assimilated into the ordinary law of contract. I can see no sound basis for treating such cases differently from cases involving the unauthorised stowage of cargo on deck. Both are examples of very serious breach. That geographical deviation can be said to be a more serious breach, is a question of degree not principle. As Longmore LJ said in *The Kapitan Petko Voivoda* (at [10]), the seriousness of the breach is no longer a self-sufficient yardstick for determining whether limitations or exemptions apply to particular breaches.[185]

[185] ibid [107] (Carr J).

However, at [112], Carr J continued to consider the doctrine of precedent, in particular, whether she was able to make the finding that the approach taken in *The Antares* and *The Kapitan Petko Voivoda* was determinative of the present case in light of the decision in *Hain Steamship.* Carr J characterised *Hain Steamship* in the following way:

> The ratio decidendi of *Hain Steamship*, either unanimously or by a majority, is that where a carrier by sea deviates impermissibly from the contract route, the cargo-owner can treat itself as not bound by any of the contract terms.[186]

The claimant argued that the decision of the House of Lords in *Hain Steamship* was binding on the High Court. In response, the defendant had suggested that *Hain Steamship* had been impliedly overruled by *Suisse Atlantique* and *Photo Production.*[187]

Carr J, turning to those submissions, held that she did not 'consider that *Hain Steamship* has been impliedly overruled by the House of Lords' decisions in *Suisse Atlantique* and *Photo Production*.'[188] She referred to the judgment of Lord Wilberforce in *Photo Production* as authority for the position that the deviation cases 'were not swept up under the auspices of the general law of contract.'[189] Of *The Antares* and *The Kapitan Petko Voivoda,* Carr J noted that the Court of Appeal had in

[186] ibid [112] (Carr J).

[187] ibid.

[188] ibid [113] (Carr J).

[189] ibid.

those cases 'expressly proceeded on the basis that the position with geographical deviation cases remains open.'[190] She suggested that the correct conclusion to be drawn from those authorities was that *Hain Steamship* could be reconciled with the decisions in *Suisse Atlantique* and *Photo Production.* The conclusion reached in Carr J's judgment is as follows:

> In these circumstances, *Hain Steamship* has not been impliedly overruled by nor is it irreconcilable with subsequent House of Lords' decisions in the shape of *Suisse Atlantique* and *Photo Production*. As the commentators make clear, there has not been a further consideration by the House of Lords or Supreme Court of geographical deviation cases since *Photo Production*.[191]

Carr J considered herself bound to follow *Hain Steamship,* despite the view she had expressed at [118] that the decision in *Hain Steamship* ought to be integrated into general contract law. Carr J therefore found for the claimant, holding that the one-year time bar in Article III Rule 6 was not available to exclude the liability of the defendant.[192]

[190] ibid.

[191] ibid [114] (Carr J).

[192] ibid [117] (Carr J).

Chapter 2: What is the future of the deviation doctrine?

The cases following *Hain Steamship v Tate & Lyle,*[193] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale,*[194] and *Photo Production Ltd v Securicor Transport Ltd*[195] leave open both the possibility that the deviation doctrine should be subject to special rules, and the possibility that it should be amalgamated into general contract law. The current state of the law is confused. Commentators such as Girvin have highlighted the need for a Supreme Court judgment to 'rationalise the cases.'[196] Indeed, in *The Sur,* Carr J described the deviation doctrine as an issue 'that merits a full and comprehensive survey.'[197] It is clear that future judicial intervention is necessary to determine what the effect of a deviation on a contract of carriage is: what is more divisive is the approach to be taken.

The jurisprudence and academic scholarship on the deviation doctrine suggest three approaches which could be taken to the future of deviation. One approach is to continue to treat deviation as a body of authority *sui generis*, with special rules derived for historical and commercial reasons. This approach would involve preserving the doctrine of fundamental breach through the recognition that in deviation cases termination for breach would render the exclusion and limitation clauses in a contract

[193] *Hain Steamship v Tate & Lyle* (n 137).

[194] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* (n 153).

[195] *Photo Production Ltd v Securicor Transport Ltd* (n 162).

[196] Girvin (n 4) 543. See also, Reynolds and Rose (n 4) [9-060]; Lewison (n 4) [12.142].

[197] *The Sur* (n 2) [116] (Carr J).

of carriage unenforceable. Another approach, proposed for instance by Coote and Cashmore respectively, would be to reconcile the deviation doctrine with the law of bailment.[198] This approach would apply the bailment rules relating to deviation to a contract of carriage. This approach would also involve treating deviation from a contract of carriage as subject to special rules, as other breaches of the contract of carriage are governed by general contractual principles. A third approach is to reform the doctrine in line with the principles of general contract law. This approach would dispense with the traditional notion that the deviation doctrine should be treated as a body of law *sui generis*. It would instead treat a deviation as a repudiatory breach of contract, and the usual principles of general contract law would govern the consequences which would stem from a termination for breach.

This chapter argues that the deviation doctrine should not be subject to special rules. Whilst historically the effect a deviation would have had on marine insurance contracts warranted an especially serious response to this type of breach of a contract of carriage, the law of marine insurance has progressed, removing the normative basis for the strictness of the doctrine. Arguments rooted in deviation's provenance in bailment similarly fail to provide a convincing argument for the persistence of the doctrine. Rather, the correct approach to be taken to the future of the deviation doctrine is that it should be brought into line with the principles of general contract law in all respects. The final section adds to current proposals to integrate the deviation doctrine into general contract law by examining each stage of a claim for

[198] Coote (n 5); Cashmore (n 5).

breach of a contract of carriage following a deviation. It takes each stage in turn to demonstrate what the reformed law should look like.

2.1. Do we need special rules for deviation?

The existence of the deviation doctrine as a body of law *sui generis* is often explained by reference to its historical provenance.[199] The modern deviation doctrine has origins in both the law of marine insurance and the law of bailment. Both marine insurance and bailment attached harsh consequences to deviation, which may have provided a rationale for the severity of the early deviation doctrine. However, there have been significant developments in the law of both marine insurance and bailment, and the modern rules in both areas bear little resemblance to the state of the law during the formation of the deviation doctrine. Historical provenance is, in light of these developments, an unconvincing justification for the continued treatment of the deviation doctrine as a body of law *sui generis*. Given the substantial changes in these areas of law there is no reason why deviation should be governed by special rules.

2.1.1. *Marine insurance*

The effect of a deviation on the enforceability of a contract of carriage was historically justified by the effect a deviation would have on the cargo-owner's contract of

[199] Bennett (n 4) [4-327] - [4-330]; Reynolds and Rose (n 4) [9-038]; *Parker v James* (1814) 171 ER 37 (Assizes); *George Mitchell v Finney Lock Seeds* [1983] QB 284 (CA) 311 (Kerr LJ); *Photo Production Ltd v Securicor Transport Ltd* (n 162) 845 (Lord Wilberforce); *The Sur* (n 2) [79] (Carr J); Simon Baughen, 'Does Deviation Still Matter?' [1991] LMCLQ 70, 71.

insurance.[200] A vessel making a journey other than that specified in the insurance policy will have one of two effects on the policy at common law. First, a vessel which deviates by setting sail on a different voyage to the one specified in the insurance policy will retrospectively prevent the risk from attaching under the policy.[201] This will, in essence, absolve the insurer from all liability. Second, and alternatively, a deviation from the customary course of the voyage pursued will negate the protection of the policy, and will discharge the insurer from liability for loss which occurs subsequent to the deviation.[202] This is because the failure to comply with the condition of the regular course of the insured voyage alters the nature of the risk which the insurer has assumed.[203] It was therefore justifiable to attach harsh consequences to deviation to enable the shipper to recover the full value of their lost or damaged cargo from the defendant carrier, because they would not be able to claim on the insurance policy. As Egbe comments, treating deviation with stringent rules made sense, because the effect of a deviation was that the shipper lost its insurance cover.[204] The deviation doctrine evolved with a keen eye on the law of marine insurance: arguments put before the court in cases such as *Joseph Thorley v Orchis Steamship Co Ltd* drew parallels with the law of marine insurance to suggest that a deviation would set aside

[200] See generally, *Hain Steamship v Tate & Lyle* (n 137) 178 (Lord Wright); *The Sur* (n 2) [76]-[79] (Carr J). This was also the position in the United States: *Constable v National Steamship Company* (1894) 154 US 51 (United States Supreme Court).

[201] *Simon Israel & Co v Sedgwick* [1893] 1 QB 303; *Nima SARL v The Deves Ins Public Co Ltd (The Prestrioka)* [2003] 2 Lloyd's Rep 327 [54] (Potter LJ). This circumstance is often referred to as a 'change of voyage'- see Jonathan Gilman QC et al, *Arnould: Law of Marine Insurance and Average* (20th edn, Sweet & Maxwell 2022) [14-09].

[202] *Green v Young* (n 14); *New York Firemen Ins Co v Lawrence* (1816) 14 Johns 46 (Court for the Correction of Errors of New York).

[203] Gilman et al (n 201) [14-16].

[204] Tamaraudoubra Egbe, 'Effect of deviation- Hain Steamship not sunk yet?' (2021) 32(5) ICCLR 297, 301.

a contract of carriage.[205] Lord Atkin, delivering his judgment in *Hain Steamship,* said that 'no doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo-owner when the ship has deviated has become uninsured.'[206]

However, most standard marine insurance policies now incorporate a 'held covered' clause, a common feature of such policies since the late nineteenth century.[207] Held covered clauses maintain cover in the event of a deviation, subject to notice of the deviation being given by the assured to the insurer within a reasonable time,[208] and the payment of an additional premium.[209] The operation of a held covered clause means that where there is a deviation, subject to the aforementioned conditions, the cargo insurance policy taken out by the shipper will still be actionable.[210] Where a shipper will still have an insurance claim, the impetus to attach unusually harsh consequences to deviation is removed, as the shipper is no worse off than they would be in the event of other breaches of the contract of carriage. As Lloyd LJ observed in the case of *State Trading Corporation of India v Golodetz,* 'with the advent of the

[205] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 663.

[206] *Hain Steamship v Tate & Lyle* (n 137) 173 (Lord Atkin).

[207] *Hyderabad (Deccan) Co v Willoughby* [1899] 2 QB 530 (Commercial Court).

