LIMITATION OF LIABILITY, SALVAGE AND GENERAL AVERAGE ACTIONS

RIGHTS AND REMEDIES UNIQUE TO MARITIME LAW

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This paper involves three topics in Canadian maritime law: limitation of liability; salvage actions, and; general average actions. Limitation of liability in maritime matters continues to develop in Canadian courts. Actions for salvage and general average are maritime concepts less often seen by the courts, but which continue to form an important part of our Canadian law of the sea.

I) LIMITATION OF LIABILITY

i. Historical Context

The principle of limitation of liability in marine claims has been in existence for many hundreds of years. It has been traced back to the eleventh century in what is now Italy, but may have originated as early as 454 AD, (The Origins and Development of Shipowners Liability, J. Donovan, 53 Tul. L. Review 999, 1979).

The first limitation of liability statute in the United Kingdom was passed by Parliament in 1733. It was a policy decision by Parliament to protect shipowners from strict liability damages which they faced as common carriers. This limitation policy has remained in effect through various statutes and International Conventions.

The 1976 Convention on the Limitation of Liability and the 1996 Protocol were adopted into Canadian Law in the Canada Shipping Act and later moved to the Marine Liability Act.

Prior to the Marine Liability Act, these conventions were amendments to Part IX of the Canada Shipping Act in 1998. Before this, Canada followed the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957, which had much lower limitation amounts, but limitation was easier to break. Under this regime a shipowner, in order to limit liability, had the burden of establishing that damage or loss caused did not result from his actual fault or privity. Under the new regime, that burden shifts to the plaintiff to break limitation.

ii Current Legislative Regime : Federal Court Rule 496, The 1976 Convention on Limitation of Liability and the Marine Liability Act and

Rule 496 of the Federal Court Rules provides the mechanism for bringing an action to limit liability:

> **496.** (1) A party bringing an application under subsection 33(1) of the Marine Liability Act shall bring it as an action against those claimants whose identity is known to the party.
>
> Motion for directions re service
>
> (2) A party referred to in subsection (1) may bring an *ex parte* motion for directions respecting service on possible claimants where the number of possible claimants is large or the identity of all possible claimants is unknown to the party.

Section 33 of the Marine Liability Act sets out the Federal Court's powers concerning claims for limitation of liability:

> **33.** (1) Where a claim is made or apprehended against a person in respect of liability that is limited by Section 28 or 29 of this Act or paragraph 1 of Article 6 or 7 of the Convention, the Admiralty Court, on application by that person or any

other interested person, including a person who is a party to proceedings in relation to the same subject-matter before another court, tribunal or authority, may take any steps it considers appropriate, including:

(a) determining the amount of the liability and providing for the constitution and distribution of a fund under Articles 11 and 12 of the Convention;

(b) joining interested persons as parties to the proceedings, excluding any claimants who do not make a claim within a certain time, requiring security from the person claiming limitation of liability or from any other interested person and requiring the payment of any costs; and

(c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject-matter.

S. 33(2) allows the Court to postpone distribution of a limitation fund where appropriate.

S.33(3) sets out that liens or other rights in respect of a ship or property do not affect the proportions of how a limitation fund is distributed.

S.33(4) allows the Court to make any procedural rules it considers appropriate and to determine what form of guarantee it considers adequate.

S.33(5) sets out the Interest calculation for a limitation fund.

iii. Limitation of Liability Legislation

Currently limitation of liability in Canadian maritime law is found in Part 3 of **The *Marine Liability Act* S.C. 2001 c.6, (" MLA")** which came into force in August 2001 and was amended in 2010. The MLA adopts Articles 1-15 and Article 18 of the **1976 Convention on Limitation of Liability and the 1996 Protocol ("LLMC")** with a few Canadian amendments.

The LLMC

Article 1 sets out who can limit liability, being:

a) The owner;
b) The charterer;
c) The manager;
d) The operator of seagoing ships; and
e) Salvors.

Article 1(4) extends this right to limit liability to employees and agents of the foregoing.

Article 1(6) extends the benefits to liability insurers of persons entitled to limit.

Section 25(1)(b) of the MLA further extends those entitled to limit liability to the owners, charterers, managers and operators of all ships, not just seagoing ones, and to any person with an interest in or possession of a ship.

Article 2 sets out the types of claims subject to limitations of liability, including:

a) Claims for loss of life or personal injury or loss or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations and consequential loss;

b) Claims for loss resulting from delay in the carriage by sea of cargo, passengers, or their luggage;

c) Claims for loss resulting from infringement of rights other than contractual rights, occurring in direction connection with the operation of the ship or salvage operations;

d) claims for raising, removing, destroying or rendering harmless a ship which is sunk, wrecked, stranded or abandoned, including anything which has been on board the ship; and

e) Claims by anyone other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability.

Article 3 sets out the claims which are exempted from limitation of liability. These are:

a) Claims for salvage or contribution in general average;

b) Claims for oil pollution damage governed by the 1969 Convention on Civil Liability for Oil Pollution;

c) Claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;

d) Claims against the shipowner of a nuclear ship for nuclear damage; and

e) Claims by employees/servants of the shipowner or salvor if the applicable law does not permit limitation.

Conduct Barring Limitation of Liability

Article 4 sets out the circumstances under which a claimant will lose its right to limit liability:

> "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." (Emphasis added.)

Article 4 represents the biggest change to a shipowner's right to limit his liability for his acts and those of his servants. Under the 1957 Convention limitation was available except where "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". Difficulties arose in determining who was the "owner".. The 1976 Convention no longer involves the fault or privity of the owner, but requires proof of loss resulting from the "personal act or omission" of the person liable for the loss which was "committed with intent to cause such loss, or recklessly...." , (Griggs, Limitation of Liability for Marine Claims, 4th Edition, 2005, pp 31-32).

This new clause, Article 4, is very similar to that of Article 25 of the Warsaw Convention 1929 as Amended by Article 13 of the Hague Protocol 1955, and now the Montreal Convention, Article IV Rule5(e) of the Hague Visby Rules, Clause 13 of the Athens Convention and Article 8 Rule 1 of the Hamburg Rules. There some minor differences among the clauses, (See Griggs, Supra Above, pp.32-33).

