

**STEEL CARGO CLAIMS**

By:

**PETER W. DAVIDSON**  
Brisset Bishop S.E.N.C.

## INDEX

89

	<u>Page No.</u>
Introduction	1
Clausing Bills of Lading	3
Claused Bills of Lading - Burden of Proof	11
Proof of Damage on Delivery	16
Damages	18
Excepted Perils, Seaworthiness and Due Diligence	22

## STEEL CARGO CLAIMS

Peter Davidson, Brisset Bishop

The purpose of this paper is to cite a few examples of how claims for damage to steel differ from other cargo claims. The focus will primarily be on rust damage, involving both wrapped and unwrapped steel.

Rust is the corrosion product formed when steel reacts with oxygen and water. On an unprotected steel surface, rust will develop from the moisture in the atmosphere, particularly where the relative humidity exceeds 60%. Relative humidity in excess of 80% causes more rapid and severe rusting. At sea, or on land close to the sea, the relative humidity of the air is nearly always above 80%. Rust development slows down as the rust coating thickens and limits the oxygen available.<sup>1</sup>

Steel that is shipped unwrapped is so shipped because, under normal circumstances, this coating of rust does not matter. Hot-rolled steel sheets in coils or plates, for example, are often intended to be "pickled" in sulfuric acid or hydrochloric acid before further processing. The pickling will, amongst other things, remove the rust coating.

What can be damaging to unwrapped steel is wetting by water combined with certain other substances, so that the rusting process is accelerated. This produces irregularities in the surface of the steel referred to as pitting. The "salt" in seawater is one such substance but so are acid rain and emissions from factories and incinerator chimneys.<sup>2</sup> In addition, salt spray can often be found on the docks of a seaport. Moreover, as Canadians, we are familiar with the fact that in wintertime, the effect of road salt can extend to anything within splashing range of the road surface.

---

<sup>1</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., pp. 40-43.

<sup>2</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., pp. 43-44.

The position with regard to wrapped steel is somewhat simpler. Wrapped steel, of which cold-rolled sheets in coils are a prime example, is so packaged because, in most instances, if it is rusty at all, it is considered to be damaged.<sup>3</sup> The protection usually consists of oil on the surface of the steel. Once the steel has been "coiled", it is wrapped in a single sheet of kraft paper and lined with an adhering film of plastic, the overlaps of which are not usually sealed. The unit is then fitted with an outer metal wrapper composed of waste steel sheets. Thereafter, flat metal strapping bands are applied around the circumference of the unit and transversely through the centre core.<sup>4</sup> The wrappers are often painted.<sup>5</sup>

At the time the packing is completed, the surface of the steel is, or should be, immune to the effects of atmospheric moisture. It is liable to be damaged if water, fresh or otherwise, condenses inside the package (even between the turns of the plating), or penetrates the packing.<sup>6</sup>

When delivered to the carrier, unwrapped steel will, to some extent, be visibly rusty. The condition of wrapped steel will, of course, normally be concealed.

The overwhelming majority of steel cargo claims, at trial or in negotiated settlements, are essentially determined by whether the cargo owner can meet the initial burden upon him of proving that the cargo was not delivered in the same condition as received on board<sup>7</sup>.

---

<sup>3</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 37.

<sup>4</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 126.

<sup>5</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 84.

<sup>6</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., pp. 15, 21, 73.

<sup>7</sup> In cargo claims generally, the burden of proof, as stated in Kruger Inc. et al. v. Baltic Shipping Co. ((1989 47 D.L.R. (4<sup>th</sup>) 498 @ p. 502 (F.C.A.) approving (1988) 1 F.C. 262 @ p. 267) is as follows:

- "1. Initially, the cargo owners need only establish their interest in the cargo, that it was not delivered in the same apparent good order and condition as received on board and the value of the cargo lost or damaged. If the carrier offers no defence, the plaintiffs will obtain judgment.

### Clausing Bills of Lading

What distinguishes the carriage of steel from the carriage of most other cargoes is the amount of time and effort devoted to determining pre-shipment condition with respect to (a) sufficiency of packing, (b) existing physical damage and (c) the rust condition of the cargo. Most goods are carried under clean bills of lading. In the case of steel cargoes, however, the bills of lading are likely to be filled with notations. This is the practical application, on a daily basis, of the decision of the UK Court of Appeal in Silver & Layton v. Ocean Steam Ship Company<sup>8</sup>.

Some twenty-one thousand tins of frozen eggs of 42 lbs. each were shipped on board the steamship "Aeneas" from Shanghai to London in 1927. Approximately 50 or 60 tins were rejected when they were brought on board because they were seen to be damaged. Clean bills of lading were issued for the remainder<sup>9</sup>.

- 
2. The carrier can shift the burden of proof back to the plaintiffs by establishing that the loss or damage is attributable to one of the excepted perils set out in Article IV of the Hague Rules.
  3. Thereafter the cargo owners must establish the carrier's negligence or both that the ship was unseaworthy and that the loss was caused by that unseaworthiness.
  4. If the points, in the context of unseaworthiness, are established, the carrier can only escape liability by establishing that due diligence was exercised to make the ship seaworthy."

<sup>8</sup> (1929) 34 Ll.L. Rep. 149 (K.B.); (1929) 35 Ll.L. Rep. 49 (C.A).

<sup>9</sup> The voyage was uneventful, although one cannot resist the temptation to refer to the Court's description of the discharge of the cargo at London, if only as an illustration of characteristic English understatement.

"These tins were at first stacked on a wooden tray, with very slight sides. It was found that some tins slid off or fell unpleasantly near the heads of people of working below. They not unnaturally protested and the ship adopted a system of discharging in nets." (Court of Appeal decision at p. 53).

