Limitation of Liability Allowed but Insurance Coverage Denied: Telus v. Peracomo

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Supreme Court of Canada decides

- On April 23, 2014 the Supreme Court of Canada renders its decision in *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29
- An important ruling on two key issues:
  - The right to limit liability under the *Marine Liability Act*, S.C. 2001,c.6, s.29, despite the *1976 Convention on Limitation of Liability for Maritime Claims,* Art. 4
  - Wilful misconduct under the *Marine Insurance Act,* S.C. 1993, c.22, s. 53(2)

Man and Boat

Source: http://www.hebdosregionaux.ca/cote-nord/2013/01/24/la-cour-supreme-entendra-la-cause-de-real-vallee,by Charlotte Paquet

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"[He] is a good man; a decent man; an honest man – a fisherman. However he did a very stupid thing."

Justice Harrington
Federal Court of Canada

Trial Decision, para. 1

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Fishing in 2005

Museum of Navigational Wonders

- And on that chart there was a note…

"abandonné"

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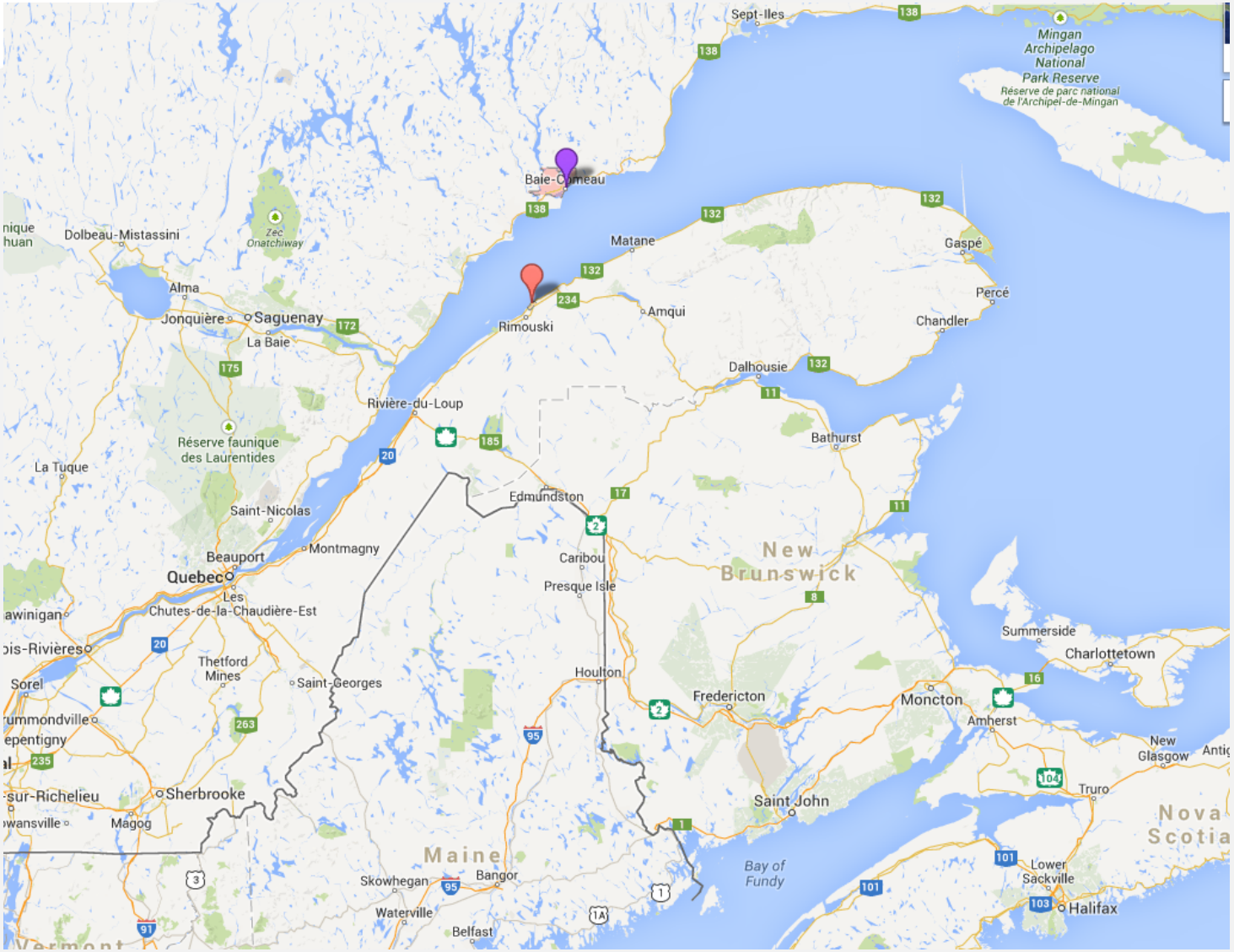