(a) Personal Act or Omission

The Athens Convention, the Hamburg Rules and the Hague Visby Rules refer to "acts or omissions of the carrier", but the LLMC refers only to the "personal act or omission of the person liable". Courts will have to determine whether or not corporations whose acts or omissions will be treated as a "personal act or omission of the person liable". They may refer back to the law concerning "alter ego" that many nations used to address the problem of who was the "owner" under the 1957 LLMC.

The "Alter Ego" concept was originally developed in the case of *Lennard's Carrying Co.* [1915] A.C. 705. In this case, which involved the Merchant Shipping Act 1894, the Court held that the "fault or privity" must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable but somebody for whom the company is liable because his action is the very action of the company itself.

A further example of the concept of "alter ego" can be found in the case of *The Marion*, [1984] 2 Lloyd's Rep. 1, in which the ship's managers failed to ensure the ship had up to date charts on board. By using an out of date chart, the vessel's anchor caused damage to an oil pipeline on the seabed. It was held the managers were at fault, and that fault was that of the shipowners at law, therefore the shipowners could not limit their liability.

(b) The "person liable"

The person liable could be any of those listed in Article 1.

(c) "Loss"

This is presumably referring to all the various types of loss or damage or injury or expense to which Article 2 refers, (Griggs, Supra p.35).

(d) "Such Loss"

Under the Warsaw Convention and the Hague Visby Rules, it seems that the carrier's right to limit liability will be lost if he intends to cause any damage, whether or not the intended or foreseeable damage was the same as the damage actually inflicted.

The Athens Convention and the 1976 LMCC refer to "such loss". It may be that this means that the right to limit liability is barred only if the type of loss intended by the person liable is the actual loss suffered. This seems to be the case in recent English decisions, such as *The MSC Rosa M*, [2000] 2 Lloyd's Rep. 399, and *The Leerort* [2001] EWCA Civ 1055. + Peraccino

(e) Recklessness and with Knowledge

The concepts of "recklessness and with knowledge" form the basis of much of the litigation involving the LMCC.

Recklessness and knowledge are separate but cumulative concepts and both need to be proven, (*The MSC Rosa, Supra Above).*

The definition of recklessness does not appear to be settled in English law. As the C.A. stated in the case of *Herrington v. British Railways Board* (1971) 2 Q.B. 107:

" "Reckless" is an ambiguous word which may bear different meanings in different contexts. In some branches of the law it is used to connote a rare state of mind between negligence however gross on the one hand and deliberate wrongdoing on the other. In other contexts "reckless" simply amounts to gross negligence...."

Some cases have held that recklessness involves deliberately running an unjustifiable risk, such as the decision in *Albert E Reed & Co. v. London & Rochester Trading Co. Ltd.* [1954] 2 LI LR 463, 475 QB. This case has been cited in Canadian air cargo cases for the definition of recklessness.

Other cases have concluded that recklessness amounts to gross carelessness, as opposed to gross negligence, and is assessed on an objective standard, such as the case of *Shawnigan Ltd. v. Vokins & Co. Ltd.* 3 All ER 396, 403 QB. This case is also cited in Canadian air cargo cases for the definition of recklessness.

The definition of recklessness appears not to be settled in Canadian caselaw. Following the English cases, some Canadian courts have defined the term as gross carelessness, and base its presence on an objective test, distinguishing it from gross negligence, such as in the case of *Newell v. Canadian Pac. Airlines* [1976] 74 DLR (3d) 574, Ont. Ct. In this case the court concluded that recklessness existed where there was a failure of cargo services employees to inform the ramp service employees that there was dry ice in the compartment of the aircraft where live animals were being transported.

Other Canadian decisions describe recklessness as a conscious disregard for or indifference to harm, being more than negligence, a gross deviation from what a reasonable man would do, such as in the case of *Tiura v. United Parcel Service Canada Ltd.* [2009] OJ No 6059.

In the B.C. case of *Gundersen v. Finn Marine Ltd.* [2008] BCJ No. 2366, the B.C.S.C. defined "recklessness" as gross negligence.

There has been much debate in Canadian caselaw as to whether or not an objective or subjective test to establish the likelihood of damage should be employed. Objective, or "reasonable man" tests have been employed by the Federal Court in cases such as *Swiss Bank Corp v. Air Canada* (1981) FCJ No 167. In the *Swiss Bank* case a parcel of Canadian bank notes was shipped from Switzerland to Montreal by the defendant carrier and disappeared after reaching Montreal. Air Canada admitted liability for the loss, but sought to limit its liability. The Federal Court found for the plaintiff and applying an objective test, reasoned that the bank notes were likely to have been stolen by an Air Canada employee, who must have had knowledge that damage would probably result.

French caselaw applies an objective test. Australian caselaw seems to follow the subjective approach as set out in many of the English cases. It is unclear what the dominant trend is in Canadian caselaw.

The case of ***Société Telus Communications v. Peracomo Inc.*, 2011 FC, 494,** is the first Canadian case of which I am aware in which limitation has been broken. In this case, the plaintiff was the owner of two submarine cables on the bottom of the St. Lawrence River. The defendants were the owners and operators of a fishing vessel. The operator snagged one of the cables while he was fishing and cut it with a saw, thinking the cable was not being used. He did the same thing a second time a few days later. The trial judge, Justice Harrington, found that the cables were included in notices to mariners and were shown on navigation charts and

that it was the duty of the defendants to be aware of them. Justice Harrington further found that the sole cause of the loss was the intentional and deliberate act of the operator. With respect to limitation of liability, he held that the defendants were not entitled to limit liability because the plaintiff had proven the operators act was "reckless and with knowledge that such loss would probably result".

Mr. Justice Harrington's judgment was upheld by the Federal Court of Appeal in ***Peracomo v. Société Telus Communications* 2012 FCCA 199.** The FCCA agreed that the defendants intended to physically damage the cable and that it did not matter whether the defendants were aware of the actual loss that would result. This seems to discount the requirement for knowledge of the actual loss required by Article 4, and diverges from the recent UK caselaw.

This case was heard by the Supreme Court of Canada. in November, 2013 and judgment has been reserved.

