



SUPREME COURT OF CANADA

CITATION: Peracomo Inc. v. TELUS Communications Co., 2014
SCC 29

DATE: 20140423
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BETWEEN:

**Peracomo Inc., Réal Vallée, the owners and all other
persons having an interest in the fishing vessel “Realice”
and the fishing vessel “Realice”**

Appellants
and

**TELUS Communications Company, Hydro-Québec, Bell Canada and
Royal & Sun Alliance Insurance Company of Canada**
Respondents

OFFICIAL ENGLISH TRANSLATION: Reasons of Wagner J.

CORAM: McLachlin C.J. and Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Cromwell J. (McLachlin C.J. and Rothstein and
(paras. 1 to 72) Karakatsanis JJ. concurring)

REASONS DISSENTING IN PART:
(paras. 73 to 110) Wagner J.

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PERACOMO INC. v. TELUS COMMUNICATIONS

**Peracomo Inc.,
Réal Vallée, the owners and all other persons having an interest
in the fishing vessel “Realice” and the fishing vessel “Realice”**

Appellants

v.

**TELUS Communications Company,
Hydro-Québec, Bell Canada and
Royal & Sun Alliance Insurance Company of Canada**

Respondents

Indexed as: Peracomo Inc. v. TELUS Communications Co.

2014 SCC 29

File No.: 34991.

2013: November 15; 2014: April 23.

Present: McLachlin C.J. and Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Maritime law — Liability in tort — Limitation of liability — Conduct
barring limitation — Standard of fault — Fisherman intentionally cutting submarine
fiber-optic cable he believed to be abandoned, resulting in almost \$1 million in*

damage — Whether appellants' right to limit their liability pursuant to Convention is barred — Whether fisherman acted with intent to cause such loss or recklessly and with knowledge that such loss would probably result — Convention on limitation of liability for maritime claims, 1976, 1456 U.N.T.S. 221, art. 4.

Maritime law — Marine insurance — Exclusion of coverage — Standard of fault — Wilful misconduct — Whether standards of fault under Marine Insurance Act and Convention are same — Whether loss caused by fisherman's wilful misconduct such that it is excluded from coverage — Marine Insurance Act, S.C. 1993, c. 22, s. 53(2).

V, a crab fisherman and sole shareholder of P, was fishing in the St. Lawrence River when one of his anchors snagged a cable lying on the river bottom. He adverted to the risk that the cable could be in use but formed the belief that it was not. This belief was based on a handwritten note on some sort of map that he had seen for a few seconds the year before on a museum wall. V made no further inquiries to confirm or dispel his belief and proceeded to cut the cable. The cable was, in fact, a live fiber-optic cable co-owned by or used by a number of the respondents. The result was almost \$1 million in damage.

In the Federal Court, V, his company and its vessel were found to be jointly and severally liable for the damage. The trial judge held that because V had cut the cable on purpose, the appellants were not entitled to limit their liability to \$500,000 pursuant to the *Convention on limitation of liability for maritime claims*

because the damages cap on maritime liability imposed by that Convention does not apply where a loss has been caused by a person's intentional and reckless conduct. Further, the appellants' insurance policy was found to be inapplicable because cutting the cable constituted "wilful misconduct", a statutory exclusion from marine liability insurance set out at s. 53(2) of the *Marine Insurance Act*. An appeal to the Federal Court of Appeal was unsuccessful.

Held (Wagner J. dissenting in part): The appeal should be allowed in part.

Per McLachlin C.J. and Rothstein, **Cromwell** and Karakatsanis JJ.: The limit on liability under the *Convention* applies and the appellants' liability is capped at \$500,000, but the loss is excluded from their insurance coverage. V may be held personally liable for the damage.

While the exclusions set out in the *Convention* and the *Marine Insurance Act* are related, there are important differences between them, both in purpose and text, which drive the result in this case. The *Convention* imposes a higher standard of fault than does the insurance exclusion. In order to bar the benefit of the *Convention's* limitation on maritime liability, it must be proven that the loss resulted from an act or omission committed either with the intent to cause such loss or recklessly and with knowledge that such loss would probably occur. For its part, the *Marine Insurance Act*, excludes marine insurance coverage for losses resulting from "wilful misconduct", a standard of fault which includes not only intentional

wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know.

It is insufficient to break the limit on liability under art. 4 of the *Convention* that V intended to cut the cable. Rather, in order to break that limit, it must be proven that he intended to cause the loss that actually resulted or that he acted recklessly and with knowledge that the loss would probably occur. The trial judge found that V thought the cable was useless. In cutting the cable, he did not intend to cause the loss incurred by the respondents or know that it was a probable consequence of his actions. It was therefore an error of law for the lower courts to conclude that V intended to cause a loss, or was reckless knowing that such loss would probably occur, within the meaning of art. 4 of the *Convention*.

Although V's conduct does not meet the very high level of fault so that he loses the benefit of the *Convention's* limit on liability, it does constitute wilful misconduct for insurance purposes. V had a duty to be aware of the cable and he failed miserably in that regard. His acts were so far outside the range of conduct to be expected of him in the circumstances as to constitute misconduct. The trial judge's findings make clear that his misconduct was willful. For insurance purposes, the fact that V believed that the cable was not in use is beside the point. V knew that what he was cutting was a submarine cable. He adverted to the risk that it could be in use but failed to make further inquiries in order to confirm or dispel his belief that the cable was abandoned and useless. His conduct exhibited a reckless indifference to the

possible consequences of his actions of which he was actually aware. He thus committed an act of wilful misconduct: he ran an unreasonable risk with subjective knowledge of that risk and indifference as to the consequences.

Per Wagner J. (dissenting in part): The appellants can both limit their liability and benefit from coverage under their insurance policy.

Even though the provisions do not have the exact same wording, the provision of the *Marine Insurance Act* at issue must be read harmoniously with the *Convention's* provisions. Both of them require proof of the same fact: that the insured had knowledge of the harmful consequences of his or her act, and intended or was reckless with regard to those consequences. Section 53(2) of the *Marine Insurance Act*, like art. 4 of the *Convention*, establishes a subjective criterion: an act cannot be characterized as wilful misconduct unless it is proven that the insured intended the result of his or her act or was reckless in that regard.

“Wilful misconduct” 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. Conduct exhibiting reckless indifference in the face of a duty to know cannot be characterized as wilful misconduct unless it is proven that at the time of the wrongful act, the person who committed it had subjective knowledge of the loss that would result. Proving conduct exhibiting reckless indifference in the face of a duty to know is but the first step, as it must then be proven that this misconduct was wilful. If after considering the possible consequences of an act, an

insured sincerely, although erroneously, believes that the act will cause no loss, his or her misconduct cannot be characterized as *wilful*.

The fact that a reasonable person ought to have known, or that a person had a duty to know, does not suffice to justify a finding that an act has the characteristics of wilful misconduct: it is also necessary to establish that the person intended to cause the loss, and to prove gross negligence or misconduct in which there is a very marked departure from the conduct of a reasonable person.

This definition clearly does not apply to V's conduct. He sincerely believed the cable was not in use. Nothing in the record supports a finding that V actually knew or had any suspicion that the cable was in use. Nor is there any support in the record for a conclusion that V had knowledge of the loss that would result, let alone that he intended to cause such a loss. This shielded him from being deprived of coverage under his liability insurance policy while at the same time enabling him to limit his liability.

Cases Cited

By Cromwell J.

Referred to: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101, leave to appeal refused, [2000] 1 S.C.R. xv; *Nugent v. Michael Goss*

Aviation Ltd., [2000] 2 Lloyd's Rep. 222; *Margolle v. Delta Maritime Co. (The "Saint Jacques II" and "Gudermes")*, [2002] EWHC 2452, [2003] 1 Lloyd's Rep. 203; *Schiffahrtsgesellschaft MS "Mercur Sky" m.b.H. & Co. K.G. v. MS Leerort Nth Schiffahrts G.m.b.H. & Co. K.G. (The "Leerort")*, [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep. 291; *The "Bowbelle"*, [1990] 1 Lloyd's Rep. 532; *Daina Shipping Co. v. Te Runanga O Ngati Awa*, [2013] NZHC 500, [2013] 2 N.Z.L.R. 799; *MSC Mediterranean Shipping Co. S.A. v. Delumar BVBA (The "MSC Rosa M")*, [2000] 2 Lloyd's Rep. 399; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *McCulloch v. Murray*, [1942] S.C.R. 141; *Studer v. Cowper*, [1951] S.C.R. 450; *Thompson v. Fraser*, [1955] S.C.R. 419; *Walker v. Coates*, [1968] S.C.R. 599; *Markling v. Ewaniuk*, [1968] S.C.R. 776; *Goulais v. Restoule*, [1975] 1 S.C.R. 365; *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49; *Attorney General's Reference (No. 3 of 2003)*, 2004 EWCA Crim 868, [2005] Q.B. 73; *Lewis v. Great Western Railway Co. (1877)*, 3 Q.B.D. 195; *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd's Rep. 399.

