Federal Court of Appeal | Cour d'appel fédérale

Date: 20120629

Docket: A-199-11

Citation: 2012 FCA 199

CORAM: **LÉTOURNEAU J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

PERACOMO INC.,
RÉAL VALLÉE,
LES PROPRIÉTAIRES ET TOUTES LES AUTRES PERSONNES AYANT UN DROIT SUR LE NAVIRE DE PÊCHE « REALICE »,
LE NAVIRE DE PÊCHE « REALICE »

Appellants

and

SOCIÉTÉ TELUS COMMUNICATIONS,
HYDRO-QUÉBEC,
BELL CANADA

Respondents

and

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

Third party

Heard at Montréal, Quebec, on May 16, 2012.

Judgment delivered at Ottawa, Ontario, on June 29, 2012.

REASONS FOR JUDGMENT BY: GAUTHIER and TRUDEL JJ.A.

CONCURRED IN BY: LETOURNEAU J.A.

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REASONS FOR JUDGMENT

GAUTHIER and TRUDEL JJ.A.

Overview

[1] This appeal is all about an underwater telecommunications cable (the Sunoque I or brown cable) owned by Société Telus Communications (Société Telus) and Hydro-Québec and the extent to which Réal Vallée and his company Peracomo Inc. (Peracomo) are liable for the damages suffered by the respondents after Mr. Vallée decided to cut it.

[2] It was found by a judge of the Federal Court (the Judge) that Mr. Vallée's personal act was deliberate and done with intent to cause the loss resulting from the cutting of the brown cable and therefore, that Mr. Vallée was liable for the loss. Since Mr. Vallée was Peracomo's directing mind and its sole officer, his actions were deemed to be Peracomo's. Therefore, Peracomo was also liable on the basis of Mr. Vallée's actions.

[3] As a result, the appellants were held liable for the damage to the brown cable and the respondents' loss, which amounts to $980,433.54. The Judge also found that the appellants neither could limit their liability pursuant to Article 4 of the *Convention on Limitation of Liability for Maritime Claims, 1976,* as amended by the Protocol of 1996 (the 1976 Convention), reproduced in Schedule I to the *Marine Liability Act*, S.C. 2001, c. 6 (the MLA) nor benefit from the protection of the insurance policy issued to them by Royal and Sun Alliance Insurance Company of Canada (Royal or Third party).

[4] The amended judgment under appeal is cited as 2011 FC 494. For the reasons that follow, we propose to dismiss the appeal.

The relevant facts

[5] The facts are straightforward and uncontested. In October 1999, two submarine fibre optic cables were laid across the St-Lawrence River, one of which is the Sunoque I running from Pointe-au-Père on the south shore to Baie-Comeau on the north. Telus and Hydro co-own the Sunoque I while Bell Canada has a right of use in it (collectively Telus).

[6] Mr. Vallée has been a fisherman all his life. He is now 64 years old and the sole shareholder and president of Peracomo which owns the fishing vessel *Realice*. Mr. Vallée, the master of the *Realice*, was engaged in snow crab fishing at the time of the incident. The vessel was in "Zone 17" where Mr. Vallée has been fishing since 2002. The crab fishing season extends from roughly mid-April until early June.

[7] The crab fishing technique consists of laying cables on the river bottom measuring each about 1 mile in length with cages attached approximately every 400 feet. These cables are secured at both ends by small anchors thus allowing the cables and cages to maintain or regain their hold when the wind or current changes the direction of the pull. These anchors themselves are tied to buoys to mark their location and to also identify the cages' owner as other vessels are competing for the same halieutic stock in Zone 17. The anchors must be lifted from the river bottom in order to haul the

cages out and unload the catch. Unsurprisingly, anchors getting entangled in debris, such as lost crab cages, ship lines and other abandoned items is a common occurrence. Most of the time, the reason why an anchor is hooked at the bottom remains unknown. The vessel will be motored slowly around the location of the anchor in the hope of freeing it without endangering the safety of the vessel and crew. According to the evidence, Mr. Vallée would see a piece of equipment or another get hooked at the bottom 7 or 8 times per year. He had drawn an imaginary line on his navigation plotter showing the locations where this regularly happened, mostly parallel to the Sunoque I (appeal book, volume XVIII at page 3072)**.** The navigation plotter also allowed Mr. Vallée to see his cages on the river bottom but not the Sunoque I.

[8] In 2005, one of Mr. Vallée's cage string anchors got hooked onto something at the bottom of the river. Mr. Vallée managed to pull a brown cable of approximately one inch in diameter close to the surface and released the anchor.