Counterclaims

Article 5 allows that where a person is entitled to limit liability has a claim against the claimant arising out of the same occurrence, the claims can be set off against each other, and the provisions of the Convention shall only apply to the balance.

iv. Limitation Amounts

General Limits

Article 6 of the Convention and Section 29 of the MLA set out the general limits of liability.

For vessels in excess of 300 tons, the limits of liability are set by the LMCC 1976 Convention. Specific Canadian limits are set in Section 29 for vessels of less than 300 gross tonnes. The limits are as follows, as of April 15, 2014, and rounded up:

Ship's Gross Tonnage	Claims For Loss of Life or Personal Injury (except passengers or persons carried on a ship)	Other Claims (except passengers or persons carried on a ship)
Less than 300	C$1,000,000	C$500,000
300 - 2,000	2,000,000 SDR (approx. C$3,400,000)	1,000,000 SDR (approx. C$1,700,000)
2001 - 30,000	2,000,000 SDR (approx. C$3,400,000) plus 800 SDR (C$1,360) for each ton over 2000	1,000,000 SDR (approx.. C$1,700,000) plus 400 SDR (C$680) for each ton over 2000
30,001 - 70,000	24,400,000 SDR (approx. C$41,500,000) plus 600 SDR (C$936) for each ton over 30,000	12,200,000 SDR (approx. C$ 20,740,000) plus 300 SDR (C$468) for each ton over 30,000
over 70,000	48,400,000 SDR (approx. C$82,300,000) plus 400 SDR (C$624) for each ton over 70,000	24,200,000 SDR (approx. C$ 41,140,000) plus 200 SDR (C$312) for each ton over 70,000

These limits are set to be reviewed in 2015.

For claims arising from vessels in excess of 300 tonnes, pursuant to **Article 6(2),** where the limitation amount applicable to a personal injury claim is insufficient to satisfy all such claims the amount for property damage claims shall be made available to satisfy the personal injury claims.

Section 30 of the MLA sets out that owners of a dock, canal or port, including any person having the control or management of the dock, canal or port and any ship repairer using the dock, canal or port are entitled to limit their liability for loss caused to a ship or to any cargo or property on board the ship. The limitation is calculated by multiplying $1,000 by the tonnage of the largest ship to have used the dock in the last five years, subject to a minimum of $2,000,000. The right to limit liability can be lost, once again, by proving the loss resulted from the personal act or omission of the person seeking to limit, committed with intent to cause loss and with knowledge such loss would probably result.

Limits of Liability for Fatalities and Personal Injury Claims

The carriage of passengers is regulated by **Part 4 of the MLA** which implements the **1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea** (the

and the **1990 Protocol, (the "Athens Convention")**, and introduces some specific Canadian amendments. **Section 37 of the MLA** gives the Convention and Protocol the force of law in Canada.

The Athens Convention applies only to international contracts for the carriage of passengers in seagoing ships. **Section 37(2)** of the MLA extends the Athens Convention to contracts for the domestic carriage of passengers as well as the international carriage. **Section 37(2)(b)** does away with the requirement for a contract of carriage in the case of persons carried on ships operated for a commercial purpose (excluding the Master, crew and employees).

Article 7 of the Athens Convention and MLA Section 28 set out the limits of liability for passenger claims.

For claims for loss of life or personal injury to passengers on a ship, the limit of liability of the shipowner is 175,000 SDR's (CDN $273,000) multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

If there is no certificate, then **Section 28(1)** sets out that the limitation amount is the greater of 2,000,000 SDR's (CDN $3,120,000) and 175,000 SDR's (CDN $273,000) multiplied by the number of passengers on board the ship.

Section 28(3) sets out that the limits do not apply to the master, crew, stowaways and shipwrecked persons carried out of necessity, nor do the limitations apply to persons carried on ships used for pleasure purposes.

Article 8 provides that the maximum liability of the carrier for loss or damage to cabin luggage is limited to 1,800 SDR, (Cdn $ 2,800) and to 10,000 SDR (Cdn $15,600) for loss of or damage to a vehicle including all luggage carried in the vehicle.

Article 18 says that any contractual provision that tends to relieve the carrier of his liability or to fix a lower limit of liability than that prescribed shall be null and void. Similarly, any provision which tends to shift the burden of proof which rests upon the carrier or to restrict the claimants right to commence proceedings in the specified jurisdictions is null and void.

Section 37.1 of the MLA exempts "adventure tourism activities" from the provisions of Part 4. The liability of adventure tour operators is governed by the common law and the exclusion

clauses that operators use for such activities. A shipowner cannot benefit from the Part 4 limitations, but is subject to the limits of Part 3 which could be higher.

"Adventure Tourism" is defined in the MLA as an activity that:

1. Exposes participants to an aquatic environment;
2. Normally requires safety equipment and procedures beyond the norm;
3. Exposes participants to greater risks than normal;
4. Its risks have been presented to the participant and they have accepted in writing to be exposed to them;
5. Any other prescribed condition.

Where these conditions are met, Part 4 of the MLA does not apply.

Article 13 of the Athens Convention provides that a carrier will lose his right to limit liability where it is proven that the damage resulted from an act or omission done with intent to cause damage or recklessly and with the knowledge that such damage would probably result. (This is the same test as in the LLMC, 1976.)

v. Caselaw Involving Limitation of Liability

To Whom do the Limits Apply?

In the case of ***Buckley v. Buhman,* 2012 FCA 9**, the FCCA held that the limits for passenger claims apply only to passengers on board the ship seeking to limit liability. (This case was decided when the provisions of the MLA had different numbering than they do now, but is referring to the current Sections 28 and 29 of the MLA.)

In the case of ***Gundersen v. Finn Marine Ltd.*, 2008 BCSC 1665** the court held that the Athens Convention will apply domestically to a non-paying guest on board a vessel used for commercial purposes. This case also confirms the heavy onus on a plaintiff who wishes to challenge the defendant's right to limit liability.

Jurisdiction of the Court

The Supreme Court of Canada case **of *Isen v. Simms,* S.C.R. 349, 2006**, is an earlier case concerning limitation of liability and court jurisdiction. The defendant was injured when a bungee cord securing the engine cover of a small pleasure craft slipped out of the plaintiff's hands and struck the defendant in the eye. The boat had been removed from the lake and was on a trailer being prepared for road transportation. The Defendant brought personal injury proceedings in the Ontario Superior Court and the Plaintiff commenced a Federal Court action to limit liability.