However, this was not the end of the problem:

When the cargo was surveyed at destination, more than 10,000 tins were found to be damaged because they had let in air. They let in air because they became punctured. In some cases the perforations were large and described as "gashes". In others, they were as small as pinholes. In all cases, the instruments which caused the punctures were the edges or points of the tins in contact with one another. When the matter went to Court, in first instance the Defendant shipowners essentially succeeded on the grounds of insufficiency of packing and perhaps the matter would have ended there but for that the fact that the Trial Judge made the following determination:

"I am satisfied that these goods inevitably received, and must receive, and did receive, damage at each stage of their progress – they go through so many handlings – that the damage began when they were on their way from the cold store in Shanghai to the ship; that some damage was done on board the ship in Shanghai; that some damage was done during the discharge from the ship into lighters; and that some damage was done when the goods were being dealt with by the lightermen and the cold storage employees and the vanmen at the later stages of the progress."<sup>10</sup>

In other words, the damage was caused by something that could just as easily occur on land as at sea.

Noting that the tins would have been covered with frost at time of loading, the Court of Appeal unanimously found that the shipowner was estopped from proving that some tins were gashed when the goods were shipped but was free to raise the question

---

"Mr. C.R. Taylor, dock representative of the Union Coal Storage Company, said he was present when the tins were discharged, and he protested against the use of nets. Mr. Nightingale, the Superintendent of the ship, replied that they had carried thousands of tons of that class of cargo and knew how to discharge it." (K.B. decision at p. 150).

This being the London docks, one is left to imagine the precise language used to get these points across.

<sup>10</sup> K.B. decision at p. 153.

whether there was minor or pinprick damage at that time. It is worth remembering that the pinprick damage was not simply difficult to see: it was concealed.

On the question of insufficiency of packing, the shipowners had contended that (a) the eggs were packed in uncovered tins and, therefore, were difficult to handle when frozen and had less protection than if the tins were covered, (b) the tins had sharp edges and corners and were therefore dangerous to each other and (c) the tins were of too-thin plating to stand the wear and tear of contact with other tins. By a two-to-one majority, the Court of Appeal ruled that the shipowner was estopped from raising the first two grounds advanced in support of the insufficiency of packing defence because it would have been obvious on shipment that the tins (1) were uncovered and (2) had rectangular edges. The result of the Court of Appeal's decision was that the shipowner was held liable for 60% of the claim, 10% representing damage which had occurred up to time of discharge and 50% representing damage caused during discharge. Damage associated with the pinprick holes in the tins at time of loading, for which the shipowner was not responsible, was assessed at 15% of the claim and post-discharge damage at 25%.

What this decision leaves open for interpretation is the precise choice of words to describe what the carrier perceives to be insufficient packing. Indeed, the dissenting judge had trouble with this.<sup>11</sup> Perhaps the shipowner could have claused the bills of lading with remarks such as "tins uncovered", "tins with sharp corners" but should he have gone so far as to say "the packing of these goods is considered insufficient because ..."?

Another issue left open from Silver v. Ocean Steam Ship, of course, is the balance to be struck between the need to recite the apparent order and condition of cargo in the bill of lading and the requirement of the shipper for a clean bill of lading in

---

<sup>11</sup> "I doubt whether a square tin can be said to be not in good order and condition because it is square and has always been so, or because it is uncovered and has always been so uncovered"; Court of Appeal decision at p. 55.

order to receive payment under a letter of credit. Silver v. Ocean Steam Ship is a case of concealed damage in the sense that the condition of the eggs could only be determined once the tins had been opened at destination. However, the condition of the eggs was directly related to the "apparent order and condition" of the packing. What the case strongly suggests to the shipowner is that, whether the cargo is wrapped or unwrapped, if there is anything visible upon a reasonable inspection to indicate that it might be damaged or might not be suitable for ocean carriage, a notation must be made in the bill of lading. There is no opportunity to change one's mind later.

Notwithstanding that warning, it seems that, in the years that followed, notations more often than not found their way into letters of indemnity given by shippers to shipowners in consideration of the issuance of clean bills of lading. We have no way of knowing how often claims were made under these letters of indemnity but the danger to shipowners in accepting them was made clear by the UK Court of Appeal in Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London), Ltd. in 1957.<sup>12</sup> In that case, a letter of indemnity had been given with respect to a shipment of barrels of orange juice to avoid the insertion of the notation "old and frail containers in leaking condition" in the bill of lading. The claim under the letter of indemnity was held to be unenforceable as it was based upon an unlawful transaction, i.e. a false representation that would be relied upon by persons who received the bill of lading.

We read in the case report that in the previous 20 years it had become customary, in the short sea trade in particular, for shipowners to give clean bills of lading against letters of indemnity in cases where there was a bona fide dispute as to the condition or packing of the goods. However, as one of the judges remarked: "This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness."<sup>13</sup> The inference may be that a letter of indemnity is enforceable within a narrow range of the spectrum, eg. where the shipper

---

<sup>12</sup> (1957) 2 Lloyd's Rep. 1.

<sup>13</sup> Lord Justice Pearce at p. 13.



in good faith represents that the remark which the shipowner wishes to insert in the bill of lading is not indicative of damage or inadequate packing but the representation turns out to be wrong.

Did Brown, Jenkinson bring an end to the practice of issuing clean bills of lading in exchange for letters of indemnity? Again, apparently not, as nine British P&I Clubs felt obliged to issue a circular on October 22, 1963, reminding their members that their insurance coverage would be prejudiced if they accepted such letters.<sup>14</sup>

This was followed on February 28, 1964, by another circular from the Clubs listing some 27 clauses to be used when describing steel shipments which show signs of rust or a similar condition on shipment, including "partly rust-stained", "rust-spotted", "wet before shipment", "pitted" and "rusty". It was emphasized that the clause to be

---

<sup>14</sup> The circular stated:

**"Letters of Indemnity**

There appears to be a growing tendency among shipowners and charterers at certain ports, in particular at Antwerp, to accept letters of indemnity in return for clean bills of lading covering cargo that is known to be damaged at the time of shipment.