Source: https://maps.google.ca/maps

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Fishing in 2006

Fishing a few days later 2006

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Federal Court action - parties

- **Plaintiffs**
  - TELUS and Hydro Quebec
  - Bell Canada
- **Defendants**
  - Renee Vallée
  - Peracomo Inc.
  - The “REALICE”
- **Third Party**
  - Royal & Sun Alliance Insurance Co. of Canada

Claims in the Federal Court

- Plaintiffs claimed damages of $980,433.54 and sought to break the defendants' right to limitation
- Defendants denied liability and sought:
  - contributory negligence against Telus
  - limit their liability to $500,000
  - insurance coverage from RSA for any liability
- Third Party RSA sought to have its denial of coverage, based wilful misconduct, upheld

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Federal Court Trial and Appeal

- After trial Justice Harrington found the defendants jointly and severally liable to the plaintiffs for $980,433.54
  - Defendants' right to limit broken
  - Wilful misconduct supporting the coverage denial was found and the claim against RSA was dismissed
- Defendants appealed but Federal Court of Appeal upheld the Trial Court's ruling

Supreme Court of Canada

Supreme Court of Canada

- Hearing on Nov 15, 2013 before 5 justices
- Decision April 23, 2014 – appeal allowed in part
- Judgment written by Cromwell J. with Wagner J. dissenting in part
- Three issues were raised on this appeal.
- The first was whether Mr. Vallée who was the *alter ego,* directing mind, and the sole officer and shareholder of the company, was personally liable for the wrongs of his company.
    - SCC held that that he was, even though he was carrying out corporate duties at the time.

Two Key Issues

The Supreme Court then looked a two key issues:

1) Limitation of Liability
   - Whether the defendants could limit their liability under s. 29 of the *Marine Liability Act*, despite Art. 4 of the *1976 Limitation Convention*?

2) Insurance Coverage
   - Whether cutting the cable constituted “wilful misconduct” under s.53(2) of the *Marine Insurance Act*, such that coverage could be denied

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Key Issue - Limitation of Liability

Limitation of Liability

"there is not much justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justifications in convenience"

Lord Denning, in *The Bramley Moore*,
[1963] 2 Lloyd's Rep. 429 at 437

- 1976 Limitation Convention
  - Historic trade off
  - Virtually unbreakable limit in exchange for higher limits allowing for greater recoveries by claimants

Limitation of Liability in Canada Today

Marine Liability Act

- S. 26 incorporates the *1976 Limitation Convention* (as amended by the 1996 protocol) as a Schedule to the MLA. It applies to vessels greater than 300 tons.
- Under s.29 maximum liability for maritime claims involving a ship of less than 300 gross tonnage, is

  (*a*) $1,000,000 for loss of life or personal injury; and

  (*b*) $500,000 in respect of any other claims**.**
- REALICE is 44 tons = $500,000 limit for property damage

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Limitation of Liability in Canada

Gross Tonnage	Claims For Loss of Life or Personal Injury*	Other Claims *
Less than 300	CAD$1,000,000	CAD$500,000
300 - 2,000	2,000,000 SDR (CAD $3,400,000)	1,000,000 SDR (CAD$1,700,000)
2001 - 30,000	2,000,000 SDR (CAD $3,400,000) plus 800 SDR (CAD$1,400) for each ton over 2000	1,000,000 SDR (CAD$1,700,000) plus 400 SDR (CAD$700) for each ton over 2000
30,001 - 70,000	24,400,000 SDR (CAD$42,000,000) plus 600 SDR (CAD$1000) for each ton over 30,000	12,200,000 SDR (CAD$21,000,000) plus 300 SDR (CAD$500) for each ton over 30,000
over 70,000	48,400,000 SDR (CAD$83,000,000) plus 400 SDR (CAD$700) for each ton over 70,000	24,200,000 SDR (CAD$41,000,000) plus 200 SDR (CAD$350) for each ton over 70,000

*Except for passengers or persons carries on a ship
*SDR = Special drawing right = approx. 1.7 CAD currently

Limitation of Liability

***Article 4* - 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. [emphasis added]

1976 Limitation Convention

Schedule 1 to Marine Liability Act

Limitation of Liability

Federal Court (Trial Division)

- Mr. Vallée's conduct barred limitation
- Key finding – Mr. Vallée honestly thought the cable was abandoned and non-operational

Federal Court of Appeal

- Upheld the decision of the Trial Court
- What mattered was that Mr. Vallée intentionally damaged the cable

Limitation of Liability

- SCC noted the *1976 Convention* was intended to have a virtually unbreakable limit and that it should be interpreted with that in mind.
- It noted that Art.4 was expressed in restrictive language:

> 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.