There was a question as to whether federal or provincial law applied to the ship. The trial court and FCCA found that the claim was a maritime law claim and was subject to limitation of liability, but the SCC found that held the matter was governed by provincial law, therefore no limitation. The SCC pointed out that the court did not have jurisdiction per se over pleasure craft and that the court had to look at the allegedly negligent acts "and determine whether that activity is integrally connected to the act of navigating the pleasurecraft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter". The SCC agreed that the launching or retrieving pleasurecraft would be within Parliament's jurisdiction over navigation, the court did not agree the securing of the bungee cord had anything to do with navigation.

The case of ***Siemens Canada Ltd. v. J.D. Irving Ltd,* [2011] FC 791, and [2012] FCA 225** is a recent, while somewhat complicated, example of an action for limitation of liability. In this case, two steam turbine rotors were being loaded onto barges in Saint John Harbour for transport, and were both dropped into water.

Siemens, the turbines' owner, started proceedings in the Ontario Superior Court against Irving, (the carrier) and Maritime Marine Consultants Inc (the naval architects and others) to recover their losses.

Irving and Maritime Marine Consultants (MMC) brought an action in the Federal Court for a declaration limiting their liability to $500,000 plus interest, to the date of the constitution of a

limitation fund pursuant to paragraph 29(b) and section 29.1 and subsection 32(2) of the Marine Liability Act.

Siemens brought applications for:

a) an order staying the limitation proceeding, saying that its claims were not governed by Canadian maritime law and that the Federal Court did not have jurisdiction;

b) an interlocutory stay pursuant to S. 50 of the Federal Courts Act saying that the Ontario proceedings were broader than the Federal Court ones and that there was a risk of inconsistent findings if both continued; and

c) a final stay on the basis that Irving and MMC were not entitled to limit their liability pursuant to Article 4 of the Convention on Limitation of Liability for Marine Claims – saying that the defendants were "reckless".

In response to Siemens' motions, Irving and MMC sought direction from the Federal Court as to the manner in which their limitation actions were to be heard and determined and an order enjoining Irving and others from commencing Siemens and others from commencing or continuing proceedings in any other court than the Federal Court.

Judge Heneghan dismissed Siemens claims for interlocutory and permanent stays of the proceedings and held that it was clear that the nature of Siemens' claim was essentially maritime law and that the Federal Court held concurrent jurisdiction with the Ontario Supreme Court. She enjoined Siemens and others from commencing or continuing proceedings against Irving and MMC in any court other than the Federal Court.

Siemens appealed. The FCCA reviewed the relevant legislative provisions, including Rule 496 of the Federal Court Rules, the relevant provisions of the Marine Liability Act, and the Convention on Limitation of Liability for Marine Claims, 1976. The FCCA concluded that Judge Heneghan was correct in concluding that the incident which gave rise to Siemens' claims does fall within the Federal Court's maritime jurisdiction.

The FCCA, at paragraph 50 of the judgment, further finds that sections 28 – 32 of the MLA gives the shipowner the right to choose the forum in which he will assert his right to limit, irrespective of the forum in which the claimant has filed or may file his action for damages.

At paragraph 77 the FCCA comments on Subsection 33(1) of the MLA and says that the raison d'etre of the provision is clearly to allow a shipowner against whom a claim has been made or where one is apprehended to have the Federal Court determine whether or not he can limit his liability in respect of the loss suffered by the claimant, and that the subsection clearly contemplates situations where the right to limit has not been judicially determined.

Two of the major issues yet to be determined in this case are:

i) What is the definition of "reckless behaviour" to be applied; and

ii) Who is entitled to limit liability? Does a naval architect or a surveyor fall under the Article 1(4) extension of liability to agents?

II) SALVAGE ACTIONS IN CANADA

i). What is salvage?

Salvage is the rescue of any vessel, cargo, freight or other objects of salvage from danger at sea. Salvage services can be either contractual or voluntary. A salvage award is given to the person who has salved the property as compensation for the salvor's efforts. The law of salvage is ancient and can be traced back to Byzantium times (Brice, *Maritime Law of Salvage*, 3d ed. 1999, pp. 195-201.)

Most salvage services today are performed under a contract. Lloyd's Standard Form of Salvage Agreement, prepared by the Council of Lloyd's and known as Lloyd's Open Form (LOF) is the most common form of salvage contract in use around the world. Salvage awards in this cases are determined by arbitrations. **The 1989 International Convention on Salvage, Article 14**, contemplates situations where the salved fund is insufficient to allow them to recover adequate remuneration, so the SCOPIC clause was developed to be used in conjunction with the Lloyd's Standard Form of compensation to calculate the special compensation for contractors that would not recover sufficiently under Article 13 of the Convention.

The law of pure salvage, (salvage work done without a salvage contract) can be found in the **International Convention on Salvage, 1989**, which has been incorporated into the **Canada Shipping Act 2001 c. 26**, and the common law.

The Federal Court under **Section 22(2)(j) of the Federal Court Act** has jurisdiction over salvage actions.

A good definition of pure salvage can be found in **Section 452 of the Canada Shipping Act**, before it was amended, which read as follows:

> "When, within Canadian waters or on or near the coasts thereof, any vessel is wrecked, abandoned, stranded or in distress, and services are rendered by any person in assisting the vessel or in saving any wreck, there shall be payable to the salvor by the owner of the vessel or wreck, as the case may be, a reasonable amount of salvage including expenses properly incurred."

The Canada Shipping Act deals with wrecks and salvage claims. **Sections 155 -158** establish that anyone who finds a wreck must report it to the Receiver of Wrecks and take measures as requested by the Receiver, and cannot take any other measures with respect to the wreck before directed by the Receiver. If the Receivers measures are complied with, a salvage award may be appropriate.

Section 153 defines wreck as including:

> (a) jetsam, flotsam, lagan and derelict and any other thing that was part of or was on a vessel wrecked, stranded or in distress; and
>
> (b) aircraft wrecked in waters and anything that was part of or was on an aircraft wrecked, stranded or in distress in waters.