Steel shipments from Antwerp are a case in point. At that port, letters of indemnity have been accepted by Owners in exchange for clean bills of lading when the cargo is visibly rusty on shipment. On occasions, shippers have intimated that they do not object to the bills of lading being claused "atmospherically rusty" or "partially rusty" but in practice it has been found that clauses of this nature provide no protection to the carrier.

The undersigned associations wish to draw members' attention to the fact that:

- a) The issuing of clean bills of lading when cargo is known to be damaged is fraudulent and the acceptance of a letter of indemnity does not correct the position.
- b) Members' rights of recovery from the undersigned associations will be prejudiced in such cases.
- c) If steel shipments are seen to be rusty on shipment, Mate's Receipts and bills of lading must be claused with the single word "rusty". Special qualifications to that word "rusty", such as "atmospherically" or "partially", to meet the requirements of shippers are not acceptable."

used must accurately describe the apparent condition of the steel on shipment and must also come within the 27 clauses set out in the circular.<sup>15</sup>

Notwithstanding the risk of prejudicing their coverage and despite the obvious lack of sympathy from the Courts, shipowners still did not always insert notations in bills of lading for steel shipments. Such was the pressure from suppliers, who continued to demand clean bills of lading for their cargo, that several years elapsed before the use of claused bills of lading became widespread. For this to come about, it became necessary for buyers and sellers to resolve the documentary credit problem by agreeing among themselves that many of these clauses did not affect the condition or transportability of the steel. It should be noted that this is not a consensus of opinion shared by the shipping industry.

The vast majority of documentary credits incorporate the terms of the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce. The 1951 edition of the UCP defined a clean bill of lading as "one which bears no superimposed clauses expressly declaring a defective condition of the goods or packaging" with the added explanation that clauses in any of three defined groups should not be considered as reservations rendering a bill of lading unclean. In 1962, the following instruction was added to the UCP:

"Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states clauses or notations which may be accepted."

The ICC recommended that a seller have it clearly agreed before the conclusion of the sales contract that the buyer will instruct the bank holding a letter of credit for the seller's benefit to accept either a clean bill of lading or a bill of lading bearing certain

---

<sup>15</sup> For the text of the circular, see Sparks, *Steel Carriage by Sea*, 3<sup>rd</sup> ed., p. 58.

specified carrier's clauses (but no others), if they can be anticipated in that class of trade.<sup>16</sup>

If the "officious bystander" were to ask shippers and carriers what they believe to be the significance of the clauses usually found in bills of lading for the carriage of steel<sup>17</sup>, they would receive vastly different answers. A steel supplier would say that the notations are of no importance and simply the result of the carrier being "overzealous in protecting his interests".<sup>18</sup> A carrier, on the other hand, would say that such clauses are necessary to protect him from claims that are "grossly exaggerated, if not actually fraudulent".<sup>19</sup>

The problem of pre-shipment notations on steel cargoes is exacerbated by the fact that once the condition has been identified, the die is cast. Damaged steel coils cannot be replaced like torn bags of rice or coffee. Moreover, in the case of cold-rolled steel coils, if damage to the contents is suspected, it would be very expensive to verify the actual condition as this would involve having the coils unwrapped or "de-canned".<sup>20 21</sup>

---

<sup>16</sup> ICC Publication entitled "The Problem of Clean Bills of Lading".

<sup>17</sup> The ICC itself, in the publication previously cited, listed 37 clauses for iron and steel products.

<sup>18</sup> ICC publication previously cited, at p. 4. See also the report of Thyssen, Inc. v. SS "Eurounity" (1994) A.M.C. 1638 @ 1644 (U.S.C.A. 2<sup>nd</sup> Circuit) where testimony was given by an Antwerp forwarder that "rust stained", "partly rust stained" and "wet before shipment" are standardized notations that have been used for approximately 30 years to refer to non-damaging, atmospheric rust that does not affect the value of hot-rolled steel.

<sup>19</sup> Circular of May 1979 of The London Steam-Ship Owners' Mutual Insurance Association Limited.

<sup>20</sup> Francosteel Corp. et al. v. Fednav Ltd. et al. (1990) 37 F.T.R. 184 @ 187.

<sup>21</sup> An alternative solution to the problem, which appears to have found acceptance in United States courts, is the Retla Clause, named after the steamship company that was its author. The clause, on the face of a bill of lading which otherwise contains no remarks, reads:

"The term 'apparent good order and condition', when used in this bill of lading with reference to iron, steel or metal products, does not mean that the goods when received were free of visible rust or moisture. If the shipper so requests, a substitute bill of lading will be issued, omitting the above definition and setting forth any notations as to rust or moisture which may appear on the Mate's or Tally Clerk's Receipts."

Tokio Marine & Fire Ins. Co. v. Retla S.S. Co. (1970) A.M.C. 1611 @ 1613 (9<sup>th</sup> Circuit)

In the days of Silver v. Ocean Steam Ship, cargo was apparently checked as it was placed in stow at the port of loading. In modern times, particularly with steel cargoes, this would be either impossible or very dangerous. In fact, the cargo is inspected on the dock prior to loading, the notations subsequently inserted in the bill of lading reflecting what could be seen at that time. This is so even though, if an "on board" bill of lading is demanded, Article III, Rule 7 of the Hague Visby Rules requires a statement in the bill of lading of the apparent order and condition of the goods when "shipped".<sup>22</sup> In practice, damage occurring during loading, unless it is obvious, eg. from cargo being dropped, will not be noted.

