

# After the Disaster is Over—

## MV *Ever Given* and Law of General Average

by Michael J. Rauworth, Esq.

Imagine it is spring, 80 CE. You are a garum merchant in Carthage, not far from the site of today's city of Tunis. (Garum, as our readers will doubtless know, was the queen of condiments of the day—a sauce fermented from crushed fish, highly prized by the wealthy households of the time, and vigorously traded throughout the Mediterranean.) Pompeii was a major producer of garum for Rome and its empire, but the eruption of Mount Vesuvius the previous August had destroyed the city and buried everything in it. This event produces, among other things, a garum shortage and drives up its price, especially in Rome. Tragedy, for some, is an opportunity, and the shortage in Rome makes it economically worthwhile for you to load a ship with seventy amphorae full of your best product and send it northwards across the Mediterranean to Italy because the price it'll fetch in Rome will repay you far beyond the cost of shipping it there.

It'll be a ship with open cargo holds, and you arrange to accompany your amphorae on the sea voyage to the port serving Rome, as you expect to do the haggling for the selling of your garum yourself, once you've landed it.

But the increase in demand has another effect. It also motivates your chief rival—not a friendly one—to join in the garum trade in Carthage, one Hannicus. Nevertheless, it appears that the market in Rome will take all of your amphorae, as well as the additional sixty that Hannicus is planning on shipping aboard the same ship. He, too, plans on accompanying his cargo. His amphorae arrive at the docks first and are mostly stowed onboard by the time the crew begins loading yours.

The pressure of profitable trade also prompts the owner of the ship to book more cargo for loading than is customary. The vessel, laden with the 130 amphorae, a small crew, and the two supercargoes, sets out from Carthage and sets a course for Rome, across the Tyrrhenian Sea. Two days out, the ship encounters a storm. Deeply laden, the vessel begins to ship water over the gunwales as the wave height increases. The weight of the water coming onboard—there being no reliable pumps—bears her down even more. The master sees the way the situation is heading and rousts his crewmen, who go forward into the cargo area and begin to hurl amphorae over the side to lighten the load, thereby increasing the freeboard—to save the ship, the remaining cargo, and, of course, all the souls on board. Hannicus goes forward as well and starts vigorously casting amphorae overboard—*your* amphorae—sparing his own. He encourages the crew to focus on your amphorae, too.

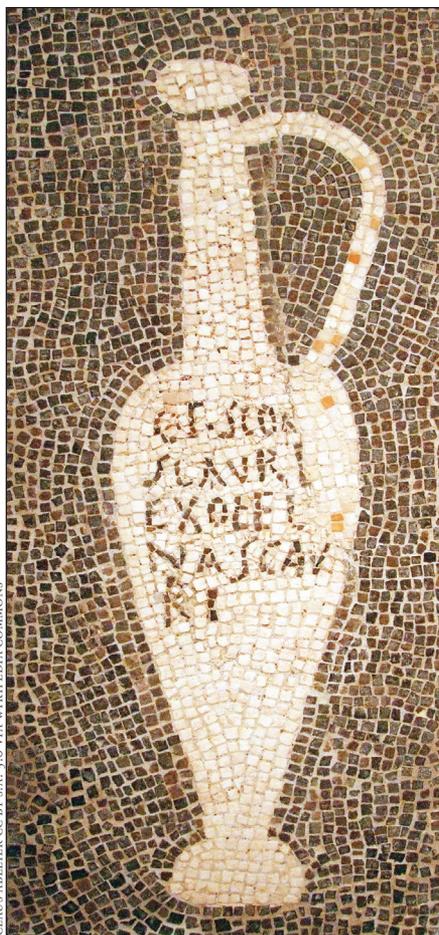
You become aware of this travesty, go forward, and fisticuffs ensue. While the two of you are fighting about whose amphorae to jettison, the vessel ships ever more water and is not getting lightened. You and Hannicus are equally fervent that the cargo going over the side should be the other guy's. Suddenly, the master pushes his way

between you and Hannicus and reminds you both of the urgency to lighten the vessel—quickly. Whose cargo goes by the boards, he reminds you, is irrelevant because everything stands to be lost if the ship isn't immediately relieved of some of the weight on board. Then he tells the two of you something that calms you both down, whereupon you *both* turn to helping the crew cast *your* amphorae over the side.