Schedule 3 of the Canada Shipping Act incorporates the **International Convention on Salvage, 1989** with only one minor exception. Canada's only reservation is the right not to apply the provisions of the Salvage Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situate on the seabed, (Article 30(1)(d).

ii). The International Salvage Convention, 1989

The 1989 Convention replaced a convention on the law of salvage adopted in Brussels in 1910 which incorporated the "'no cure, no pay" principle under which a salvor is only rewarded for services if the operation is successful.

The 1910 Convention did not take pollution into account. A salvor who prevented a major pollution incident (for example, by towing a damaged tanker away from an environmentally sensitive area, but did not manage to save the ship or the cargo received nothing. There was therefore little incentive for a salvor to undertake an operation which had only a slim chance of success.

The International Salvage Convention, 1989's purpose was to encourage the salvage of property, and the avoidance of environmental harm that wrecks often entail, by setting criteria for when a salvor can expect a reward. The Convention provides that any act or activity undertaken to assist a vessel or any other property in danger in navigable waters, that provides a "useful result" entitles the salvor to a reward.

Chapter 1 – General Provisions

Article 1 of the Convention provides the following definitions:

> (a) *Salvage operation* means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.
>
> (b) *Vessel* means any ship or craft, or any structure capable of navigation.
>
> (c) *Property* means any property not permanently and intentionally attached to the shoreline and includes freight at risk.
>
> (d) *Damage to the environment* means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

(e) means any reward, remuneration or compensation due under this Convention.

(f) *Organization* means the International Maritime Organization.

(g) *Secretary-General* means the Secretary-General of the Organization.

Articles 2-6 set out of the scope of application of the Convention.

The Convention applies to all salvage operations except for those where a contract exists that provides otherwise, expressly or by implication, (Article 6).

The Convention applies whenever judicial or arbitral proceedings relating to matters dealt with in this convention are brought by a State Party, (Article 2).

The Convention does not apply to:

a) drilling platforms either fixed or floating, (Article 3);
b) warships or other non-commercial vessels owned by the State, (Article 4); or
c) to salvage operations controlled by public authorities, (but salvors carrying out these types of salvage operations can still avail themselves of the rights and remedies in the Convention, Article 5).

Article 8(1) sets out that a salvor shall owe a duty to the owner of the vessel or other property in danger:

(a) to carry out the salvage operations with due care;

(b) in performing the duty specified in subparagraph (*a*), to exercise due care to prevent or minimize damage to the environment;

(c) whenever circumstances reasonably require, to seek assistance from other salvors; and

(d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger;

provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

Article 8(2) sets out that the owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:

(a) to co-operate fully with him during the course of the salvage operations;

(b) in so doing, to exercise due care to prevent or minimize damage to the environment; and

(c) when the vessel or other property has been brought to a place of safety, to accept redelivery when reasonably requested by the salvor to do so.

Chapter III – Rights of Salvors

Article 12 sets out that if the salvage operation resulted in no useful result, there will be no reward.

Article 13 sets out the criteria for fixing the reward, being:

(a) The salved value of the vessel and other property;
(b) The skill and efforts of the salvors in preventing or minimizing damage to the environment;
(c) The measure of success obtained by the salvor;
(d) The nature and degree of the danger;
(e) The skill and efforts of the salvors in salving the vessel, other property and life;
(f) The time used and expenses and losses incurred by the salvors;
(g) The promptness of the services rendered;
(h) The availability and use of vessels or other equipment intended for salvage operations; and
(i) The state of readiness and efficiency of the salvor's equipment and the value thereof.

The reward is to be paid by the vessel and other property interests in proportion to their respective salved values, and the rewards, exclusive of interest and costs shall not exceed the salved value of the vessel and other property, Article 13(2) and (3).

Article 14 sets out that if the salvage operations have been carried out in respect of a vessel or its cargo which threatened environmental damage, and the salvor has not earned a reward under Article 13 at least equivalent to the special compensation assessable in accordance with the Article, the salvor is entitled to special compensation from the owner of that vessel equal to his expenses (which are then defined.)

Article 16 sets out that no remuneration is due from persons whose lives are saved, but that a salvor of human life is due part of the proceeds awarded to the salvor for salving the vessel or other property, or minimizing damage to the environment.

Article 17 sets out that no payment is due a salvor unless the services rendered exceeds performance of a contract entered into before the danger arose.

Article 18 sets out that a salvor can lose his reward if the salvage operations became necessary or more difficult because of his own fault or neglect, or if the salvor has been guilty of fraud or other dishonest conduct.

Chapter IV – Claims and Actions

Article 20 sets out that a salvor's maritime lien is not affected by the Convention.

Article 21 sets out that upon a salvor's request, a person liable for payment under the Convention shall provide satisfactory security, inclusive of interest and costs.

Article 22 sets out that the tribunal with jurisdiction over the salvor's claims can order an interim amount be paid.

iii). Limitation of Time for Salvage Proceedings

Article 23 of the Convention sets out that the limitation for commencing an action for payment is two years from the day in which the salvage operations are terminated.

The Canada Shipping Act also confirms the two year suit time limitation period in Section 145:

> (1) No action in respect of salvage services may be commenced more than two years after the date that the salvage services were rendered.

Subsection (2) allows the court to extend the limitation period to the extent and on conditions it sees fit.

iv). Salvage Caselaw

There are few reported Canadian cases on the law of salvage. This may change as we are likely to have increased tanker traffic in Canadian waters.

Article 13 now encapsulates the common law factors which have traditionally gone into the making of a salvage award. In the case of ***General Accident Indemnity Co. V. Panache IV (The)*, [1998] 2 F.C. 455**, the Court noted that salved value is one of the most important ingredients in fixing an award but that a court ought not to be induced by a salved value figure to award a lump sum which is out of proportion to the services rendered. The Court also found that where the salved value is large the amount of the reward may bear a smaller proportion to the salved value than in cases where the property salved is of small value.

Historically, in case of derelict (voluntary abandonment by the owner with no intention of return or recovery) the courts would award a moeity, being one half the salved value of the vessel. The Federal Court held in the *General Accident* case that a moiety is no longer automatically awarded in the case of derelict and that if a vessel is derelict that is only one factor of many to be considered in arriving at an appropriate award.