[208] This obligation arises in circumstances where the assured becomes aware of the fact of deviation: *PT Buana Samudra Pratama v Marine Mutual Ins Association (NZ) Ltd (The Buana Dua)* [2011] 2 Lloyd's Rep 655 [43]-[44] (Teare J). This obligation is a condition of the right to be held covered; *Thames & Mersey Mar Ins Co Ltd v Van Laun* [1917] 2 KB 48 (HL).

[209] In the event that no premium is agreed, the Marine Insurance Act 1906 s.31(2) provides that a 'reasonable additional premium is payable.'

[210] See also the Institute Cargo Clauses (2009) (A) (B) (C) (Institute of London Underwriters), Clause 8.3, which provides that the insurance shall remain in force during any deviation.

held covered clause' in contracts of marine insurance, there is no longer a clear rationale for preserving the deviation doctrine as a body of law *sui generis*.[211]

The historical law of marine insurance is, in both the literature and jurisprudence, closely linked to the modern deviation doctrine.[212] As the editor of *Carver on Charterparties* writes:

> Such involuntary and, indeed, unknown loss of insurance cover may provide the basis for the carriage of goods deviation principle: a shipowner whose vessel has deprived a charterer of its cargo insurance does not deserve to enjoy the benefit of contractual exceptions.[213]

It seems hard to justify the harsh deviation doctrine in the context of the modern law of marine insurance. The advent of the held covered clause 'draws the sting from a shipowner's deviation.'[214] Where the fact of a deviation will not necessarily deprive the shipper of his insurance policy, it is difficult to see why the carrier should lose the benefit of the contract of carriage. An unjustified deviation does not necessarily put the shipper in a worse position than other breaches of the contract of carriage. Rationalising by analogy to the law of marine insurance does not lead to the conclusion that deviation should be subject to special rules.

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[211] *The Sara D* (n 177) 289 (Lloyd LJ).

[212] *The Sur* (n 2) [79] (Carr J); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 668 (Collins MR).

[213] Bennett (n 4) [4-330].

[214] ibid.

2.1.2. *Bailment*

The deviation doctrine also has roots in the law of bailment.[215] The law of bailment governs the situation where there has been a transfer of possession of goods from the owner of the goods (the bailor) to someone else (the bailee). The bailee gains a lesser legal title to the goods by reason of their possession of the goods. The bailor always has constructive possession of the goods.[216] A bailment relationship will almost always arise in the circumstances of a contract of carriage, as the carrier takes possession of goods owned by the shipper.

The law of bailment provides for circumstances of deviation and has done for several centuries.[217] In parallel with the deviation doctrine in contracts of carriage, the position in bailment is that a deviation will place the bailee in the position of an insurer of the goods. [218] For instance, in *Lilley v Doubleday,* the defendant contracted to warehouse the claimant's goods at a particular place. Contrary to the agreement, the defendant warehoused a part of the goods at an alternative location. These goods were

[215] e.g. *George Mitchell v Finney Lock Seeds* (n 199) 311 (Kerr LJ) 'the decisions in the deviation cases were all based in part on extra-contractual obligations, stemming from the law of bailment, underlying and additional to the express obligations undertaken by a bailee.'

[216] See generally, Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing 2017).

[217] *Lilley v Doubleday* (n 129); *Sleat v Fagg* (1822) 106 ER 1216 (KBD); *Edwards v Newland* [1950] 2 KB 534 (CA); *Mitchell v Ealing London Borough Council* [1979] QB 1 (QBD); *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 [2010] QB 1 (CA). The bailment cases do not generally use the term 'deviation' (cf *Woolf v Collis Removal Service* [1948] 1 KB 11 (KBD), *The Huntsworth Wine Company Limited v London City Bond Limited* [2021] EWHC 2831 (Comm), [2021] 10 WLUK 310). However, there are clear parallels in the factual circumstances which give rise to the application of this doctrine (i.e. the bailee holds the goods in a location other than that agreed), and indeed academic commentary on the law of bailment describes these cases in terms of deviation (see e.g. Andrew Burrows, *English Private Law* (3rd edn, OUP 2013) [16.38]).

[218] *Mitchell v Ealing London Borough Council* (n 217) 6 (O'Connor J); *Gibaud v Great Eastern Railway Company* [1921] 2 KB 426 (CA) 435 (Scrutton LJ).

destroyed without negligence on the part of the defendant. When giving judgment, Grove J held that:

> [T]he defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other.

The rule in *Lilley v Doubleday* demonstrates the high causative burden placed on a bailee who deviates from the terms of the bailment, for instance, by storing the goods at a location other than that agreed. Several of the deviation cases explicitly drew upon bailment cases such as *Lilley v Doubleday* to explain the position that a deviation will set aside the contract of carriage.[219] However, these cases only make limited reference to the bailment cases. For example, in *James Morrison*, neither Swinfen Eady LJ nor Phillimore LJ explain why it is that the contract of carriage is set aside as a result of the deviation. Swinfen Eady LJ cites a passage from Tindal CJ's judgment in *Davis v Garrett* to explain the test for causation in the deviation cases, noting that '*Sleat v Fagg* and *Lilley v Doubleday* are also authorities against the defendants' contention.'[220] Similarly, Phillimore LJ provides that:

> [T]he cases of *Davis v Garrett* and *Lilley v Doubleday* lay down the true principle. As the accident occurred at the time and place when it did, the ship being then on her

[219] *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37) 796 (Swinfen Eady LJ), 800 (Phillimore LJ); *The Kapitan Petko Voivoda* (n 171) [11] (Longmore LJ); see also argument for the defendants in *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118) 362.

[220] *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37) 796 (Swinfen Eady LJ).

> deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course for London.[221]

Neither judge comments on the relationship that deviation from a contract of carriage has to the law of bailment, and the discussion which is present only goes to the rules of causation. There is no discussion of the interplay between the principles of bailment and the notion that the contract is set aside because of the deviation.[222] The same can be said of the decision in the *Kapitan Petko Voivoda.* In this case, Longmore LJ cited Scrutton LJ's decision in *Gibaud v Great Eastern Railway Company*:[223]

> If you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.[224]

Longmore LJ did not elucidate further on the bailment cases. The passage he cited from *Gibaud* appears to be authority for the proposition that, upon their proper construction, the terms extending protection to the bailee were not intended to apply

[221] *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37) 800 (Phillimore LJ).

[222] It might be said that the fact that *Lilley v Doubleday* (n 129) did not involve a cause of action in bailment, but rather was pleaded as a breach of contract and conversion, further weakens the argument that these cases draw upon the law of bailment to explain the deviation doctrine within the carriage context.

[223] *Gibaud v Great Eastern Railway Company* (n 218).

[224] *The Kapitan Petko Voivoda* (n 171) [11] (Longmore LJ), citing *Gibaud v Great Eastern Railway Company* (n 218) 435 (Scrutton LJ).

in the circumstances which materialised in fact. In this way, the judgment does not seem to lend authority to the view that the deviation doctrine is best understood as part of the law of bailment. Indeed, in a later section of Longmore LJ's judgment, he appears to regard the principles of bailment as entirely separate from the doctrine of geographical deviation. At paragraph [31], he said that:

> Our attention was drawn to the sensitivity of the common law to secure the performance of particular types of obligation, such as those relating to bailment, and, in shipping cases, in relation to deviation in the geographical sense, from the agreed route, and to the unauthorised carriage of cargo on rather than under deck.[225]

At most, this passage appears to demonstrate parallels between these two bodies of law. Despite the relative brevity of the discussion of bailment in these cases, several commentators have suggested that the deviation doctrine ought to be recognised as part of the law of bailment. The following section explores this argument as advanced by Coote and Cashmore respectively, before outlining three respects in which this argument is limited.[226]

Coote argued that the doctrine of deviation is best regarded as *sui generis,* suggesting that the explanation for the phenomena associated with the doctrine lies in the nature of a bailment relationship.[227] Coote wrote that:

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[225] ibid [31] (Longmore LJ).

[226] Coote (n 5); Cashmore (n 5). A similar argument is made in Brian Coote, 'The Second Rise and Fall of Fundamental Breach' (1981) 55 ALJ 788.

[227] Coote (n 5) 234.

> When a bailee's authority to hold the bailed goods has been limited in particular ways and he then fails to observe those limitations, he ceases to hold the goods within the ambit of the bailment and is reduced to the status of a mere detainor. As such, he loses the benefits of the bailment relationship and thereafter has to carry the risk of loss or damage to the goods.[228]

The carrier will therefore be absolutely liable for loss or damage to the goods so detained, with 'his only available defence [being] to show that the loss or damage would have occurred anyway.'[229] Coote noted the discord between the orthodox understanding of discharge for breach and the deviation doctrine, and sought to reconcile the two by emphasising that 'the important [point is] that deviation and quasi-deviation are particular to bailment.'[230] Coote concluded that, following the decision in *Hain Steamship,* the 'chief step…would be to recognise that deviation and quasi-deviation are *sui generis* and to be kept distinct from discharge by breach.'[231]

Cashmore made a similar argument, writing that 'it is clear that the doctrine of deviation is a doctrine of bailment not a doctrine of contract.'[232] In reaching this conclusion, Cashmore wrote that 'it is merely necessary to go back to the seminal case on the modern law of bailment, namely *Coggs v Barnard*.'[233] In *Coggs v Barnard,* the defendant had undertaken, gratuitously, to carry some barrels of brandy for the

[228] ibid 234.

[229] ibid.

[230] ibid.

[231] ibid 238.

[232] Cashmore (n 5) 492.

[233] ibid.

claimant.[234] On unloading, one of the barrels was staved, causing the loss of the brandy within it. Lord Holt, in giving his judgment, set out six categories of bailment recognised in law at the time. He said that the case before him fell into the sixth category, the delivery of goods or chattels gratis. In his judgment Lord Holt does give an example of a circumstance of deviation from bailment: he writes that the bailee will be chargeable for 'any accident [which] happen[s]'[235] where there is a deviation from the bailment terms. However, this example is given as a demonstration of his second category of bailment, the situation where 'a man sends cattle to another which are profitable, gratis.'[236] The point is therefore obiter. It is this part of Lord Holt's judgment that Cashmore relied on in making the proposition that 'deviation applies to gratuitous as well as contractual bailments.'[237] Cashmore continued by writing that 'the relevant principles [of deviation] are those of bailment, not contract, whether the bailment is gratuitous or is also accompanied by a contract.'[238] Cashmore contended that the coexistence of relationships in contract and bailment in the commercial context 'are an irrelevance' given the fact that the relevant principles are those of bailment, not contract.[239]

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[234] *Coggs v Barnard* (1703) 92 ER 999 (KBD).