[9] Not too long after this event, Mr. Vallée visited Église Saint-Georges, a deconsecrated church in Baie-Comeau, which is now a museum. There, he saw what he described as a chart illustrating an abandoned underwater cable, part of which was resting on the river bottom within his fishing zone. Mr. Vallée stated that the chart showed a line drawn across the river over which the word "abandonné" was written. Without further investigation, he concluded that this was the brown cable he had seen previously and what he was hooking with his anchor.

[10] On June 6, 2006, Mr. Vallée, onboard the *Realice*, navigated to his buoys in his favourite fishing spot in Zone 17. The day before one of his string cage anchors had snagged something again but bad weather had forced him to leave the area before releasing it or recuperating his catch. As he got to his buoys, Mr. Vallée proceeded to lift the string cage anchor and, with it, came the Sunoque I, the same brown cable that he had lifted the year before. This time, Mr. Vallée was determined to put an end to this situation: he had had it with this brown cable and decided to cut it ("… j'en avais assez avec ce câble et j'ai decidé de le couper") (Mr. Vallée's statement to the Sûreté du Québec, *ibidem* at page 3061).

[11] The operation was dangerous and not an easy one as the Sunoque I runs over 100 kilometers and is obviously very heavy. The risk of capsizing while pulling it to the surface is real. Still, Mr. Vallée succeeded in lifting part of the Sunoque I completely outside the water. Afraid that his pulling line would break because of the weight, he supported the Sunoque I with a stronger cable before securing it to his vessel. Then, either he or his son, Mr. Vallée does not remember, attempted to cut the Sunoque I with a metal cutting hand saw. This attempt proved unsuccessful, so Mr. Vallée took a circular electric saw and finally cut the Sunoque I in two.

[12] Once the Sunoque I was cut, one of its ends stayed trapped in Mr. Vallée's equipment while the other end sunk to the bottom. Mr. Vallée returned to the dock without his catch. A few days later, once again an anchor got hooked in the Sunoque I. This time Mr. Vallée could easily lift it to the surface as it had already been severed. After releasing his anchor, he used the same circular

electric saw, cut the Sunoque I again and hauled the cut segment away from his fishing spot, to where the water was deeper.

[13] This was the end of the matter for the Sunoque I but not for Mr. Vallée. Some weeks later in July 2006, he found out about what he had done through a newspaper article reporting that a Telus cable had been deliberately cut and that the authorities were searching for the culprit.

[14] Mr. Vallée came forward. He contacted his lawyer and his underwriters, who promptly denied coverage, and he made a voluntary statement to the Sûreté du Québec. He was then charged with committing mischief by wilfully damaging property and interfering with the lawful use, enjoyment or operation of a communication service, but was later acquitted: *La Reine c. Réal Vallée*, 2008 QCCQ 1086, (Francoeur, j.c.q.).

[15] In hindsight, had Mr. Vallée abandoned his anchor, the line and the buoy, his loss would have been approximately $250, a loss that he could have recuperated from the owners of the Sunoque I. Instead, he cut the Sunoque I and, as a result of the amended judgment under appeal, the appellants are now left with no insurance coverage from Royal and a debt of $1,213,320.07, including pre-judgment interest.

[16] The *Realice* was also found liable *in rem*. A warrant of arrest was issued on July 20, 2007. She remains under arrest, as bail was never posted. To prevent the sale of the ship before judgment, the appellants undertook to maintain the vessel so that she would not become a wasting asset

(amended reasons for judgment of the Federal Court (thereafter referred to as “reasons”) at paragraph 44).

[17] The Judge identified five issues to be addressed: 1) whether the appellants were liable for Telus’ loss; 2) the quantum of damages; 3) whether the appellants were entitled to limit their liability to the principal amount of $500,000 pursuant to section 29 of the MLA or whether they had lost that right pursuant to Article 4 of the 1976 Convention; 4) whether the appellants had lost their insurance cover; and 5) the interests and costs relating to the principal action and Third party proceedings.

[18] This appeal is concerned with the first, third and fourth issues. Also the appellants raised an issue that was not argued specifically before the Judge. In fact, it is not discussed in their defence. They say that it was an error of law to find Mr. Vallée jointly and severally liable with Peracomo. Thus to facilitate the analysis, we have reordered the issues as follows:

1 Mr. Vallée’s liability and Telus’ alleged contributory negligence

2 Mr. Vallée’s joint and several liability with Peracomo

3 The appellants’ right to limit their liability

4 The appellants’ loss of insurance coverage

[19] The reasons of the Federal Court and the relevant submissions of the appellants will be reviewed in the course of our analysis.

Analysis

Issue 1) Mr. Vallée's liability and Telus' alleged contributory negligence

[20] The appellants' defence to the respondents' claim was that "Mr. Vallée should have been given notice by Telus of the cable's existence, and furthermore that it was not properly installed. It should have been buried" (reasons at paragraph 7). As a result, the appellants could not be found liable for Telus' loss. At the very least, there was contributory negligence on the part of Telus.