***Early Recovered Resources Inc. v. British Columbia* [2006] 1 F.C.R. 187**, is authority for the proposition that the concept of marine salvage has been extended beyond ships and their cargo to include property such as logs and log booms.

III) GENERAL AVERAGE ACTIONS IN CANADA

1). What is General Average?

The word "average" means "loss" and the concept of general average has been around for centuries. It is based on the idea that ship, cargo and freight all form part of a common maritime adventure. Basically, all those with an interest in a voyage have an interest to ensure that the voyage is completed successfully. The stake of each of the parties extends to a participation in the costs and expenses incurred to ensure the ship and its' cargo are extricated from peril.

General average applies where the common adventure is at risk and an interest of it is sacrificed, or an extraordinary expenditure is incurred, in order to preserve that property and other interests involved in the same maritime adventure. The sacrifice or expenditure is the general average act, and it must be voluntary and reasonable. The person whose property has been sacrificed, or who incurred the expenditure is entitled to a general average contribution by the other interests who are saved. The loss is claimed back as a percentage contribution of the saved values of those interests who have benefitted as a result.

A definition of general average can be found in the **Marine Insurance Act 1906 of the UK at S.66(2)** which states:

"There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril and for the purpose of preserving the property imperiled in the common adventure".

This definition has been incorporated into our Federal Marine Insurance Act as well as into the seven provincial Marine Insurance Acts. This definition is also incorporated into the York Antwerp Rules which are the governing Rules for general average adjustment.

Therefore, there are four elements required for a general average act to occur:

1) A danger, or peril to the common adventure;
2) Extraordinary sacrifice or expense;
3) Voluntarily and reasonably made; and
4) Preservation of the property involved in the danger.

Section 22(2)(g) of the Federal Courts Act, RSC 1985, gives jurisdiction to the Federal Court for claims for general average contribution.

Canada's Marine Insurance Act S.C. 1993, c.22, Section 65 codifies the law relating to general average, (essentially that of the York Antwerp Rules) and clarifies how claimants can claim directly from maritime insurers. It reads as follows:

> (1) A general average loss is a loss caused by or directly consequential on a general average act, and includes a general average sacrifice and a general average expenditure.
>
> (2) A general average act is any extraordinary sacrifice or expenditure, known as a general average sacrifice and a general average expenditure, respectively, that is voluntarily and reasonably incurred in time of peril for the purpose of preserving the property from peril in a common adventure.
>
> (3) Subject to the conditions imposed by maritime law, a person who incurs a general average loss is entitled to receive from the other interested persons a rateable contribution, known as a general average contribution, in respect of the loss.
>
> (4) subject to any express provision in the marine policy,
>
> (a) an insured who incurs a general average expenditure may recover from the insurer in respect of the proportion of the loss falling on the insured; and
>
> (b) an insured who incurs a general average sacrifice may recover from the insurer in respect of the whole loss, without having enforced the insured's right to contribution from other persons.
>
> (5) Subject to any express provision in the marine policy, an insured who has paid, or is liable to pay, a general average contribution in respect of the subject-matter insured may recover the contribution from the insurer.
>
> (6) Subject to any express provision in the marine policy, an insurer is not liable for a general average loss or a general average contribution, unless the loss was

incurred for the purpose of averting, or in connection with the avoidance of, a peril insured against.

(7) Where any ship, freight and goods, or any two of them, are owned by the same insured, the liability of the insurer for a general average loss or a general average contribution shall be determined as if they were owned by different persons.

ii). The York Antwerp Rules

The UK definition of general average was codified in in the **York Antwerp Rules, 1994** (Adopted at Sydney, Australia by the CMI in 1994, **(the "YAR")** and incorporated by commercial parties into bills of lading. In 2004 the York Antwerp Rules were amended, and modernized general average, but most general average adjustments still seem to incorporate the 1994 Rules. The 2004 Rules are seldom found in contracts of carriage.

As general average acts can occur anywhere, questions can be raised about what jurisdiction and law should apply to the adjustments, but if the York Antwerp Rules are incorporated into the shipping contract, they provide a complete code.

Most times shipping contracts will incorporate the York Antwerp Rules, but if the contract does not, it seems the law of the place where the general average act occurs governs. 13 *Simonds v. White (1824) 2 B & C 805.*

The York Antwerp Rules consist of a set of lettered rules, followed by a set of numbered rules. The lettered rules ostensibly set out the general principles and the numbered rules deal with commercial practicability of the rules.

The General Principle, or Lettered Rules:

Rule A

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Rule C

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average".

See also *Eisenerz G.m.b.h. v. Federal Commerce (the Oak Hill), [1974]* S.C.R. 1225 at pp. 1240-1242, (1973) 31 D.L.R. (3d) 209 at pp. 219-220.

Rule D

Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault."

Rule E

"The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average".

Common Maritime Adventure

Generally, maritime adventures are the common enterprise represented by the carriage of goods by sea in which both ship and cargo are involved.

In both the 1994 and 2004 York Antwerp Rules, **Rule B** defines a common maritime adventure as including circumstances when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in salvage operation. The Rule further states that a vessel is not in common peril with another vessel or vessels if, by simply disconnecting from the other vessel if she is safe by disconnecting, but if the disconnection itself is a general average act, the common adventure continues.

Extraordinary Expenditure or Sacrifice

Examples of an extraordinary sacrifice which will be allowed in general average are:

1) The jettisoning of part of the cargo (Rule I);
2) Causing damage to the ship or cargo for the purpose of making a jettison (Rule II);
3) Pouring water into the holds to extinguish a fire (Rule III);
4) Voluntary Stranding (Rule V);
5) Damage done to the ship when it is aground (Rule VII); and
6) Ships materials or fuel burnt for fuel for the Common Safety (Rule IX).

Intentionally and Reasonably Made

The common law demonstrates that the general average act must be made or incurred with the sole objective of preserving the interests involved from the peril. *Athel Line Ltd. V. Liverpool & London War Risks In. Assn Ltd.* [1994] KB 87 at page 94.

The requirement of reasonableness is directed at the Master or the person in charge of the Ship. As long as the action he takes benefits the common adventure as a whole it will be reasonable. He will be able to enter into towage contracts or salvage services on standard terms. Lord Denning pointed out in *33 Australian Coastal Shipping Commission v. Green* [1971] 1 QB 456 at page 483, that even onerous towing contract terms will be recoverable in general average provided there were no reasonable alternatives available to the master.

