

# Recklessness with Knowledge

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# Overview

- Historical background
- International maritime law
- Degree of fault
- *Peracomo Inc v TELUS Communications Co*  
2014 SCC 29

# Historical Background - I

- § 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 - 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

# International Maritime Law - II

- “[...] 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

Civil Law		Common Law
<p><i>Dolus</i></p> <p>Direct intention (<i>dolus directus</i>)</p> <p><i>Dolus eventualis</i></p>		<p>Wilful misconduct</p> <p>Intentional wrongdoing</p> <p>Recklessness with knowledge</p>
<p>Negligence</p>		<p>Negligence</p>
Slight negligence	Gross negligence	
Inadvertent negligence ( <i>negligentia</i> )	Advertent negligence ( <i>luxuria</i> )	

# 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!**