By Wagner J. (dissenting in part)

McCulloch v. Murray, [1942] S.C.R. 141; *Studer v. Cowper*, [1951] S.C.R. 450; *Russell v. Canadian General Insurance Co. (1999)*, 11 C.C.L.I. (3d) 284; *Avgeropoulos v. Karanasos (1969)*, 6 D.L.R. (3d) 34; *Lewis v. Great Western Railway Co. (1877)*, 3 Q.B.D. 195; *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd's Rep. 399; *Forder v. Great Western Railway Co.*, [1905] 2 K.B. 532;

Horabin v. British Overseas Airways Corp., [1952] 2 Lloyd's Rep. 450; *Kenyon Son v. Baxter, Hoare & Co.*, [1971] 1 Lloyd's Rep. 232; *Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The "Eurysthenes")*, [1976] 2 Lloyd's Rep. 171; *Rustenburg Platinum Mines Ltd. v. South African Airways*, [1977] 1 Lloyd's Rep. 564; *Sidney G. Jones Ltd. v. Martin Bencher Ltd.*, [1986] 1 Lloyd's Rep. 54; *National Oilwell (UK) Ltd. v. Davy Offshore Ltd.*, [1993] 2 Lloyd's Rep. 582; *National Semiconductors (UK) Ltd. v. UPS Ltd.*, [1996] 2 Lloyd's Rep. 212; *Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd.*, [1997] 2 Lloyd's Rep. 369; *Symons General Insurance Co. v. Sabau Construction Inc.*, [1986] R.J.Q. 2823; *Aetna Casualty and Surety Co. v. Groupe Estrie, mutuelle d'assurance contre l'incendie*, [1990] R.J.Q. 1792; *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283; *Audet v. Transamerica Life Canada*, 2012 QCCA 1746 (CanLII); *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [1976] 1 S.C.R. 309.

Statutes and Regulations Cited

Carriage by Air Act, 1961 (U.K.), 9 & 10 Eliz. 2, c. 27.

Charts and Nautical Publications Regulations, 1995, SOR/95-149.

Civil Code of Lower Canada, arts. 2383, 2385, 2663, 2693.

Civil Code of Québec, arts. 1461, 1471, 1474, 1613, 1706, 2301, 2464, 2576.

Marine Insurance Act, S.C. 1993, c. 22, s. 53.

Marine Insurance Act, 1906 (U.K.), 6 Edw. 7, c. 41, s. 55(2)(a).

Marine Liability Act, S.C. 2001, c. 6, ss. 26, 28 [am. 2009, c. 21, s. 3], 29, Sch. 1.

Motor Vehicle Act, S.N.S. 1932, c. 6, s. 183.

Treaties and Other International Instruments

Convention for the Unification of Certain Rules Relating to International Carriage by Air, 137 L.N.T.S. 11 [Warsaw Convention], art. 25.

Convention on limitation of liability for maritime claims, 1976, 1456 U.N.T.S. 221, arts. 1, 2, 4.

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 478 U.N.T.S. 371 [Hague Protocol].

Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37, art. 32.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Gauthier and Trudel J.J.A.), 2012 FCA 199, 433 N.R. 152, [2012] F.C.J. No. 855 (QL), 2012 CarswellNat 2191, affirming a decision of Harrington J., 2011 FC 494, 389 F.T.R. 196, [2011] F.C.J. No. 602 (QL), 2011 CarswellNat 1226. Appeal allowed in part, Wagner J. dissenting in part.

Nicholas J. Spillane and Victoria Leonidova, for the appellants.

Jean Grégoire, John O'Connor and Michel Jolin, for the respondents the TELUS Communications Company, Hydro-Québec and Bell Canada.

Jean-François Bilodeau and *Nick Krnjivic*, for the respondent the Royal & Sun Alliance Insurance Company of Canada.

The judgment of McLachlin C.J. and Rothstein, Cromwell and Karakatsanis JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] The appellant, Réal Vallée, fishes for crab in an area of the St. Lawrence River know as Zone 17, near Baie-Comeau, Quebec. He had been fishing for about 50 years, starting when he was just 15. In 2005 and 2006, he operated the fishing boat *Realice* which he owns through his company, Peracomo Inc.

[2] While in his boat, he took an electric saw and cut a fibre-optic submarine cable that he raised to the surface after it had become entangled with his fishing gear. Mr. Vallée knew he was cutting a cable and had adverted to the risk that it could be in use. However, he formed the belief that it was not. His belief was based on a handwritten note on some sort of map that he had seen for a few seconds the year before on a museum wall. This belief was wrong. The cable was live. The result was

almost \$1 million in damage. As the trial judge put it, Mr. Vallée is a good man who did a very stupid thing.

[3] Mr. Vallée, his company and the vessel were sued successfully for the damage in the Federal Court and their appeal to the Federal Court of Appeal was dismissed. On further appeal to this Court, the main issues are whether their liability is limited to \$500,000 by virtue of both the *Convention on limitation of liability for maritime claims, 1976*, 1456 U.N.T.S. 221 (“*Convention*”) and s. 29 of the *Marine Liability Act*, S.C. 2001, c. 6, and whether the loss is covered by their insurance. In addition, Mr. Vallée contends that he is not personally liable for the loss.

[4] Both the limitation of liability and the insurance issues turn on Mr. Vallée’s degree of fault. He is not entitled to the limited liability if the loss resulted from his act “committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result” (art. 4); furthermore, the loss is excluded from his insurance coverage if it is attributable to his “wilful misconduct”. We must decide whether the federal courts erred in finding that both of these exclusions apply to Mr. Vallée’s conduct.

[5] In my view, the limit on liability under the *Convention* applies, but the loss is excluded from the insurance coverage. While the two exclusions are related, there are important differences between them, both in purpose and text, which drive the result in this case. The *Convention*, as we shall see, imposes a higher standard of fault than does the insurance exclusion. Mr. Vallée’s conduct does not meet the very

high level of fault so that he loses the benefit of the *Convention's* limit on liability, but it does constitute wilful misconduct for insurance purposes.

[6] I conclude that Mr. Vallée is personally liable for the damage, the appellants are entitled to the limitation on liability under the *Convention*, but the loss is excluded from their insurance coverage.

II. Facts and Proceedings

[7] In 2005, Mr. Vallée was fishing for crab when one of his anchors snagged an obstacle on the river bottom. The anchor was raised using a winch and the snagged object was found to be a cable. It was in fact a cable known as the Sunoque I, co-owned by the respondents TELUS Communications Company (“Telus”) and Hydro-Québec and which Bell Canada has the right to use.

[8] Sometime after snagging the cable in 2005, Mr. Vallée got a brief look at a map or a chart in a local museum (a former church) which showed a line drawn running through the area in which he fished and which had [TRANSLATION] “abandoned” (“*abandonné*”) written on it by hand. He thought that this was the cable he had snagged. As the trial judge put it, “[w]ithout giving [the matter] a second thought, [Mr. Vallée] concluded that this was what he was hooking with his anchor. He only glanced at it for a matter of seconds and cannot recall whether it was a marine chart, a topographical chart, or indeed what type of map it was at all”: 2011

FC 494, 389 F.T.R. 196, at para. 40. The trial judge found as a fact that “[t]here is not, and there never was, such a marine chart”: para. 83.

[9] When Mr. Vallée snagged the cable again in 2006, he cut it with a circular electric saw and buoyed one end of the cable. A few days later, while fishing in the same area, his anchor got snagged on the cable once more. Mr. Vallée cut the cable a second time. Telus, Hydro-Québec and Bell Canada (the “Telus respondents”) sued Mr. Vallée, his company and his vessel to recover the costs of repairing the cable.

[10] At trial, Harrington J. found the appellants liable in negligence for damaging the cable because Mr. Vallée had breached his common law duty of care and statutory duty to be aware of the submarine cables in the areas in which he fished: paras. 34 and 49. Mr. Vallée did not own or consult any of the maritime charts of Zone 17, as the trial judge held he was obliged to do under the *Charts and Nautical Publications Regulations, 1995*, SOR/95-149. The judge rejected the appellants’ argument that Telus was contributorily negligent in failing to bury the cable underground and in failing to provide mariners with adequate notice of its installation.

[11] Section 29 of the *Marine Liability Act* (then s. 28, amended by S.C. 2009, c. 21, s. 3), sets a damages cap of \$500,000 on maritime liability for property damage caused by ships of the size and class of the *Realice*. However, the trial judge held that because Mr. Vallée cut the cable on purpose this limit did not apply pursuant to art. 4

of the *Convention*, which provides that the cap is inapplicable where a loss resulted from a person's intentional or reckless conduct. Further, the appellants' lost the benefit of their insurance policy with the respondent, Royal & Sun Alliance Insurance Company of Canada ("Royal"), because cutting the cable fell within the statutory exclusion from marine liability insurance for "wilful misconduct" set out at s. 53(2) of the *Marine Insurance Act*, S.C. 1993, c. 22. The trial judge explained that "[r]ecklessness connotes a mental attitude or indifference to the existence of the risk" and found as a fact that while Mr. Vallée "believed the cable was not in use", he had been "reckless in the extreme": paras. 5 and 84-85.

[12] In the result, the trial judge found Mr. Vallée, Peracomo, and the *Realice* as an *in rem* defendant, jointly and severally liable for the \$892,395.32 it cost to repair the Sunoque I, in addition to \$88,038.22 for administrative charges, for a total amount of \$980,433.54.

[13] The Federal Court of Appeal dismissed the appellants' appeal, finding no error in the trial judge's evaluation of the evidence or in his legal analysis.

III. Issues

[14] On their appeal to this Court, the appellants raise three main issues:

(1) Is Mr. Vallée personally liable for the loss?

In my view, he is.

- (2) Are the appellants entitled to the limit on marine liability despite art. 4 of the *Convention*?

In my view they are and I would reverse the conclusions of the federal courts on this point.

- (3) Was the loss caused by Mr. Vallée's "wilful misconduct" so that it is excluded from coverage under the insurance policy with Royal?

In my view, it was and the loss is excluded from coverage.

IV. Analysis

A. *Is Mr. Vallée Personally Liable for the Loss?*

[15] The appellants submit that there is no basis for holding Mr. Vallée personally responsible for the wrongs of Peracomo. Mr. Vallée is the sole shareholder and officer of Peracomo and the appellants concede that Mr. Vallée is the *alter ego* of Peracomo. But they argue that imposing personal liability on Mr. Vallée would disregard Peracomo's distinct legal personality. The appellants rely on this Court's decision in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R.