[21] The Judge dismissed this defence in its entirety. As for the installation of the Sunoque I, the Judge preferred the respondents' expert evidence demonstrating that burying the cable either using a plow or a high-pressure water jetting system was unfeasible considering the softness of the river bottom and the length of the brown cable.

[22] The Judge found that Mr. Vallée ought to have known about the presence of the Sunoque I by virtue of the *Charts and Nautical Publications Regulations, 1995* (SOR/95-149) (the Regulations) and that he had breached this statutory obligation. More particularly, he found that the Sunoque I was "… a navigational hazard … it was Mr. Vallée's duty to know of its existence … he failed miserably in that regard" *(ibidem* at paragraph 34).

[23] Although the appellants argue that, as a matter of fact, the Sunoque 1 was not a navigational hazard (appellants' memorandum of fact and law at paragraph 26), we note paragraph 22 of their re-amended defence in the Federal Court where they state that the "abandoned cable constituted a danger for the [appellants] and their crew" [TRANSLATION]. In that vein, the Judge rejected the

distinction that the appellants were drawing between the Sunoque I being a hazard while fishing, as opposed to navigating.

[24] On the evidence before him, we are satisfied that it was open to the Judge to find that the Sunoque I was a navigational hazard within the meaning of the Regulations.

[25] Subsections 4(1) and 4(2) of the Regulations, as well as paragraph 5(1)(*b*) state clearly that the master and owner of a ship are not required to have "the most recent editions of the charts, documents and publications" that apply "to the immediate area in which the ship is being navigated" if ("si")

Ccarriage of charts, documents and publications	Cartes, documents et publications à bord
4.	4.
…	[…]
(2) … the person in charge of navigation has sufficient knowledge of the following information, such that safe and efficient navigation in the area where the ship is to be navigated is not compromised:	(2) … la sécurité et l'efficacité de la navigation n'est pas compromise compte tenu du fait que la personne chargée de la navigation connaît suffisamment, dans la zone où le navire est appelé à naviguer :
(*a*) the location and character of charted	*a*) l'emplacement et les caractéristiques des éléments cartographiés suivants :
(i) shipping routes,	(i) les routes de navigation,
(ii) lights, buoys and marks, and	(ii) les feux de navigation, les bouées et les repères,
(iii) navigational hazards; and	(iii) les dangers pour la navigation;
…	[…]

[26] Contrary to the Judge's specific finding in that respect (reasons at paragraphs 31-38), Mr. Vallée says that he had sufficient knowledge to ensure safe and efficient navigation in conformity with the Regulations (appellants memorandum of fact and law at paragraph 25) Therefore, he had no duty to carry the most up-to-date charts. We cannot agree.

[27] As found by the Judge, Mr. Vallée was not aware of the notices to mariners published "time and time again" by the Federal government about the Sunoque I.

[28] Most importantly, in our view, is the fact that in 2005 Mr. Vallée lifted the Sunoque I to the surface. There could not have been better notice to Mr. Vallée of the presence of a cable, one in which, he said, an anchor or another piece of equipment got caught on a regular basis, that is 7 to 8 times during a fishing season that lasts approximately 8 weeks. Yet, Mr. Vallée never made inquiries as to the nature and use of this heavy brown cable. Whatever he saw at Église Saint-Georges was "a chart of one sort or another", not a marine chart. The Judge held that "there is not, and there never was, such a marine chart" (reasons at paragraph 83). We agree that Mr. Vallée had the obligation to seek further and better information following his first encounter with the Sunoque I.

[29] With that in mind, it becomes relevant that, as noted by the Judge, Mr. Vallée used his navigation plotter simply to mark his fishing spots and Baie-Comeau. The *Realice* had onboard an out-dated marine chart and unapproved electronic chart, both of which predated the Sunoque I. An

electronic chart programmed at the proper scale would have shown the brown cable on the river bottom.

[30] In the circumstances, we have not been persuaded that the Judge made an error in respect of his factual determination that Mr.Vallée did not have sufficient knowledge and did not meet his obligation within the meaning of the Regulations.

[31] As for Telus' failure to notify the Fishermen's Association for Zone 17 of the existence of the (brown) cable, the Judge found it to be not causative (reasons at paragraph 53). He concluded, "…such shortcoming there may have been on Telus' part did not, in my opinion, cause or contribute in any way to the damage suffered by the Sunoque I" (reasons at paragraph 14).

[32] In fact, the Judge concluded that:

> The cause of the loss was not lack of notice on Telus' part. The cause of the loss was not the fact that the [brown] cable was not buried. The cause of loss was not that the [brown] cable was hooked by a snow crab anchor. The loss was caused because Mr. Vallée intentionally and deliberately cut the [brown] cable in two with an electric saw (*ibidem* at paragraph 47).