It is, in theory, possible for the inspection which gives rise to the notations to be performed by a steamship checker or a ship's officer but in fact, these notations are usually made by a marine surveyor employed by the shipowner and, in many cases, paid for by his P&I Club. Depending upon the port at which the cargo is loaded, this brings to the inspection of the cargo a degree of expertise perhaps not anticipated at the time of Silver v. Ocean Steam Ship. However, even with additional sophistication involved in recording the condition of the cargo, notations such as "wet before shipment" and "rusty" are, to some extent, subjective.<sup>23</sup> In recent times, therefore, steps have been taken by the P&I Clubs to seek consistency in interpretation and they have developed a more detailed description of the surface condition to which each of the

---

Under such a clause, the carrier is not estopped from providing the actual condition of the cargo before shipment, because the purchaser did not rely on the description of the goods in the bill of lading. (Mr. Galvanized, Inc. v. SS Shin Ming et al. (1982) A.M.C. 1049; Acwoo International Steel Corp. v. M.V. "Hosei Maru" et al. (1989) A.M.C. 2894) This is not an ideal solution.

<sup>22</sup> This is made clear by the French version of the Rule found in Schedule 3 of the Marine Liability Act, S.C. 2001, c.6; the English version of the Rule does not have the equivalent of the words "s'il contient les mentions de l'article 3, paragraphe 3"; the French version would appear to be correct as it reproduces the text of the official version of the 1924 Brussels Convention. See Tetley, Marine Cargo Claims, 3<sup>rd</sup> ed., pp. 1111-4.

<sup>23</sup> Not all ship's officers would use the same notation to describe what they see. The following clause appears in some time charters: "Remarks, if any, to be inserted on the Mate's receipt shall be limited to the exceptions noted by the surveyor. Cost of (the) survey shall be shared equally by Owners and Charterers."

standard clauses should apply.<sup>24</sup> For example “rusty” now means “brown to heavy deep brown rust which, when removed by wire brushing, reveals an uneven and dull steel surface”. “Wet before shipment” means “water visible on the surface or dripping out of bundles”.

With hot-rolled steel, bills of lading will sometimes, although not often, contain a reference to the American Rust Standard Guide (ARSG) or the Swedish Standards. These involve coded systems of photographs to describe the surface condition of steel ranging from entirely new blue to entirely rusted. While frequently used between buyer and seller, there does not appear to be a strong trend towards their adoption by sea carriers. Similarly, the use of photographs instead of written notations to describe steel at time of loading appears impractical as a steel shipment may typically involve several thousand tons of cargo.<sup>25</sup>

### **Claused Bills Of Lading – Burden Of Proof**

A properly cloused bill of lading serves as proof of visible, actual damage at time of loading, if there is any. It also negates any inference that would arise from the issuance of a clean bill of lading. The practical effect is that the claimant faces the burden of proving delivery to the carrier in good order by means other than the bill of lading itself. As the cases illustrate, the claimant may attempt to do this by trying to (1) eliminate any other possibility or (2) finding a more probable cause of damage that would place responsibility on the carrier. Some examples follow.

In Wirth Ltd. et al. v. Belcan N.V. et al.<sup>26</sup> bundled rails, when unpacked at destination, had small notch-type defects on the flange and scratching at the base.

---

<sup>24</sup> Steel Pre-Shipment Surveys, A Guide to Good Practice, Arthur Sparks MNI and North of England P&I Association, published 1993.

<sup>25</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 50.

<sup>26</sup> (1996) 112 F.T.R. 81 (F.C.T.D.)

Clean bills of lading had been issued at time of loading in Antwerp. Mr. Justice Nadon stated<sup>27</sup>:

“In my view, the bills of lading constitute a statement by the carrier that, upon a reasonable and practical examination of the cargo, no damage was visible. I am satisfied that if damage existed upon receipt of the cargo at Antwerp, such damage could not be discovered upon reasonable examination. That is what, in my view, the clean bills of lading mean in the present case. The bills of lading are certainly not a statement that the cargo was in perfect condition when it arrived at Antwerp.”

In that case, the shipment was discharged without exceptions, no evidence was presented with respect to the handling of the rails before they arrived at the loading port and the action was dismissed.

In Voest-Alpine Stahl Linz GmbH et al. v. Federal Pacific Ltd. et al.<sup>28</sup> wrapped coils of galvanized steel were carried from Antwerp to Montreal under bills of lading containing notations such as “metal packing partly rust-stained where uncoated” and “core envelopes slightly gaping, where gaping contents exposed”. A comparison of photographs take at time of discharge with several taken at time of loading indicated that the rust on the packing had substantially increased during the voyage and in some instances, there were patterns of rust consistent with condensation drip-down in the holds. When surveyed at the consignees’ warehouse approximately 2 months after discharge, some of the galvanized sheeting was found to be rusty, although there appeared to be no connection between the rusting on the exterior of the wrappers and the degree of rust found inside particular coils. No proof was made of the conditions to which the coils might have been exposed from time of manufacture in Austria to time of

---

<sup>27</sup> at p. 96

<sup>28</sup> (1999) 174 F.T.R. 69 (F.C.T.D.)

arrival at the Antwerp docks. However, the Court concluded that on the balance of probabilities, the cargo was loaded in good condition in Antwerp.

In Associated Metals & Minerals Corp. v. M.V. "Olympic Mentor" et al.<sup>29</sup> the plaintiff established delivery of wrapped steel coils to the carrier in good order by showing that:

- a) the damaged condition discovered at outturn would have affected the way the packages appeared on delivery had such conditions existed at the time; for example, the coils were dry at time of loading but covered with sweat at time of discharge;
- b) the cargo was packaged and transported to the loading port in such a manner and under such conditions that should have prevented damage from occurring en route.

