CBMU
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Siemens

- *Siemens Canada Limited v. J.D. Irving, Ltd.*
- In the course of being loaded upon a barge, two valuable steam turbine rotors worth $40 million dollars fell into the waters of Saint John Harbour

Limitation: Siemens

- Barge operator brought limitation proceeding to limit liability to $500,000 per the 1976 Limitation Convention
- [O]ne of the goals of the Convention was to reduce the amount of litigation as far as actions for limitations of liability were concerned, explaining that to achieve that goal, the signatories to the Convention had agreed to increase the limitation fund and to create “a virtually unbreakable right to limit liability”.

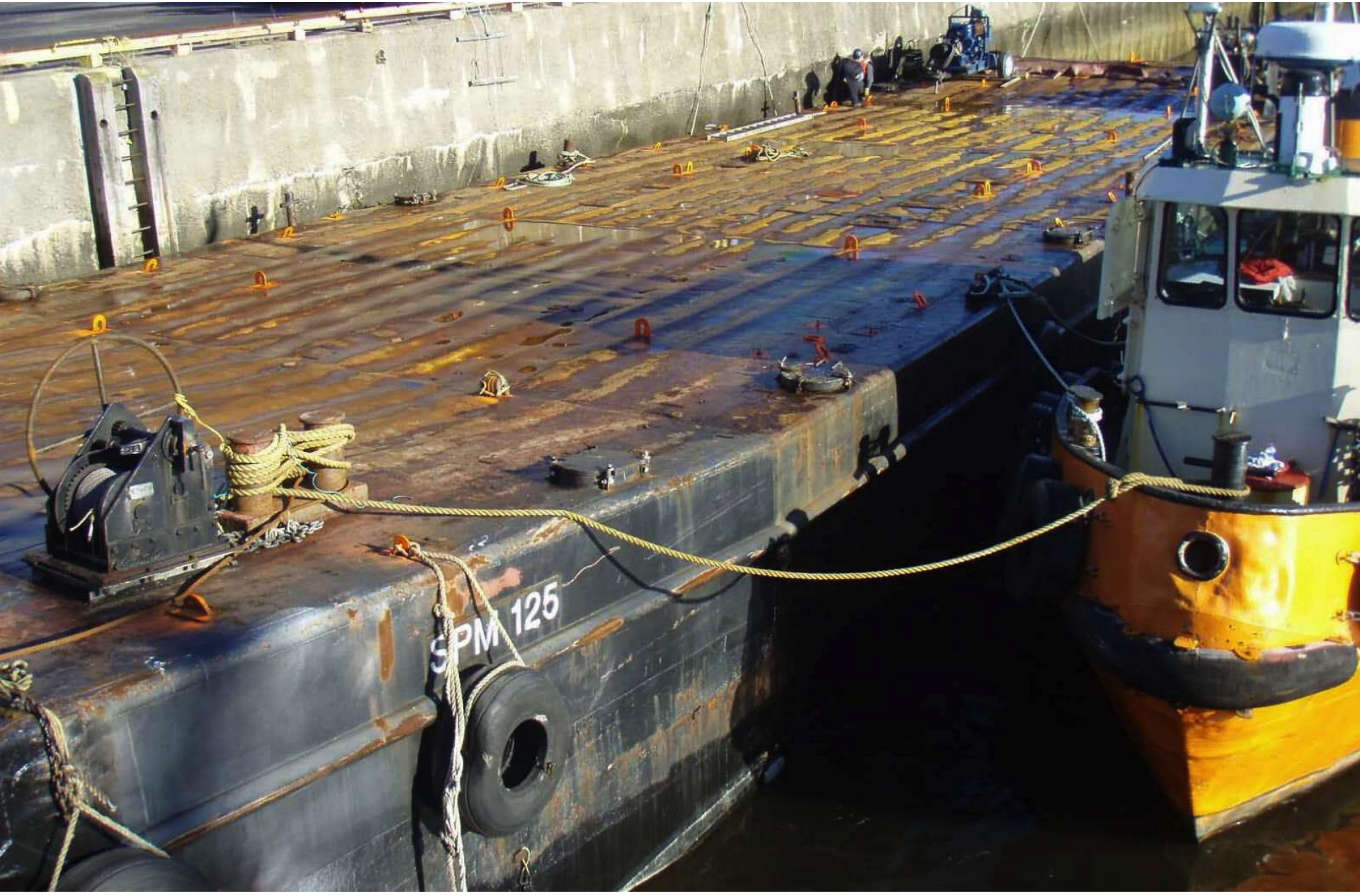
Limitation: Siemens

- Conduct barring limitation
- A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, **committed with the intent to cause such loss**, or **recklessly and with knowledge that such loss would probably result**.
- Peracomo dealt with committed with the intent to cause such loss

