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"A Very Stupid Thing" - A Mariner's Limit of Liability and How it Can be Broken

"[He] is a good man; a decent man; an honest man – a fisherman. However he did a very stupid thing. He cut the plaintiffs' submarine fibre optic cable in two. It cost them almost $1,000,000 to repair it".

So begins the judgment in the recent Federal Court of Canada decision *Telus v. Peracomo & F/V Realice.* This case is significant to mariners because it provides an important opportunity to understand limits of liability under marine law, and how these limits protect us. Mariners are wise to appreciate the protections offered by these limits of liability, as well as their liability insurance, and how both of these comforts can be lost resulting in financial disaster.

The *Peracomo* Cable Cutting Case -

In *Peracomo*, Telus maintained a fibre optic cable that had been lawfully laid across the bed of the St. Lawrence River in 1999. The 44 gross tonne fishing vessel *Realise*, a snow crab long-liner, was owned by Peracomo Inc. and her master (as sole shareholder of Peracomo Inc.). In June of 2006 an anchor on one end of the *Realise's* longline became caught on the fibre optic cable, and with much effort was pulled to the surface by the master who then used an electric saw to cut the cable free of the anchor. A few days later the *Realise's* longline anchor became caught on the same cable, and the master again cut the cable.

Telus sued the vessel, the owner Peracomo Inc. and the master for the cost of repairing the cable, which was approximately $980,000. The master testified he believed the cable was not in use, despite the cable being marked on current charts. The vessel owner and master argued the cable should have been buried, but if they were at fault for the damage they were entitled to limit their liability to $500,000 under Canadian maritime law. Telus argued the owner and master had lost their right to limit their liability because the damage was intentionally caused. The vessel owner claimed on its liability insurance, and their insurer denied coverage maintaining the insurance did not cover damage due to the insured's "willful misconduct", as this was excluded under the *Marine Insurance Act*.

The trial judge found the master had intentionally cut the cable, and the defendants were not entitled to limit their liability to $500,000 or require their insurer to cover the loss, because the damage was intentional. The Federal Court of Appeal agreed. The *Peracomo* case is important because it is the first Canadian case where the limitation of liability in a marine accident has been broken.

What is a Limit of Liability, and Why?

Aside from the *Canada Shipping Act 2001*, Canada's core marine legislation is the *Marine Liability Act* ("*MLA*"). The *MLA* gives the force of law in Canada to various international conventions, including the *International Convention on the Limitation of Liability for Maritime Claims 1976* (the "*Liability Convention*"). The *Liability Convention* is important because it puts a cap, or limit, on what can be claimed for a marine loss such as damage to property, or injury or death of a person.

People entitled to limit liability under the *Liability Convention* are vessel owners, charterers, managers and operators (masters) and any person with an interest in the ship, as well the ship itself. The limitation covers accidents involving not just seagoing commercial vessels, but inland and recreational vessels as well. In the case of damage to property, the limit of liability is $500,000 for loss caused by a vessel under 300 gross tonnes. For vessels between 300 and 2,000 gross tonnes, the limit is currently CDN$1,493,000. For vessels between 2001 and 30,000 tonnes the limit is CDN$1,493,000 plus $600 for every tonne over 2,000. The Canadian dollar value of the limit floats based on an International Monetary Fund unit called a Standard Drawing Right or SDR; the values provided are current as of September 4, 2012.

There are various reasons these limits of liability exist, but one of the foremost reasons is to encourage marine enterprise. By establishing limits on liability mariners are encouraged to engage in more business adventure and risk. Marine insurers, knowing that the liability of their customers is limited, can offer lower insurance premiums, making those adventures more economical for marine businesses to pursue. Clearly, if limitations of liability did not exist, the insurance premiums we pay would be significantly higher, as would our exposure to financial ruin in the event of a significant accident.

How Can the Limit be Broken?

Importantly, the *Convention* provides that the protection of the limitation of liability can be lost or broken, if the loss was caused by a personal act or omission (a failure to act) either "*with the intent to cause such loss*" or "*recklessly and with knowledge that such loss would probably result*". The limitation has historically been referred to as an "unbreakable limit" for at least two reasons. Firstly, the loss must result from the "personal act or omission" of owners, charterers, managers and operators. Of course, many marine accidents occur because of the acts of an employee of the owner, in which case it is the not the personal act or omission of the owner or operator that caused the loss. In the *Peracomo* case it was the owner and operator's personal act that caused the loss when he cut the cable. The second reason the limitation has been difficult to break is the requirement that the loss be caused *intentionally* or *recklessly with knowledge of the probable result*.

Intent is an obvious concept and needs no explanation. In the *Peracomo* case the court found the master intended to damage the cable by cutting it to free his anchor. Although the master lost his right to limit his liability on that basis alone, the test for breaking the limitation being *intent* to cause damages "or" *recklessly* and with *knowledge*, so the court went on to discuss whether the master acted recklessly and with knowledge. What is reckless is not as clear as what is intentional. In *Peracomo*, the court held that recklessness meant an attitude or indifference to the existence of a risk, essentially "turning a blind eye to a risk", and found that because the master had turned a blind eye to current charts that showed the location of the cable, so he was "*reckless in the extreme*".

Fortunately, cases where a mariner loses their ability to limit their liability are rare. However, we should not take the limitation for granted and assume it is "unbreakable" as it is often called. In *Peracomo* the court reminded us the limitation of liability provided under the *MLA* and the *Liability Convention* are a "privilege". While most marine accidents occur as a result of an innocent mistake (simple negligence), anyone can have a bad day and do "a very stupid thing".

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