[235] ibid 1000 (Lord Holt).

[236] ibid.

[237] Cashmore (n 5) 492.

[238] ibid, 493. Although Cashmore says that the liability is 'in bailment,' the upshot of his argument appears to be that the bailee cannot rely on an exculpatory clause where there has been a wrongful deviation that amounts to a conversation (493). His reliance on *Coggs v Barnard* (492), which was pleaded as an action on the case, the precursor to conversation, illustrates this position. However, a deviation from a contract of carriage will not always amount to a conversion, for instance when the goods have been damaged, rather than destroyed or lost. In this sense, there is a problem with Cashmore's argument: it cannot refute the point that deviation in circumstances where there has been no conversion will have its basis in contract (see e.g. Nick Palmer, 'The Application of the Torts (Interference with Goods) Act 1977 to Actions in Bailment' (1978) 41 MLR 629, 636).

[239] ibid 493.

Contrary to the position taken by both Coote and Cashmore, there are three reasons why the bailment principles are an inappropriate model for the development of the deviation doctrine.

First, the understanding in the deviation cases in the context of the carriage of goods by sea is that the relationship is pre-eminently of contract, not of bailment.[240] This is not to say that the relationship between carrier and shipper does not give rise to the common law obligations arising from bailment in many cases.[241] But the view of the courts is that the deviation doctrine is a contractual problem, to be remedied with a contractual solution.[242] As Coote himself noted, the bailment origins of the deviation doctrine were 'lost sight of as the nineteenth century advanced and by 1890 the courts had begun to seek explanations in the law of discharge by breach.'[243] Coote cites three landmark cases in the development of the modern deviation doctrine in support of this proposition: *Balian v Joly*, *Joseph Thorley v Orchis Steamship* and

[240] *Balian v Joly, Victoria & Co* (n 99); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104); *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37); *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin). This point is not addressed in Cashmore's work. Indeed, the cases Cashmore relied upon in making his argument that the principles relevant to deviation are those of bailment, not of contract are all cases which deal with deviation from bailment on land.

[241] See e.g. *Exportadora Valle de Colina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm), [2010] 12 WLUK 306 [31] - [32] (Flaux J). Although the carrier and the shipper will often have both a contractual relationship and a relationship in bailment, there is considerable authority which suggests that bailment is a cause of action independent from both contract and tort (see Palmer (n 238); *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL), 489-490 (Lord Denning); *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 (CA); *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 NSWLR 192 (NSWCA)).

[242] This is, to some extent, also the case in land deviation cases. The courts have, for instance, been willing to uphold contractual exception and limitation clauses where there has been a deviation from the terms of a bailment: see *Harris v Great Western Railway Co* [1876] 1 QBD 515 (QBD) 525 (Mellor J) 527-530 (Blackburn J) cf 519 (Lush J).

[243] Coote (n 5) 235.

James Morrison v Shaw Saville & Albion.[244] With a view to doctrinal consistency, it is pertinent that the reasoning visible in all of these cases is 'attributable more broadly to interpretation of the contract, the underlying bailment sometimes providing the framework for the interpretation.'[245] The premise of the decision in *Hain Steamship* is that the deviation doctrine falls within the law of contract and not bailment.[246] Lord Atkin's judgment states this clearly: of the deviation, he wrote that 'the event falls within the ordinary law of contract.'[247] Recasting the deviation doctrine in line with bailment would, in this way, uproot the principles relied on by the deviation cases. There does not appear to be a justification for taking this approach: as Sheehan argues, when loss is caused under a charterparty, there is little reason to rely on the relationship of bailment as a cause of action.[248] In Sheehan's view, outside of sub-bailment and a circumstance where the carrier does not attorn to the new holder of a bill of lading, the bailment relationship is unimportant.[249] Given the relative inconsequentiality of the bailment relationship in bringing a suit, the conclusion that the deviation doctrine should be reformed in line with bailment principles appears odd.[250]

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[244] ibid.

[245] Reynolds (n 115) 32. The view that contracts of carriage are outside of the law of bailment persists in the later cases: see *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* (n 153) 382 (Lord Hodson) 'If under a contract of carriage or bailment the carrier or bailee departs from the agreed route or uses a place other than that agreed on for storing the goods, or otherwise exposes the goods to risks quite different from those contemplated by the contract, he cannot rely on clauses in the contract designed to protect him against liability arising within the four corners of the contract.'

[246] Egbe (n 204) 305; Francis Dawson, 'Fundamental Breach of Contract' (1975) 91 LQR 380, 393.

[247] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin).

[248] Sheehan (n 216) 258-259.

[249] ibid.

[250] It is also noteworthy that the Court of Appeal in *Levison v Patent Steam Carpet Cleaning* (n 241), a bailment case in which the bailor alleged deviation, distinguished the shipping cases in their reasoning without explanation (see 84 (Sir David Cairns)).

Secondly, the deviation rule within bailment itself has been subject to criticism and, to some extent, reform.[251] Judicial dissatisfaction with the deviation doctrine in bailment is well-illustrated by the decision of the Court of Appeal of New South Wales in *PS Chellaram & Co v China Ocean Shipping Co.*[252] In this case, the defendant misdelivered a cargo of cassette tapes, owned by the claimant. The claimant brought an action for damages on the basis that they had been irretrievably deprived of their goods because the misdelivery of the tapes had caused them to lose their value. The claimants contended that the defendants' failure to deliver was a deviation. Gleeson CJ, relying on *Photo Production v Securicor,* dismissed the argument that an exclusion clause would be unenforceable following a deviation from the terms of the bailment on the basis that it reflected 'notions of fundamental breach and an outdated construction of exclusion and limitation clauses.'[253] Kirby P rejected the argument that the misdelivery was a deviation within the meaning of the Hague Rules, because deviation within the meaning of those rules was 'not concerned with events happening after the relevant voyage has concluded.'[254] Kirby P added that the claimant's argument 'represent[ed] an attempt to resurrect the now discredited doctrine of fundamental breach.'[255] Whilst Kirby P rejected the submission that there had been a

[251] The change has been primarily concerned with the way that damages are calculated. Whilst *Lilley v Doubleday* (n 129) and *Sleat v Fagg* (n 217) suggested that bailment damages in cases of deviation were calculated differently to damages under contract or tort law, this does not appear to reflect the current understanding of bailment actions: *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270, 1284 (Lord Phillips of Worth Matravers MR); *Yearworth v North Bristol NHS Trust* (n 217).

[252] *PS Chellaram & Co v China Ocean Shipping Co* [1991] 1 Lloyds Rep 493 (NSWCA).

[253] ibid 500 (Gleeson CJ).

[254] ibid 519 (Kirby P).

[255] ibid.

deviation within the scope of the Hague Visby Rules, it is implicit that the misdelivery was a deviation from the terms of the bailment.[256] *PS Chellaram* demonstrates the Australian position that deviation from a relationship of bailment will not result in exclusion and limitation clauses being unenforceable. This is significant because it demonstrates that the deviation rule in bailment has moved on from the historical position relied upon in early contract of carriage cases.

The approach in *PS Chellaram* has parallels in domestic jurisprudence. In *The Huntsworth Wine Company Limited v London City Bond Limited*,[257] the High Court considered the claimant's argument that a deviation from the terms of the bailment would render a limitation clause unenforceable. His Honour Judge Pearce expressed doubt as to whether the principle of deviation within bailment remained good law.[258] He continued by holding that the claimant's 'argument that the Defendant is strictly liable because of the inadequacies of the storage of the Subject Wine at the Linton Warehouse appears to be an attempt to resurrect the doctrine of fundamental breach which was laid to rest in *Photo Productions v Securicor.*'[259] Although he recognised that 'there are cases where the deviation from the contractual terms and/or the application of the four corners doctrine may act so as to prevent a bailee relying on an exclusion or limitation clause,' this conclusion appears tentative given his doubt as to the continued existence of the doctrine.[260] The orthodox deviation rule in bailment is

[256] ibid.

[257] *The Huntsworth Wine Company Limited v London City Bond Limited* (n 217).

[258] ibid [186] (His Honour Judge Pearce).

[259] ibid [187] (His Honour Judge Pearce).

[260] ibid.

further undermined by case law which has recognised that an action for breach of bailment will be subject to the principles of general contract law with respect to damages.[261] This position would suggest a departure from any rule which renders all exemption and limitation clauses unenforceable, given that general contract law has dispensed with the doctrine of fundamental breach. The sentiment expressed in this case law is also mirrored in academic commentary: for instance, the editors of *The Law of Personal Property* write that, with respect to deviation from a bailment, 'it would be preferable for the reasoning to be made consistent with the modern learning on the termination of contracts.'[262]

In light of this, it appears that even if the correct approach were to amalgamate the deviation doctrine into the principles of bailment, this would still involve a modification of the rule in *Hain Steamship.* For this reason, it is suggested that reconciliation in line with bailment would not provide clarity within the deviation doctrine in contracts for the carriage of goods by sea. The deviation doctrine within bailment remains subject to scrutiny; applying these rules does not address the criticisms made of the deviation doctrine in the carriage context.

Third, any argument that deviation ought to be subject to the principles of bailment appears to be premised on the assumption that deviation is different from other breaches of a contract of carriage. As this chapter has sought to demonstrate, breach by deviation does not necessarily place a cargo-owner in a better or worse

[261] *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* (n 251) [58]-[63] (Lord Phillips MR); *Yearworth v North Bristol NHS Trust* (n 217) [48]-[50] (Lord Judge CJ).

[262] Professor Michael Bridge et al, *The Law of Personal Property* (3rd edn, Sweet & Maxwell 2021) [12-026].

position than other, comparable breaches of the contract of carriage.[263] Other breaches of a contract of carriage are subject to the principles of general contract law. If it is accepted that breach of a contract of carriage by deviation is not special, arguments to apply special rules, be they *sui generis* or related to bailment, fall away.

