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Overview

- Historical background
- International maritime law
- Degree of fault
- *Peracomo Inc v TELUS Communications Co* 2014 SCC 29
§ 55 Marine Insurance Act, 1906

Included and excluded losses:
(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular—
(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew [...]

Historical Background - I
Historical Background - II

- Convention for the Unification of Certain Rules relating to International Carriage by Air, 1929 (Warsaw Convention)

- Art. 25: “The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such fault on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct.”
Historical Background - III

- **Diplomatic Conference, 1929**
  - “[...] dol ou d’une faute qui, d’après la loi du tribunal saisi, est considérée comme équivalente au dol.”
    - Civil law → dol (Roman law: dolus)
    - Common law → fault which is considered to be equivalent to dol
  - Reference → legal terminology
  - British delegation: Question of terms → wilful misconduct

- **Practice**
  - Common law: only wilful misconduct → state of mind of the wrongdoer
  - Civil law: dolus / fault equivalent to dolus = gross negligence (culpa lata) → necessary care which a reasonable person should have shown
  - Severe diversity between jurisdictions → forum shopping
Historical Background - IV

- Amendment with the Protocol of 1955 to Amend the Warsaw Convention (Hague Protocol)

- Art. 25: “The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; [...]

= wilful misconduct
International Maritime Law - I

• Carriage of Goods
  • Hague/Visby Rules, 1968
  • Hamburg Rules, 1978
  • Rotterdam Rules, 2009

• Carriage of Passengers – Athens Convention, 2002

• Pollution Conventions
  • CLC’92
  • HNS, 2010
  • Bunker Convention, 2001 → LLMC

• Global Limitation – LLMC, 1976
“[…] is not entitled to limit his [its] liability, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause [such] damage, or recklessly and with knowledge that [such] damage would probably result”

Wilful misconduct
- Intent to cause [such] damage
- Recklessly and with knowledge that [such] damage would probably result
Wilful Misconduct - I

- Intent to cause [such] damage → *dolus directus*, *Absicht*

- Recklessly and with knowledge that [such] damage would probably result
  - Recklessness → conscious & deliberate & unjustifiable risk taking
  - Knowledge as to the consequences → acts of unawareness are not included

- Literature → advertent gross negligence, *sui generis*, *dolus eventualis*
# Wilful Misconduct - II

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- Dolus: Direct intention
  - *Dolus directus* (direct intention)
  - *Dolus eventualis* (eventual intention)

- Wilful misconduct: Intentional wrongdoing with knowledge
Peracomo - I

- *Peracomo Inc v TELUS Communications Co* 2014 SCC 29

- Shipowner: Peracomo Incorporation → sole shareholder: Mr. Vallée

- Submarine cable → live fiberoptic cable

- Damage ≈ $1 million
Peracomo - II

Federal Court & Federal Court of Appeal

- No limitation → Art. 4 LLMC: “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.”

- No insurance cover → Sec. 53 (2) MIA: “[...] an insurer is not liable for any loss attributable to the wilful misconduct of the insured [...]”
Peracomo - III

Supreme Court of Canada

- Fault standard → Art. 4 LLMC ≠ Sec. 53 (2) MIA
- Wilful misconduct (Sec. 53 (2) MIA)
  - Intentional wrongdoing
  - “Conduct exhibiting reckless indifference in the face of a duty to know”
    - “Conduct exhibited a reckless indifference to the possible consequences of his actions of which he was actually aware”
    - “Simply misconduct with reckless indifference to the known risk despite a duty to know”
- Result: limitation of liability, but no insurance cover
Peracomo - Remarks

- Fault standard → Art. 4 LLMC = Sec. 53 (2) MIA
- Unlimited liability = loss of insurance cover

- “Reckless indifference in the face of a duty to know”
  - Duty of care expected of a reasonable person → negligence
  - Wilful misconduct → actual knowledge of and indifference to the probable consequences
  - Wilful misconduct → reckless indifference despite the knowledge
Thank you for your attention!