SEMAPHORE

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Georgia On My Mind!

Has modern-day access to the Internet and World Wide Web nullified a 155-year-old legal ruling relating to the disclosure of information in insurance transactions?

This question was posed by Professor Rob Merkin KC, special counsel with Duncan Cotterill, in his "Georgia On My Mind" address to delegates at the MLAANZ New Zealand Branch Conference.

The legal ruling in question is *Bates v Hewitt* (1867) LR2 QB 595, in which the Court decided that, when the insurer of a ship did not realise that the vessel was the very same United States Confederate cruiser that had earlier come to England in a glare of publicity, it was incumbent on the assured to highlight that fact to the insurer.

In 1861, during the United States Civil War, the Southern slave states seceded from the Union and as a result the Northern states blockaded Confederate ports and largely destroyed shipbuilding facilities in Virginia. The Southern states were deprived of trade and supplies.

President Abraham Lincoln authorised privateering – allowing private ships to seize vessels flying a Confederate flag – but no Letters of Marque were issued. The Confederates responded by doing the same.

Britain meanwhile, had previously passed the Foreign Enlistment Act in 1819 which made it illegal to recruit for activities against a friendly nation and also illegal for any person in a British port to "equip, furnish, fit out, or arm" a vessel to cruise against a friendly nation.

While Britain issued a Neutrality Proclamation in May 1861 it did not recognise the Confederate states. Instead, all British ports (including in the Caribbean) were pronounced closed to warships and privateers of both North and South, other than in an emergency or for essential repairs. No "prizes" (captured ships) were to be brought into British ports either.

The issue of "blockade runners" then arose – light, fast ships which could slip through the blockade. Cargoes from Britain could be sent to the Caribbean and transhipped onto these blockade runners, and potentially get through to the Confederate states.

This prompted the United States Supreme Court to adopt the doctrine of "continuous voyage", whereby the start of such a voyage in Britain was deemed to be the start of the voyage of the blockade runner. "Commerce destroyers" were another class of ship that could be used as floating prize courts.

The Georgia was an iron commercial steamer built on the Clyde, crewed in Greenock and launched in January 1863. Ostensibly headed for China, in Brest crew were recruited for Confederate service and the ship was armed, whereupon she destroyed seven United States vessels and bonded two more.

She was chased into Liverpool by United States warships on May 2, 1864, advertised for sale and bought by Edward Bates on condition that she was decommissioned. He leased her to the Portuguese Government but nonetheless she was seized by a United States warship on August 15, 1865, and sold again.

A Lloyd's underwriter had refused to insure Georgia for Mr Bates but a second underwriter, a Mr Hewitt, did agree to insure Georgia for £23,000. No questions were asked by him about Georgia's history.

Mr Hewitt knew of the Georgia cause célèbre from articles in *The Times* and questions in Parliament about her being granted permission to stay in Liverpool, but he did not connect the notorious Georgia with the vessel he was insuring.

When the loss of the ship prompted an insurance claim, the factual finding by the jury was that Mr Hewitt did not know, but ought to have known, that the vessel was the notorious Georgia.

The case was one of the first occasions to use "utmost" style language – "full and perfect good faith". Mr Bates' ignorance of the fact that the vessel was liable to be seized was irrelevant. Mr Hewitt meanwhile was under no duty to make inquiries.

Professor Merkin asked the question "is *Bates v Hewitt* still good law?", given that modern research is so easy and widespread.

He quoted the Insurance Contracts Bill 2022, due to be introduced into the New Zealand Parliament next year. It emulates the United Kingdom's Insurance Act 2015.

Section 33(1), regarding disclosure requirements, states:

(a) disclosure of every material circumstance that the policyholder knows or ought to know, or (b) failing that, disclosure that gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries or the purpose of revealing those material circumstances.

The same Bill 2022, s 33(2)(e) alludes to "no duty to disclose a circumstance" – (d) that the insurer is presumed to know or (e) as to which the insurer waives information. While s 47 states an insurer is presumed to know (a) things that are common knowledge and (b) things that an insurer offering insurance of the class in question to policyholders in the field of activity in question would reasonably be expected to know in the ordinary course of business.

"Insurance is not a passive profession," said Professor Merkin.

"Insurers can't sit on their hands.

"With the ease of Internet access, *Bates v Hewitt* won't stand up, because it is so easy to find the information you need. Section 33 1(b) may look innocuous, but it could turn out to be a powerful legal weapon."

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