Article 4 of the *1976 Convention*

Schedule 1 of the *Marine Liability Act*

Limitation of Liability

SCC finds:

- Resulting loss was “the diminution the value of the cable measured by the cost of repairing it.” (para.32)
- Mr. Vallée thought the cable was useless and had no value, and would not be repaired. He “did not have a sufficient knowledge of the probable consequences of his actions pursuant to art.4” (paras.32,34)
- He did not know that “such loss” (cost of repairs) would occur, and did not intend to cause “such loss” that actually occurred. Without that specific intent or knowledge limitation could not be broken.

Limitation of Liability

Peracomo clarifies that in Canada limitation will be almost impossible to break. Simply proving intent or recklessness alone will not suffice. To break limitation you need:

1) loss resulting from the personal act or omission of person liable; and either
2) intent to cause the loss that actually occurred; or
3) recklessness with the knowledge that the loss that actually occurred would probably result.

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Key Issue – Insurance Coverage

Insurance Coverage

Under the *Marine Insurance Act:*

Losses covered

53. (1) Subject to this Act and unless a marine policy otherwise provides, an insurer is liable only for a loss that is proximately caused by a peril insured against, including a loss that would not have occurred but for the misconduct or negligence of the master or crew.

(2) Without limiting the generality of subsection (1), an insurer is not liable for any loss attributable to the wilful misconduct of the insured… [emphasis added]

Insurance Coverage

Federal Court (Trial Division)

- Wilful misconduct more than negligence but requires “either a deliberate act intended to cause the harm, or such blind and uncaring conduct that one could say that the person was heedless of the consequences”:

  para. 91, quoting from Strathy & Moore,

  The Law and Practice of Marine Insurance in Canada, p.108.

- Mr. Vallée’s conduct was “reckless in the extreme” and a marked departure from the norm and constituted wilful misconduct excluding coverage (paras. 84, 92)

Insurance Coverage

Federal Court of Appeal

- Upheld the Trial Court's decision
- Greater emphasis on issue of whether Mr. Vallée's conduct had been the proximate cause of the loss

Insurance Coverage – Issue 1

Supreme Court of Canada

1) whether the fault standard under art. 4 of the *1976 Convention* and s. 53(2) of the *MIA* are the same

- Liability limit an upper limit on the insurer's exposure but does not seek to regulate scope of risks insured
- S.53(2) related to a fundamental principle of insurance law – allocation of risk. Loss caused by wilful misconduct is not a fortuity. Purpose of s.53(2) is to draw a line between the sorts of perils that are insured and the sorts that are not.
- S.53(2) has a different and lower fault standard than called for by the *Convention*

SCC paras. 51,53

Insurance Coverage – Issue 2

(2) interpretation of “wilful misconduct” in the MIA

Wilful misconduct includes:

a) intentional wrongdoing; or

b) other misconduct committed with reckless indifference in the face of a duty to know.

SCC para. 61

Insurance Coverage – Issue 2

SCC found Mr. Vallée's conduct was:

1. "misconduct"
   - He had a duty to be aware of the cable and he "failed miserably in that regard". His actions were "far outside" the range of expected conduct.
2. "wilful"
   - He knew he was cutting a submarine cable. He adverted to the possibilities that it could be either in use or abandoned. He had actual knowledge of the risk he could be cutting a "live" cable.

Insurance Coverage – Issue 2

Supreme Court concluded that Mr. Vallée was "reckless in the extreme". As Cromwell J. put it:

> "…at the time he cut the cable Mr. Vallée, who had a duty to know better, subjectively adverted to the risk that the cable might be live and decided to cut it anyway on the sole basis of some handwriting that he had seen for a few seconds on a map on a museum wall — a map which was not a marine chart and was of unknown origin or authenticity. Cutting the cable in those circumstances constitutes wilful misconduct …" (emphasis added)
>
> SCC paras.65,67

Insurance Coverage – Issue 3

(3) whether the Quebec civil law approach to "intentional fault" applies to "wilful misconduct" under the *MIA*

- SCC concluded "no". The term "wilful misconduct" in marine insurance law has a wider meaning than has "*faute intentionnelle*" in the Quebec civil code

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SCC Disposition

- Appeal on limitation issue allowed
  - The Peracomo appellants can limit their liability to $500,000
- Appeal on insurance issue dismissed
  - The Peracomo appellants' loss is excluded from insurance coverage due to Mr. Vallee's "wilful misconduct"

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Conclusion

In light of *Peracomo:*

- The virtually unbreakable liability limit is restored. Must now show either intent to cause the loss that actually occurred, or recklessness with knowledge that the loss that occurred would probably result
- The meaning of "wilful misconduct" under the *MIA* has been clarified to include intentional wrongdoing; or other misconduct committed with reckless indifference in the face of a duty to know.
- Even when conduct is not sufficiently egregious to break limitation it may still be sufficient to breach the terms of a marine insurance policy.

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The differences among negligence, gross negligence and recklessness are the same as the distinctions among a fool, a damned fool and a god-damned fool.

Judge Magruder (reputedly) to his students at Harvard Law School

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