2.1.3. *A doctrine sui generis?*

Given the arguments above, it is now unclear why a deviation ought to be treated as more serious than other breaches of the contract of carriage through the continued application of the fundamental breach doctrine.[264] There is nothing inherently special about the breach of a contract of carriage by a deviation. Deviation does not usually place the shipper in a worse position than other breaches, yet the consequences which stem from a deviation are uniquely severe. It is tenable that, prior to the advent of the held covered clause, a deviation might have placed the shipper in a more disadvantageous position than other breaches, but this is evidently no longer the commercial reality. As Dockray writes, 'a rule that any deviation makes a contract of affreightment completely unenforceable in such circumstances is absurdly disproportionate to the legitimate aims of the law.'[265] Historical provenance is an insufficient reason to continue to treat deviation as a body of law *sui generis* in the absence of positive reasons for doing so.[266]

[263] cf Cashmore (n 5) 496.

[264] See, for instance, Egbe (n 204) 307; cf Cashmore (n 5) 496.

[265] Dockray (n 1) 98.

[266] ibid.

Furthermore, there is significant judicial doubt as to the continued treatment of deviation as *sui generis.* Commenting on Lord Wilberforce's *Photo Production* decision in *The Antares,* Lloyd LJ said that:

> Whatever might be the position with regard to deviation cases strictly so called, (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorised loading of deck cargo as a special case.[267]

Carr J's judgment in *The Sur* is a more recent example of judicial scrutiny of the deviation doctrine. Carr J viewed herself as bound to follow the decision in *Hain Steamship.*[268] However, she said that were she not so bound she 'would hold that a geographic deviation does not preclude a carrier from relying on the one-year time bar created by Article III Rule 6. The weight of modern authority supports that conclusion.'[269] Carr J explicitly called for the departure from the principle of fundamental breach, commenting that 'the reasons for discrediting the doctrine are relevant to geographical deviation cases just like any other.[270] The weight of the modern judicial authority suggests that the deviation doctrine ought not to be governed by special rules. This is not a unanimous position taken in the case law. Lord Wilberforce's dicta in *Photo Production* is often identified in support of the view that the deviation doctrine ought to exist *sui generis.*[271] However, Lord Wilberforce's dicta

[267] *The Antares* (n 172) 430 (Lloyd LJ).

[268] *The Sur* (n 2) [117]-[118] (Carr J).

[269] ibid [118] (Carr J).

[270] ibid [108] (Carr J).

[271] C P Mills, 'The Future of Deviation in the Law of Carriage of Goods' (1983) 4 LMCLQ 587**,** 594.

demonstrates ambivalence as to the correct approach to the deviation cases: he says that 'it may be preferable that they should be considered as a body of authority *sui generis* with special rules derived from historical and commercial reasons.'[272] In any event, it is important to contextualise this dicta. The statement is obiter, given that *Photo Production* involved neither the deviation doctrine nor a contract for the carriage of goods by sea. Further, the dicta ought to be read alongside Lord Wilberforce's judgment in *The New York Star.*[273] In this case, the defendant stevedores sought to use a Himalaya clause to rely on the time bar in the bill of lading when an action was brought against them by the claimant shipper for loss caused when goods stored in the stevedores' warehouse were obtained by thieves. Lord Wilberforce refers to fundamental breach as a 'proposition that exemption clauses may be held inapplicable to certain breaches of contract as a matter of construction of the contract,' citing, amongst other cases, both *Suisse Atlantique* and *Photo Production v Securicor*.[274] This suggests a view that the House of Lords' rejection of the fundamental breach model in *Photo Production* is applicable in the context of contracts for the carriage of goods by sea. Debattista wrote that this undermines the weight that can be placed on Lord Wilberforce's view in *Photo Production.*[275] Whilst Lord Wilberforce's judgment in *The New York Star* does not necessarily exclude the treatment of the deviation doctrine as *sui generis,* and so the point may not be quite as dispositive of *Photo Production* as Debattista suggested, it is striking that Lord Wilberforce makes no mention of the deviation doctrine as being an exception to the

[272] *Photo Production Ltd v Securicor Transport Ltd* (n 162) 845 (Lord Wilberforce).

[273] *Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty (The New York Star)* [1981] 1 WLR 138.

[274] ibid 144 (Lord Wilberforce).

[275] Debattista (n 170) 32.

principles he set out in the *New York Star* given that the cases were decided merely five months apart and raised similar issues. Lord Wilberforce's dicta in *The New York Star* appear to weaken the authority of the *Photo Production* dicta, and in turn, renders reliance on this judgment unpersuasive.[276]

Even were there to be convincing reasons as to why deviation may warrant special attention, these concerns do not detract from the need to apply the principles of general contract law to the deviation doctrine with respect to the effect of discharge for breach.[277] As Reynolds puts the point, 'special rules for special breaches are too dangerous to preserve.'[278] There is an emerging view in contract law jurisprudence and literature that a general part of the law of contract should apply to all categories of contracts.[279] Discharge for breach is regarded by the courts as a component of the general part of the law of contract.[280] This view can be seen, for instance, in the judgment of Moore-Bick LJ in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt:*

> [*Geys v Société Générale*] raised a number of questions, but the only one of relevance to the present case was whether the contract had been terminated when the employer

[276] See e.g. *The Sur* (n 2) [113] (Carr J).

[277] *The Sara D* (n 177) 288 (Lloyd LJ).

[278] Reynolds (n 115) 47.

[279] *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL) 263 (Lord Goff of Chieveley); *Geys v Société Générale, London Branch* (n 6); *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All ER (Comm) 483. See generally Hugh Beale (ed), *Chitty on Contract* (34th edn, Sweet & Maxwell 2022), in particular the division of the work into 'Volume I – General Principles' and 'Volume 2 – Specific Contracts.'

[280] *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* (n 279); *Geys v Société Générale, London Branch* (n 6).

> wrongfully dismissed the employee, or only when the employee accepted the employer's conduct as having that effect. The Supreme Court held that the general rule applies to contracts of employment and that the contract came to an end only when the employee elected to treat the employer's conduct as terminating it. That was the case despite the fact that it was accepted that an employee who has been summarily dismissed cannot sue for his wages in respect of the period after his dismissal.[281]

This passage demonstrates an understanding that even within contexts of specific contracts (for instance, employment), the principles of termination for breach to be applied are those of general contract law, even where there may be good normative reasons to apply a different approach. In this way, the approach of applying special rules to termination for breach in deviation cases is out of step with the way that the courts approach termination for breach more generally.

In the absence of convincing reasons justifying the doctrine of deviation remaining *sui generis,* and considering the understanding that principles relating to discharge for breach form part of the general law of contract, this thesis contends that the deviation doctrine should be subsumed into general contract law. The following section identifies the points of tension between the modern deviation doctrine and general contract law. These conceptual problems must be addressed when recasting the rules governing an unjustified deviation. The thesis then continues by proposing a model of the deviation doctrine which is consistent with the general principles of

[281] ibid [36] (Moore-Bick LJ).

contract law. It addresses each stage of a claim for breach of contract by unjustified deviation in turn, to demonstrate how this approach might work in practice.

2.2. Conceptual problems with the current regime

The previous section contended that there is no convincing rationale for subjecting deviation to special rules. The deviation doctrine as it stands is out of step with the law of marine insurance and the law of bailment, and also the general law of contract. There are two major conceptual problems with the current deviation doctrine. First, it relies on notions of fundamental breach that have subsequently been discredited. Second, it departs from general contract law principles around termination. The future of the deviation doctrine must address both of these conceptual problems.

2.2.1. *The orthodox deviation doctrine preserves the doctrine of substantive fundamental breach*

The modern deviation rule preserves the doctrine of fundamental breach.[282] On this approach, a fundamental breach of contract by deviation will render all terms of the contract of carriage inapplicable, irrespective of whether as a matter of construction, a term may appear to have been intended to be applicable.

At the outset, it is important to appreciate the significant problems with the doctrine of fundamental breach. First, because it renders the entire contract

[282] Bennett (n 4) [4-382]; Reynolds and Rose (n 4) [9-058]; Egbe (n 204) 301-303; *The Sur* (n 2) [80] (Carr J).

unenforceable, the doctrine appears conceptually inconsistent. If the effect of an unreasonable deviation is that the contract is destroyed *ab initio,* it is unclear why the innocent party has a cause of action upon a contract (the sword) but for the purpose of the defaulting party's defences (the shield), the contract has been destroyed.[283] Further, and as for instance Clarke contended, if termination of a contract automatically renders exemption clauses unenforceable, it is unclear why exemption clauses would be enforceable for a non-fundamental breach of condition but not in cases of fundamental breach.[284] These conceptual difficulties made the doctrine of fundamental breach an unattractive solution to a circumstance of serious breach of contract. What is more, because the fundamental breach doctrine 'arises by operation of law, rather than agreement of the parties, it contradicts the basic premise of contractual freedom.'[285] The doctrine displaces even very clearly worded exception or limitation clauses. This approach fails to give effect to the contractual provisions put in place by the parties to govern the eventuality of breach. This offends our understanding of the principles that general contract law should protect, namely freedom of contract and the intention of the parties.

It was for these reasons, amongst others, that the decline of fundamental breach was applauded in much of the domestic academic commentary: Tiplady, for

[283] Dawson (n 246) 392 ('if the contract was rescinded *in toto,* on what did the plaintiff sue?'); *Horsler v Zorro* [1975] Ch 302 (Ch) 307 (Megarry J) (cf *Johnson v Agnew* [1980] AC 367 (HL) 398 (Lord Wilberforce), at which Lord Wilberforce overruled *Horsler* on the basis that it 'cannot stand so far as [it is] based on the theory of 'rescission *ab initio*' which has no application to the termination of a contract on accepted repudiation.' The central point in *Horsler,* that recission *ab initio* is inconsistent with a claim for damages, is unimpaired by the later decision of the House of Lords in *Johnson,* and serves to demonstrate the weakness of the fundamental breach doctrine.)

[284] Malcolm Clarke, 'Fundamental Breach of Charter-Party' [1978] LMCLQ 472, 474.