299, which left open the possibility that specific circumstances might call for departure from the general rule for piercing the corporate veil. The appellants do not say what those specific circumstances might be.

[16] The trial judge, upheld by the Federal Court of Appeal, found that Mr. Vallée was personally liable for breaching his duty of care to the Telus respondents: para. 49. He held that Peracomo was also liable for the losses both vicariously and personally. Mr. Vallée was the directing mind and *alter ego* of Peracomo: para. 50. The court of appeal cited *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), leave to appeal refused, [2000] 1 S.C.R. xv, for the proposition that corporate officers and directors may be held liable in their personal capacity where they negligently cause property damage in the course of their corporate duties: para. 43.

[17] I agree with these conclusions. As the Telus respondents point out, corporate personality is not a relevant consideration in this case since Mr. Vallée was personally negligent in cutting the cable. The company is liable as a result of his acts, not the other way around. I would dismiss this ground of appeal.

B. *Are the Appellants Entitled to the Limit on Marine Liability Despite Article 4 of the Convention?*

[18] Section 29 of the *Marine Liability Act* limits liability for property damage caused by the operation of ships in the same class as the *Realice* at \$500,000.

However, this limit does not apply if the loss “resulted from [the defendant’s] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result”. This flows from the fact that s. 26 of the *Marine Liability Act* gives the force of law in Canada to art. 4 of the *Convention*, which establishes this exclusion from the limitation on 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.

[19] Whether the limitation on liability is excluded by art. 4 depends on the fault of the person liable. It sets out two types of fault, either of which bars the operation of the *Convention*’s limitation on liability. The first is an intention to cause “such loss” and the second is to cause the loss “recklessly and with knowledge that such loss would probably result”.

[20] There is some ambiguity in the trial judge’s reasons about what Mr. Vallée intended or knew. I agree with the Federal Court of Appeal’s reading of his reasons: Mr. Vallée knew that he was cutting a cable and that this was sufficient to establish an intention to cause the loss. As the court of appeal put it: “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”: para. 58. The court of appeal was thus of

the view that what mattered was the fact that Mr. Vallée intentionally caused physical damage to the cable.

[21] The appellants submit that this conclusion is in error and that Mr. Vallée's conduct does not fall within either of the fault components set out in the *Convention*. With respect to the first (intention to cause such loss), Mr. Vallée did not intend to cause the loss because he thought the cable was worthless junk and that cutting it would not cause any loss: A.F., at paras. 48-49. The trial judge and the Federal Court of Appeal erred, submit the appellants, because they focused on the cutting of the cable itself as opposed to its consequences in assessing Mr. Vallée's intention. As for the second fault element (recklessness with knowledge that such loss would probably occur), the appellants say that Mr. Vallée was neither reckless nor knew that the loss was probable. The appellants rely on *Nugent v. Michael Goss Aviation Ltd.*, [2000] 2 Lloyd's Rep. 222 (C.A.), for the proposition that the defendant must have recognized the risk and gone on to take it. In this case, they submit that Mr. Vallée was not aware of any risk. He believed from the map he had seen that the cable was abandoned. They further submit that even if he did act recklessly, he did not have any knowledge that the cable was in use and so had no knowledge that his actions would cause the Telus respondents any loss.

[22] The Telus respondents submit that Mr. Vallée possessed both fault elements under art. 4. His actions in cutting the cable constituted the common law intentional tort of trespass to goods. Since the facts would have supported liability for

an intentional tort, Mr. Vallée’s conduct should be seen as intentional for the purposes of art. 4: *Telus factum*, at para. 86. In the alternative, the *Telus* respondents say that Mr. Vallée’s actions were reckless. They say that recklessness requires either “a decision to run the risk or a mental attitude of indifference to its existence”: para. 99, citing *Goldman v. Thai Airways International Ltd.*, [1983] 3 All E.R. 693 (C.A.), at p. 699, *per* Lord Eveleigh. Mr. Vallée claims to have seen the word [TRANSLATION] “abandoned” written by hand on a map in a museum, although he could not remember any other details regarding this map. He did not take any other steps to satisfy himself that the cable was not in use. As the *Telus* respondents put it, [TRANSLATION] “He deliberately remained in ignorance. He shut his eyes.”: para. 102.

[23] While I do not accept all of the appellants’ submissions, I agree with them that they are entitled to the limit on liability provided for under the *Convention* and set out more specifically at s. 29 of the *Marine Liability Act*. In my respectful view, the Federal Court of Appeal took too narrow an approach to the intent requirement under art. 4 of the *Convention*. It held, in effect, that if Mr. Vallée knew he was “cut[ting] the very cable for the loss of which he is sued”, the intent element of the *Convention* was satisfied. I cannot agree. This amounts to saying that all that is required to break the limit on liability is knowledge that one is interfering with property. Such an approach undermines the *Convention*’s purpose to establish a virtually unbreakable limit on liability and does not accord with its text.

[24] I turn first to the *Convention's* purpose. The contracting states to the *Convention* intended the fault requirement to be a high one — the limitation on liability was designed to be difficult to break: *Margolle v. Delta Maritime Co. (The "Saint Jacques II" and Gudermes)*, [2002] EWHC 2452, [2003] 1 Lloyd's Rep. 203, at para. 16; *Schiffahrtsgesellschaft MS "Mercur Sky" m.b.H. & Co. K.G. v. MS Leerort Nth Schiffahrts G.m.b.H. & Co. K.G. (The "Leerort")*, [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep. 291, at para. 18. The *Convention* has been described as a "trade-off": "As a *quid pro quo* for the increase of the [limitation] fund, the article providing for the breaking of limitation became tighter, so that it is almost impossible for the claimants to break the right to limit": A. Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd ed. 2007), at p. 865. Meeting the threshold fault requirement requires a high degree of subjective blameworthiness: *Nugent*, at p. 229 (interpreting the similarly worded Warsaw Convention, 137 L.N.T.S. 11, as amended by the Hague Protocol, 478 U.N.T.S. 371). The fault standard set by art. 4 has been described as "a virtually unbreakable right to limit liability" (P. Griggs, R. Williams and J. Farr, *Limitation of Liability for Maritime Claims* (4th ed. 2005), at p. 3) and as "an almost indisputable right to limit . . . liability": *The "Bowbelle"*, [1990] 1 Lloyd's Rep. 532 (Q.B.D.), at p. 535; see also D. Damar, *Wilful Misconduct in International Transport Law* (2011), at p. 168; R. P. Grime, "Implementation of the 1976 limitation convention" (1988), 12 *Marine Pol'y* 306, at p. 313; P. Heerey, "Limitation of Maritime Claims" (1994), 10 *MLAANZ Journal* 1, at p. 3; T. Ogg, "IMO's International Safety Management Code (The ISM Code)" (1996), 1 *I.J.O.S.L.* 143, at p. 149; J. F. Wilson, *Carriage of Goods by Sea* (7th ed. 2010), at p. 288;

E. Gold, A. Chircop and H. Kindred, *Maritime Law* (2003), at p. 728. It is worth noting that the contracting states considered, but expressly rejected, the inclusion of “gross negligence” as a sufficient level of fault to break the liability limit: Comité Maritime International, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* (2000), Article 4 — Conduct barring limitation, at pp. 123-32.

[25] In my respectful view, the Federal Court of Appeal’s approach to breaking the limit on liability lowered the intended fault element and thereby undermined the *Convention*’s purpose to establish a virtually unbreakable right to limit liability.

[26] Turning to the text of the *Convention*, my view is that the Federal Court of Appeal’s approach fails to distinguish between, on one hand, the limitation of liability that relates to a “claim” and, on the other, the bar to the limitation which arises if there was intention to cause “the loss” that resulted from the act or omission of the person liable. As we shall see, the limitation is expressed in broad and generic terms while the intention required to break the limitation relates to specific consequences of the conduct of the person liable.

[27] Article 2 lists the types of claims which are subject to the limitation of liability set out in the *Convention*. The list of “claims” in art. 2 includes, in para. 1(a), “[c]laims in respect of loss of life or personal injury or [as is in issue here] loss of or damage to property . . . occurring on board or in direct connexion with the operation

of the ship”. Article 4 then addresses the limit on liability of “[a] person liable”. That person is entitled to limit his liability unless 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”.

[28] Two things stand out about the relationship between the limitation set out in art. 2 and the conduct barring that limitation set out in art. 4. First, the limitation of liability in art. 2 relates to liability for “claims”. “Claims” refer to the broad, generic categories of consequences for which recovery may be sought, such as in this case, “damage to property”. In short, it is “claims” that are subject to limitation of liability and this limitation is expressed in broad and generic terms. Second, the conduct barring the benefit of the limitation is expressed in much more restrictive language. The bar, unlike the limitation itself, is not expressed in relation to claims. The bar arises only if the “loss” resulted from the intentional act of the person liable, or as a result of reckless conduct committed with knowledge that the loss was probable. This signals that the intention which invokes the bar must relate to more specific consequences of the person’s conduct than that captured by the sorts of generic consequences referred to by the word “claims”. This requirement of intention in relation to more specific consequences is underscored by the use of the words “such loss” in connection with the intent and knowledge clauses of art. 4. Before the bar arises, the *loss* must be shown to have resulted from the “personal act or omission” of the person liable “committed with the intent to cause such loss or recklessly and with knowledge that such loss, would probably result”. As one leading text puts it, “the

use of the words ‘such loss’ in Article 4 seem[s] to underline the fact that the right to limit is barred *only* if the type of loss intended or envisaged by the ‘person liable’ is the actual loss suffered by the claimant”: Griggs, Williams and Farr, at p. 36 (emphasis in original); see also Damar, at p. 173.