Siemens – Limitation Hearing Oct. 5th

- Limitation hearing to determine if J.D. Irving can limit liability to $500,000 for the $40 million loss
- Siemens arguing that J.D. Irving and its subcontractors were recklessly and with knowledge that such loss would probably occur


SPM 125


SPM 125


IRVING


SIEMENS


SIEMENS

Siemens' Argument

- Barge was too small for the job – unstable
- Naval Architect hired by JD Irving did not realize that transporter bed could move hydraulically and didn't include such movement into the stability calculations
- Barge had ballast fore & aft peak tanks that were not bifurcated but one tank – causing surface water "sloshing" reducing stability

and operation was not stopped when discovered

Siemens' Argument

- Turbines were not loaded on centre line – very small margin of error and was off centre line by 6 inches
- All of these amount to recklessness with knowledge that the loss would occur

JD Irving Argument

- Experts analyzed the loss after the fact
- Experts agree barge was sufficient size
- Experts agree that the barge was stable
- Experts cannot conclude on the cause of the barge flipping
- Likely the operator of the transporter in adjusting the deck with hydraulics did so incorrectly, or the hydraulics failed

JD Irving

- Naval architect (independent contractor), a marine surveyor (hired by Siemens), JD Irving experienced personnel were all on board the barge when it flipped (and righted itself). Accidents happen. No recklessness.
- Move was planned
- Can limit liability

Siemens

- Justice Strickland (a former maritime lawyer and naval architect) 2016 FC 69 : JD Irving could limit liability
- Justice Strickland examined *Peracomo*
- Recklessness in the context of Article 4 required **subjective knowledge** that the loss that had actually occurred would probably occur, while recklessness in the context of wilful misconduct (for the purposes of marine insurance) has a lower fault element requiring only reckless indifference to the known risk despite a duty to know.

Siemens

- Justice Strickland found that on the evidence (of JDI employees, Bremner, Hamilton, and expert testimony) that the barge was suitable, despite the fact that it was smaller than prior barges used. Her Honour also found that there was no evidence that JDI was made aware prior to the loss that there were any concerns about the barge and the operation

Siemens

- Supplementary Reasons 2016 FC 287
- Can an independent contractor working for a shipowner limit liabilty?
- Justice Strickland concluded that JDI, as the shipowner, was not vicariously liable for the acts, neglect or default of its independent contractor, and that MMC and its principal Bremner were not entitled to limit their liability pursuant to the *Limitation Convention*.

Trucking Limitation of Liability

A & A Trading Ltd. v. Dil's Trucking Inc 2015 ONSC 1887

- Ontario regulates the "contract of carriage" the bill of lading
- $263,000 shipment shipped from Toronto to Calgary
- Bill of lading filled out: no declaration of value
- Shipper attached a copy of the supply invoice showing value
- Provided to pick up driver, who endorsed the the plaintiff's invoice number
- Shipment stolen in transit
- Shipment weighed 50,000 pounds

BILL OF LADING

NOT NEGOTIABLE

CARRIER & ADDRESS: _____ HIGHWAY CARRIAGE B/L No. ----------

At ..... Date ..... WMS No. ..... Order Date .....
(Point of Origin)

Consignor ..... Address ..... Order No. ..... Client: .....
(or Agent)

Received at the point of origin on the date specified, from the consignor mentioned herein, the property herein described, in apparent good order, except as noted (contents and conditions of contents of package unknown) marked, consigned and destined as indicated below which the carrier agreed to carry and to deliver to the consignee at the said destination. If on its own authorized route or otherwise to cause to be carried by another carrier on the route to said destination, subject to the rates and classification in effect on the date of shipment. It is mutually agreed, as to each carrier or all or any of the goods over all or any portion of the route to destination, and as to each party of any time interested in all or any of the goods, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, including conditions on back hereof, which are hereby agreed by the consignor and accepted for himself and his assigns.

Consignee ..... Call Out Date / Time .....
(Name and Address)

Destination ..... Arrival Date / Time .....