[285] Mitchell McInnes, 'Fundamental Breach in the Supreme Court of Canada' (2010) 126 LQR 365.

instance, memorably remarked that in the *Photo Production* decision the House of Lords 'had staked [the] vampire.'[286]

The doctrine of fundamental breach, during its lifespan, was met with similar scepticism in other jurisdictions. For instance, the doctrine never gained a foothold in Australian contract law.[287] During the brief period of English contract law which recognised a doctrine of fundamental breach, Australian courts were reluctant to apply that approach, and instead expressed concerns as to the correctness of the model. In *Sydney City Council v West*, the High Court of Australia rejected the claimant's submission that a contract of bailment had been fundamentally breached.[288] Barwick CJ and Taylor J said in their combined judgment that they '[found] difficulties in understanding precisely what is meant by the expression "fundamental term",' and proceeded to cast doubt on the correctness of the rule that a breach of a fundamental term would exclude the applicability of exemption or limitation clauses.[289] Windeyer J took the same position, and held that 'the doctrine of fundamental terms and fundamental breaches as it has recently been expounded, which the Supreme Court to a large extent adopted, has many difficulties. It does not I think provide the solution of the question in this case.'[290] Rather, the approach favoured by the High Court was simply to interpret the contract as it was written.

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[286] David Tiplady, 'The Judicial Control of Contractual Unfairness' (1983) 43 MLR 601, 602.

[287] See generally, John Atkin, 'Fundamental Breach and the Nature of Exclusion Clauses- Photo Production Ltd v Securicor Transport Ltd' (1981) 9 Sydney L Rev 434, 443.

[288] *Sydney City Council v West* (1966) 114 CLR 481 (HCA).

[289] ibid [7] (Barwick CJ and Taylor J).

[290] ibid [2] (Windeyer J).

The approach taken in *Sydney City Council v West* can be seen in another Australian case decided in the same year, *Thomas National Transport v May & Baker.*[291] In this case, expressing the same view as he had in *Sydney City Council,* Windeyer J relied on *Suisse Atlantique* as dispositive of any suggestion that Australian contract law should include a doctrine of fundamental breach.

The Canadian courts similarly abandoned the doctrine of fundamental breach in general contract law. The decision of the Supreme Court of Canada in *Tercon Contractors Ltd v British Colombia*[292] came after decades of mixed judicial views on the persistence of the fundamental breach doctrine in Canadian law.[293] Binnie J said that the doctrine of fundamental breach had been 'laid to rest,' bringing Canada into line with other common law jurisdictions.[294]

One would expect the persistence of the fundamental breach doctrine within the deviation doctrine to be underpinned by strong normative grounds, given that the fundamental breach doctrine was widely criticised during its general contract law lifespan, leading to its abandonment. The rejection of the doctrine in general contract law suggests that any support for the application of the fundamental breach doctrine in the carriage of goods context must stem from considerations unique to that context.[295] However, as the preceding sections have sought to demonstrate, although

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[291] *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353 (HCA).

[292] *Tercon Contractors Ltd v British Columbia* [2010] SCC 4 (SCC), [2010] 1 SCR 69.

[293] See generally, McInnes (n 285) 365.

[294] *Tercon Contractors Ltd v British Colombia* (n 292) [81] (Binnie J).

[295] Particularly given that the doctrine of fundamental breach originated from, and represented an expansion of, the deviation cases into general contract law: see Clarke (n 284) 472; Dockray (n 1) 76.

these strong normative reasons did historically exist, the evolution of the law of marine insurance and bailment suggest that no good reasons to retain the old law on deviation remain.

2.2.2. *The orthodox deviation doctrine departs from contractual principles around termination*

The orthodox deviation doctrine departs from general contract law principles surrounding the termination of a contract, with respect to both whether the innocent party can elect to terminate the contract, and whether that termination will have retrospective effect.

Election

The historical deviation doctrine provided that an unjustified deviation would result in the automatic discharge of the contract of carriage.[296] Departing from this position, the decision in *Hain Steamship* suggested that the innocent party would have to elect to treat the contract as at an end, and as such, could elect to affirm the contract should they wish to do so.[297] The decision in *Hain Steamship* broke from orthodoxy but represents the correct approach to take to breach by deviation. The historical approach is out of line with the general contract law position that a repudiatory breach does not automatically discharge primary obligations: rather, the innocent party must

[296] *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104).

[297] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 178 (Lord Wright) 182 (Lord Maugham); *The Sara D* (n 177) 287 (Kerr LJ), 288 (Lloyd LJ).

elect to terminate for breach.[298] This section argues that there are four problems with the automatic discharge model which render the approach in *Hain Steamship* preferable.

First, the automatic discharge model is unfair to the innocent party. This has been noted in a number of cases.[299] For instance, in *London Transport Executive v Clarke,* Templeman LJ said that 'it would be manifestly unjust to allow a wrongdoer to determine a contract by repudiatory breach if the innocent party wished to affirm the contract for good reason.'[300] The same approach was taken by the Supreme Court in *Geys v Société Générale, London Branch*.[301] When dealing with the question of whether a party's repudiation of an employment contract automatically terminated the contract, Lord Hope emphasised that 'the automatic theory can operate to the disadvantage of the injured party in a way that enables the wrongdoer to benefit from his own wrong.'[302] Lord Wilson described rejecting the automatic theory as necessary for the protection of the innocent party from the consequences of the breach.[303]

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[298] e.g. Beale (n 279) [27-054]; Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020) [18-005]; *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm) [2012] 2 Lloyd's Rep 6; *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* (n 279) [36] (Moore-Bick LJ); cf Jordan English, 'The Nature of Promissory Conditions' (2021) 137 LQR 630, 636-637.

[299] *London Transport Executive v Clarke* [1981] 2 WLUK 212, [1981] ICR 355 (CA); *Alghussein Establishment v Eton College* [1988] 1 WLR 587 (HL); *Geys v Société Générale, London Branch* (n 6).

[300] *London Transport Executive v Clarke* (n 299) 366 (Templeman LJ); cf *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL), which suggests that there is a qualifier on the right to affirm such that in some cases there will be *de facto* automatic discharge, although probably upon the innocent party being informed of the repudiation.

[301] *Geys v Société Générale, London Branch* (n 6).

[302] ibid [15] (Lord Hope).

[303] ibid [97] (Lord Wilson).

Second, and for the reasons outlined above, the automatic discharge model has been subject to scrutiny and ultimately abandonment within general contract law. To reconcile the deviation doctrine with general contract law, the automatic discharge model must be departed from. This is the correct approach in light of the conclusion that there is nothing inherently special about a breach of a contract of carriage by deviation.

Third, whilst the desirability of the power model over the automatic discharge model has been the focus of general contract jurisprudence and literature, in the deviation context the automatic discharge model has additional disadvantages.[304] In the context of contracts of carriage, the operation of the automatic discharge doctrine may be made attractive to the carrier by factors such as changing market conditions, for instance a sharp increase in the market value of charters. To effectively regulate the contractual position of the carriers and shippers against market forces, it is important to guard against unilateral discharge. The adoption of the power model does so.

Fourth, it might be contended that the force of the criticism of the automatic discharge model is undercut by the fact that in some circumstances automatic discharge will be favourable to the innocent party. The automatic discharge of a contract of carriage may undoubtedly be favourable to the shipper in some respects. For instance, a deviation, under the current law, would leave the party in breach with only a claim in restitution for the value of the services in place of the agreed obligation

[304] Peel (n 298) [18-005]; Frederick Wilmot-Smith, 'Termination after breach' (2018) 134 LQR 307; *London Transport Executive v Clarke* (n 299); *Geys v Société Générale, London Branch* (n 6); *Alghussein Establishment v Eton College* (n 299).

to pay freight.[305] The value of this claim in restitution would be assessed at the market rate of the time at which the services were received.[306] This would be disadvantageous to the party in breach were the continuation of the contract to result in a freight payment higher than quantum meruit. However, this argument fails to address the fact that automatic discharge deprives the innocent party of all power with respect to the breach. As Wilmot-Smith suggests, in making an argument that automatic discharge is always unfair on the innocent party, there is a failure to acknowledge the risks involved in both termination and keeping the contract alive. [307] It is not obvious that treating the contract as subsisting will always be preferable to the innocent party, as by affirming the contract the innocent party runs the risk of losing the right to performance or compensation. [308] Rather, the power model is the preferable approach because an innocent party is able to select which risks they wish to run. The automatic discharge model, on the other hand, places the decision as to whether the contract is at an end outside of the control of the innocent party in all circumstances.

Retroactivity

The orthodox position in the deviation cases was that a deviation would render the contract of carriage void *ab initio.*[309] Under this approach, a carrier would not be able

[305] A quantum meruit claim: see *Hain Steamship v Tate & Lyle* (n 137) 174-175 (Lord Atkin), 180-181 (Lord Wright), 183 (Lord Maugham); David Foxton et al, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2021) [12-017].

[306] *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351 [14] (Lord Clarke).

[307] Wilmot-Smith (n 304) 316.

[308] ibid 315.

[309] *Kish v Taylor* (n 149) 618 (Lord Atkinson); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 668 (Collins MR); *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118) 365 (Pickford J).

to rely on an exclusion clause in relation to cargo damage suffered before the deviation. This position is out of step with the general contractual orthodoxy that termination is prospective only.[310]

The question of whether a deviation renders a contract of carriage void *ab initio* did not arise in *Hain Steamship,* as the damage actioned occurred after the deviation. The House of Lords appeared to suggest that the contract would be void from the moment of deviation onwards.[311] Lord Wright, for example, analogised with the law of marine insurance, writing that 'it is on similar reasoning that a voyage policy of insurance is avoided from the moment that the vessel actually deviates.'[312] However, the point was not expressly taken in any of the judgments.

2.3. What principles should govern deviation?

The following section proposes a solution to the current problems with the deviation doctrine. It suggests that the doctrine should be harmonised with the principles of general contract law with respect to the effect of termination for breach of condition. This section takes each stage of a claim for breach of a contract of carriage by a deviation in turn to demonstrate what the reformed law should look like. The stages are, in outline, the elements of causation which the innocent party will have to demonstrate, the question of whether a breach must be accepted by the innocent party

[310] Peel (n 298) [18-001]; *Photo Production Ltd v Securicor Transport Ltd* (n 162) 851 (Lord Diplock).

[311] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 182 (Lord Maugham); *The Sara D* (n 177) 297 (Kerr LJ); cf Reynolds (n 115) 41.