What on earth could the master have told the two of you—with such an effect? It is what you—in 80 CE—have in common with MV *Ever Given*, the massive container ship that caught the world's attention for a week in March when it got lodged sideways across the Suez Canal, blocking all ship traffic in either direction. We are talking about the doctrine of “general average”—a phenomenon of property law found only in maritime law. (In this context, the word “average” may have different linguistic roots than does the term as used in arithmetic.). The master assures you that Hannicus will share *equally* in the loss by jettison, even though it is your amphorae that are being tossed overboard.

In 80 CE, assuming you and your ship thereafter land successfully at Rome, the amount that you lost in the jettisoning of your amphorae at sea would have been calculated, and compared to the total value of your surviving cargo. In effect, a tax of sorts would have been imposed on Hannicus—and the proceeds paid to you—so that his loss was in the same proportion to yours.

The phenomenon of general average (affectionately abbreviated as “G.A.” by shipping executives and maritime attorneys) evolved to prevent the situation as described from being governed by the principle that “no good deed goes unpunished.” Obviously, you and Hannicus were literally in the same boat, and somebody's goods had to be sacrificed so that all persons and most of the cargo—not to mention the ship itself—would have a chance of surviving. You all were united in what the law considers a “common venture,” and the jettisoning of some portion of the cargo was a sacrifice



*This image of an urseus (an earthenware jug with one handle) is depicted in a mosaic discovered in Pompeii in 1958, in what had been the atrium of a garum supplier.*

that benefitted all concerned, even though it actually came “out of the hide” of just one member of the common venture in our little fable. Thus, the principle of general average has existed since those ancient times to provide for a fair outcome. The actual practice in today’s world is much more complicated, of course, but the concept is the same.

On 1 April 2021, not too many days after being freed from her position blocking the entire Suez Canal, the owners of the *Ever Given* declared a G.A. This launched a process by which the interests of all the owners of the cargo on board, plus the interests of the owner of the ship itself, are made subject to a one-off, self-contained scheme of taxation, limited to those who had financial interests in the common venture. (While cargo and vessel interests are the biggest ones, there may be some other assorted interests involved, depending on how the business of the ship was put together. For example, if someone other than the shipowner actually owned the bunker fuel aboard, this would have to be accounted for separately, and taxed accordingly. But because we don’t know enough about the business arrangements on board, we will stick to the simple case of cargo and ship alone.) Despite its complexity, the objective would have been the same as compared to your jettisoned amphorae in ancient times—to apportion the loss incurred in saving the vessel, so that the pain would be borne equally, in proportion to the value of the property that each owner had at risk.

In the case of the *Ever Given*, of course, although some initial thought was given to off-loading some of the cargo, at the end of the day, no cargo was off-loaded, much less was any cast overboard. Instead, the sacrifice alleged would be a sacrifice on the part of the shipowners (or perhaps the charterers) as distinct from cargo owners. Once again, at the time of this writing in mid-April, because not enough is known about the details, we will assume that the principal claim of the shipowners is for out-of-pocket expenditures made in the efforts to free the ship from her stranded position.

The immediate effect of the declaration of general average is to require the owners of cargo to post security—either a cash



*MV Ever Given stuck in the Suez Canal, viewed from the International Space Station.*

bond or a letter of guarantee from an insurer—as a condition of getting their cargo released to its recipient, once it is in a position to be unloaded. This security ensures that the shipowner will have funds from which to collect the G.A. “tax,” once it is finally calculated; the remainder will be refunded to its source(s).