[33] The appellants argue that the Judge misapplied the concept of contributory negligence and omitted to consider all of the evidence. More particularly, they say that the Judge erred by ignoring the agreements between Société Telus, Hydro-Québec and Bell in relation to the Sunoque I's operation providing that Société Telus had a continuing obligation to publicize the existence of the

Sunoque I to fishing associations prior to the start of every season (appeal book, volume XVIII, page 3007 at 3011-3012, paragraph 6.4.1d); also page 3022 at 3029-3030, paragraph 2.6.1g)). Had the Judge considered that evidence, he would have concluded to Telus' contributory negligence. Once again, we disagree.

[34] The Judge did not have to mention every piece of evidence that was presented to him before reaching his conclusion, especially remote evidence relating to the contractual relationship between the respondents. The Judge's conclusions of facts and or mixed law and fact will not be disturbed absent a palpable or overriding error. No such error has been demonstrated. It was open to the Judge to conclude that there was no contributory negligence on the part of Telus and that its "failure to inform the *Association des pêcheurs de crabe de la Zone 17* was not causative" (reasons at paragraph 53). There was ample evidence supporting his conclusion. Mr. Vallée had the last clear chance to avoid the accident by not cutting the Sunoque I and by simply releasing it, the same way he had done previously. But, he did not.

[35] Turning now to the Judge's finding as to the only true cause of the loss – the cutting of the Sunoque I, the appellants note that however negligent Mr. Vallée may have been, Telus will not have a valid maritime claim against them unless it is found that they owed Telus a duty to be careful. The question of whether a duty of care exists is a question of law attracting a standard of correctness: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670. On the other hand, the question of the standard of care, *i.e.* the conduct required to satisfy the duty, is a question of mixed law and fact. Findings of facts or mixed law and fact will stand absent a palpable or overriding error, or an

extricable error of law: *Madison v. Canada*, 2012 FCA 80 at paragraph 8; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraphs 26, 36 and 37.

[36] The appellants submit that Telus was not in the reasonable contemplation of Mr. Vallée, and it is therefore not owed any duty of care. In their view, the Judge's approach was not in line with the most recent case law dealing with the determination of the existence of a duty of care (appellant's memorandum of fact and law at paragraph 22).

[37] In our view, once he turned his mind to the liability of the defendants (as opposed to dealing with the defence based on Telus' fault), the Judge correctly noted that the case fell to be determined by Canadian maritime law, which includes the English common law of negligence as applied in the English admiralty courts before 1934: *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752. This is not contested.

[38] On the basis of the factual matrix, the Judge had no difficulty concluding that Mr. Vallée owed a duty of care to the respondents taking support on the meaning of the duty of care expressed by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 at page 580 :

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. […] Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[39] Indeed, in the Judge's view, it was clear that Mr. Vallée owed a duty of care to his "neighbours both on and below the water line", including Telus (reasons at paragraph 49). We agree with the Judge's approach as this is not a new category of duty that required a more detailed analysis, given that the duty of ship operators not to damage underwater cables or pipelines has been recognized and applied time-and-time again. It even pre-dates *Donoghue: The Clara Killam* (1870) L.R. 3 A & E 16. It is part of Canadian maritime law. In fact, there are many cases where liability for damage to such underwater structures were admitted and the cases focused on whether the ship owner could limit its liability: *Grand Champion Tankers Ltd. and Norpipe A/S and others*, [1984] A.C. 563 (H.L.).

[40] We also agree with the Judge that it was a breach of that duty to tamper with the brown cable by cutting it in two without further investigating about it. Cutting the Sunoque I constituted a positive act readily supporting the existence of a duty of care: Christopher Walton, ed, *Charlesworth & Percy on Negligence*, 12th ed. (London, UK: Wildly & Sons Ltd., 2012) at paragraph 2-97. We see no reason to intervene on this issue.

[41] As a result, we do not share the appellants' view that the Judge erred by considering the act of cutting the Sunoque I as the breach of duty relevant for the purposes of Article 4 of the 1976 Convention. To even get to the liability of the appellants and their right to limit their liability pursuant to section 29 of the MLA, the Judge had first to examine their defence, which required an analysis of the parties' respective obligations in terms of notification and knowledge of the presence and location of the Sunoque I. The appellants' defence called into play the Regulations and the

appellants' statutory obligations under them. It was not an error on the part of the Judge to conclude that Mr. Vallée had breached his statutory obligations under the Regulations and then to go on finding that Mr. Vallée had also breached his common law duty of care towards Telus, here his neighbour under the water line. There is no doubt here that the cutting of the Sunoque I is the cause of Telus' loss. This was the breach of duty to be considered under the MLA and the 1976 Convention. Had Mr. Vallée simply released the Sunoque I, as mentioned above, these proceedings would be non-existent.