[29] How specifically must the loss have been intended? There is some ambiguity in the authorities with respect to this question. Some authorities take the view that knowledge of the type of damage that occurs is required: see, e.g., *Nugent*, p. 229, *per* Auld L.J., interpreting the similar, but not identical language in art. 25 of the Warsaw Convention, as given effect by the *Carriage by Air Act, 1961* (U.K.), 9 & 10 Eliz. 2, c. 27. However, this authority may be of limited assistance given that under the Warsaw Convention, what is required is foresight that “damage” would probably result, rather than as under the *Convention*, foresight that “such loss” would probably result: see *The “Saint Jacques II”*, at para. 16. Other cases have required knowledge of the very loss that actually occurred: see, e.g., *Daina Shipping Co. v. Te Runanga O Ngati Awa*, [2013] NZHC 500, [2013] 2 N.Z.L.R. 799, at para. 42, distinguishing the Federal Court of Appeal decision in this case, at para. 45. This appears to be the dominant view in the English courts. The leading case is *The “Leerort”* in which Lord Phillips of Worth Matravers M.R. (as he then was) stated that foresight of “the very loss that actually occurs, not merely of the type of loss that occurs” is required: para. 13; see also *MSC Mediterranean Shipping Co. S.A. v. Delumar BVBA (The “MSC Rosa M”)*, [2000] 2 Lloyd’s Rep. 399 (Q.B.D.), and *The “Saint Jacques II”*. This view also has the support of leading commentators: see

Griggs, Williams and Farr, at p. 36; Damar, at p. 173; S. Hodges and C. Hill, *Principles of Maritime Law* (2001), at pp. 593-94.

[30] Lord Phillips in *The “Leerort”* gave examples to illustrate the difference between the notions of “type of loss” and “very loss”:

It seems to me that where the loss in respect of which a claim is made resulted from a collision between ship A and ship B, the owners of ship A, or cargo in ship A, will only defeat the right to limit liability on the owner of ship B if they can prove that the owner of ship B intended that it should collide with ship A, or acted recklessly with the knowledge that it was likely to do so.

The alternative, which is perhaps arguable, is that the claimant merely has to prove that the owner of ship B intended that his ship should collide with another ship, or acted recklessly with the knowledge that it was likely to do so. [Emphasis added; paras. 16-17.]

[31] While Lord Phillips expressed a preference for the “very loss” requirement, he did not resolve the debate entirely and, in the present case, we do not have to take a firm position as to whether we ought to adopt the “type of loss” or the “very loss” approach. As I see it, the appellants are entitled to limit their liability on either view.

[32] The “loss” that “resulted” from Mr. Vallée’s act was the diminution in value of the cable measured by the cost of repairing it. Whether this description of the loss is considered to be of the “type of loss” or of the “very loss” that resulted from Mr. Vallée’s action, on the trial judge’s findings of fact, Mr. Vallée did not intend to cause that loss or know that it was a probable consequence of his actions.

The trial judge found as a fact that Mr. Vallée thought the cable was useless — no matter how recklessly he may have reached that view — and therefore did not think it would be repaired because he thought it had no value: paras. 75 and 77. This does not constitute either “the intent to cause such loss” or “knowledge that such loss would probably result”.

[33] With respect, the Federal Court of Appeal misread *The “Leerort”* by finding that it was sufficient to break the limit on liability under art. 4, that Mr. Vallée intended “to cut the very cable for the loss of which he is sued”: para. 58. This statement mischaracterizes the legal effect of the relevant facts as found by the trial judge in *The “Leerort”* case. Here are the relevant comments of Lord Phillips in that case:

Mr. Teare submitted that the words “such loss” meant loss of the type suffered and that, to identify the type of loss, it was necessary to refer back to art. 2, which sets out the various types of loss in respect of which a right to limit arises. Thus, in the instant case, the claims advanced are in respect of “loss of or damage to property”, so that the only foresight required to defeat the right to limit was of the likelihood of loss of or damage to property.

This submission runs counter to the clear meaning of the wording of art. 4. The words “such loss” in that article clearly refer 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. [Emphasis added; paras. 14-15.]

[34] Contrary to what the Federal Court of Appeal implied in its application of *The “Leerort”*, the trial judge in this case did not find that Mr. Vallée was merely mistaken in his assessment of the value of the property (a highly valuable cable

versus a worthless cable). He found that he was mistaken with respect to the nature and ownership of the property (an abandoned cable versus a cable owned by someone who would repair damage to it). *The “Leerort”*, as applied to the facts of this case, supports the position that Mr. Vallée did not have a sufficient knowledge of the probable consequences of his actions pursuant to art. 4. As Lord Phillips put it, art. 4 refers to “the loss that has actually resulted and which is the subject matter of the claim in which the right to limit is asserted” (emphasis added). Here, the Telus respondents claim their cost of repair. Whatever else may be said about Mr. Vallée’s conduct, he did not actually know that his actions would probably result in damaging someone’s property who would then have to repair it. It was therefore an error of law to conclude that Mr. Vallée intended to cause a loss, or was reckless knowing that such loss would probably occur, within the meaning of art. 4.

[35] I conclude that the appellants did not intentionally or recklessly cause the loss in question within the meaning of art. 4 of the *Convention*. They are therefore entitled to its limitation on liability.

C. *Was the Loss Caused by Mr. Vallée’s “Wilful Misconduct” so That It Is Excluded From Coverage Under the Insurance Policy With Royal?*

[36] The appellants were covered by an insurance policy which they claim indemnifies them against the damages payable. However, the insurer, the respondent Royal, contends that coverage is excluded. The federal courts decided in favour of the insurer and the appellants submit they erred.

[37] Royal issued a policy to the appellants including protection and indemnity coverage during the relevant time. The policy covered liability “in consequence of . . . damage to any fixed or movable object” and arising from “an accident or occurrence”: cls. 20.1 and 20.1.1. It is common ground that the policy is subject to s. 53(2) of the *Marine Insurance Act*, which excludes coverage for any loss attributable to the “wilful misconduct” of the insured. The issue is whether the trial judge erred in finding that this exclusion applied in this case. The relevant provision in the Act is this:

53. (1) [Losses covered] 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) [Losses specifically excluded] 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

. . .

[38] While the insurer does not concede that the loss was in consequence of “an accident or occurrence”, the focus of the appeal is on whether the exclusion under the Act applies.

[39] The trial judge dealt with this issue quite briefly, but I think his findings have to be read in light of his conclusions relating to liability and with respect to the *Convention*. The judge found that the cable was a navigational hazard, that it was

Mr. Vallée's duty to know of its existence, and that he failed miserably in that regard: para. 34. Mr. Vallée had on board a paper marine chart that was more than 20 years out of date: Royal factum, at para. 15. Marine warnings had been issued and charts were amended to show the cable after its laying in 1999. Had Mr. Vallée consulted any of these documents over a six and a half year period following the laying of the cable, he would have been aware of the cable and that it had not been abandoned: trial reasons, at para. 28.

[40] The trial judge found that the federal government had published notices about the existence of the cable "time and time again" and that it was Mr. Vallée's duty to be aware of them: para. 27. He accepted the evidence of an expert called by the Telus respondents that the ordinary practice of seamen would be to communicate with marine traffic control to make inquiries as to the nature and use of the cable: para. 32.

[41] As previously discussed, in 2005, Mr. Vallée hooked an anchor and in freeing it, he pulled the cable to the surface. At the end of the fishing season, he was visiting the Église Saint-George, a deconsecrated church in Baie-Comeau, which is now a museum. He saw a chart or map with a line drawn across the river in the area where he usually fished. The word [TRANSLATION] "abandoned" was written on that line by hand. As the trial judge put it "[w]ithout giving it a second thought, he concluded that this was what he was hooking with his anchor. He only glanced at it for a matter of seconds and cannot recall whether it was a marine chart, a

topographical chart, or indeed what type of map it was at all”: para. 40. The trial judge found that “[t]here is not, and there never was” a marine chart of this nature, meaning that the paper seen by Mr. Vallée was nothing as formal as a proper marine chart: para. 83.

[42] The trial judge concluded that if recklessness were in issue, “Mr. Vallée was reckless in the extreme”: para. 84. The trial judge said that “wilful misconduct” is 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. The trial judge concluded that Mr. Vallée’s conduct was a “marked departure” from the norm and so constituted wilful misconduct excluding coverage: para. 92. The finding of extreme recklessness on Mr. Vallée’s part is based on the trial judge’s understanding that recklessness “connotes a mental attitude or indifference to the existence of the risk”: para. 85. According to the trial judge, the fact that Mr. Vallée relied on the map on the museum wall to conclude that the cable was not in use shows that, at the time he cut the cable, he was indifferent to the risk, of which he was subjectively aware, that the cable that had snagged his anchors could be live.

[43] The Federal Court of Appeal upheld the trial judge’s conclusion, although the focus of its attention was on whether Mr. Vallée’s wilful misconduct had been the proximate cause of the loss: paras. 68-80.

[44] The appellants say that if Mr. Vallée was negligent, he was simply negligent — any attempt to bring them under the scope of “wilful misconduct” would dramatically lower the bar on the meaning of that concept in Canadian maritime insurance law. They submit that wilful misconduct requires a “very marked departure” from normal standards of conduct. Furthermore, this departure needs to be intentional. The appellants say that the requirement of intention here includes a requirement that the consequences be intended as well as the action itself. They submit that the wilful misconduct standard for insurance purposes is virtually the same as the intentional or reckless standard set under the *Convention*.