To rebut the plaintiff's case, the carrier had presented evidence that there were no other claims for steel cargoes carried in the same holds on the vessel. The Court considered this to be insufficient without proof of the condition of the coils as actually received by the other consignees.

Evidence of pre-shipment and post-delivery handling will not always assist the claimant. In Chung Hwa Steel Products and Trading Company Ltd. v. Glen Line Ltd.<sup>30</sup>, a decision of the King's Bench Division of the High Court of Justice in London, the Court heard evidence of this nature in connection with a claim for pilferage from cases of wool gabardine. The action was brought only against the ocean carrier, although the goods had undergone land transportation at both ends. The judge, in concluding that the

---

<sup>29</sup> (1997) A.M.C. 1140 (S.D.N.Y.)

<sup>30</sup> (1935) 51 Lloyd's Rep. 248

Plaintiff had not discharged the burden of proof against the Defendant, made the following comment:

“Now, of course, when one has a case of this kind, everybody through whose hands the goods have passed comes and says: ‘While they were in my charge they could not possibly have come to any harm at all.’ That is true of everyone along the line . . . but what I have got to form an opinion about is whether the Plaintiffs have succeeded in discharging the onus which lies upon them of showing not only that the goods might have disappeared from the cases while the cases were on board the ship, but that they did – which is a very different thing.”

In Francosteel Corp. et al. v. Fednav Ltd. et al.<sup>31</sup>, shipments of cold-rolled steel and zincrometal steel sheets in coils were carried from Antwerp to Hamilton, Ontario and Detroit, Michigan. The bills of lading were claused to the effect that the wrappers were either partly rusted or white oxidated. These were said to be minor comments. However, even at time of discharge, the appearance of the coils did not alert the surveyors to inspect for internal damage. Mr. Justice Rouleau stated<sup>32</sup>:

“Thus it appears to me that there is at least a possibility that moisture may have already penetrated the coils prior to shipping, which could subsequently have condensed and be the primary cause of the rust damage eventually discovered. The foregoing facts are sufficient in my mind, particularly where we are concerned with packaged goods, to stand in the way of the Plaintiff being able to establish, as part of its prima facie case, that the cargo was moisture free and in good condition prior to being shipped.”

---

<sup>31</sup> (1990) 37 F.T.R. 184

<sup>32</sup> at p. 195



In some cases, there will be evidence that seawater has entered the vessel's holds during the voyage or that there has been ship's sweat (condensation on the ship's steel work) or cargo sweat (shown by condensation on the cargo surface). A Plaintiff will wish to use this evidence as an alternative to direct proof that steel has been received by the carrier in good order and delivered by him in damaged condition. However, proof of water in the holds is not necessarily proof of damage, particularly where wrapped steel is concerned. This would, I believe, be borne out if steel carriers were to record the location in stow of each coil according to its individual manufacturer's number. So far as known, this is not the usual practice, but a few years ago a ship carrying steel coils from Antwerp to Chicago experienced hatch leakage in one hold with the result that numerous coils were actually standing in seawater at one point. The discharging stevedores recorded the individual numbers of the coils that had tide marks on them indicative of seawater contact. A large claim for rust damage was presented by the consignees but when the claim was examined on a coil by coil basis, it was found to relate mostly to cargo in holds unaffected by seawater (or condensation for that matter). Moreover, it was found that for about one third of the coils that had been standing in seawater, there was no claim at all. In other words, although the packing is not designed to be watertight, it can nevertheless be quite effective in some cases.

Surveyors inspecting steel shipments, whether they act for carrying or cargo interests, will frequently use a silver nitrate test to determine the possibility of seawater wetting. Strictly speaking, this should simply be one step in the process of investigation although one often sees that the investigation has come to a halt when the silver nitrate test has proved positive. A positive result to a silver nitrate test does not indicate contact only with seawater. The true nature of the impurities in the water causing the positive reaction should be determined by spectrographic analysis in a laboratory.<sup>33</sup>

Should the outcome of a court case or arbitration proceeding rest on a silver nitrate test, inquiry should be made as to whether the testing and sampling has been

---

<sup>33</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 150

carried out correctly. Rust scrapings must be removed directly into a suitable receptacle and soaked in distilled water before applying silver nitrate solution to the liquid. The rust scrapings must not come into contact with the hands of the sampler because various solids such as sodium and chlorides, etc., are exuded through the pores of human skin.<sup>34</sup> Also of importance is the representative nature of a positive result in relation to the shipment as a whole. The cargo is most likely to be insured and cargo underwriters may cast a wary eye on any claim presented by their assured that is purely for fresh water damage.<sup>35</sup> One or more positive results may enable the claim to be more easily accepted by underwriters but such results may also discourage further inquiry on the part of the assured and may not tell the whole story.

### Proof of Damage on Delivery

Nowadays, a great deal of effort is devoted to the efficiency of distribution of goods. The build-up of inventory is to be avoided. Carriers – even marine carriers, as far as possible – are expected by their customers to maintain schedules that will put a product in their hands at the right moment but not a moment sooner. That is not always the case with steel. Very often, steel that has been carried by sea is stored for several months before it is used for its intended purpose or, in the case of wrapped steel, opened for inspection. This certainly has an effect on a steel claimant's ability to prove that the cargo was damaged while in the custody of the ocean carrier.

In Francosteel Inc. et al. v. Fednav Ltd. et al.<sup>36</sup> Rouleau, J, stated:

"I am not satisfied that the Plaintiff has proven that the cargo was discharged in a damaged state, so as to permit a prima facie inference

<sup>34</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 151

<sup>35</sup> "loss damage or expense caused by inherent vice or nature of the subject matter insured" is a common exclusion in marine cargo policies.