Arriving at that calculation will involve lots of time, plus a massive spreadsheet of individual values of the vessel and all of the thousands of cargo interests on board the 400-meter ship at the time. The vessel has a capacity of approximately 20,000 TEUs (Twenty-foot Equivalent Units) and was reported to have had some 13,000 TEUs on board, either in the form of actual 20-foot boxes, or 40-footers (counted as two TEUs), and perhaps some odd 53-footers. Within each box might have been freight belonging to quite a few cargo owners, assembled by intermediaries known as freight forwarders, or as NVOCCs—Non-Vessel-Operating Common Carriers. (We won’t even begin to pick apart the complexities of the bills of lading involved.) Suffice it to say that this calculation will be very complicated and time consuming. For the most part, the “tax” imposed on the cargo will be covered by the insurance that will have been placed on most of the cargo. This only makes sense because it is literally the pocketbooks of the insurance companies that are spared by a successful G.A. sacrifice—they don’t have to pay for

a total loss of cargo. Given the choice, those insurers would be happy to spend a penny to save a dollar, and their policies are clausured accordingly.

It will also involve a determination of which expenditures claimed by the owner actually qualify as sacrifices for purposes of G.A. These decisions are usually arrived at by members of a select priesthood of maritime lawyers and marine insurance practitioners known as “average adjusters,” applying a set of principles known as the York-Antwerp Rules. These Rules were settled upon in international agreements in 1890 and have been amended several times—as recently as 2016—and are set forth in the bills of lading and charter parties that govern the legal relations between ships and cargo owners. They tend not to get much coverage on CNN. The adjustment of the G.A. as to the *Ever Given* is likely to take years.

At the end of the day, this ancient remedy—as evolved—still functions as the best means the law has to see to it that those who are literally “in the same boat” share, in a fair manner, the perils of the sea that they confront in common.

But what about the interests of the hundreds of vessels whose transit was blocked, some by as much as six or seven days? Aren’t there vast liabilities that lay at the feet of the *Ever Given* interests, in favor of those delayed ships and their cargoes?

### **These questions call for another tale...**

Imagine you’re the night watchman aboard a bulk carrier alongside the dock, pointed upriver. It is winter and you are in a northern latitude in a river choked with ice. You have been assigned to mind the interests of the ship until the grain elevators downriver can accept the cargo. You are the only person onboard.

Suddenly you notice something is wrong. Ice floes carried downstream by the current are getting wedged between the hull and the dock, forcing the bow out into the river. The mooring lines are stretched bar-tight—twisting and smoking and making frightening noises. The gangway suddenly crashes down onto the ice floes. Your heart’s in your throat.

Then, POW!! POW!! and POW!! again—the mooring lines at the bow part

under the extreme strain. Your adrenaline levels spike as you realize how lucky you were not to be too close to them when they exploded. But now the bow swings freely out into the river, perpendicular to the current, tearing the ship free of the dock, as the stern lines also part. You rush forward to drop an anchor, but you only manage to get both of them jammed, and they are now useless.

“Oh, %\$!@#,” you murmur, as you contemplate your future employment prospects.

“Oh, %\$!@#” is right, because now your ship is swept by the current into another vessel. Horrible sounds ensue, sparks fly, and shock waves shudder through the steel hull. People onboard the stricken vessel are shouting and running. Now the second ship also breaks free of its mooring, and it, too, is being swept down the river toward the town downstream. The two ships continue to careen down the river...toward a bridge.

That’s when the *ship hits the span*.

It collides with and demolishes a major bridge, essentially knocking it into the river. The helpless ships are pinned by the current across the upstream side of the bridge. The ice that formerly was being swept downstream and out of the river is instead now trapped on the upstream side of this pile-up, and begins to stack up.

This ice dam impedes the flow of the river. The river rises, overflows its banks, and pours into the surrounding streets, flooding many businesses, causing general civic chaos.