Rule D does set out that rights of contribution in general average shall not be affected if the event giving rise to the sacrifice or expenditure is due to the fault of one of the parties, but that this doesn't prejudice any remedies or defences which may be available to that party. (One such defense can be found in **Rule I** which states that if cargo is not carried with the customs of the trade, no jettison of cargo will be allowed as general average.)

The question of an actionable fault will depend on the terms of the Shipping Contract and **whether or not the Hague or Hague Visby Rules apply.**

Article 5 of the Hague and Hague Visby Rules states:

> "Nothing in these rules shall be held to prevent the insertion in a bill of lading any lawful provision regarding general average."

Article 3(8) of the Rules states:

> "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect...".

Cargo interests cannot claim general average when their servants are at fault for the peril which causes the extraordinary sacrifice or expenditure either. Section 4 of the Hague and Hague Visby Rules set out that no general average claim by cargo will be valid or events such as if the loss arises due to an inherent defect, Rule 4(2)(m) or insufficient packing, Rule 4(2)(n).

At common law, a carrier/shipowner cannot have been at fault at law in order to claim for contribution in general average from cargo interests. If the peril which causes the extraordinary sacrifice or expenditure is arises from the negligence or actionable fault of the carrier/shipowner, or his employees, then no general average contribution can be claimed.

An example of an actionable fault of a carrier, under UK and Canadian law, is where a carrier has failed to exercise due diligence in ensuring the ship is seaworthy before and at the beginning of the voyage, where the Hague or Hague Visby Rules apply.

If there is negligence in an action undertaken for the purpose of general average causing damage, it may break the chain of causation between the general average act and the original loss, then such expenditure may not be recoverable in general average. Such was the case in *Eisenerz G.m.b.h. v. Federal Commerce (the Oak Hill), [1974]* S.C.R. 1225,.where the cargo was handled carelessly during discharge after the vessel's accident.

To Preserve Property Imperiled

Generally, the property imperiled has been found to be the ship, the equipment on board, bunkers, cargo and freight.

In order to be liable to contribute in general average, the freight has to be at the carrier's risk. Once freight has been earned by cargo interests, then the carrier is no longer liable to contribute, but the cargo for which the freight has been earned still is.

Causation

Rule C of the YAR requires that only losses, damages, or expenses which are the direct consequence of the general average act shall be allowed as general average.

Rule E puts the onus of proof upon the party claiming in general average to show the losses were caused as a direct consequence of the general average act.

Rule C excludes general average contribution for the following:

a) Losses caused by delay or loss of market; and
b) Loss and expense incurred with respect to the environment or connected with the release of pollutants.

Security

In order to protect the rights of general average creditors, a shipowner is obliged to obtain reasonable security from contributing interests. This is necessary as the calculation of general average adjustment can take months or years. Usually an average adjuster is appointed by the shipowner and he or she will make a preliminary calculation of the adjustment request that security be posted by a party for its pro rata share of the calculation.

The general average act gives rise to a possessory lien (not maritime) on the property, and the shipowner/master may withhold delivery of the property until reasonable security has been provided, 54 *Crooks v Allan* (1879) 5 QBD 38.

iii). Limitation Period for General Average Actions

The process of adjusting a general average event begins with a declaration of general average, ordinarily made by a shipowner through his underwriters.

Rule E of the York Antwerp Rules sets out that general average claims must be submitted in writing to the average adjuster within twelve months of the date of termination of the common maritime adventure. If no notification is made, then the average adjuster can estimate. Adjustment is usually done pursuant to the York Antwerp Rules.

The cause of action for contributions in general average accrues at the time when each general average sacrifice is made or general average expense is incurred.

Rule XXIII of the York Antwerp Rules 2004 (which is not widely incorporated into shipping contracts) sets out a one year limitation period for a party to bring an action for contribution.

In the UK, general average contribution is viewed as a contractual cause of action, attracting a six year limitation period for commencement of an action, 52 *The Potoi Chau* [1983] 2 Lloyd's Rep. 376 (P.C.)

In Canada, we have no federal legislation governing the time period for general average actions. In 2009, Section 140 was added to the Marine Liability Act, and it prevents the commencement of a proceeding later than three years after the cause of action arose for any maritime claim which has no other time bar under Canadian Federal legislation. I am unaware of any Canadian court decision concerning this issue, but expect that Section 140 would apply to claims in general average.

iv). General Average Caselaw

As with the law of salvage, there are few report Canadian decisions concerning general average.

The Federal Court of Appeal considered the law of general in the case of ***Ellerman Lines Ltd. v Gibbs* [1986] 2 F.C. 463**. In this case, the respondent's cargo was loaded on board the appellant's vessel in India for delivery at Toronto. The vessel was delayed in Montreal for

repairs to the main engines. The damage was discovered after the ship's arrival in port. The respondent obtained delivery of the cargo in Montreal pursuant to a mandatory injunction. The Trial Judge was asked to determine if a general average situation existed immediately after the cargo was delivered. The trial judge dismissed the action stating neither the cargo nor the vessel were ever in peril, and this was upheld by the FCCA. The court noted that it has been held in England that cargo removed from a stranded ship to a place of safety is not liable in general average for expenses subsequently incurred, unless its removal was part of one continues operation to save both the ship and the cargo rather than the cargo alone. By its delivery the cargo passed out of the control of the vessel, thus severing the common maritime adventure. Expenditures had been incurred for the ship alone, not for the common safety of the ship and cargo.

This case was decided pursuant to the York Antwerp Rules 1974 which had formed part of the shipping contract. Section 65 of the Marine Insurance Act had also just come into force.

A case which demonstrates what can occur with an oil spill and pollution cleanup is that of ***Ultramar Canada Inc. v. Mutual Marine Office Inc. (T.D.)*** **[1995] 1 F.C. 341**. This was an action for apportionment of damages amongst insurance policies. The plaintiff Ultramar's barge grounded off the coast of Matane, Quebec. The barge was damaged and spilled part of its oil cargo. The Coast Guard advised Ultramar it needed to take action. Ultramar hired Smit American Salvage Inc. to remove the vessel and its cargo from the strand and bring it to a place of safety. The costs for salvaging the vessel were nearly $2,000,000. Pollution cleanup commenced the next day and cost in excess of $3,000,000. Ultramar declared general average about three days after the stranding of the barge. An adjustment was prepared by the general average adjuster allocating excess general average expenses between ship and cargo.