<sup>36</sup> (1990) 37 F.T.R. 184 @ 195

that the damage occurred while in the carrier's possession... It was not until some four weeks (after discharge), when the coils were de-canned, that rust damage was discovered. During this time, the cargo had been stored in enclosed warehouses, where undoubtedly the atmospheric temperature was warmer than that of the cargo; had moisture penetrated the packaging it no doubt would have condensed on the coils and may have been the ultimate cause of rusting."

In Kurt Orban Company, Inc. v. SS Federal St-Laurent et al.<sup>37</sup> Plaintiff's surveyor examined a cargo of galvanized steel coils almost two months after delivery and found a form of white rust inside some of the coils. Samples of the rust were sent to a chemist for examination. The chemist tested for only four of the elements present in seawater. He did not test for magnesium, which is generally considered necessary for reliability. Furthermore, his test for sodium yielded results far below the relative proportion of sodium in seawater. The Court stated<sup>38</sup>:

"Plaintiff's acceptance of the goods without notice of damage within three days of delivery is prima facie evidence that the cargo was discharged in good order and condition, as described in the bill of lading. Plaintiff has not overcome this presumption. The tests conducted at Plaintiff's insistence, even if they had resulted in a definitive conclusion of damage by saltwater, would still be of questionable probative value since they were not conducted until about 2 months after the coils were discharged and delivered to Plaintiff, and without giving Defendant notice or the opportunity to inspect the goods or observe the tests."

---

<sup>37</sup> (1975) a.M.C. 55 (S.D.N.Y.)

<sup>38</sup> at p. 58

In Acwoo International Steel Corp. v. M.V. "Hosei Maru" et al.<sup>39</sup> a shipment of cold-rolled steel coils arrived in Detroit from Korea in early September 1979. The coils were examined on the ship and on the pier by a total of four experienced marine surveyors representing various interests. None of the four representatives arranged to have the coils opened or "decanned" to determine whether the steel had been rusted. The wrappers exhibited clear signs of atmospheric rusting and there were signs that some of the coils had been exposed to an additional source of fresh water, leaving lighter-coloured streaks on some wrappers. In the circumstances of the case, the Court found that the consignee's failure to open any of the coils for evaluation was fatal to its contention that the cargo had been damaged while on board the vessel.

### Damages

Claims against carriers for damage to steel frequently involve questions of apportionment as well as the amount of damages.

With regard to apportionment:

"Where the damage is caused in part by an act or fault for which the carrier is responsible and in part by an act or fault for which the carrier is not responsible, the carrier must be able to make proof sufficient to separate the damage resulting from one cause from the damage resulting from the other, or in the alternative be held responsible for the whole claim."<sup>40</sup>

In breach of contract cases, there is as yet no apportionment of fault.<sup>41</sup>

---

<sup>39</sup> (1989) A.M.C. 2894 (Eastern District of Michigan)

<sup>40</sup> Tetley, Marine Cargo Claims, 3<sup>rd</sup> ed., p. 328.

<sup>41</sup> It is interesting to note, nevertheless, that a proposed new US COGSA, still in draft form, would contain the following provision:

In the carriage of steel, however, damage may often occur on more than one occasion and different legal principles apply. For example, if there is evidence that some damage occurred prior to loading and some damage during the voyage (for which the shipowner is responsible), the burden would normally be on the claimant to separate the damage occurring during the voyage from the rest of the damage.

The apportionment of damage occurring on more than one occasion need not be an exact science, as the case of Silver v. Ocean Steam Ship itself indicates. It is not an "all or nothing" proposition. In a recent arbitration decision arising from an action commenced in the Federal Court of Canada, the arbitrator found that hot-rolled coils of steel had already been affected by chlorides when shipped under claused bills of lading but had also suffered seawater damage during the voyage. The arbitrator made an award based on his estimation that 216 out of 702 coils were stowed on the ship in locations where they were likely to have been damaged by seawater.<sup>42</sup>

In the calculation of damages, reference is often made to the rule that the claimant should be recompensed on the basis of market values at the time and place of

---

"9(e) Allocation of Damages –

(1) IN GENERAL – if loss or damage is caused in part by a breach of a carrier's obligations, or the fault or neglect of a carrier, and in part by one or more of the exceptions described in subsection (c), then the carrier or the ship is ...

(A) liable for the loss or damage to the extent that the party seeking to recover for the loss or damage proves that it is attributable to that breach, fault or neglect; and

(B) not liable for the loss or damage to the extent the carrier proves it is attributable to one or more of those exceptions.

(2) INSUFFICIENT EVIDENCE – if there is no evidence upon which the trier of fact in an action for loss or damage can base a determination of the extent to which the loss or damage is attributable under paragraph (1), and a carrier or ship is found liable for an undetermined portion of such loss or damage, then the aggregate liability of all the carriers and ships is one-half of the loss or damage."

