

The Carrier's Liability for Third Parties for Theft and Robbery Under the Danish Carriage of Goods by Road Act

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1 The Rule in § 4 of the Carriage of Goods by Road Act

In recent years courts of law have passed rulings on a number of cases involving theft of goods under carriage.¹ Often the carriage is performed by a sub-contracted carrier. This article concerns the contracting carrier's liability for such sub-contracted contractors in cases of theft or robbery of the goods during carriage.² As far as contractual liability is concerned, the general rule is that the contracting party is liable for the acts and omissions committed by independent contractors.³ § 4 of the Carriage of Goods by Road Act⁴ (the CMR act) consolidates this general position since the rule states that the carrier "is liable for the acts and omissions of persons employed by him or other persons of whose services he makes use for the performance of the carriage, when such persons are acting within the scope of their employment, as if such acts or omissions were his own".⁵ The sub-contracted carrier belongs to the category of persons for which the carrier is liable in accordance with the liability rule in § 4 of the CMR act.⁶ In the following it will be discussed how this rule should be applied in cases of theft and robbery.

2 The Specific Meaning of Liability for Others in Contract

The fact that the rule deals with "contractual" liability for third parties implies that acts or omissions which the independent contractor has committed must lead to a breach of contract between the contracting party and the other party to the

¹ Within the last five years this concerns the following cases in Danish law: U 2004.366H, U 2003.1166 H, U2003.1170 H, U 2002.6/2 H, U2002.1241 H, FED 2002.685 SH, FED 2000.3017 SH, U 1999.1624 SH, FED 1998.1220 V.

² § 4 is also applicable to cases covered by § 43 of the CMR act but the scope of this article is limited to cases that do not fall within the range of § 43 since this provision establishes an extended liability for all carriers involved. The scope of application of § 43 in Danish law is uncertain, see Ulfbeck, *Kontraktens relativitet*, 2000, (Ulfbeck, *Kontraktens relativitet*), p. 379 ff, Jahr, *Direktekrav mot underfraktførere etter CMR-Konventionen* i Mats Tullberg, *CMR – ett seminarium i vägtransporträtt*, 2000 (Jahr, *Direktekrav*), p. 94ff., Vestergaard Pedersen, *Undertransportører som ansvarssubjekter for transportansvar*, U 1997B.320 (Vestergaard Pedersen, *Undertransportører som ansvarssubjekter*), p. 325, Windahl, *Mere om regres mellem CMR-fragtførere*, U 2001B, p. 394 ff.

³ Gomard, *Obligationsret*, volume 2, 3 ed. 2003, (Gomard, *Obligationsret 2*), p. 163, Bryde Andersen og Lookofsky, *Lærebog i obligationsret*, volume 1, 2000, (Bryde Andersen og Lookofsky, *Obligationsret 1*), p. 199, Hagstrøm, *Obligasjonsrett*, 2003 (Hagstrøm, *Obligasjonsrett*), p. 470 Bull, *Innføring i veifraktrett*, 2 ed, 2000, (Bull, *Innføring i veifraktrett*), p. 67.

⁴ Act no. 602 of 9.9.1986.

⁵ The parallel provision in the CMR (Convention on the contract for the international carriage of goods by road, of May 19, 1956 with later amendments) is found in article 3 stating: "For the purposes of this convention the carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own".

⁶ See, e.g. Regnarsen, *Lov om fragtaftaler ved international vejtransport*, 2 ed., 1993, (Regnarsen, *Lov om fragtaftaler*), p. 54.

contract.⁷ Therefore, “liability for third parties” can sometimes be explained as an application of the general rule of contract according to which an agreement is binding and breach of contract results in remedies for the breach.⁸ For example, one of the remedies available to the buyer receiving non conforming goods from the seller is the right to claim a price reduction, or – in cases of material breach – termination of the contract, regardless of whether the breach is attributable to the seller or a third party or to neither of them, since the determining factor is that the seller has undertaken the supply of goods specified in the contract and the goods are not in conformity with the contract. In such cases - even if the breach is due to a mistake committed by a third party - it is not necessary to apply the rule imposing liability for third parties. Liability can be based directly on the contract between the seller and the buyer. However, imposing liability for third parties takes on practical significance if the remedy in question requires special conditions to be fulfilled and only the third party has acted in such a way that may cause the remedy to be applicable. According to § 24, section 1 of the CMR act, the liability of the carrier is generally a no-fault liability. However, this starting point is modified by specific points of defence as specified in section 2. Of particular relevance is the rule providing exemption from liability if the carrier can prove that the loss occurred due to circumstances which the carrier was not able to avoid, and that the carrier could not have prevented the resulting consequences. Case law shows that in general it is harder for the carrier to escape liability in cases of theft than in cases of robbery.⁹ However, even in cases of theft the liability of the carrier is not entirely strict, see eg. ND 1989.100 DH. It is necessary to look at the circumstances under which the theft or robbery took place in order to decide whether the carrier is liable under § 24.