[45] The appellants refer to jurisprudence on the meaning of art. 2464 of the *Civil Code of Québec* (“C.C.Q.”), excluding from insurance coverage injury resulting from the “intentional fault” of the insured (“*faute intentionnelle de l’assuré*”). Under the civil law of Quebec, this means that “[t]he insured must seek not only to bring about the event that is the object of the risk, but also to bring about the damage itself”: *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at para. 33.

[46] Royal relies on a variety of authorities from the marine insurance context for the proposition that “wilful misconduct” under s. 53(2) can consist of either intentional or reckless wrongdoing. Royal denies that the civil law cases on the exclusion of intentional fault are relevant in this context. These cases turn on the wording of art. 2464 C.C.Q., which is significantly different from the wording of

s. 53(2) of the *Marine Insurance Act*. Canadian maritime law is rooted in English admiralty law and so civilian jurisprudence must be treated with caution. In any event, Royal says that the present facts are distinguishable from the Quebec cases cited by the appellants. In this case, unlike those cases, Mr. Vallée intentionally destroyed a cable that did not belong to him: Royal factum, at paras. 66-68.

[47] Royal says that the purpose of the statutory exclusion of “wilful misconduct” from marine liability insurance is twofold. The first purpose is based in public policy. It guards against the moral hazard of allowing insured persons to rely on coverage under an insurance policy to avoid the consequences of their deliberate conduct. The second purpose is to promote the insurability of marine liability, which is based on indemnification for unforeseeable risks or perils. Insurers can attempt to quantify the risk of unforeseen perils, but it would be impossible for the insurer to quantify the risk of an action that is entirely within the control of the insured.

[48] This part of the appeal therefore raises three questions: (1) whether the fault standard under art. 4 of the *Convention* and the insurance exclusion at s. 53(2) of the Act are the same; (2) whether the trial judge erred in his interpretation of “wilful misconduct” in the Act; and (3) whether the Quebec civil law approach to “intentional fault” applies to “wilful misconduct” under the Act?

(1) The Fault Standard Under the *Convention* and the Act

[49] I reject the appellants' submission that the fault standard under the insurance exclusion and the *Convention* are the same. Both the purposes and the text of the provisions are different. The purpose of the *Convention* provision, as I discussed earlier, was to create a virtually unbreakable upper limit on liability. The purpose of the exclusion of coverage for insurance purposes is to define and limit the type of risk insured under that overarching limit created by the *Convention*. The two provisions are, of course, related. One of the purposes of the *Convention's* upper limit on liability is to facilitate insurability at affordable rates by providing assurance that liability will not exceed the limited amount. As explained by Dr. Damar, at p. 16:

Insurance premiums to be collected are determined according to the financial amount of the insured value and the risk. Liability insurance premiums, in this respect, are calculated according to the limitation amounts set by international and national law provisions since, independent from the insured risk, the limitation amounts reflect the maximum which can be paid by a carrier or shipowner. [Emphasis added.]

[50] Thus, while the limit on liability serves as an upper limit on the total financial exposure of the insurer, it does not seek to regulate the scope of coverage in the sense of the sorts of risks that are insured. The concern about insurability which the *Convention* addresses is the total potential amount of liability, not the nature of the insured risk.

[51] The purpose of the insurance provision is related to a fundamental principle of insurance law. Insurance contracts allocate risk. A loss caused by the insured's wilful misconduct is not the product of a fortuitous event or an accident and

is therefore not within the scope of the insured risk. The purpose of the wilful misconduct exclusion, therefore, is to draw a line between the sorts of perils that are insured and the sorts that are not.

[52] The distinct purposes of the *Convention* limitation and the Act's insurance exclusion are underlined by the very different words chosen to give effect to them. As just discussed, the *Convention's* limit was intended to be virtually unbreakable. In short, it calls for either intention to bring about the loss or knowledge that it will probably occur. As we shall see, the mental state required for wilful misconduct includes recklessness as to consequences — that is, actual knowledge of the risk and running it anyway, a different and lower fault standard than is called for by the *Convention*.

[53] Discussions of the interaction between the right to limitation under the *Convention* and the insurance exclusion relating to wilful misconduct often begin with the well-known comments made by Lord Diplock during the development of the *Convention*. He stated that “the limits should be made as unbreakable as possible on the principle that breakability should begin where insurability ended”: *Travaux Préparatoires*, at p. 127 (para. 264). This statement, however, does not mean that breakability and insurability are coextensive. Lord Diplock's concern was to ensure that the *Convention* was drafted so that it would prevent a situation where liability would not be limited but the insurer would still be liable; he was not addressing the converse situation, where insurance coverage might be excluded even though the

limitation on liability had not been broken. His remarks relate to the total potential amount of liability, not the nature of the insured risk.

[54] To conclude, I do not agree that the two standards of fault are the same.

(2) Wilful Misconduct

[55] In the context of marine insurance, the principle that coverage was excluded for losses resulting from wilful misconduct predated, and was in effect codified by, the English *Marine Insurance Act, 1906*, 6 Edw. 7, c. 41, s. 55(2)(a): Damar, at pp. 35-43. The purpose of the modern-day Canadian provision is to distinguish the excluded losses from the covered losses, that is, those attributable to the “misconduct or negligence of the master or crew”: s. 53(1) of the *Marine Insurance Act*. Most of the “wilful misconduct” cases in the marine insurance field involve deliberate scuttling of a vessel to obtain the insurance proceeds — an obvious example of wilful misconduct — and so there is relatively little jurisprudence interpreting the finer points or meaning of the phrase: Damar, at p. 41; J. Gilman et al., *Arnould’s Law of Marine Insurance and Average* (17th ed. 2008), at p. 958.

[56] While this Court has not interpreted “wilful misconduct” in the context of a marine insurance exclusion, it has interpreted similar language in other contexts on many occasions. One statement that has been particularly influential is that of Duff C.J. in *McCulloch v. Murray*, [1942] S.C.R. 141. The Court had on appeal a jury finding that a driver was liable to a gratuitous passenger. That liability depended on

whether it had been open to the jury to find that the passenger's injury had been the result of the driver's "gross negligence, or wilful and wanton misconduct": *Motor Vehicle Act*, S.N.S. 1932, c. 6, s. 183. In upholding the finding of liability made by the jury, Duff C.J. held that the terms "gross negligence", "wilful misconduct" and "wanton misconduct" all "imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves": p. 145. I pause to note that, unlike the standard set by the *Convention*, "conscious wrongdoing" — that is "intentional wrongdoing" — is not required in order for the insured's actions to constitute wilful misconduct. While Duff C.J. did not set out an exhaustive definition of "wilful misconduct", his comments have been repeatedly cited with approval by the Court in gratuitous passenger cases: *Studer v. Cowper*, [1951] S.C.R. 450; *Thompson v. Fraser*, [1955] S.C.R. 419; *Walker v. Coates*, [1968] S.C.R. 599; *Markling v. Ewaniuk*, [1968] S.C.R. 776; *Goulais v. Restoule*, [1975] 1 S.C.R. 365.

[57] In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing *Attorney General's Reference (No. 3 of 2003)*, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their

conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take”: “*Mens Rea* in Tort Law” (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.

[58] These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. This view is supported by two of the key authorities relied on by the appellants and they are, as I see it, sufficient to deal with the issue raised on this appeal.

[59] The appellants’ point first to the reasons of Bramwell L.J. in *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195 (C.A.). He referred to wilful misconduct (in the context of carriage by rail) as being either conduct such that “the person guilty of it should know that mischief will result” or which the person “acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not”: p. 206. This formulation encompasses not only intentional wrongdoing but also reckless indifference in the face of a duty to know.

[60] The appellants also rely on the judgment of Cresswell J. in *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd’s Rep. 399 (Q.B.D.), dealing with the limitation in the unamended Warsaw Convention which excluded limitation of liability for damage caused by the wilful misconduct of the carrier: art. 25(1). Cresswell J. reviewed the English jurisprudence in detail and set out six propositions

concerning the meaning of wilful misconduct. He began by dealing with the word “misconduct” and holding that the inquiry is as to whether the conduct is so far outside the range of conduct expected of a person in the circumstances as to be properly regarded a misconduct: p. 407. He then turned to the sort of misconduct that could be considered wilful. Among the sorts of conduct to which he refers is this:

A person wilfully misconducts himself if he knows and appreciates that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet . . . acts with reckless carelessness, not caring what the results of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.) [p. 408]

[61] Without attempting to spell out exhaustively the sorts of conduct that are covered by the term “wilful misconduct”, I accept, as do the appellants, that these statements accurately, although not necessarily exhaustively, describe types of conduct that fall within that description for the purposes of the exclusion of liability under the *Marine Insurance Act*. In short, wilful misconduct includes not only intentional wrongdoing but also other misconduct committed with reckless indifference in the face of a duty to know.

[62] I am not convinced that this is the standard applied by the trial judge or the Federal Court of Appeal. However, my view is that the findings of fact made by the trial judge read in light of the record make it clear that Mr. Vallée’s conduct constituted wilful misconduct as described in these authorities.

[63] As to misconduct, there can be no doubt as I see it that Mr. Vallée's acts were "so far outside the range of conduct" to be expected of him in the circumstances as to constitute misconduct. As the trial judge found, it was Mr. Vallée's duty to be aware of the cable and "he failed miserably in that regard": para. 34. The trial judge accepted the opinion evidence of Captain Jean-Louis Pinsonnault that Mr. Vallée exhibited a "lack of elementary prudence": paras. 33-34. Thus, the trial judge's findings fully support the conclusion that Mr. Vallée's actions constituted misconduct because, in light of his duty and all of the other circumstances, his actions were "far outside" the range of conduct expected of a person in this position.

