

A Carrier's Knowledge is the Key to Consequential Losses in Cargo Claims

Litigation & Dispute Resolution | Transportation and Logistics

9 April 2026

Motor carriers will be intimately familiar with the limits of liability for cargo damage and loss. Across Canada, the uniform rules of carriage generally provide for a limit of liability of \$2 per pound or \$4.41 per kilogram, absent a declared value on the face of the bill of lading. Many carriers have terms and conditions on their bills of lading, on their websites or in shipper-carrier agreements, which include their own limitations of liability stemming from loss, damage or delays in delivery of cargo. Of interest here are losses beyond the value of the cargo where the sole limitation on liability is at common law.

A frequent issue in cargo litigation are claims for consequential losses, which are suffered by a plaintiff as a consequence of the cargo being damaged, destroyed or its delivery delayed. A common example is loss of business damages, incurred by a shipper or consignee due to goods not arriving on time or at all, whether arising through the loss of a customer, from a missed commercial opportunity, lost profits from business interruption or penalties imposed by a third party. The range of potential consequential losses are broad but the key consideration in claims for consequential losses are whether they were foreseeable to the carrier at the time it agreed to transport the cargo.

Hadley v Baxendale – The origins of the general principle

The classic case on consequential losses for a carrier's breach of contract is the 1854 English decision in *Hadley v Baxendale*, (1854) 9 Exch 341. Hadley operated a steam-powered mill and needed to send a broken crankshaft to the company manufacturing its replacement to ensure a proper fit. Hadley contracted with Baxendale to deliver the crankshaft to the manufacturer and return it by a particular date. Baxendale failed to meet the date for delivery. Rather than return the crankshaft by wagon, Baxendale waited several days to carry it by water to Hadley along with other goods consigned to them. The mill was out of operation for a period of time as a result of the delay and Hadley sued for the resulting loss of business. The Court determined that the carrier could not be held liable for losses which it could not have anticipated at the time the contract was formed while noting that parties remain free to contract liability for collateral losses where there is concern they may arise absent timely delivery.

Under what circumstances will liability arise?

Carriers are not insurers bound to make a shipper or consignee whole for any losses flowing from their breach of contract. They are, however, more than a mere bailee and their responsibilities and potential liability under a contract of carriage extend beyond the safety and security of the cargo to its timely delivery.

Where the carrier is aware or made aware of the need for delivery by a particular date and of the potential consequences of failing to do so, it may be exposed to liability for consequential losses. The nature and extent of such liability is based on what was in the reasonable contemplation of the parties at the time the contract was made: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 54. The underlying principle is the assumption that a carrier knows less than the shipper and consignee about the purposes for which the consignee needs the goods or other special circumstances which might cause exceptional losses: *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] K.B. 528 (C.A.) at 539. If a carrier is not given a firm delivery date and the potential consequences of failing to meet this date are not communicated, a carrier will generally not be held liable for the knock-on effects, as the carrier could not have anticipated them.

Tort liability vs. contractual liability

Absent a direct contract, it is still possible for third parties affected by a loss (including those unknown to or not in contractual privity with the carrier) to advance a claim for consequential losses. As the question is one of knowledge and foreseeability of the consequential losses by the performing carrier, the analysis is the same whether the carrier has contracted directly with the plaintiff or where the plaintiff is claiming in tort. Losses which are not foreseeable in contract do not become foreseeable as a function of a claim being made in tort: *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, 1986 CanLII 51 (SCC).

Load brokers' liability

If a load broker or freight forwarder was made aware of the requirement for timely delivery and the potential consequences of delay or non-delivery, this will not alter the carrier's liability as they cannot have knowledge of discussions to which they were not a party. However, this may serve to impose some measure of liability on a broker who fails to convey critical information to the performing carrier. Where brokers receive information from the shipper or consignee, they should convey that information to the carrier or risk being exposed to liability with no contribution from the innocent carrier. If the broker makes the carrier aware of the nature and risk of consequential losses and they accept the cargo on that basis, they accept the liability as well.

When will a carrier face liability exposure for consequential losses?

Ignorance is not always bliss. Carriers should not remain deliberately in the dark as to the urgency or the consequences of late or non-delivery as this may expose them to different types of unforeseen liability. A carrier should always know what they are carrying, to whom it belongs and when it must be delivered.

Similarly, a shipper is unlikely to reserve the possibility of a claim for consequential losses merely by intoning ominously, but vaguely, about the dire consequences of missing a delivery. It is no good to suggest the mere possibility of consequences, there must be some particular and foreseeable consequence which is in the contemplation of the carrier at the time of contracting.

A carrier should not imagine itself free of exposure to consequential losses simply because it has no knowledge of special circumstances or particular risk. There are always circumstances in which it will be plainly obvious that certain losses may result from late delivery, given the nature of the cargo or circumstances of delivery. Where perishable goods are being transported for sale, it will be foreseeable to any carrier that late delivery could result in loss of profits. A carrier bringing cargo to a vessel at port which is due to sail could find itself exposed to liability for detention and demurrage charges incurred by the shipper. Though less common in recent years due to technological advancements, a courier is handling time-sensitive documents and who is aware of their import could be found liable for the consequences of a lost opportunity or a government fine for late filing.

Carriers holding themselves out as specialists in certain industries or cargos should also be wary, as they could attract liability where it is found that they ought to have known about the nature of the shipper's or consignee's trade such that the consequences of their default would have been in their contemplation. Recall that a carrier is expected to have less knowledge of the cargo than the shipper or consignee but if the carrier has specialized knowledge of the industry which they serve, a court could find that they would have known of the consequences of a failure to deliver. For example, a company advertising guaranteed rapid delivery of cargo for enterprises engaged in just-in-time manufacturing operations run the risk of liability based on those representations of industry knowledge.

Where a carrier is informed of the need for timely delivery and the potential consequences of a failure to deliver, it will have difficulty resisting a claim for consequential losses at common law. If a party is made aware of the consequences of a breach of contract, they should price that risk accordingly by charging a higher rate to the shipper. The exigencies of the motor truck industry do not always permit such pricing, but carriers must be prepared to face risks not priced into the equation.

An astute carrier may wonder if their motor truck cargo insurance policy will cover a claim for consequential losses. This is unlikely as most policies on the market expressly exclude such liability, given the broad potential exposure. A policy extension covering consequential losses may be offered by some underwriters but as with the carrier made aware of potential liability by the shipper, as risk increases, so does the price.

The nature of the motor freight industry means that it is not always practical for the parties to sign broker-carrier or shipper-carrier agreements prior to dispatching cargo. It is preferable to have contract terms outlining consequential damages and whenever possible these agreements should be in place to protect carriers. If this is not a carrier's practice, they should have terms and conditions on the face of their bills of lading, on their website and embedded in their email correspondence or they risk finding themselves at the mercy of a court's interpretation of what was in their reasonable contemplation at the time of entering into the contract of carriage. A PDF version is available for download [here](#).

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