[312] *Hain Steamship v Tate & Lyle* (n 137) 178 (Lord Wright).

as terminating the contract, and the applicability of contract terms, such as exclusion clauses, in the event of termination for breach. It is explained that, at each of these stages, integration into general contract law would provide clarity, doctrinal consistency, and better facilitate the autonomy of the parties to the contract of carriage.

2.3.1. *Causation*

The causation rules currently place a heavy burden on the carrier. Where the cargo-owner can show that an unjustified deviation has taken place, the factual onus of proof will shift to the carrier.[313] With the burden of proof transferred in this way, the carrier will only be able to escape or limit liability for the loss caused (by relying on the exceptions granted to common carriers) if they can demonstrate that the loss *must* have occurred anyway, whether the ship deviated or not.[314] As the editor of *Carver on Charterparties* writes, the carrier must prove that 'the loss has no connection whatsoever with the deviation in that the cargo would certainly have suffered at least equal prejudice even without the deviation.'[315] The result of this is that the claimant will not be required to prove that the deviation actually caused the loss claimed for, only that the ship has unjustifiably deviated, placing the onus of proof almost

[313] *Davis v Garrett* (n 19) 1459 (Tindal CJ); *Balian v Joly, Victoria & Co* (n 99); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 666-667 (Collins MR); *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37) 795 (Swinfen Eady LJ), 800 (Phillimore LJ); *Hain Steamship v Tate & Lyle* (n 137) 176 (Lord Wright).

[314] e.g. *Islamic Investment Co ISA v Transorient Shipping Ltd (The Nour)* [1999] 1 Lloyd's Rep 1 (CA). This test is the same as that used in the law of bailment: *A/S Rendal v Arcos Ltd* [1937] 3 All ER 577, [1937] 58 Lloyd's Rep 287 (HL) 297-299 (Lord Wright).

[315] Bennett (n 4) [4-385].

exclusively on the carrier. This places the carrier in an unsatisfactory position in two respects.

First, as a matter of factual causation, it will be very difficult for the carrier to satisfy the burden of proof. This test will be almost impossible for the defendant to meet save in cases of inherent vice.[316] The current causation rules effectively put a defendant carrier in the position of an insurer of the claimant cargo-owner's goods. This position could historically be justified by the effect a deviation had on a contract of marine insurance, but this is no longer the case.[317]

Second, as a matter of legal causation, the carrier is not able to rely upon concepts such as proximate/legal cause, remoteness and mitigation.[318] These concepts limit the responsibility a carrier would have for loss in circumstances factually resulting from the breach. The fact that these principles do not currently apply to deviation contributes to the severity of the current legal position as it reduces the causation inquiry to the factual question only. The correctness of this position must be questioned given that the principles of legal causation apply to other breaches of the contract of carriage.[319] The deviation doctrine ought not to be subject to special rules in this respect, and therefore should be brought into line with the principles governing damages in general contract law.

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[316] ibid; *The Nour* (n 293) 8-9 (Evans LJ).

[317] See Section 2.1.1.

[318] See generally Beale (n 279) [29-002].

[319] e.g. *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 (HL) (breach of the seaworthiness obligation); *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV* [2015] EWHC 2505 (Comm), [2017] 1 All ER (Comm) 99 (repudiatory breach by delay); *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] UKSC 43, [2017] 1 WLR 2581 (repudiatory breach by early redelivery).

The present test for causation in deviation has been subject to criticism in other jurisdictions. The leading maritime law text in the United States, for example, states that 'the carrier should not be liable even as an insurer unless the damage is causally related to the unreasonable deviation,'[320] although United States maritime law uses the same test for causation as English law.[321] The test for causation is so difficult for the carrier to meet in practice that the jurisprudence from the United States has described the test for causation in terms of strict liability.[322] In *Du Pont de Nemours,* Circuit Judge Timbers wrote of the Carriage of Goods by Sea Act[323] that:

> We must assume that Congress, in enacting the 'reasonable deviation' provision set forth above, was aware of the harsh doctrine which had rendered a deviating carrier an insurer of any subsequent causally related loss and chose to confine strict liability to situations where the deviation was unreasonable.[324]

This formulation demonstrates the difficulty that a carrier will have when attempting to prove that the loss would have happened even if the ship had not deviated. It also speaks to the acknowledgment across jurisdictions that the current causation principles are unduly harsh on the carrier.

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[320] Thomas J Schoenbaum, *Admiralty and Maritime Law* (6th edn, Thomson/West 2022) [11:14].

[321] ibid [10:34].

[322] *Du Pont de Nemours International v SS Mormacvega* (1974) 493 F 2d 97 (United States Court of Appeals, Second Circuit).

[323] 46 USCA § 30706 (2006).

[324] *Du Pont de Nemours International v SS Mormacvega* (n 322) 102 (Timber CJ).

The appropriate test for causation to use in the event of an unjustified deviation is that employed in general contract law, with respect to both factual and legal causation. As a matter of factual causation, a claimant will only recover damages for a loss where they can prove that a breach of contract is an 'effective' or 'dominant' cause of the loss.[325] The process of determining whether a breach of contract is such a cause does not involve the application of any definitive principles: rather, it will be 'an application of the court's common sense.'[326] The principles of legal causation, such as remoteness, would then apply to limit the extent of the defendant carrier's responsibility for loss which is a factual result of the breach.

2.3.2. *Election*

The House of Lords in *Hain Steamship* held that in the event of a deviation the innocent party could elect to treat the contract as subsisting.[327] This finding was surprising, given that the understanding of the effect of a deviation prior to *Hain Steamship* had been that deviation automatically discharged the contract of carriage *ab initio*.[328] Although the case broke from the then orthodoxy, the rejection of the automatic discharge model in favour of the power model was a welcome development in the deviation doctrine, and ought to be retained.

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[325] *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) 1374-1375 (Glidewell LJ); *Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667 (Ch) 671-672 and 681-682 (Carnwath J).

[326] *Galoo v Bright Grahame Murray* (n 325) 1375 (Glidewell LJ).

[327] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 178 (Lord Wright), 182 (Lord Maugham).

[328] *Internationale Guano en Superphosphaatwerken v MacAndrew & Co* (n 118).

Prior to the advent of GPS tracking and modern electronic communication, it would have been difficult for a shipper to know whether a ship had deviated until the end of the voyage.[329] A shipper being able to elect to terminate a contract of carriage in the event of deviation would not have been viable in practice, as this information would likely only have come to light after the conclusion of the performance of the contract. An awareness of this problem is demonstrated in the reasoning of the House of Lords in *The Good Luck,* a case concerning the effect of a breach on an insurance policy.[330] The assured were in breach of warranty by sailing into 'special risks areas.' The insurer had failed to notify the assured that their coverage had ceased. The assured contended that the policy of insurance was still in place at the time of the loss because of this failure to notify. The House of Lords rejected this argument and held that the contract of insurance was automatically discharged when the assured knowingly sailed, in breach of contract and without reasonable grounds, into the special risks area. This position was justified on the basis that any other interpretation of the obligation owed by the insurer (i.e. that reasonable notice would need to be given that the insurance policy had been discharged) would expose the assured to a prolonged risk of the ship being uninsured.[331] However, in the context of modern shipping, a cargo-owner can track the ship their cargo is being carried on in real time.[332] Given the capabilities of modern technology, it will be rare for instantaneous communication of a ship's deviation to be practically impossible. Election is a far more suitable

[329] In this way, the benefit of the automatic discharge rule was that a shipper did not need to know about a deviation in order for the contract to be discharged.

[330] *The Good Luck* (n 279). See also *F v West Berkshire HA* [1990] 2 AC 1 (HL) 75 (Lord Goff of Chieveley).

[331] *The Good Luck* (n 279) 265 (Lord Goff of Chieveley).

[332] e.g. https://www.vesselfinder.com/ [accessed 16-06-2023].

model, as it is likely that the shipper will be aware of the fact of a deviation as it takes place, and will be able to utilise their right to terminate effectively.

2.3.3. *Applicability of contract terms*

The decision of Carr J in *The Sur,* the most recent authority on the deviation doctrine, demonstrates the persistence of the position that a deviation will prevent any of the terms of a contract from being applicable.[333] Carr J rejected the submission that *Hain Steamship* had been impliedly overruled by the cases which dispensed with the fundamental breach doctrine in general contract law.[334] Consequently, the current position is that the parties will no longer be bound by any of the contract terms in the event of a deviation, including exception and limitation clauses. The current deviation rule is unjustified, manifestly unfair, and often contrary to the intention of the parties to the contract of carriage. It is suggested that the correct approach to the enforceability of contract terms should be one of construction, in line with the principles of general contract law.

The modern deviation rule preserves the doctrine of fundamental breach. On this approach, a fundamental breach of contract by deviation will render all terms of the contract of carriage inapplicable, irrespective of whether as a matter of construction, a term may appear to have been intended to be applicable.[335] The

[333] *The Sur* (n 2) [116]-[118] (Carr J).

[334] ibid [113] (Carr J).

[335] *Balian v Joly, Victoria & Co* (n 99); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104); *Hain Steamship v Tate & Lyle* (n 137); *The Sur* (n 2); Bennett (n 4) [4-376]. On the doctrine of fundamental breach generally, see Peel (n 298) [7-018]; Beale (n 279) [17-023]-[17-027].

previous discussion has elucidated the substantial problems with the fundamental breach doctrine: the approach taken to the applicability of contract terms in the event of termination for breach after deviation therefore must change.

The correct approach to take to the applicability of contract terms in the event of termination for breach after deviation is one of construction. The question for the court will be simply whether a term was intended to be enforceable in the event of such a breach: whether the obligation is primary, secondary, or ancillary.[336] As Lord Sumption puts the point in *Geys v Société Générale,* 'whether collateral obligations of this kind continue to bind after the termination of the contract… will normally depend on the construction of the contract…'[337]

This approach to the enforceability of contract terms in the event of breach should be welcomed for its flexibility, and for the way that it protects the intention of the contractual parties. If the clear intention of the parties is that a term will remain enforceable even in the eventuality of breach, there is no reason why this intention should not be given effect to; permitting the court to engage in flexible analysis of the contract to identify the way that obligations should be constructed facilitates freedom of contract.