Issue 2) Mr. Vallée's joint and several liability with Peracomo

[42] Finally, the appellants submit that the Judge erred in law in holding Mr. Vallée personally liable. At paragraph 85 of their memorandum of fact and law, the appellants argue that even if Mr. Vallée was Peracomo's directing mind or *alter ego*

> "… such that his act or omission was the corporation's act or omission and thereby engaging the company's liability as shipowner, there is no basis for holding Mr. Vallée personally liable, as this amounts to disregarding the corporate legal personality."

[43] It is undisputed that Peracomo is a one-man company. Mr. Vallée was the directing mind or *alter ego* of Peracomo. He was entrusted with the decision-making power in Peracomo's entire sphere of activities. He intentionally and deliberately cut the Sunoque I. As a matter of fact, he cut it twice. Mr. Vallée did all this while exercising his duties as the master and alter ego of the corporate owner of the *Realice*. In *ADGA Systems International ltd. v. Valcom Ltd. et al.,* 43 O.R. (3d) 101,

[1999] O.J. No. 27, leave to appeal to the Supreme Court of Canada refused, [1999] S.C.C.A. No. 124, although in a different factual context, it was decided that employees, officers and directors will be held personally liable for tortious conduct causing property damage even when their actions are pursuant to their duties to the corporation. Moreover, as permitted by Article 1 of the 1976 Convention, Mr. Vallée personally sought to avail himself of the limitation of liability provided for in the 1976 Convention (Article 1(4)). It is clear that the 1976 Convention envisages that both the owner and a person for whose actions he may be liable could be sued together and be both found liable. Article 9(a) of the Convention deals with the aggregation of claims in such cases.

Issue 3) <u>The appellants' right to limit their liability</u>

[44] The appellants while facing a maritime claim sought to limit their liability to the principal amount of $500,000 by reason of section 29 of the MLA, which reads:

Other claims	Autres créances
29. The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is	29. La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l'article 28 — nées d'un même événement impliquant un navire d'une jauge brute inférieure à 300 est fixée à :
(*a*) $1,000,000 in respect of claims for loss of life or personal injury; and (*b*) $500,000 in respect of any other claims. 2001, c. 6, s. 29, c. 26, s. 324; 2009, c. 21, s. 3.	*a*) 1 000 000 $ pour les créances pour décès ou blessures corporelles; *b*) 500 000 $ pour les autres créances. 2001, ch. 6, art. 29, ch. 26, art. 324; 2009, ch. 21, art. 3.

[45] However, this statutory right to limit will be lost if the conditions set forth in Article 4 of the 1976 Convention are met:

Article 4 Conduct barring limitation	Article 4 Conduite supprimant la 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.	Une personne responsable n'est pas en droit de limiter sa responsabilité s'il est prouvé que le dommage résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérairement et avec conscience qu'un tel dommage en résulterait probablement

[46] After comparing the wording of Article 4 with the wording of similar provisions in other international conventions some of which are annexed to the MLA and after reviewing relevant foreign case law, the Judge concluded at paragraph 77 of his reasons that Telus had succeeded under the first prong of the test:

> The personal act or omission of both Mr. Vallée and Peracomo, as Mr. Vallée is its *alter ego*, has clearly been established, as has been their intentional act. It also appears to me that "such loss" was caused intentionally. The loss is the diminution in value of the [brown] cable, not the cost of repair. Telus was under no obligation to repair the [brown cable, but was under an obligation to mitigate its damages, which it did by effecting repairs, by putting the [brown] cable back together. Mr. Vallée intended the very damage, he just didn't think the [brown] cable would be repaired because he thought it had no value.

[47] The Judge, however, did not stop there. Should he be wrong, he also asked himself, whether Mr. Vallée's actions were "reckless and with knowledge that such loss would probably result". The Judge undertook that analysis although he was of the view that recklessness was not in issue in this case (reasons at paragraph 84). The Judge first stated that recklessness "connotes a mental attitude or indifference to the existence of the risk". As to whether "such loss was committed with knowledge that the loss would probably result", the Judge held that the "loss was a certainty" (*ibidem* at paragraph 87).

[48] The appellants contend that it is most uncommon that liability will not be subjected to limitation under section 29 of the MLA. The burden to prove otherwise is "very heavy" and rests solely on the respondents (appellant's memorandum of fact and law at paragraph 38). Here again, they rely on the Judge's finding that Mr. Vallée was in breach of his duty to know about the Sunoque I to say that when considering Article 4 of the 1976 Convention, the "act or omission" that the Judge should have considered was that failure, not the cutting of the Sunoque I (*ibidem* at paragraph 47).