The Defendants in the action are all marine insurers, representing cargo, hull and pollution interests. The voyage was insured as follows:

(1) Hull and machinery- $3,000,000;
(2) Cargo -$999,332; and
(3) Pollution liability up to $300,000,000.

The insurers ended up paying over $7,000,000 to the plaintiff (being hull underwriters $3,276.995.80, cargo underwriters $950,000 and P & I Club $3,000,000).

The issue in the case was how the costs in excess of $2,000,000 incurred under the Smit contract were to be allocated amongst the various insurers. Some of the expenses were recoverable under the various insurance policies, but the question was whether some of those expenses were the Plaintiff's responsibility

In its decision, the court reviewed the law of general average and found that the Plaintiff had engaged Smit for the common benefit of all interests, to save both cargo and hull and to prevent a pollution disaster. As the preservation of property from peril was one of the underlying reasons for the expenditures, both cargo and hull underwriters bore a liability under the law of general average.

The court found that the cargo underwriter's liability was limited to its properly calculated contributory value, and that to the extent there are excess general expenses after contributory values were exhausted, those expenses fall to the shipowner. They are not shared by the cargo and hull underwriters. The Federal Court found that the net sums owing under the insurance policies were: cargo underwriters $331,254.99 and hull underwriters $423,512.91.

The court found that the remaining cost of the Smit contract was to be borne by Ultramar. The court noted that the plaintiff's potential liability, had the situation deteriorated into a massive oil spill would have been very substantial. The court found, at pargraph 85, that there was no injustice in requiring Ultramar to bear the cost of averting a major liability as compared to necessitating the property insurers to pay for expenses which did not result in the saving of property.

I expect we will see more of these types of general average cases as our oil tanker traffic increases in Canadian waters.

ADDENDUM
LIMITATION OF LIABILITY

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On April 23, 2014 the Supreme Court of Canada decision in the ***Peracomo Inc v. Telus Communications Co. et al.*** was released.

Cromwell J, writing for the majority, determined main issues were whether liability was limited to $500,000 by virtue of both the Convention on Limitation of Liability for Marine Claims 1976 and S. 29 of the ***Marine Insurance Act*** S.C. 2001 c.6, and whether the loss was covered by insurance. The S.C.C. held that the limit of liability in the Convention applied but that the loss was excluded from the insurance coverage. Cromwell J, writing for the majority, noted that the Convention imposed a higher standard of fault than the insurance exclusion.

The decision discusses the purpose of the Convention, Cromwell J notes, at paragraph 24, that the contracting parties to the Convention intended the limitation on liability to be difficult to break. He further notes that the contracting states had considered, but expressly rejected the inclusion of "gross negligence" as a sufficient level of fault to break the liability limit.

In paragraph 28, Cromwell J discussed the Article 4 requirement that the loss must be shown to have resulted from the "personal act or omission" of the person liable "committed with the intent to cause <u>such loss</u> or recklessly and with knowledge that <u>such loss</u> would probably result". He then refers to the Griggs text at p.36:

> "the use of the words '<u>such loss</u>' in Article 4 seems[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".

The Judgment goes on to discuss the English cases and points out that some authorities require knowledge of the type of damage that occurs, and others, as the *Leerort* case, require knowledge of the very loss that actually occurs, not just the type that occurs. The S.C.C. held that it did not have to decide which approach ought to be adopted, as the court found the appellants were entitled to limit their liability under either test. The trial judge had found as fact that Mr. Vallée did not intend to cause the damage to the cable, or know that it was a probably consequence of his actions.

The S.C.C. then went on to determine whether the claim was covered or excluded by the insurance policy, which did not cover "any loss attributable to the wilful misconduct of the insured", pursuant to Section 53(2) of the ***Marine Insurance Act.*** The S.C.C. did not agree with the appellants' position that the standards of fault under Article 4 and the ***Marine Insurance Act*** were the same. The ***Marine Insurance Act*** does not require intention to bring about the loss or knowledge that it would probably occur. The ***Marine Insurance Act*** requires wilful misconduct, which the S.C.C. finds at paragraph 52, includes recklessness as to consequences (which is different than actual knowledge).

At paragraph 61, the S.C.C. held that wilful misconduct includes not only intentional wrongdoing but also conduct exhibiting reckless indifference in the fact of a duty to know. As the trial judge found, Mr. Vallée knew that he was cutting a submarine cable. He was relying on an old chart or map which did not show that the cable was in use. At paragraph 66, Cromwell J notes: "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". At paragraph 67 the court finds that Mr. Vallée had a duty to know better, that the cable might be live, and decided to cut it anyway, constitutes wilful misconduct. The appellants' loss is excluded from coverage.

Wagner J delivered a dissenting Judgment. He found that even though Article 4 of the Convention and Section 53(2) of the ***Marine Liability Act*** do not have the exact same wording the Act must be read harmoniously with the Convention's provisions. In his view, set out at paragraph 73, 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.

Wagner J notes the finding that at the time Mr. Vallée cut the cable, he believed it was not in use, therefore it cannot be assumed he had knowledge of the loss that would result from his cutting it. Wagner J finds, at paragraph 75, that this shielded Mr. Vallée from being deprived of coverage under his liability insurance policy while at the same time enabling him to limit his liability.

At paragraph 80, Wagner J agrees with Cromwell J that "intentional wrongdoing" constitutes wilful misconduct, but disagrees with his interpretation of conduct exhibiting reckless indifference in the fact of a duty to know. He states:

> "Conduct exhibiting 'reckless indifference in the fact 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 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'".

At paragraph 91, Wagner J held that for the purposes of S. 53(2) of the ***Marine Insurance Act***, the respondent had to prove that Mr. Vallée had subjective knowledge of the risks associated with his act. The evidence did not show he had any misgivings at the time of the incident therefore his misconduct cannot be characterized as *wilful*.