[64] As to whether the misconduct was wilful as described in these authorities, my view is that the trial judge's findings make clear that it was.

[65] As the trial judge found, Mr. Vallée knew that what he was cutting was a submarine cable. It is obvious from his reliance on the chart or map on the museum wall that he adverted to the possibilities that the cable either could be in use or could be abandoned. Mr. Vallée testified that he was aware that it was possible to [TRANSLATION] "transmit electricity by means of a submarine cable": A.R., vol. III, at p. 111. He thus had actual knowledge of the risk that he could be cutting a "live" cable. His conduct is consistent only with indifference to this risk in the face of his duty to know. His reliance on the map, of unknown date or authenticity, which was not a marine chart and which he saw for only a few seconds, coupled with his duty to be aware of hazards to navigation and his failure to have up-to-date charts or make

inquiries by radio from his vessel, amply bear out the trial judge's conclusion that Mr. Vallée's conduct was "reckless in the extreme": para. 84. His conduct exhibited a reckless indifference to the possible consequences of his actions of which he was actually aware. He thus committed an act of wilful misconduct: he ran an unreasonable risk with subjective knowledge of that risk and indifference as to the consequences.

[66] The fact that Mr. Vallée, as the trial judge found, believed that the cable was not in use is beside the point. To hold otherwise is to conflate recklessness with intention. People like Mr. Vallée who take unreasonable risks of which they are subjectively aware often wrongly believe that the risk which they decide to take will not result in harm. That is the essence of recklessness.

[67] While the threshold to break liability under the *Convention* requires intention or recklessness with knowledge that the loss will probably occur, wilful misconduct under the *Marine Insurance Act* does not require either intention to cause the loss or subjective knowledge that the loss will probably occur. It requires, in the context of this case, simply misconduct with reckless indifference to the known risk despite a duty to know. The trial judge's reasons, read in light of the record, show that 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 as that term is defined in all of the authorities to which I have referred.

(3) Intentional Fault

[68] The appellants referred to a number of insurance cases from Quebec concerned with the exclusions under the *C.C.Q.* for losses resulting from the insured's "*faute intentionnelle*": see, e.g., arts. 2464 and 2576. As noted earlier, this concept in Quebec civil law relates to conduct by the insured that seeks "not only to bring about the event that is the object of the risk, but also to bring about the damage itself": *Goulet*, at para. 33, interpreting art. 2563 of the *Civil Code of Lower Canada*. This is arguably a higher fault standard even than that required under the *Convention*, which excludes the limit not only in cases of intentional conduct, but also reckless conduct taken with knowledge that the loss would probably result.

[69] The term "*faute intentionnelle*" is generally expressed in the *C.C.Q.* for the English terms "deliberate" or "intentional" fault: see, e.g., arts. 1461, 1471, 1474, 1613, 1706, 2301 and 2464. However, in the marine insurance provision, art. 2576, it is expressed as "wilful misconduct". This may be contrasted with the French version of s. 53(2) of the Act which expresses "wilful misconduct" as "*l'inconduite délibérée*". There is no dispute here that it is the Act and not art. 2576 that governs in this appeal.

[70] The use of “wilful misconduct” in the English version of art. 2576, in my view, does not support the position that “wilful misconduct” in the Act should be equated with “*faute intentionnelle*” in Quebec civil law. The meaning of “*faute intentionnelle*” is well established in Quebec civil law and it is equally well established that the term “wilful misconduct” in marine insurance law has a wider meaning. The provisions of the Act have their origins in English admiralty law and the English *Marine Insurance Act, 1906* and the French version of the Act expresses this in the term “*l’inconduite délibérée*”, not the well-known civil law term “*faute intentionnelle*”.

(4) Conclusion

[71] I conclude that applying the correct legal standard to the trial judge’s findings of fact make it clear that the appellants’ loss is excluded from insurance coverage as it resulted from Mr. Vallée’s “wilful misconduct”.

V. Disposition

[72] In relation to the appellants’ limitation of liability, I would allow the appeal with costs but including only one half of their costs of the leave application. The appellants’ joint and several liability is limited by the *Convention*. In relation to the claim against Royal, I would dismiss the appeal with costs including its costs of the leave application.

English version of the reasons delivered by

WAGNER J. —

[73] I agree with my colleague Cromwell J. that art. 4 of the *Convention on limitation of liability for maritime claims, 1976*, 1456 U.N.T.S. 221 (“*Convention*”), does not preclude the appellants from exercising the right, provided for in arts. 1(1), (4), (6) and (7) and 2(1) of the *Convention*, to limit their liability. Having said this, however, I also believe that s. 53(2) of the *Marine Insurance Act, S.C. 1993, c. 22* (“the Act”), must be read harmoniously with the *Convention*’s provisions. Even though art. 4 of the *Convention* and s. 53(2) of the Act do not have the exact same wording, I find in the circumstances that the appellants can both limit their liability and benefit from coverage under their insurance policy. I am of the view that both the provisions at issue require proof of the same fact: that the insured had knowledge of the harmful consequences of his or her act, and intended or was reckless with regard to those consequences. In my respectful opinion, it is impossible, upon concluding on the one hand that the appellants can limit their liability under the *Convention* because they did not intend to cause the loss or because they did not act recklessly or with knowledge that the loss would probably result, to also find on the other hand that the liability insurer can deprive them of coverage under s. 53(2) of the Act on the basis that the loss was the result of wilful misconduct. For these reasons, I would allow the appeal in its entirety, with costs.

[74] I will begin by discussing the concept of “wilful misconduct” referred to in s. 53(2) of the Act, after which I will deal with the question of loss of coverage in non-marine insurance both in the civil law and at common law before finally explaining how the provisions of the *Convention* and s. 53(2) of the Act are to be read harmoniously.

I. Facts

[75] I generally agree with my colleague Cromwell J.’s presentation of the facts. However, I wish to stress one finding of the trier of fact that I consider determinative in this case: at the time Mr. Vallée cut the cable, he sincerely believed it was not in use. At no time did the trier of fact mention a possibility that Mr. Vallée entertained a doubt in this regard when he cut the cable. The respondents have never disputed this finding or argued that the trial judge made a palpable and overriding error in interpreting the facts. But if Mr. Vallée sincerely believed that the cable had been abandoned and was not in use, it cannot be assumed that he had knowledge of the loss that would result from his cutting it. This shielded him from being deprived of coverage under his liability insurance policy while at the same time enabling him to limit his liability.

[76] Support for the trial judge’s finding can be found in the evidence that a year earlier, when Mr. Vallée had no reason to think that the cable in question was not in use, he had spotted it in the river but had not cut it. Moreover, the trial judge was right to find that Mr. Vallée had sincerely believed the cable was not in use, as it

would not have made sense to find that he would have tried to cut the submarine cable, thereby putting his life in danger, if he believed it was live. Mr. Vallée *should* of course have known and, what is more, he should not have acted negligently or wrongfully. But that is not what is at issue in this case. The respondent Royal & Sun Alliance Insurance Company of Canada (“Royal”) had to establish on a balance of probabilities that at the time Mr. Vallée cut the cable, he had knowledge of the loss that would result from his act. It has not done so, however, and for this reason it cannot be found that Mr. Vallée’s misconduct was *wilful* within the meaning of s. 53(2) of the Act.

II. Wilful Misconduct

[77] Article 4 of the *Convention* has the force of law in Canada pursuant to s. 26 of the *Marine Liability Act*, S.C. 2001, c. 6. This article’s purpose is to enable an insured to limit his or her civil liability. It establishes a subjective criterion: a person who has caused a loss cannot limit his or her liability if he or she *intended* to cause the loss, or committed the act that caused the loss recklessly and with knowledge that such a loss would probably result. To trigger the bar on limitation provided for in art. 4 of the *Convention*, it is necessary to establish intention or subjective knowledge on the part of the person who caused the loss.

[78] Section 53(2) of the Act, like art. 4 of the *Convention*, also establishes a subjective criterion, “wilful misconduct”, although it does not contain an exhaustive definition of that concept. An act cannot be characterized as wilful misconduct unless

it is proven that the insured intended the result of his or her act or was reckless in that regard. Thus, in the words used by my colleague Cromwell J. at para. 42 of his reasons in referring to the trial judge's reasons, "wilful misconduct' is 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'". This definition clearly does not apply to Mr. Vallée's conduct.

[79] The relevant provisions read as follows:

Marine Insurance Act

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 nor, unless the marine policy otherwise provides, for

(a) in the case of insurance on a ship or goods, any loss proximately caused by delay, including a delay caused by a peril insured against;

(b) ordinary wear and tear, ordinary leakage or breakage or inherent vice or nature of the subject-matter insured;

(c) any loss proximately caused by vermin; or

(d) any loss or damage to machinery not proximately caused by maritime perils.

Convention on limitation of liability for maritime claims, 1976, as amended by the Protocol of 1996 to amend the Convention on limitation of liability for maritime claims, 1976

ARTICLE 1

PERSONS ENTITLED TO LIMIT LIABILITY

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

...

4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

...

6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.

7. The act of invoking limitation of liability shall not constitute an admission of liability.

ARTICLE 2

CLAIMS SUBJECT TO LIMITATION

...

2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

...

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.

[80] According to Cromwell J., “wilful misconduct [includes] not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know” (para. 58 (emphasis added)). I agree that “intentional wrongdoing” constitutes wilful misconduct. With respect, however, the second part of my colleague’s statement requires amplification. Conduct exhibiting “reckless indifference in the face of a duty to know” cannot be characterized as *wilful* misconduct unless it is proven that at the time of the wrongful act, the person who committed it had subjective knowledge of the loss that would result. To find *wilful* misconduct on the part of a person who did not have such knowledge is to disregard an essential aspect of the meaning of the word “wilful”, which, in the context of an act or an omission, means that the pros and cons — the consequences — have been weighed. The effect of doing so is to deprive the adjective “wilful” of “will”.