[49] They add that Article 4 speaks of actual intent, rather than constructive intent. Mr. Vallée never had the intent of causing the cable's diminution in value because he thought it was useless (*ibidem* at paragraph 55). The Judge, they say, made a palpable and overriding error in finding, as a matter of fact, that Mr. Vallée intended some damage because there is no evidence to that effect. They claim the Judge made no finding of credibility against Mr. Vallée whose testimony is that he intended no damage whatsoever. Furthermore, as Mr. Vallée's "act or omission" is his failure to

know about the brown cable, it could not have been committed with intent (*ibidem* at paragraph 57). Therefore, they submit he had no knowledge of the possible loss, and was not turning a blind eye on the situation either. Mr. Vallée was, therefore, not reckless in the sense of Article 4.

[50] In addition, the appellants submit that the Judge erred in law in using far too restrictive an interpretation of the words "the loss" to which Article 4 refers to. In their mind, "the loss" refers to the "totality of physical damage along with the resulting or consequential financial loss" (*ibidem* at paragraph 49). It is not restricted to the diminution in value of the cable as found by the Judge.

[51] The Judge was clear that Mr. Vallée's act of cutting the Sunoque I was the only cause of the loss that is the subject of this action. As mentioned when discussing Issue 1, we have not been persuaded that he made any reviewable error in that respect. The factual background summarized above (in particular at paragraphs 8-12) supports the Judge's finding that Mr. Vallée intended to physically damage the Sunoque I. He wanted to get rid of it and, as mentioned above, he cut it twice. Thus, in the Judge's view "the loss resulted from his personal act, committed with the intent to cause such loss", as provided for at Article 4 of the 1976 Convention.

[52] Therefore, the only issue remaining is whether the Judge erred in the interpretation of the expression "such loss" in Article 4, and in how he applied it to the facts of this case.

[53] In *Yugraneft Corp. v. Rexx Management Corp*.**,** 2010 SCC 19, [2010] 1 S.C.R. 649 at paragraph 19, Justice Rothstein reiterated the principle that international conventions, as well as

legislation implementing them in Canada, should be construed in accordance with the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37. One must consider the international doctrine as well as the case law interpreting section 4. As noted by the Judge who referred to the House of Lord decision in *Stag Line Limited v. Foscolo, Mango & Company, Limited*, [1932] A.C. 328, when interpreting international conventions, one should not be controlled by domestic precedents, but rather by broad principles of general acceptation.

[54] This is exactly the approach the Judge took. We agree with the purpose of the 1976 Convention he describes at paragraph 61. Indeed in Patrick Griggs, Richard Williams & Jeremy Farr, *Limitation of Liability for Maritime claims*, 4th ed. (London: Singapore, 2005) at page 3, the authors described it as follows:

> It was recognised that the previous system of limitation had given rise to too much litigation and there was a desire that this should be avoided in future. There was agreement that a balance needed to be struck between the desire to ensure on the one hand that a successful claimant should be suitably compensated for any loss or injury which he had suffered and the need on the other hand to allow shipowners, for public policy reasons, to limit their liability to an amount which was readily insurable at a reasonable premium.
>
> …
>
> The text of the 1976 Convention finally adopted by the Conference therefore represents a compromise. In exchange for the establishment of a much higher limitation fund claimants would have to accept the extremely limited opportunities to break the right to limit liability (…).

[55] Furthermore, the party who seeks to break the limits now has the burden of proving the conduct barring limitation (Article 4). This burden has been consistently described as considerable

or very heavy. This does not mean, however, that the standard of proof is anything more than the only civil standard of proof recognized at common law, that is, the balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at paragraphs 36 *et seq*. and *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35 at paragraphs 40 *et seq*. It only means that intention and actual knowledge are often difficult to prove. As mentioned, here we have an exceptional case where the Judge found that the loss resulting from the act of cutting was a certainty.

[56] A review of all the authorities cited by the parties in respect of the 1976 Convention, as well as other conventions such as the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Signed at Warsaw on 12 October 1929, where similar (albeit non identical) language is used, indicates that the most relevant cases dealing with "such loss" in Article 4 are: *Schiffahrts Gesellschaft MS "Mercury Ski" m.b.H. & Co K.G. v. MS Leerort Nth Schiffahrts G.m.b.H. & Co. K.G. – The "Leerort"* (C.A.) [2001] 2 Lloyd's Rep. 291) [*The Leerort*], *Loic Ludovic Margolle & Another v. Delta Maritime Company Ltd. & Two Others – The "Saint Jacques II")* (Admiralty Court) [*The Saint Jacques II*], [2003] 1 Lloyd's Rep. 203) and *MSC Mediterranean Shipping Co SA v. Delumar BVBA and Others (Le "MSC Rosa M")*, [2000] 2 Lloyd's Rep 399, [*The Rosa*].