Staging Area .....

Pieces	Ship Unit	Pieces per Unit	Items per Ship Unit	Particulars and Description of the Goods, Special Marks and Exceptions	Weight	Model No.	Qty Ordered	On Backorder	Cancelled	Qty Shipped
				invoice #56797						

FREIGHT CHARGES

Collect Prepaid Other

Freight charges will be collect unless marked prepaid

3RD PARTY BILLING

C.O.D. SHIPMENTS

Amount $ _____
Collection Charge _____
Total _____

Special agreement between consignor and carrier/forwarder, advise here. At owner's risk? ___

DECLARED VALUATION FOR CARRIAGE $ _____ Maximum liability of $2.00 per pound ($4.41 per kilogram) computed on the total weight of the shipment, unless declared valuation states otherwise. (Conditions 9 and 10 on back).

Consignor ..... Carrier .....

Per ..... Per ..... I. M. STUPID

RECEIVED IN APPARENT GOOD ORDER EXCEPT AS NOTED

Per ..... Consignee Date .....

National Refrigerator & Air Conditioning Canada Corp. v. Celadon Group Inc., 2016 ONCA 339

- Shipments from Mexico to Canada
- Shipment by Sub contractor of Celadon from origin to Laredo Texas
- Shipments hijacked in Mexico
- Celadon Tariff provided no liability for Mexico
- Held: tariff not agreed to by the shipper
- Ontario Law applied

National Refrigerator & Air Conditioning Canada Corp. v. Celadon Group Inc., 2016 ONCA 339

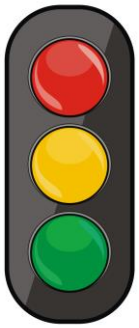
- Trial Judge: invoice accompanying the shipment was equivalent to declaration of value. No limitation.
- Appeal Court: The invoice issued to National by the consignor had nothing to do with the contract of carriage and providing a copy of the invoice to the carrier was not declaring the value of the goods on the face of the contract of carriage within the meaning of the regulation.

Gardiner v MacDonald, 2016 ONSC 602

- **Professional Drivers Owe a Higher Standard of Care than Ordinary Drivers**

Gardiner v MacDonald, 2016 ONSC 602

- Bus T-boned an SUV at an intersection
- Bus was going through green light
- SUV was going through a red light
- Held: Bus 20% liable for speeding.



- Question: Did bus have reasonable opportunity to avoid the collision but failed to do so?

AGF Steel Inc. v Miller Shipping Limited, 2016 FC 461

- The Federal Court held that a transportation services contract was a charterparty and not subject to the Hague-Visby rules.
- Parties were free to negotiate their own terms concerning liability

Platypus Marine Inc. v The Ship "Tatu", 2016 FC 501

- An agreement to pay an interest rate above 60% per annum was held to be invalid but interest was allowed at 5%

Wilson *v.* Atomic Energy of Canada Ltd., 2016 SCC 29

- Federal non-unionized employees cannot be terminated absent just cause and adequate severance pay is not a sufficient substitute
- Federally regulated industries: aviation, inter-provincial trucking and railways, shipping and navigation

Wilson *v.* Atomic Energy of Canada Ltd., 2016 SCC 29

- *Canada Labour Code* limits application of the unjust dismissal regime in the following manner:
- 1. The affected employee must have at lease twelve months of service with the employer.
- 2. The regime does not apply to managers; however this term is interpreted very narrowly. Supervisors, for example, may not be considered managers.
- 3. The regime does not apply to terminations for lack of work.
- 4. The regime does not apply to terminations for discontinuance of a function.

Changes to *Repair and Storage Liens Act - Ontario*

- tightened rules for how much – a lien may be claimed by a towing company following the removal of a tractor from a roadside accident.
- Secured creditors such as motor vehicle lenders will benefit by the increased regulation of what might be claimed by way of a ‘preferential’ lien by a towing company or a storage facility

Changes to *Repair and Storage Liens Act - Ontario*

- July 1 2016:
- 60 day for notice of a lien for storage now 15 days
- if notice is not provided within 15 days, a storer's lien is then limited to the unpaid amount owing for that period
- Remains 60 days for out of province vehicles

Changes to *Repair and Storage Liens Act - Ontario*

- July 1 2016:
- In determining ”fair” value for the lien - factors
- 1. The repairer’s fixed costs, variable costs, direct costs and indirect costs.
- 2. The repairer’s profit.
- 3. Any other relevant factors.