Thus, if the theft or robbery took place while the vehicle was parked then the place, time and duration of the parking are relevant factors, see eg. ND 1982.186 NL, ND 1997.167 DH cp. Rt 1998.1815¹⁰ and U 2003.1170 H. So is the availability of possible alternative more safe parking places, see eg. FED 1994.1589 VL.

Since liability under § 24 is not purely strict the rule establishing liability for the acts and omissions of third parties becomes relevant.

3 Basis of Liability

The contracting party is normally liable for the actions of the independent contractor if the independent contractor has acted negligently. In general, however, it must be sufficient to establish liability that the independent contractor has acted in a way that would give rise to liability judged according to

⁷ See part 5 for a discussion of the term “contractual”.

⁸ Hellner, *Special Avtalsrätt II, Kontraktsrätt*, 3. udgave, 1996, p. 119.

⁹ Bull, *Innføring i veifraktrett*, p. 72-73.

¹⁰ Discussed below. For further analysis of the judgement see Bull, *Innføring i veifraktrett*, p.73 ff.

the liability rules applicable in the relationship between the contracting party and the other party to the contract. Otherwise the contracting party, in its contracting out of the work to an independent contractor, could unilaterally alter the nature of the obligation it has undertaken toward the other party to the contract. This can also be stated as it is stated in § 4 of the CMR-act: the contracting party is liable for the acts and omissions of the independent contractor *in the same way* as it is for its own acts and omissions. However, in the Norwegian Supreme Court ruling, Rt 1998.1815, it is not entirely clear how this principle is applied.

A contract for a CMR-carriage was entered into between the contracting carrier and the sender, and the contracting carrier entrusted a driver to carry out the delivery. During carriage the goods were stolen. Part of the reason given by the court for acquitting the carrier was the fact that the driver had not acted negligently.¹¹ At the same time, however, it is emphasised that acting negligently is not necessarily a determining factor when establishing liability.

Even though the element of negligence seems to play an important role in the decision, it *cannot* clearly be inferred from this that the contracting carrier can only be held liable if the sub-contracted carrier has acted negligently. On the contrary, in accordance with the general rules of contract it must be assumed that the contracting carrier will be liable if the sub-contracted carrier is liable according to the CMR act § 24.¹²

4 The Possibility of Derogating from the Rule of Liability by Agreement

The principle of liability for the acts and omissions of the independent contractor does not apply without exception. In the first place, it can normally be derogated from by agreement. Furthermore, there is often no liability for independent contractors in cases where the other party to the contract knew, or ought to have known, that the work, or a clear discrete part of it, was intended to be, or could be handed over to an independent contractor.¹³ However, under the CMR act liability for third parties is mandatory. Consequently it must also be assumed that it is irrelevant whether or not the contracting carrier has informed the sender that the work would be contracted out to a sub-contracted carrier, or whether this, for other reasons, was an obvious assumption for the sender to have made.¹⁴ The contracting carrier is liable under § 4 of the CMR act whether or not the

¹¹ Bull, *Innføring i veifraktrett*, p. 68.

¹² Herber/Piber, *CMR, Internationales Straßentransportrecht, 1996*, (Herber/Piber, *CMR, Internationales Straßentransportrecht*), p. 121. The rule is derogated from in certain cases of combined carriage under the conditions stated in § 3, sec. 2.

¹³ Gomard, *Obligationsret 2*, p. 153, Bryde Andersen og Lookofsky, *Obligationsret I*, p. 199, Selvig, *Det såkaldte husbondeansvar*, pp. 102, 108.