[57] In all such cases, the Courts made it clear that these words referred back to the loss that has actually resulted and which is the subject matter of the claim in which the right to limit is asserted (*The Leerort* at paragraph 15). In *The Saint Jacques II*, Justice Gross noted that he did not have to determine whether in the case of a collision, for example, this meant that one had to know that a

collision in general would occur or, more particularly, that such a collision would occur with the particular ship with which the collision actually occurred. In *The Leerort*, Lord Phillips of Worth Matravers (as he then was) indicated that on the facts of the case before him, he did not have to decide which alternative was correct, although he appeared to prefer the second one.

[58] Given that in this case Mr. Vallée intended to cut the very cable for the loss of which he is sued, we do not have to discuss this issue further.

[59] It is noteworthy that in those cases the Court never inquired as to whether a person who intended to collide with a particular ship had to know the value of such ship - whether she was a derelict or not, or whether she was loaded or not, and, if so, what the value of her cargo was.

[60] This is so even though in *The Leerort*, the claim was for damage to the cargo loaded on the vessel with which the ship owned by the party seeking to limit its liability had collided.

[61] The appellants' counsel admitted that there was no case law that required such knowledge. In our view, this is so because it is simply irrelevant.

[62] Applying this interpretation of "such loss" to the present matter, we have not been persuaded that the Judge made a palpable and overriding error in concluding that Mr. Vallée's act was done with the intent require under Article 4. As mentioned, there was no need for him to make a finding that Mr. Vallée knew the exact value of the Sunoque I and the fact that it was in use before

he could reach the conclusion he did. Mr. Vallée did intend to cut the brown cable into pieces. Telus claims the cost of putting it back together.

[63] In the circumstances, there is no need for us to discuss whether the Judge erred in his alternate finding in respect of the second prong of the test "recklessly and with knowledge that such loss would probably result".

Issue 4) The appellants' loss of insurance coverage

[64] The fourth issue concerns the underwriters' decision to deny coverage to the appellants pursuant to subsection 53(2) of the *Marine Insurance Act*, S.C. 1993, c. 22, which provides that "an insurer is not liable for any loss attributable to the wilful misconduct ("inconduite délibérée") of the insured".

[65] The Judge had no difficulty finding that Mr. Vallée's conduct was a "marked departure from the norm", something more than mere negligence (reasons at paragraphs 91 and 92). As a result and considering that he had already discussed the intentional nature of this misconduct, he found that the appellants' act constituted wilful misconduct resulting in the loss of their insurance policy coverage.

[66] The appellants challenge the wilful misconduct finding made by the Judge. In their view, Mr. Vallée's action was potentially negligent but this is not sufficient to deprive them of the benefit

of their insurance policy issued by Royal. They also say that, in any event, the loss was not attributable to such conduct, however it may be described.

[67] In support of their thesis, they cite four cases where the property damage had been found to be an accident or occurrence under the policy (*Federal Business Development Bank v. Commonwealth Insurance Co.*, 1983 CarswellBC 660, 2 C.C.L.I. 200 [*FBDB*]; *Atwood v. Canada*, 1985 CarswellNat 75, 10 C.C.L.I. 62 [*Atwood*]; *Modern Livestock Ltd. v. Kansa General Insurance Co.*, 1994 CarswellAlta 233, 24 Alta L.R. (3d) 21, 24 C.C.L.I. (2d) 254, 157 A.R. 167, 77 W.A.C. 167 [*Livestock*]; *Co-Operative Avicole de St-Isidore Ltd. v. Co-Operators General Insurance Co.*, 1997 CarswellOnt 2277, 44 C.C.L.I. (2d) 1 [*Co-Operative*] inviting this Court to apply the reasoning therein. We will briefly discuss these cases later.

[68] The appellants' first challenge is based again principally on the fact that in their view, the relevant "conduct" of Mr. Vallée is not so much the cutting of the brown cable but rather his failure to meet what the Judge described as his statutory duty to be aware of and to inform himself about navigational hazards. For reasons already explained, we cannot agree with this approach.

[69] The Judge's finding that Mr. Vallée's conduct was a marked departure from the norm and thus a misconduct involves a question of mixed facts and law. The appellants have not persuaded us that he committed a palpable and overriding error in that respect. As noted earlier, the appellants have not established either that the Judge was wrong to conclude that Mr. Vallée's conduct was deliberate and intentional.