[81] As my colleague mentions, the Court considered the wilful misconduct concept in *McCulloch v. Murray*, [1942] S.C.R. 141, in which Duff C.J. stated that the term “wilful misconduct”, like “gross negligence” and “wanton misconduct”, refers to conduct in which there is a very marked departure from the conduct of a reasonable person (p. 145). However, Duff C.J. added a caveat with respect to the scope of his judgment: “I do not think it is any part of the duty of this Court, in applying the enactment before us, to define gross negligence, or to define wilful and

wanton misconduct” (p. 144). He also acknowledged that the three concepts — gross negligence, wilful misconduct and wanton misconduct — are not analogous:

I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct. All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not confused by too much verbal analysis. [Emphasis added; p. 145.]

[82] This Court has in fact distinguished these concepts from one another. Thus, Kerwin J. (as he then was) observed that wilful misconduct, unlike gross negligence, necessarily implies subjective knowledge of the risks associated with the act in question: “The term ‘wilful and wanton misconduct’ denotes something subjective on the part of the driver, whereas gross negligence may be found entirely apart from what the driver thought or intended” (*Studer v. Cowper*, [1951] S.C.R. 450, at p. 455). (See also *Russell v. Canadian General Insurance Co.* (1999), 11 C.C.L.I. (3d) 284 (Ont. Ct. J. (Gen. Div.)), at para. 47; *Avgeropoulos v. Karanasos* (1969), 6 D.L.R. (3d) 34 (Ont. Dist. Ct.).)

[83] The meaning of the word “wilful”, and of its French equivalent “*délibéré*”, supports this interpretation. The *Le Petit Robert* dictionary (new ed. 2012) defines the adjective “*délibéré*” as follows: “*conscient, intentionnel, réfléchi,*

volontaire, voulu” (conscious, intentional, thought out, intended) (p. 661). And the *Shorter Oxford English Dictionary* (5th ed. 2002) defines “wilful” as follows: “[o]f an action etc.: done on purpose; deliberate, intentional”, and “[d]one or undergone of one’s own free will; voluntary” (p. 3640).

[84] In my view, therefore, to say that “conduct exhibiting reckless indifference in the face of a duty to know” represents a manifestation of “wilful misconduct” is to disregard an essential condition of that concept. For such conduct to be considered *wilful*, it must be proven that the person who committed the act constituting misconduct had knowledge, at the very moment the act was committed, of the harmful consequences associated with it. Proving “conduct exhibiting reckless indifference in the face of a duty to know” is but the first step, as it must then be proven that this misconduct was wilful.

[85] This characteristic was discussed in the English cases filed by the appellants and by the respondent Royal. In *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195 (C.A.), Bramwell L.J. said the following about wilful misconduct:

I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, “Now this may or may not be a right thing to do.” He might say, “Well, I do not know which is right, and I do not care; I will do this.” I am much inclined to think that that would be “wilful misconduct,” because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. [Emphasis added; p. 206.]

It is clear from Bramwell L.J.'s comments that the plaintiff must prove that at the very time of the misconduct, the person who committed the act "acted under the supposition that it might be mischievous". The fact that the person acted "with an indifference to his duty to ascertain whether it was mischievous or not" is not itself sufficient. Thus, misconduct cannot be characterized as *wilful* unless the person who committed the act had subjective knowledge of the risks inherent in the act at the time it was committed.

[86] The definition of wilful misconduct formulated by the English Queen's Bench Division (Commercial Court) in *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd's Rep. 399, is also relevant. Cresswell J. said the following:

What does amount to wilful misconduct? A person wilfully misconducts himself if he knows and appreciates that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet (a) intentionally does or fails or omits to do it or (b) persists in the act, failure or omission regardless of the consequences or (c) acts with reckless carelessness, not caring what the result of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.) [Emphasis added; p. 408.]

What I understand from the third possibility, the one that most closely resembles the situation in the case at bar, is that misconduct is *wilful* if at the time the person commits the act, he or she is "aware of a risk that goods in his care may be lost or damaged". In short, it is necessary to prove subjective knowledge of the loss at the time of the misconduct.

[87] In my opinion, this proposition is consistent with the English cases, according to which misconduct will be characterized as *wilful* only if the person liable for it intended it to happen. (See *Forder v. Great Western Railway Co.*, [1905] 2 K.B. 532; *Horabin v. British Overseas Airways Corp.*, [1952] 2 Lloyd's Rep. 450 (Q.B.D.); *Kenyon Son v. Baxter, Hoare & Co.*, [1971] 1 Lloyd's Rep. 232 (Q.B.D.); *Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The "Eurysthenes")*, [1976] 2 Lloyd's Rep. 171 (C.A.); *Rustenburt Platinum Mines Ltd. v. South African Airways*, [1977] 1 Lloyd's Rep. 564 (Q.B.D. (Com. Ct.)); *Sidney G. Jones Ltd. v. Martin Bencher Ltd.*, [1986] 1 Lloyd's Rep. 54 (Q.B.D.); *National Oilwell (UK) Ltd. v. Davy Offshore Ltd.*, [1993] 2 Lloyd's Rep. 582 (Q.B.D. (Com. Ct.)); *National Semiconductors (UK) Ltd. v. UPS Ltd.*, [1996] 2 Lloyd's Rep. 212 (Q.B.D. (Com. Ct.)); *Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd.*, [1997] 2 Lloyd's Rep. 369 (C.A.).)

[88] Duygu Damar adopts the same reasoning in her seminal work, *Wilful Misconduct in International Transport Law* (2011). An act characterized as "reckless" will be considered to constitute wilful misconduct only if the evidence shows that it was committed with "subjective recklessness". Professor Damar illustrates such misconduct as follows: "If a person is actually aware, *i.e.* conscious of the existence of the unjustifiable risk, his recklessness is subjective, or in other words, his conduct is classified as advertent recklessness" (pp. 272-73). On the other hand, an act involving "objective recklessness" that is committed by a person who

does not foresee the risk the act might entail cannot be regarded as *wilful* misconduct.

Professor Damar explains this as follows:

Unlike subjective recklessness, the wrongdoer need not be actually aware of the unjustifiable risk under objective recklessness. It is sufficient for a finding of objective recklessness that a reasonable person would have seen the risk, even if the wrongdoer did not see it. [p. 273]

[89] Thus, knowledge that an act is reckless cannot be ascribed to an individual solely on the basis of the reasonable person standard, or on the basis that the individual had a duty to inquire further. Professor Damar states in this regard that “[objective recklessness] should . . . not be taken into consideration in transport law cases since it does not fulfil the ‘actual knowledge’ prerequisite which attaches to the degree of fault of wilful misconduct” (p. 273). The fact that a reasonable person ought to have known, or that a person had a duty to know, does not suffice to justify a finding that an act has the characteristics of wilful misconduct: it is also necessary to establish that the person intended to cause the loss, and to prove gross negligence or misconduct in which there is a very marked departure from the conduct of a reasonable person.

[90] Moreover, I adopt the comment of Peter Cane, in “*Mens Rea* in Tort Law” (2000), 20 *Oxford J. Legal Stud.* 533, that “recklessness” necessarily implies subjective knowledge of the consequences of the act. Professor Cane maintains, in effect, that “to say that a person was consciously reckless in relation to a particular

outcome involves saying that they believed the outcome not to be impossible” (p. 538).

[91] For the purposes of s. 53(2) of the *Marine Insurance Act*, the respondent Royal had to prove, on a balance of probabilities, that Mr. Vallée had subjective knowledge of the risks associated with his act. I note that the evidence has not shown that he had any misgivings in this regard at the time of the incident. If after considering the possible consequences of an act, an insured sincerely, although erroneously, believes that the act will cause no loss, his or her misconduct cannot be characterized as *wilful*.

[92] In sum, proof of “conduct exhibiting reckless indifference in the face of a duty to know” will not be sufficient to justify a finding that an individual’s act constituted *wilful* misconduct. If such proof were sufficient, it is quite possible that the act in question would constitute “misconduct” for the purposes of s. 53(2) of the Act even though it could not be characterized as *wilful*.

III. Loss of Coverage in Non-marine Insurance

[93] To support a conclusion that *wilful* misconduct requires subjective knowledge of the risks, it may be helpful to consider what has been said in the civil law and common law contexts with respect to non-marine insurance. Although the schemes are not identical, each of them requires that, before an insured is deprived of coverage, he or she be proven to have had subjective knowledge of the risks

associated with the act in question. The appropriateness of referring to the civil law in this regard should not be open to dispute. I agree with L'Heureux-Dubé J.A., as she then was, in *Symons General Insurance Co. v. Sabau Construction Inc.*, [1986] R.J.Q. 2823, at p. 2831, and Brossard J.A. in *Aetna Casualty and Surety Company v. Groupe Estrie, mutuelle d'assurance contre l'incendie*, [1990] R.J.Q. 1792 (C.A.), that Quebec insurance law is based in part on the common law (see also C. Belleau, "L'harmonisation du droit civil et de la common law en droit des assurances au Québec" (1991), 32 *C. de D.* 971, at p. 973). In *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283, at pp. 293 and 297, this Court found that the *Civil Code of Lower Canada* effectively codified the law of marine insurance with respect to bottomry and respondentia (art. 2693), abandonment (art. 2663) and privileges (arts. 2383 and 2385).