¹⁴ See in particular U 1987.481 H.

sender knew or did not know the work could have been contracted out to a sub-contracted carrier.¹⁵

5 The Requirement that Liability Must be Contractual

§ 4 of the CMR act only applies when the contracting carrier has made use of the services of the person concerned “for the performance of the contract”. Since it is also stated in § 1 that the act is applicable to “contracts on road carriage”, it seems clear that § 4 of the CMR act covers contractual liability only.¹⁶ This implies that the sub-contracted carrier’s acts or omissions must have been the cause of a breach of the contract between the contracting carrier and the sender. Therefore, the fact that an incidence of theft is the cause of the loss of the goods does not in itself imply that the liability is not contractual.

When liability for third parties pursuant to § 4 is limited in scope to contractual liability one could ask what would be the position if the sender sues an “intermediary contracting carrier”, ie. a sub-contracted carrier with whom the sender is not in privity and who has passed on the task of performing the contract to another sub-contracted carrier. Such cases are not generally thought to be a matter of contractual liability since there is no privity between the parties. On the contrary, in several law systems it is the understanding that the relationship between the sender and the sub-contracted carrier (beyond the scope of article 34 of the CMR-Convention (equivalating § 45 in the Danish CMR act)) shall be judged according to tort law rules.¹⁷ If tort law rules on liability for independent contractors are applied, the defendant intermediary contracting carrier would not be liable for the actions of the sub-contracted carrier, including acts of theft, since as a general rule there is no liability for independent contractors in tort. In the Norwegian Supreme Court ruling Rt 1995.486 (Nordland), however, the opposite conclusion was reached.

In this case the intermediary contracting carrier (Nordland) was imposed with direct CMR liability to the owner of the goods (who was also the sender). The reason stated for this was that: “Nordland has acknowledged that the company has to be considered a carrier. This necessarily implies that the liability rule of *veifraktloven* [the Norwegian CMR act] applies to the company. § 27 of *veifraktloven* must be taken to mean that a party who is regarded a carrier is directly liable to the owner of the goods. § 45 of *veifraktloven* (which is equivalent to article 34 of the CMR Convention on carriage performed by successive carriers) shows that a carrier can be liable for loss which occurs while another carrier is in charge of the goods consignment.... I add that even though Nordland entered into a contract of carriage with Fischer, it was made for the

¹⁵ Bull, *Innføring i veifrakttrett*, p. 68.

¹⁶ Malcolm A. Clarke, *International Carriage of Goods by Road: CMR*, 4 ed., 2003, p. 149. Hill and Messent, *CMR: Contracts for the Carriage of Goods by Road*, 3 ed., 2000, p. 64-65, reject that the provision – even though there is support for it in the language – should be read as liability for the actions of *employees*, regardless of whether or not the actions amount to breach of contract.

¹⁷ See Jahr, *Direktekrav*, p. 87 regarding Swedish, British and German law.

benefit of Backe. Also on the basis of general rules on contracts for the benefit of third parties Backe/Storebrand is able to base a direct claim – including a claim for contractual damages – on the contractual obligation assumed by Nordland”.

It is worth noticing that reference is not made to veifraktlovens § 6 (equivalent to § 4 in the Danish CMR act) as the basis for establishing the intermediary contracting carrier’s liability for the actions of the sub-contracted carrier performing the carriage. Presumably, this is because Nordland’s direct liability towards the owner is not primarily founded on the rules of contract, but rather on the somewhat more free grounds that Nordland held the status of carrier.¹⁸ The Danish judgement U 1976.337/2 H also imposes CMR liability on the intermediary contracting carrier directly towards the sender by referring to the performing carrier’s acts, but without expressly referring to the rule of liability in § 4.¹⁹ The above cases appear to show that a degree of uncertainty prevails with regard to the scope of the rule in § 4 when a claim is made against an intermediary contracting carrier. In reality, it seems that the principle of the rule is applied in such cases.

6 The Requirement for Having Acted “Within the Scope of the Employment”

The requirement for having acted “within the scope of the employment” is not identical to the requirement for liability to be “contractual”. In the contract between the contracting party and the plaintiff it can be expressly stated that the contracting party shall be liable for non-performance of the contract, also when the non-performance is a result of actions being in the periphery of the employment or falling outside the scope of the employment.