[70] In the circumstances, the appellants can only succeed if they can persuade us that the Judge erred when he concluded that the loss is "attributable" to such wilful misconduct within the meaning of subsection 53(2) of the *Marine Insurance Act*, which reads as follows:

Losses covered	Périls assurés
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.	53. (1) Sous réserve des autres dispositions de la présente loi et sauf disposition contraire de la police maritime, l'assureur n'est responsable que des pertes résultant directement des périls assurés, y compris la perte qui ne se serait pas produite sans l'inconduite ou la négligence du capitaine ou de l'équipage.
Losses specifically excluded	Périls expressément exclus
(2) Without limiting the generality of subsection (1), an insurer is not liable for any loss attributable to the wilful misconduct of the insured nor, unless the marine policy otherwise provides, for	(2) Sans restreindre la généralité du paragraphe (1), l'assureur n'est pas responsable des pertes attribuables à l'inconduite délibérée de l'assuré ni, sauf disposition contraire de la police :
…	[…]

[71] At Clause 20 of its attached Institute Fishing Vessel Clauses for Protection and Indemnity, the insurance policy provides coverage in the following terms:

> 20.1 The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable, as owner of the vessel for any claim, demand, damages and/or expenses, where such liability is in consequence of any of the following matters or and things and arises from an accident or occurrence during the period of the insurance.

[72] At paragraph 20.1.1, the policy expressly refers to **"**loss of or damage to property other than the vessel, arising from any cause whatsoever (…)".

[73] Royal and the appellants initially argued about whether Mr. Vallée's action of cutting the brown cable falls within the meaning of "accident or occurrence" in the policy under review. However, they agreed at the hearing that this does not really matter if the claim would still be denied pursuant to subsection 53(2) above.

[74] In Strathy and Moore, *The Law and Practice of Marine Insurance in Canada*, (Markham: Lexis Nexis Butterworths, 2003) at page 108, the authors explain with respect to the wilful misconduct of the insured:

> Subsection 53(2) of the *CMIA* provides that the insurer is not liable for a loss attributable to the insured's wilful misconduct. This exception must be read in conjunction with subsection 53(1), which provides that the insurer *will* be liable for a loss which would not have occurred but for the misconduct or negligence of the master or crew, provided that the loss was caused by an insured peril.
>
> …
>
> If the "proximate cause" of the loss is an insured peril, the fact that the negligence of the captain or crew contributed to the loss will not prevent recovery. However, where the loss is "attributable" to the wilful misconduct *of the insured*, the insurer will not be liable.

[75] The case law relied upon by the appellants only confirms and in fact illustrates the above principle. These four cases can all be distinguished on their facts.

[76] In *FBDB*, although the insured had clearly been negligent (no wilful misconduct involved) in mooring his vessel at an improvised and flimsy float half way, the vessel broke loose and grounded as a result of the action of the wind and the sea, a peril insured against. It was held that such peril proximately caused the loss and thus coverage was confirmed.

[77] In *Atwood*, the fire which destroyed the insured vessel would not have occurred but for the sparks resulting from the intentional actions of the insured who was reckless in attempting to start his failed engine. Still, the Court found that the proximate cause of the loss was fire, a peril insured against.

[78] In *Livestock*, the insured auctioneer sold pigs that his employee knew to be infected with pneumonia. The said employee was not aware that this condition was fatal unless the pigs were promptly inoculated. In fact, most veterinarians did not know this disease was dangerous. Although the Court found that the negligence of the insured was part of the chain of happenings that led to the loss, it also held that such loss could only occur if the purchaser did not give the purchased pigs antibiotics in time and then if the disease spread and the newly infected animals did not get antibiotics in time. None of these events were inevitable, none could be foreseen, let alone intended by the insured. Thus, given the particular definition of accident in the policy under review there, the Court found that the loss was covered.

[79] In *Co-Operative*, the insured breached his contract to spray a client's crop. The term "occurrence" was defined as an accident, including continuous and repeated exposure to conditions

neither expected not intended from the standpoint of the insured. The growth of the crop was stymied by the weed infection caused by the lack of proper spraying at the appropriate time. Here again, the Court found that despite the insured's breach of contract (no wilful misconduct), the loss was due to an accident as defined given that it would not have occurred if the insured's client had taken up the work himself or had it done by another contractor. Here, the insured could not foresee that his client would simply choose not to have his crop sprayed.

[80] In the present case, there is nothing other than Mr. Vallée's electric saw that caused the loss. His wilful misconduct was the proximate cause of the loss, within the meaning of subsection 53(2).

Conclusion

[81] Despite the valiant efforts of counsel for the appellants and our panel's sympathy for Mr. Vallée's plight, we would dismiss the appeal with costs in favour of the respondents and Third party.

"Johanne Gauthier"
J.A.

"Johanne Trudel"
J.A.

"I agree
Gilles Létourneau J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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