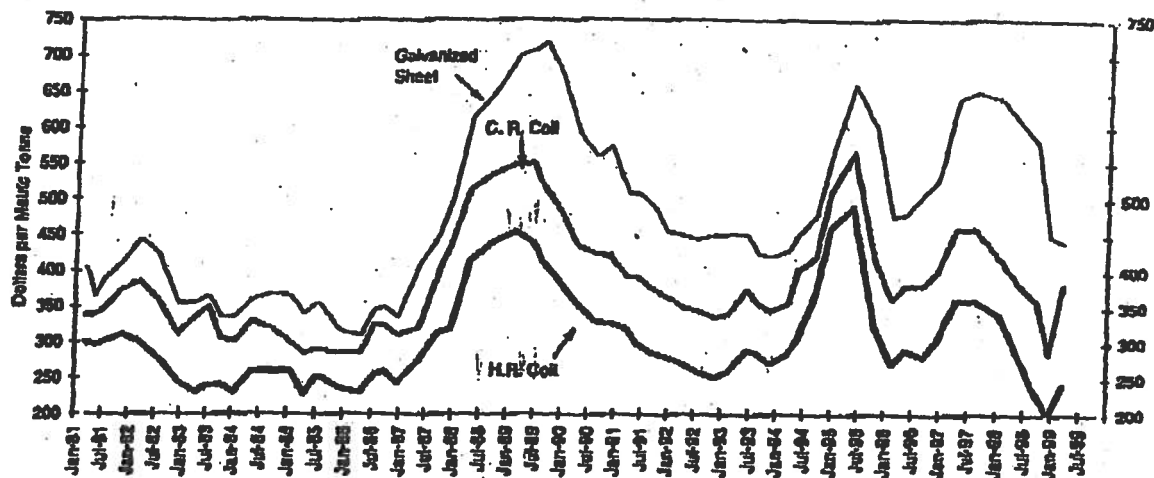
It remains to be seen whether, and if so, when, a provision of this nature would gain wide acceptance.

<sup>42</sup> Francosteel Canada Inc. v. The M.V. "African Cape" et al., Federal Court No: T-625-97.

delivery (A.S.M.V. less A.D.M.V.)<sup>43</sup>. In the case of steel shipments, it often happens that damaged steel is sold on the salvage market from three to fifteen months after the cargo has been delivered. In such cases, considering the normal fluctuations in the steel market<sup>44</sup>, can the salvage sales be considered evidence of arrived damaged market value? The decision of the Commercial Court in the U.K. in The "Good Friend"<sup>45</sup> involved a cargo of soya bean meal that had to be resold by the importer because it could not lawfully be discharged in Cuba. The defendant shipowners objected to the resale price as evidence of damaged value because the resale was made some two months after the shipment would otherwise have been delivered. The Court ruled, however, that "if a plaintiff reasonably deferred reinstatement of the loss caused to him by a wrongdoer and in consequences reinstatement became more expensive he might be able to recover the full cost because it represented his true loss". What the importer had lost was the value of the soya bean meal when it should have been delivered in July. The Court had accepted that the measurement of loss could be deferred from July until September when the importer repurchased a replacement cargo, as the measure of which it would have been worth to him if delivered. Whether the deferred sale of steel on a falling market falls into this category remains to be determined.

<sup>43</sup> Tetley, Marine Cargo Claims, 3<sup>rd</sup> ed., pp. 323-324.

<sup>44</sup> WSD PriceTrack History – Antwerp Spot Prices, January 1981 to July 1999



<sup>45</sup> (1984) 2 Lloyd's Rep. 586

Very often the question arises as to whether damaged cargo should have been reconditioned rather than sold at a reduced price. This is particularly important in the case of hot-rolled steel because the decision to recondition the cargo can have a direct mitigating effect on the loss.<sup>46</sup> In general, "the market discount theory is not the exclusive measure of damages and need not be applied if circumstances suggest a more appropriate alternative" such as remediation costs.<sup>47</sup>

Another difficulty with the assessment of damages is that a significant amount of steel is sold on terms whereby the end user does not assume risk of loss or damage in transit until after the ocean voyage has been completed. Typically, in the Western Europe to North America trade, steel manufactured to the end user's specifications will be sold by the manufacturer to its North American subsidiary on FOB load port or CIF discharge port terms. The subsidiary will invoice the end user on terms that require delivery at the purchaser's plant.<sup>48</sup> In effect, steel that has arrived at the purchaser's plant in damaged condition no longer meets contract specifications. The damage is not simply just another problem to be dealt with but creates a situation where the purchase price may need to be renegotiated. As a result, damages are frequently assessed in advance of the steel being put into production rather than waiting until the steel has been used and then calculating what additional costs were incurred because it was damaged. The numbers involved are bound to be different, depending on which approach is taken.

---

<sup>46</sup> If the progression of salt water rust can be arrested in time, say 4 to 6 weeks, through acid bath pickling, the goods can be returned to prime condition. Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed. pp. 15, 23 and 152.

<sup>47</sup> Thyssen, Inc. et al. v. SS "Eurounity" et al. (1994) A.M.C. 1638 (Court of Appeals, Second Circuit).

<sup>48</sup> In the ocean bill of lading, the manufacturer will be named as the shipper and the North American subsidiary as consignee. No documentary credit is involved so that, for that purpose at any rate, a claused bill of lading presents no difficulty.

### Excepted Perils, Seaworthiness and Due Diligence

Once the claimant establishes that damage to cargo has occurred on the vessel, the burden rests with the carrier to exonerate himself. In the case of steel, considering the nature of the damage, this is not likely to be easy. However, a few comments can be made with respect to the evidence that is likely to be presented in connection with these issues.

In addition to appointing surveyors to ensure that bills of lading accurately describe the apparent order and condition of cargo at time of loading, P&I Clubs have for many years usually required the surveyor to examine and report on the condition of the vessel's hatches.<sup>49</sup> This will usually include the testing of the vessel's hatch covers for weathertightness.<sup>50</sup> The two most common leak detection tests are the water hose test and the ultrasonic test. There are disadvantages to both tests but if they reveal that the hatch covers are not weathertight, steps can be taken to remedy the defect before the commencement of the voyage.<sup>51</sup>

If the vessel's hatches are found weathertight while she is in port, there is no guarantee that they will remain so under seagoing conditions. When I say "no guarantee", I mean that literally. When the hatch covers are in good condition, the

---

<sup>49</sup> May 1979 circular of The London Steam-Ship Owners' Mutual Insurance Association Limited; Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 78; Steel Pre-Shipment Surveys, A Guide to Good Practice, Arthur Sparks MNI and North of England P&I Association, 1993.