Fast-forward several years. The negligent parties are held responsible (that is, legally liable) for the damage caused to the innocent ships (and other structures) that were hit, to the owners of the businesses flooded out, and more.

“Yeah, yeah,” say you, “but what’s this tale got to do with the *Ever Given*?”

It’s this: Back in our icy river scene there are two other ships, both physically undamaged but whose passage to their discharge berth is now blocked by this pile-up. Their owners also make a claim against the same negligent parties for the economic harm that they experience from the ice dam. But the court rules that they cannot recover. Why should that be? They are in the



*The freighters Michael K. Tewksbury and MacGilvray Shiras in the ice-choked Buffalo River, 21 January 1959, after they had taken out the Michigan Avenue lift bridge.*

same position as all those ships whose transit through the Suez Canal was blocked by the *Ever Given*. What gives?

First of all, this little fable is a short-hand account of a real event that took place in Buffalo, New York, in 1959. The ship that started the incident was a laker named *MacGilvray Shiras*, built in 1904 and owned by a family firm named Kinsman Transit. Its vice president at the time, George Steinbrenner (before his time with the New York Yankees), was mentioned in the legal decisions in a ruling that allowed Kinsman Transit, remarkably, to limit its liability for the damages that were assessed. (Maritime limitation of liability is a controversial doctrine that will require a whole separate article to explain and discuss.)

Even though its story is perhaps the juiciest, the legal ruling—*Petitions of Kinsman Transit*, 388 F.2d 821(2d. Cir. 1968)—is actually one of many that apply the legal principle in question. That basic principle is this: with a few exceptions, the law of admiralty will not award damages for purely economic loss caused by negligent conduct, in the absence of a contract. Thus, the ships and businesses that suffered actual physical harm were allowed to collect against the responsible parties. Those who suffered only economic harm—in other

words, whose cargo operations were prevented by the ice dam—were not. This is sometimes known as the “economic loss rule.” This same principle was applied, for example, to deny recovery to a vessel that was prevented from reaching its discharge berth in Boston by a vessel that caused an oil spill in the harbor.

To many, the doctrine seems arbitrary and unfair, and indeed has been hotly debated by legal scholars. But the *Kinsman* decision includes a hypothetical that illustrates the problem that the doctrine seeks to solve:

Although to reason by example is often merely to restate the problem, the following illustration may be an aid in explaining our result. To anyone familiar with NY traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers

or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to “clock in” an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners.

The courts essentially reason that to allow the claim of one person who suffered delay (but not physical damage) would be a step down a slippery slope: once you allow one, how do you come up with a *reasoned* principle that allows you to know where to stop? After all, the people who could claim some kind of economic loss from the congestion of the tunnel could be virtually endless. How could you afford auto insurance if there weren't such a limit?

Back to the *Ever Given*. Obviously, US law will not apply to a blockage in the Suez Canal. It appears that the particular rules that govern transits through the canal will probably make the *Ever Given*

liable at least to the owners or charterers of the delayed ships.

The problem, of course, doesn't stop there. What about the claims for delay that could be lodged by the owners of all the individual cargoes on board the ships that were delayed in getting through the canal? What about the downtime of the container terminals (or bulk terminals), which had set aside crane time to discharge the ships delayed by *Ever Given* and whose schedules were disrupted? Then there are the businesses whose supply chains were thrown into disarray by the delay of those cargoes, and who had to pay for alternative supplies? What about the truckers who were idled by the dearth of cargo arrivals?

It is too early to tell how the courts in Egypt will handle this case and these problems. For the moment, the biggest problem seems to be the near-term actions that the government has taken, apparently to twist the arm of the owners and insurers of the *Ever Given* to pay seemingly exorbitant claims, without a day in court. The

authorities have since arrested the *Ever Given*. Wait...what?!?! You can actually arrest a ship? That, too, will have to be a story for another day. ↴

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