Changes to *Repair and Storage Liens Act - Ontario*

- *January 1, 2017* :
- a storer is obliged to honor the CPA provisions where the towing and storage is for a consumer's vehicle. New section 3(2.0.1) in the RSLA will provide, in respect of tow and storage services, that "*if the repair includes one or more tow and storage services in respect of which Part VI.1 of the CPA applies, no lien arises with respect to those services if the repairer fails to comply with the prescribed provisions of that Part, if any*"

Sattva v. Crestor

- “the interpretation of contracts has evolved towards a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding”

Sattva v. Crestor

- Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning

Sattva v. Crestor

- The contract must be read as a whole and the words in the contract must be given their plain and ordinary meaning, consistent with the surrounding circumstances at the time of contracting.

Sattva v. Crestor

- “while the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.”

Sattva v. Crestor

- Standard of Review on Appeal: reasonableness – not correctness
- Example is Celadon trial decision on tariff
  - Had correctness been applied – trial judge would have been overturned
  - Reasonable

MacDonald v. Chicago Title Insurance Co. of Canada (late 2015)

- “The standard of review of a standard form contract however should remain to be a question of law” (thus allowing an appellate court to substitute a ‘correct’ interpretation)
- [Sattva v. Crestor: standard of review was reasonableness]

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. 2016 SCC 37

- the interpretation of a standard form contract should be recognized as an exception to the Court's holding in *Sattva*
- in the contractual interpretation of standard form contracts the "factual matrix" carries less weight in interpretation

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. 2016 SCC 37

- Insurance claim involving coverage on the basis of an exclusion contained in the policy for the "cost of making good faulty workmanship"
- The trial judge held the insurers liable, finding that the exclusion clause was ambiguous and that the rule of *contra proferentem* applied against the insurers.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. 2016 SCC 37

- The Court of Appeal reversed that decision. Applying the correctness standard of review to the interpretation of the policy, the court held that the trial judge had improperly applied the rule of *contra proferentem* because the exclusion clause was not ambiguous.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. 2016 SCC 37

- SCC: Standard of review for standard form clauses is correctness
- SCC went on to find you didn't need *contra proferentem* to find for the insured.
- Reading of the clause – exclusion did not apply to cost of replacing the windows – not cost of making good faulty workmanship

McKeil Marine Limited v. A.G. Canada and Foss Maritime Company

- Coasting Trade litigation
- Atlantic Towing was hired to transport two dead ships from BC to Nova Scotia
- It hired Foss Maritime to transport from BC to Panama and then Atlantic Towing from Panama to Nova Scotia
- Was this a carriage from one place in Canada to another place in Canada by a foreign vessel? Contrary to the *Coasting Trade Act*

McKeil Marine Limited v. A.G. Canada and Foss Maritime Company

- Not answered
- Application was dismissed:
  - McKeil had no interest to bring the application
  - McKeil may have public interest standing in the future if the issue arises in the Great Lakes
  - Mootness: shipments had taken place by the time of the hearing.

Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re 2016 CarswellOnt 10550

- TTC operates Twitter account - @TTChelps
- Union brought a grievance against TTC asking for the account to be shut down
- Some of the tweets are aggressive, profane and derogatory
- Union: work place harrassment
- Workers feel that they are just punching bags for the public and that the TTC does not care about them

Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re 2016 CarswellOnt 10550

- *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1 (the *"OHSA")*, and the *Human Rights Code*, R.S.O. 1990, c. H.19 (the *"HRC")*
- Held: workplace harrasment. TTC was required to advise tweeters to stop and to block tweeter account
- * the workplace can include a virtual location such as the web

Peterson v. Ceva Logistics ULC, 2016 HRTO 698

- the employee brought an application under section 34 of the Ontario *Human Rights Code* seeking compensation and other relief for infringement of her rights
- The employer filed evidence that it operated a business in Canada providing contract logistics, freight forwarding and interprovincial trucking services and regulated federally (*Canada Labour Code*)

Peterson v. Ceva Logistics ULC, 2016 HRTO 698

- Held: The Adjudicator held that the *Human Rights Code* only applies to matters that fall within provincial jurisdiction and does not apply to federally regulated businesses
- Could have gone to the Canadian Human Rights tribunal.