<sup>50</sup> "Watertight" is a technical term. In the Canadian Hull Construction Regulations, CRC c.1431, s.2, it means, in relation to a structure, that the structure is capable of preventing the passage of water through it in any direction. "Weathertight" means the structure is capable of preventing the passage of seawater through it in ordinary sea conditions.

<sup>51</sup> Ultrasonic testing is the preferred method because areas of inadequate hatch sealing are accurately located. The drawbacks of ultrasonic leak detection tests are, however, that:

- a) the equipment requires an experienced and specialist operator to interpret the readings;
- b) the equipment requires regular calibration;
- c) the equipment is not normally part of the ship's equipment.



manufacturers guarantee weathertightness with the hatches in a static condition. There is no such guarantee when the vessel is at sea.<sup>52</sup> The steel hatch panels are not part of the vessel's structure; they are a ship's fitting. Therefore, as they are only attached in places to the vessel's structural parts, they do not move completely in unison with the hatchway when it temporarily distorts through being subjected to racking, hogging and sagging stresses.<sup>53</sup> However, if there is evidence that that hatch covers have been properly maintained, seawater entry under severe weather conditions can be considered a "peril of the sea".<sup>54</sup>

Quite apart from the obvious connection between hatch leakage and unseaworthiness, the question has arisen from time to time as to whether a vessel's ventilation system, by reason only of its design, should be considered unseaworthy.

There are purpose-built container ships, car carriers, livestock carriers and other types of vessels constructed for specific trades. There is, so far as I know, no such thing as a purpose-built steel-carrying ship. Most of the vessels employed in the trade are single deck bulk carriers. They have unobstructed spaces in their holds and large hatch openings, permitting steel to be more easily loaded, stowed and discharged.<sup>55</sup> Their ventilation systems, however, are designed with the knowledge that they will frequently be carrying cargo, such as grain, that will fill their holds. For such cargoes, a system of natural, rather than forced air, ventilation may be entirely suitable.

In Nissho-Iwai American Corporation v. SS "Eurymedon" et al.<sup>56</sup>, ship's sweat caused by the inability of the vessel, given its design as a bulk carrier, to ventilate its

---

<sup>52</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 192.

<sup>53</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 175.

<sup>54</sup> Even in the United States, as illustrated by J. Gerber and Co. vs. SS "Sabine Howalt" et al. (1971) A.M.C. 539 (U.S.C.A., 2<sup>nd</sup> Circuit).

<sup>55</sup> Sparks, Steel Carriage by Sea, 3<sup>rd</sup> ed., p. 9

<sup>56</sup> (1981) A.M.C. 2062 (S.D.N.Y.) affirmed 1981 A.M.C. 2068 (U.S.C.A. 2<sup>nd</sup> Circuit)

cargo properly and sufficiently, rendered the carrier liable for rust damage to steel cargo during transit from Japan to Philadelphia. The vessel was described as having only a "mast house ventilation system".

In Associated Metals & Minerals Corp. v. Etelae Suomin Laiva<sup>57</sup>, rust damage to cold-rolled and galvanized steel coils caused by cargo sweat on a voyage from Finland to Jacksonville and Houston in the month of January was found to be a peril of the sea. The vessel met with heavy weather and ventilation could not be carried out during the voyage. In other words, if there can be no intake of fresh air because of the risk of introducing rain or sea spray, it does not matter whether the vessel has a forced air or a natural system.

In Francosteel Corp. et al. v. Fednav Ltd. et al.<sup>58</sup>, the natural ventilation system of a bulk carrier was found to be acceptable for vessels transporting steel. The vessel's equipment was accepted as the norm, few vessels being equipped with forced ventilation systems.

A contrary view was taken by the United States District Court, Southern District of New York in Associated Metals & Minerals Corp. v. M.V. "Olympic Mentor" et al.<sup>59</sup>. In this case, wrapped steel coils (cold-rolled, galvanized and hot-rolled, pickled and oiled) suffered rust damage by ship's sweat. The voyage in question was from Rio de Janeiro to Philadelphia in June and July. Evidence was presented which the Court accepted that:

"Most ships built today are equipped with fans for ventilating purposes. Natural ventilation cannot be relied on to prevent ship sweat since a reduction in wind velocity, a change in wind direction, a change in the

---

<sup>57</sup> (1989) A.M.C. 678 (U.S.C.A., 11<sup>th</sup> Circuit)

<sup>58</sup> (1990) 37 F.T.R. 184 @ 188

<sup>59</sup> (1997) A.M.C. 1140

ship's course, spray, fog or rain may impede or stop ventilation. As a result, natural ventilation cannot be relied on unless the cargo is not sensitive to moisture."

It is doubtful whether, in fact, most ships are so equipped. The carrier was also held at fault for not having equipment to monitor temperature and relative humidity in the holds.

In many cases, of which the "Olympic Mentor" is an example, the question is approached from a meteorologist's perspective, i.e. given the temperature and relative humidity of the air in the hold and the temperature of the steel surfaces of the ship and cargo, should ventilation be carried out? This, to some extent, ignores the larger picture. Although a natural ventilation system may seem primitive in an age that relies on technology, it should be kept in mind that if the cargo in the hold consists entirely of steel or other non-hygroscopic cargo, the moisture you have to worry about is primarily in the air you start with and in the air you let in by ventilating. The air that is let in by ventilating can be many times the volume of the air you started out with. Steel gives off no harmful gasses that have to be expelled so the question that should be asked is whether there is any compelling reason to ventilate at all.