Consistently with this point, *Selvig, Det såkaldte husbondeansvar*, p. 82, notes that the essential matter concerning non-contractual vicarious liability is whether the loss is caused “within the scope of the employment”, while the essential point concerning contractual vicarious liability is whether “the contractor incurred the loss in a way that represents a breach of contract,²⁰ i.e. a breach according to the wording of the contract or the interpretation of the contract based on non-mandatory solutions or on the basis of the general duty of care which is the responsibility of the parties in the contractual relationship....”.

Consequently, it must normally be decided on the basis of an interpretation of the contract to what extent the contracting party has undertaken liability for actions which fall outside the scope of the employment of the third party. Since

¹⁸ See Bull, *Innføring i veifrakttrett*, p. 130, which states that the result ought to have been reasoned with reference to § 6 rather than § 45 of veifraktloven.

¹⁹ For liability of the intermediary carrier see also U 1987.481 H and U 1997.76 H and Ulfbeck, *Kontraktens relativitet*, p. 384, Vestergaard Pedersen, *Undertransportører som ansvarssubjekter*, p. 321 ff.

²⁰ It is clear from the context here that breach of contract between the contracted party and the contracting party is implied.

the CMR act is mandatory, the requirement in § 4 that the actions in question must fall within the scope of the employment cannot be derogated from by agreement in this area. In relation to theft, the question arises as to whether the sub-contracted carrier can be said to have acted “within the scope of the employment”, if this party commits the theft of the goods.²¹ The fact that theft is an “abnormal” action does not in itself preclude liability since the liability is contractual. On the other hand, it has been claimed that there must be a “subject-matter connection” between the action causing loss and the employment.²² There is hardly any doubt that under Danish law the contracting carrier will be held liable if the sub-contracted carrier steals the goods with which it has been entrusted.²³ More doubtful is whether liability will also be imposed for theft committed by a sub-contracted carrier outside working hours or by another sub-contracted party who is not entrusted the goods but engaged in other working tasks in connection with the carriage assignment.²⁴ The mandatory nature of the act cannot be a hindrance to interpreting the expression “within the scope of the employment” more widely, based on a concrete judgement. It may be argued that such an extended interpretation is supported by the Supreme Court ruling U 2002.893 H.

In this case the Danish Supreme Court held that a cleaning company was liable for theft committed by one of its employees on the premises of the cleaning company’s customer, even though the theft was committed outside working hours, since the employee had “exploited” the fact that he had keys to the customer’s property, thus amounting to a specific connection between the theft and the employment.²⁵

Thus, according to Danish law, there would presumably be a basis for establishing liability if the sub-contracted party commits a theft (outside working hours or otherwise) that is *made possible*²⁶ by the scope of the employment of the sub-contracted carrier.

²¹ See Krüger, *Kontraksrett*, 1989, p. 208, which argues that in transport law it is doubtful whether liability is imposed for deficiency resulting from theft of the goods by employees.

²² Herber/Piber, *CMR, Internationales Straßentransportrecht*, p. 117.

²³ See also Regnarsen, *Lov om fragtaftaler*, p. 55.

²⁴ In Norwegian theory it is assumed that the contracting carrier is not liable if the sub-contracted carrier commits theft of the goods during its spare time and independently of carrying out the carriage, see Bull, *Innføring i veifrakttrett*, p. 69. This conclusion finds a degree of support in rulings Rt 1982.1349 and Rt 1996.385, and comparable cases of theft beyond the area of veifraktloven.

²⁵ In contrast, in Norwegian law there are two similar rulings where the opposite conclusion was reached, see Rt 1982.1349 and Rt 1996.385.

²⁶ See also Hagstrøm, *Obligasjonsrett*, p. 476.

7 Accumulation of Responsibility as a Basis for Liability for Gross Negligence?

§ 283 of the the Danish Carriage of Goods by Sea Act only excludes disclaimers for the contracting carrier's own gross negligence. Under the CMR act the protection of the sender goes further. Thus, it is expressly stated in § 37, subsection 2, that the carrier shall be liable without limitation of liability for gross negligence or intent comitted by any party for which the carrier is liable in pursuance of § 4. If the performing carrier has acted with gross negligence or intent, the contracting carrier is liable for the entire sum towards the sender, notwithstanding provisions for limitation of liability in the contract between the contracting carrier and the sender. Ruling U 2002.6/2 H raises the question of whether liability for gross negligence under the CMR act has further implications. The question is what particulars must be put into the wording that the carrier is liable for the acts of third parties "in the same way as for his own acts and missions".