[336] See e.g. *Photo Production Ltd v Securicor Transport Ltd* (n 162) 848-851 (Lord Diplock); Peel (n 298) [18-019]; A M Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 MLR 623, 644.

[337] *Geys v Société Générale, London Branch* (n 6) [141] (Lord Sumption).

The following sections demonstrate how this approach would work with respect to both exclusion and limitation clauses, and with respect to agreed obligations such as freight.

2.3.4. *Applicability of exclusion clauses*

It follows from the prior section that a deviation should not render exclusion and limitation clauses unenforceable. These clauses are inserted into a contract to regulate the situation where a party is in breach: as a matter of construction, they will usually be enforceable. This section identifies three specific problems with the current deviation doctrine with respect to exclusion and limitation clauses. It argues that each of these problems would be remedied through the application of the principles of general contract law.

First, a finding that a deviation will prevent the application of exclusion and limitation clauses is often incompatible with the contractual intention of the parties. Such clauses are inserted into a contract of carriage in order to regulate the respective positions of the parties in the event of a breach. As Debattista puts it, 'the raison d'être of such clauses is to predict in a manner as agreeable as possible to both parties (indeed, agreed in advance by both parties), the terms under which their disputes are to be resolved.'[338] Jurisprudence on the effect of fundamental breach on exemption clauses recognises that this approach involves overriding the intention of the contractual parties. In *Karsales (Harrow) v Wallis,* for instance, the court held that if

[338] Debattista (n 170) 28.

a breach was to be considered fundamental then the exemptions were irrelevant whether or not, as a matter of construction, they covered the breach.[339] As Lord Wilberforce put the point in *Photo Production v Securicor*:

> In commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance… there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.[340]

Reforming the current law so that the applicability of an exclusion or limitation clause is a matter of construction allows parties to allocate risk in precisely the manner Lord Wilberforce identifies.

Second, because terms such as exclusion and limitation clauses are often the product of a negotiated contract which apportions benefit and risk to the contractual parties in equal measure, upholding the fundamental breach rule by disapplying exemption clauses in the event of termination for breach may allow a shipper to unfairly exploit the breach of the carrier.[341] It will be to the advantage of the shipper to escape from the limitations of an exemption or limitation clause by terminating a contract even for a trivial breach, on the assumption that the fundamental breach doctrine applies. Given that a deviation will not necessarily put the innocent party in a grievously disadvantageous position, or certainly no more so than breaches of other

[339] *Karsales (Harrow) v Wallis* [1956] 1 WLR 936 (CA).

[340] *Photo Production Ltd v Securicor Transport Ltd* (n 162) 843 (Lord Wilberforce).

[341] See e.g. Shea (n 336).

terms of the contract of carriage, the scope for harshness on the part of the innocent party appears to be broad. As a result of this, were the exclusion and limitation clauses to perish in the event of a deviation, the defaulting party would be at risk of being unduly punished for the breach. As Dockray writes, 'the rigid nature of [the] rules means that they are quite capable of inflicting serious and unnecessary harm on an unwary carrier.'[342] The effect of the deviation on the contract of carriage would be out of proportion to the nature of the wrong.[343] Even in cases of incredibly serious breach, the effect of an unjustified deviation on a contract of carriage has no analogy in the general law of contract. Deviation is simply a particular form of breach of contract: the applicable principles ought to be those used in the general law. Bringing the deviation doctrine into line with contract law in this respect would 'protect the legitimate interests of cargo claimants.'[344]

Third, even where the exemption clauses which are inserted into a contract are not reflective of an equal relationship between the two parties, there is no need to dispense with exemption and limitation clauses to control the operation of unfair terms. This is because of the many common law and statutory controls on unfair exemption clauses. For example, the Hague-Visby Rules place a number of controls on exception and limitation clauses. Article III of the Rules provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from

[342] Dockray (n 1) 98.

[343] James Whitehead III, 'Deviation: Should the Doctrine Apply to On-Deck Carriage?' (1981) 6(1) Mar Law 37, 49.

[344] Dockray (n 1) 98.

> negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

Further, Article IV provides that:

> A servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Articles III and IV, in this way, substantially restrict the ability of carriers to impose unfair exception and limitation clauses on cargo-owners. Similar controls are visible in the common law. Whilst in principle exclusion and limitation clauses are subject to the same rules of interpretation and construction as contractual terms generally, the courts have taken a strict approach to the construction of exemption and limitation clauses.[345] In *Boskalis Offshore Marine Contracting BV v Atlantic Marine & Aviation LLP (The Atlantic Tonjer)* the Commercial Court said that 'the courts have long required a clarity of contractual language with provisions which restrict the rights and remedies normally available to a party.'[346] Giving his judgment in *Boskalis*, Sir Ross Cranston noted that the 'courts have exhibited a traditional hostility' towards

[345] Beale (n 279) [17-007]; *Interactive E-Solutions JLT v O3B Africa Ltd* [2018] EWCA Civ 62, [2018] 1 WLUK 476 [14] (Lewison LJ); *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576 (PC) 586-587 (Lord Denning).

[346] *Boskalis Offshore Marine Contracting BV v Atlantic Marine & Aviation LLP (The Atlantic Tonjer)* [2019] EWHC 1213 (Comm), [2020] 1 All ER (Comm) 323 [22] (Sir Ross Cranston).

exemption and limitation clauses.[347] The process of construction of an exemption or limitation clause begins from the position that neither party intends to abandon any of his common law or contractual remedies for its breach. The courts have applied rules such as the contra proferentem rule strictly in contracts of carriage, demonstrating a vigilance against unfair or ambiguous exclusion or limitation clauses by requiring 'clear and unambiguous language.'[348]

In this way, any argument that the fundamental breach doctrine is necessary to guard against unjust exemption clauses is misguided. The range of statutory and common law controls in modern contract law are more than sufficient to control unfair clauses.

2.3.5. *Enforceability of other agreed obligations, such as payment of freight*

The previous section has demonstrated that, under the proposed approach, exemption and limitation clauses will generally be enforceable in the event of an unjustified deviation. This section contends that termination for breach by unjustified deviation will discharge the parties from the obligation to perform any future primary obligations.

[347] ibid [23] (Sir Ross Cranston).

[348] *Pera Shipping Corp v Petroship SA (The Pera)* [1985] 2 Lloyd's Rep 103 (CA) 108 (Griffiths LJ).

Primary obligations discharged from moment of termination for breach

This section contends that primary obligations will be discharged from the moment of termination for breach. This view is, admittedly, at odds with both *Joseph Thorley* and *Hain Steamship.* In *Joseph Thorley,* the Court of Appeal held that deviation automatically terminates the contract of carriage *ab initio.*[349] In *Hain Steamship,* the House of Lords suggested that termination for breach has retroactive effect, from the moment of deviation onwards.[350] However, both cases suggest that termination for breach has retroactive effect. This is inconsistent with the rule in general contract law that termination does not operate retroactively.[351]

As this thesis has demonstrated, because technological developments now mean that a shipper would have notice of a deviation as it happens, the retroactive termination model no longer serves a purpose.[352] A shipper would, in most cases, be able to terminate a contract for breach by deviation as soon as the deviation occurs. Termination for breach by deviation is comparable to termination for other breaches of contract with respect to the notice that the innocent party is likely to have of the breach. No good reasons remain for taking a different approach with respect to the point at which primary obligations will be discharged. Ergo, primary obligations will be discharged where the cargo-owner has elected to terminate the contract prior to the

[349] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 666-668 (Collins MR).

[350] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 182 (Lord Maugham); *The Sara D* (n 177) 297 (Kerr LJ); cf Reynolds (n 115) 41.

[351] Peel (n 298) [18-017]; Beale (n 279) [27-078]; *Bank of Boston Connecticut (formerly Colonial Bank) v European Grain & Shipping Ltd (The Dominique)* [1989] AC 1056 (HL); *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL); *Hurst v Bryk* [2002] 1 AC 185 (HL).

[352] See Section 2.2.2.

satisfaction of the condition triggering the primary obligation. These primary obligations will not be enforceable by either party to the contract of carriage.[353] Conversely, primary obligations which fell due to be performed prior to termination for breach will not be discharged, again in line with the rule that termination does not operate retroactively. For example, if a charterparty stipulates that contractual freight is earned on loading, it is suggested that the cargo-owner will remain liable to pay the freight even in the event of deviation.[354]

The case law demonstrates this approach being taken to a range of primary obligations in the deviation context. In *United States Shipping Board v Bunge y Born*, the House of Lords held that a deviation discharged the contractual provisions stipulating a fixed time for unloading.[355] In *Compagnie Primera de Navagaziona Panama v Compania Arrendataria de Monopolio de Petroleos SA* the Court of Appeal dealt with an unjustified deviation during a charterparty which provided for two voyages.[356] The court held that an unjustified deviation during the first voyage discharged the charterers from their obligation to fulfil their contract with respect to the second voyage. Both cases demonstrate the understanding that termination for breach by deviation will discharge future primary obligations.

[353] *Heyman v Darwins Ltd* (n 167) 399 (Lord Porter); *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 345 (Lord Reid), 350-351 (Lord Diplock); Beale (n 279) [27-081].

[354] *The Dominique* (n 351) 1098-1099 (Lord Brandon of Oakbrook).

[355] *United States Shipping Board v Bunge y Born* [1925] 12 WLUK 52 (HL).

[356] *Compagnie Primera de Navagaziona Panama v Compania Arrendataria de Monopolio de Petroleos SA* [1940] 1 KB 362 (CA).

Freight

The position is somewhat more complex with respect to the obligation to pay freight. The contractual obligation to pay freight should be discharged where the obligation falls due for performance after the unjustified deviation, with an action in restitution available to the carrier in circumstances where the goods are delivered.[357]

The editors of *Scrutton on Charterparties and Bills of Lading* write that 'the effect of deviation upon the carrier's right to freight has not been finally determined.'[358] The position in the case law appears to be that the obligation to pay freight will not be enforceable in the event of termination for breach where that obligation fell due for performance after the deviation.[359] For instance, the Court of Appeal in *Joseph Thorley* appeared to treat the duty not to deviate as a condition precedent to the recovery of the agreed freight.[360] Similarly, in *Hain Steamship* Lord Atkin said that 'once [the cargo-owner] elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight any more than by his other

[357] This will not be the case where freight is earned on loading, in which case the obligation to pay contractual freight will not be discharged in the event of termination for breach: *The Dominique* (n 351).