[94] Thus, art. 2464, para. 1 of the *Civil Code of Québec* ("C.C.Q.") provides that an insurer is liable to compensate for an injury that results from the fault of the insured unless that fault was intentional. Didier Lluelles states the following in this regard:

[TRANSLATION] . . . a manifestly inept act of an insured should not be characterized as an intentional fault if the insured *was unaware* of a risk that a loss would be the inevitable result. An unintentional gross fault is therefore covered absent an express and restrictive exclusion clause. [Emphasis in original.]

(*Précis des assurances terrestres* (5th ed. 2009), at pp. 198-99)

[95] This conclusion is supported by *Audet v. Transamerica Life Canada*, 2012 QCCA 1746, [2012] R.J.Q. 1844, which the respondent Royal has submitted. In that case, Dalphond J.A. distinguished the concept of intentional fault from that of gross fault, noting that the former [TRANSLATION] “is characterized by conduct that seeks not only the realization of the risk, but also the realization of the injuries thereby caused, that is, the consequences of such conduct” (par. 91). He explained the latter as follows:

[TRANSLATION] . . . a gross fault — gross negligence being nothing more than one form of such, like recklessness even when considered rash — stems from abnormally deficient, even inexcusable, behaviour that shows complete disregard for others. . . . [para. 90]

In *Audet*, the insured, a life insurance and investment broker, was unaware of the tax incidence of the financial products he sold his clients, and they sustained a substantial financial loss as a result. The Court of Appeal held that the broker’s lack of knowledge of the tax treatment constituted neither a gross fault nor an intentional fault but, rather, an incompetence that triggered his liability and was covered by his liability insurance policy. The insurance company therefore had an obligation to provide compensation for the loss caused by the insured and could not deprive him of coverage (para. 113).

[96] I note in passing that both art. 2576 *C.C.Q.* (which concerns marine insurance) and s. 53(2) of the Act provide in their English versions that an insurer is not liable for a loss caused by the “wilful misconduct” of the insured. In French, on

the other hand, Parliament chose to use the term “*inconduite délibérée*”, whereas the Quebec legislature used the term “*faute intentionnelle*”. The English and French versions of the *C.C.Q.* provision read as follows:

2576. The insurer is liable only for losses directly caused by a peril insured against.

The insurer is not liable for any such loss caused by the wilful misconduct of the insured, but he is liable if it is caused by the misconduct of the master or crew.

2576. L'assureur n'est tenu que des pertes et des dommages résultant directement d'un risque couvert par la police.

Il est libéré de ses obligations lorsque ces pertes et dommages résultent de la faute intentionnelle de l'assuré, mais il ne l'est pas s'ils résultent de la faute du capitaine ou de l'équipage.

The use of the words “wilful” and “*intentionnelle*” in art. 2576 attests to the importance of subjective knowledge of the risk or the loss inherent in the fault or the misconduct as a fact to be proven to justify an insurer's decision to deprive its insured of coverage.

[97] At common law, since this Court's decision in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*, [1976] 1 S.C.R. 309, “[a]t least as far as liability insurance is concerned, it is now the law that an accident arises when the result is unintended, even if it might have been foreseen, or even if it is the adverse outcome of a calculated risk” (C. Brown, *Insurance Law in Canada* (loose-leaf), at p. 8-33).

[98] In short, the interpretation of the wilful misconduct concept that I propose is compatible with both the civil law and the common law: to justifiably deprive an insured of coverage under the Act, the insurer must prove that the insured had subjective knowledge of the consequences and the risks inherent in his or her acts.

IV. Relationship Between Limitation of Liability Under the *Convention* and Section 53(2) of the Act

[99] Moreover, it is clear from the circumstances that led to the drafting of the *Convention* that the provisions relating to the limitation of liability must be read harmoniously with the one under which an insured could lose the benefit of his or her liability insurance policy.

[100] The *travaux préparatoires* of the *Convention*, which, according to art. 32 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, constitute a supplementary means of interpretation, reveal that the drafters were seeking at the time to tie the right to limit liability to the legal rules governing insurance coverage in the event of *wilful misconduct*. I note in this regard that the *travaux préparatoires* referred to s. 55(2)(a) of the *Marine Insurance Act, 1906* (U.K.), 6 Edw. 7, c. 41, the forerunner of s. 53 of the Act:

The words “recklessly and with knowledge that such loss would probably occur” come very near to the English legal term “wilful misconduct”, which normally is the degree of blame required if the insurance cover shall be forfeited (Marine Insurance Act (1906) Sect. 55 (2) a). The proposed text, therefore, implies that there will be right of limitation where the insurance cover is intact. Making the limitation

unbreakable to this extent should make possible a significant raise of the limits of liability. [Emphasis added.]

(Comité Maritime International, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* (2000), at p. 122)

[101] Moreover, Professor Damar suggests that to conclude that a person whose wilful misconduct has caused damage would not as a result of that misconduct lose the right to limit his or her liability would in a way be inconsistent with the very objective of the limitation of liability system:

As mentioned before, it was alleged that one of the basic features of limited liability is the presumed fault based or strict liability regime accepted in exchange. The win-win situation created by this exchange fails when the damage is caused by the intentional wrongdoing of shipowner or carrier. If the limitation of liability was also accepted for cases where the damage incurred was caused by intentional or reckless conduct, the situation would turn into a win-lose situation in favour of the shipowner or carrier since although guilty of criminal conduct, he enjoys the benefit of the limited liability. [Emphasis added; p. 26.]

[102] It is accordingly my view that a person who can limit his or her liability for a loss resulting from certain acts should not lose the benefit of his or her insurance coverage for those same acts, as such an outcome could upset the principles of balance, consistency and fairness that underlie certain provisions with respect to insurance that reduce the coverage and protection of a liability insurance policy.

V. Application of the Law to the Facts

[103] In this case, I agree with the majority that Mr. Vallée did not lose the benefit of the limitation of liability pursuant to art. 4 of the *Convention*. Mr. Vallée did not act with the intention of causing the loss and was not aware that such a loss would probably result from his act. The Federal Court found that Mr. Vallée was an “honest man” (at para. 1) and that he had not intended to cut a cable knowing it to be in use or live. The evidence in this regard is uncontradicted. His liability insurer can also benefit from that limitation of liability by virtue of art. 1(6) of the *Convention*.

[104] However, I cannot agree with the majority’s second conclusion with respect to s. 53(2) of the Act:

His conduct exhibited a reckless indifference to the possible consequences of his actions of which he was actually aware. He thus committed an act of wilful misconduct: he ran an unreasonable risk with subjective knowledge of that risk and indifference as to the consequences.
[para. 65]

The majority fail to take into account the uncontested finding of fact that Mr. Vallée sincerely believed the cable was not in use when he cut it. Also, in my respectful opinion, the majority incorporate a new objective test into the analysis under s. 53(2) of the Act. Since that provision requires that a purely subjective test be satisfied by proof on a balance of probabilities, and given that the trial judge’s findings of fact have not been set aside, it must be concluded as a matter of law that Mr. Vallée did not commit an act of wilful misconduct within the meaning of s. 53(2) of the Act.

[105] Mr. Vallée was clearly negligent in cutting the cable of the respondents TELUS Communications Company, Hydro-Québec and Bell Canada on two occasions. The Federal Court recognized that Mr. Vallée owed a duty of care to those companies.

[106] Nevertheless, nothing in the record supports a finding that M. Vallée actually knew or had any suspicion that the cable was in use. Quite the contrary, the Federal Court acknowledged from the outset that he was an “honest man” (at para. 1) and that he was “[m]ortified” (at para. 43) when he realized what he had done. It noted several times that he actually believed that the “cable was useless” (para. 75; see also paras. 5 and 28-29). In particular, the trial judge stated that Mr. Vallée had concluded that the cable was no longer in use on seeing, on a chart, or map, in a Baie-Comeau museum, the word “*abandonné*” (abandoned) on a line crossing the river at the place where he usually fished (para. 40). After seeing that chart, Mr. Vallée sincerely, albeit erroneously, believed that the cable was not in use.

[107] Nor is there any support in the record for a conclusion that Mr. Vallée had knowledge of the loss that would result, let alone that he intended to cause such a loss. On the contrary, it is clear from the facts as found that he believed the cable was not in use and that it therefore had “no value” (para. 77). The Federal Court stressed that as soon as Mr. Vallée had learned about the damage he had caused, he voluntarily turned himself in to the authorities (para. 43). The trial judge pointed out that Mr. Vallée’s act could very well have put his life in danger: had the cable been a

live electrical cable, he could have been electrocuted (para. 32). Even though Mr. Vallée knew that a submarine cable could be used to transmit electricity (A.R., vol. III, at p. 111), he took action and cut the cable. In my opinion, it is not reasonable to find that he harboured any suspicion that the cable was still in use.

[108] The Federal Court and the Federal Court of Appeal carefully refrained from finding that Mr. Vallée had knowledge of a risk of causing a loss. On the contrary, the Federal Court concluded: “All that can be said is that if Mr. Vallée knew Sunoque I was a cable in use, he would not have cut it” (para. 29). That court instead went no further than to state that M. Vallée *ought to have known*.

[109] In conclusion, the respondent Royal had to establish that when the insured, Mr. Vallée, committed his wrongful act, he intended to cause the loss, or had knowledge that such a loss could result from his act. The trial judge found that when Mr. Vallée cut the cable, he sincerely believed it was not in use. The respondent Royal has therefore not discharged its burden of proof, and just as Mr. Vallée had not, pursuant to arts. 1, 2 and 4 of the *Convention*, lost the right to limit his liability, he could also benefit from his liability insurance coverage and require his insurers to take up his defence and to indemnify the victims, if necessary.

[110] For these reasons, I would allow the appeal with costs throughout.

Appeal allowed in part with costs, WAGNER J. dissenting in part.

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