The case involved carriage of video cameras in a tarpaulin-covered haulier which was left from Friday to Monday unguarded in an industrial area. It had not been necessary to park at this location since there was a secure area nearby. Since the performing sub-contracted carrier at the time did not know the consignment contained valuable goods, he had not acted grossly negligently, whereas the opposite applied to the contracting carrier, who did have knowledge of the content of the goods consignment. The contracting carrier was found liable for the full amount of the loss.

It emerges that full liability was imposed on the contracting carrier, even though – from an isolated view – the performing carrier had not acted with gross negligence. The complicating aspect of the case was the impact of the subjective circumstances relating to the judgement of gross negligence. The sub-contracted carrier had acted with gross negligence in an objective sense, while the subjective aspect was fulfilled by the contracting carrier. The basis for imposing full liability on the contracting carrier was set out as follows:

"It is undisputed that Leman [the contracting carrier] knew that the goods consisted of video cameras that were in danger of being stolen. Leman would therefore have been acting in gross negligence by parking the trailer in the way Christiansen Transport [the sub-contracted carrier] did. Since Leman, as the contracting carrier is liable for actions undertaken by the carrier performing the carriage - Christiansen Transport – in the same way as it is for its own actions, the Supreme Court finds that Leman, in relation to the owner of the goods, caused the loss in gross negligence. Leman's liability toward Tokio Marine & Fire is therefore not limited according to § 29 see § 37(1)."

By its ruling the court sends a clear signal that the contracting carrier cannot achieve exemption from liability by contracting out a job to a sub-contracted carrier and failing to inform the sub-contracted carrier of the nature and contents of the cargo. It is hard to argue that the court ought to have reached a different result. However, the grounds for the ruling seem disputable. If the scope of the

contracting carrier's liability for the sub-contracted carrier is to be determined by how the contracting carrier itself – with its personal, subjective background – would have been judged if it had carried out the action that was carried out by the sub-contracted carrier, then it follows that it would not be possible to impose full liability on the contracting carrier if it were not itself aware of the contents of the cargo while the sub-contracted carrier *were* aware of this information. However, there is no doubt that in this situation the contracting carrier will be fully liable toward the sender in accordance with § 4 of the CMR act, if the objective element of gross negligence is met by the sub-contracted carrier. The reference stating that the contracting carrier is liable for acts and omissions committed by third parties “in the same way as for his own acts and omissions” is, in a sense, misleading. The reference can only be taken to mean that actions of the sub-contracted carrier must be judged according to the liability rules that are applicable between the contracting carrier and the sender,²⁷ even if the sub-contracted carrier's relationship to the contracting carrier is regulated by another body of rules which does not impose liability on the sub-contracted carrier toward the contracting carrier.²⁸ This can also be formulated in such a way that contractual liability for third parties does not presuppose that the third party is personally responsible.²⁹ However, this observation cannot explain the result in the case at hand. If the actions of the performing carrier are judged according to the rules of liability that are applicable between the contracting carrier and the sender, it would still not be possible to reach the conclusion that the sub-contracted carrier has acted with gross negligence. Only by “combining” the actions of the sub-contracted carrier with the fact that the contracting carrier was aware of the contents of the cargo can it be concluded that there is a case for gross negligence. The ruling is thus more an expression of applying a variation on the principle of liability for accumulated errors among employees³⁰ than it is an expression of applying a general principle of the contracting carrier's subjective conditions as the decisive factor in relation to the extent of liability imposed. Future case law may show whether it will also be possible to establish liability in cases of accumulated liability between more than two carriers. For instance, in cases where the contracting carrier knows the contents of the cargo but is not aware that the goods in question are by their nature valuable,³¹ while at the same time the intermediary contracting carrier is aware of this fact but the performing carrier is not, and acts in gross negligence only in objective terms.

²⁷ See above under 3, and Selvig, ND, 2003, nr. 10, p. XXX, in a comment on the ruling.

²⁸ With the exception contained in § 3, section 2 of the CMR act (see footnote 11 above).

²⁹ See Selvig, *Det såkaldte husbondeansvar*, p. 82.

³⁰ On this principle in relation to DL 3-19-2 see Von Eyben og Isager, *Lærebog i erstatningsret*, 5 ed., 2003, p. 111.

³¹ This probably was the situation in U 2004.366H.