[358] Foxton et al (n 305) [12-017].

[359] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 667 (Collins MR); *Hain Steamship v Tate & Lyle* (n 137) 174-175 (Lord Atkin), 180-181 (Lord Wright), 183 (Lord Maugham); *Alianca Navegacao E Logistica Ltda v Ameropa SA* [2019] EWHC 3152 (Comm), [2020] 1 Lloyd's Rep 603 [87] (Mr Andrew Henshaw QC).

[360] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 667 (Collins MR).

promises.'[361] These authorities suggest that the contractual claim to freight will not survive termination for breach.[362]

Although the contractual claim to freight is discharged in the event of termination for breach, it appears that the carrier may be able to avail himself of a claim in restitution on a quantum meruit basis.[363] It is noted at the outset that the availability of a claim in restitution in this context is unusual. The law of restitution will not rewrite a contractual agreement.[364] Nor will it allow a party in breach to claim for the value of services rendered, following the rule in *Sumpter v Hedges.*[365] However, it is suggested that the carriage of goods context is unique in that the carrier is almost always bound to carry out its obligation to deliver the goods to the stipulated destination: this warrants an exception to the principles of restitution in this regard.

The case law has recognised the availability of a claim in restitution in circumstances where the cargo has been delivered and the contractual claim to freight discharged. In *Joseph Thorley,* Collins MR said that: '[i]t may be, no doubt, that,

[361] *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin), 180 (Lord Wright) 'the deviation destroys, as I think, the right to claim the contract freight, even if the voyage is completed.' This point was obiter in both judgments, given the finding that the deviation was waived by the charterers.

[362] cf *Bornmann v Tooke* (1808) 170 ER 991 (Assizes) 992 (Lord Ellenborough) 'I am of opinion that this was not a condition precedent, and that the defendant having accepted the cargo must pay the stipulated freight. To hold that any short delay in setting sail or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti*.' The view that deviation should not be viewed as a condition precedent to the recovery of freight is also advanced in Ben McFarlane and Robert Stevens, 'In Defence of Sumpter v. Hedges' LQR 2002 118 (Oct) 569, 592-594.

[363] Foxton et al (n 305) [12-017]; *Societe Franco Tunisienne v Sidermar* [1961] 2 QB 278 (QBD) (award of freight on quantum meruit basis in the event of frustration; decision overruled by the Court of Appeal on another point in *Ocean Tramp Tankers Corp v V/O Sovfracht* (*The Eugenia)* [1964] 2 QB 226 (CA)); E R Hardy-Ivamy, 'Shipping Law Revision,' (1957) 10 CLP 184, 199.

[364] *Barton v Morris* [2023] UKSC 3, [2023] AC 684.

[365] *Sumpter v Hedges* [1898] 1 QB 673 (CA).

although that condition is broken, the circumstances are such as to give rise to an implied obligation on the part of the cargo-owner to pay the shipowner the freight.'[366] Fletcher Moulton LJ, giving a concurring judgment, said that '[the carrier] has carried the goods to their place of destination, and is therefore entitled to some remuneration for that service, of which their owner has received the benefit.'[367] This position is articulated more explicitly by the House of Lords in *Hain Steamship*.[368] Although the point did not arise for determination, Lord Maugham suggested that, where termination for breach discharged the obligation to pay freight, 'a claim on the footing of quantum meruit' would be available, depending on the circumstances of the case.[369] Lord Atkin said that he was 'not prepared at present to accept the view that…in no circumstances can a consignee…be liable to pay after a deviation any remuneration for the carriage.'[370]

These statements in *Hain Steamship* are inconsistent with the general rule in unjust enrichment that a party in breach cannot claim for the value of services rendered under a contract unless he has accrued a contractual entitlement to be paid.[371] However, the availability of a quantum meruit claim in the event of a deviation has

[366] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 667 (Collins MR).

[367] ibid 669 (Fletcher Moulton LJ).

[368] *Hain Steamship v Tate & Lyle* (n 137) 174-175 (Lord Atkin), 180-181 (Lord Wright), 183 (Lord Maugham). The point was also left open in *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104) 669 (Fletcher Moulton LJ): 'the most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this.'

[369] *Hain Steamship v Tate & Lyle* (n 137) 183 (Lord Maugham).

[370] ibid 175 (Lord Atkin).

[371] *Sumpter v Hedges* (n 365). This rule has been subject to considerable criticism in both the jurisprudence and the academic literature. See e.g. Peel (n 298) [18-130]; *Dies v British and International Mining and Finance Corporation* [1939] 1 KB 724 (KBD) 744 (Stable J); Law Commission, Pecuniary Restitution on Breach of Contract (Law Com No 121, 1983).

been recognised even by supporters of the rule in *Sumpter v Hedges*.[372] For instance, Professors McFarlane and Stevens wrote that 'the claim for reasonable freight as envisaged in *Hain* does constitute a genuine exception to the rule that part performance of an entire obligation by itself cannot give rise to a claim in unjust enrichment.'[373]

The availability of the quantum meruit claim here is an important supplement to the notion that primary obligations are discharged in the event of termination for breach by deviation. The claim guards against unfairness to the carrier by providing them with compensation for work done: often the cargo-owner will have received what amounts to full performance when the ship arrives at the stipulated port with the cargo.[374] From the carrier's point of view, if a deviation is immaterial and its obligations are otherwise performed in full, it seems unjust that the shipper is entitled to terminate and avoid its contractual obligation to pay freight. Although this approach is inconsistent with the orthodox view of a quantum meruit claim, there appear to be compelling reasons as to why allowing a claim in restitution is necessary in the carriage context.

[372] McFarlane and Stevens (n 362).

[373] ibid 593.

[374] *Hoenig v Isaacs* [1952] 2 All ER 176 (CA); *Bornmann v Tooke* (n 362) 992 (Lord Ellenborough); McFarlane and Stevens (n 362) 594.

2.3.6. *Consequences of termination for breach by deviation*

In the event that the innocent party elected to terminate for breach by deviation, they would have an action in damages for loss caused, consistently with the principles of general contract law.[375] This action would enable them to recover for any loss caused by the deviation.[376] In this way, a modern deviation doctrine modelled on the principles of general contract law could be flexible, preventing unfairness in cases where the deviation has resulted in the shipper forfeiting cover under their insurance policy where necessary, without adopting too harsh a stance in any one case.

[375] *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL).

[376] This may, in cases where the shipper's insurance policy has been discharged by reason of the deviation, allow an action in damages for the loss of the insurance policy, although this may be subject to remoteness problems in some instances; Reynolds and Rose (n 4) [9-044].

Conclusion

The deviation doctrine is, as Dockray has put it, 'all at sea.'[377] Future judicial intervention is necessary to clarify this uncertain area.[378] There have been diverging approaches in the case law and the academic scholarship as to the correct approach to be taken to this rationalisation.

This thesis has proposed a contractual solution to the deviation problem. This argument is advanced, first, by recognising that there is nothing inherently special about a breach of a contract of carriage by deviation. Historically, deviation would have placed a cargo-owner in a uniquely unsatisfactory position, by voiding any policy of insurance they may have had.[379] However, the wide adoption of the held covered clause has rendered a breach of a contract of carriage by a deviation much like any other breach.

The deviation doctrine also has provenance in the law of bailment. This historical connection has led to several commentators suggesting that a breach of a contract of carriage by deviation ought to be regulated by the application of the principles of bailment, and in this way, should not be subject to the principles of general contract law.[380] This thesis has dismissed such arguments. The law of

[377] Dockray (n 1).

[378] ibid; *The Sur* (n 2) [116] (Carr J); *The Kapitan Petko Voivoda* (n 171) [10] (Longmore LJ); Lewison (n 4) [12.142]; Girvin (n 4) 543; Reynolds and Rose (n 4) [9-060].

[379] Bennett (n 4) [4-330].

[380] Coote (n 5); Cashmore (n 5).

bailment does recognise circumstances of deviation.[381] However, the deviation cases in the carriage of goods by sea context are distinctly contractual. The bailment origins of the deviation doctrine were 'lost sight of as the nineteenth century advanced and by 1890 the courts had begun to seek explanations in the law of discharge by breach.'[382] Rather, the case law demonstrates that deviation is a contractual problem, with a contractual solution.[383] In any event, the modern law of bailment is confused. It has seen several recent reforms both domestically and in other common law jurisdictions, which has led to some doubt being cast over whether the law of bailment still recognises a distinct doctrine of deviation. And even if the law of bailment applied to the deviation cases, its principles would offer an ineffective solution to the deviation problem, going no way towards clarifying the doctrinal inconsistencies. For these reasons, the thesis concludes that a breach of a contract of carriage by unjustified deviation is best regarded as an ordinary contractual breach: the deviation doctrine should not exist as a body of law *sui generis*.

This thesis has contended that the correct approach to take to the rationalisation of the deviation doctrine is to apply the principles of general contract law. This approach would provide conceptual clarity in this traditionally confused area of law. Moreover, this solution strikes a fairer balance between the competing interests of the shipper and the carrier. By reforming the rule that an unjustified deviation will render exclusion and limitation clauses unenforceable, the solution

[381] *Lilley v Doubleday* (n 129); *Sleat v Fagg* (n 217); *Edwards v Newland* (n 217); *Mitchell v Ealing London Borough Council* (n 217); *Yearworth v North Bristol NHS Trust* (n 217).

[382] Coote (n 5) 235.

[383] *Balian v Joly, Victoria & Co* (n 99); *Joseph Thorley Ltd v Orchis Steamship Co Ltd* (n 104); *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd* (n 37); *Hain Steamship v Tate & Lyle* (n 137) 174 (Lord Atkin).

facilitates contractual autonomy with respect to risk allocation. This approach also provides consistency with emerging contractual theories of general and special contracts. The deviation problem is concerned with discharge for breach, an area which the Supreme Court has suggested forms a part of the general law of contract, rather than part of the law of special contracts.[384] Ultimately, a contractual solution attends to the shortcomings of the deviation doctrine, providing consistency across the law of contract generally and contracts of carriage specifically.

[384] *Geys v Société Générale, London Branch* (n 6).

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