

CUTTING A SUBMARINE CABLE CAN COST YOU, YOUR VESSEL AND YOUR INSURANCE PROTECTION!

Société Telus Communications v. Peracomo Inc., 2011 FC 494 (2011)



The decision of the Canadian court in ***Société Telus Communications v. Peracomo Inc.*** breaks new ground in cases involving faults to submarine cables and in the general international maritime law. Why is this important globally? Submarine fiber optic cables carry over 95 percent of the world's international voice, data and video communications. There are on average 200 faults to these cable systems annually. Third-party faults, principally

ships' anchors and fishing gear, are responsible for up to 59.9 percent to 77 percent of these faults.¹ The *Telus* case focuses on the legal consequences of intentional conduct that disrupts submarine cable communications.

Although the incident took place in Canadian waters, the decision has international implications because of its international law aspects. The court determined the legal issues by application of Canadian common law, which includes English common law. Canada, along with about 70 other state parties, is a party to the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol (1976 Convention). As a result, the shipping community should pay close attention.

Facts

The master of the fishing vessel *Realice*, with a fishing anchor attached to a string of crab cages laid on the bottom of the St. Lawrence River, hooked a telecommunications cable owned by a consortium of telecom companies. The master hauled the telecommunications cable aboard his ship and freed his gear by cutting the cable with an electric saw. A few days later, his gear caught the cable and he again freed his gear by cutting the cable. The cable was on a nautical chart. The cable owners claimed US\$1,213,320 for the cost of the repair plus attorney fees against the vessel *en rem* and against the master personally.

The master's defenses were that (1) he understood the cable to be abandoned; (2) the cable was not properly installed because it was not buried; (3) the cable owners were contributorily negligent because they did not give the master actual notice of the cable's position and the cable should have been buried to avoid contact with fishing gear; and (4) the damages were limited to US\$500,000 by Article 4 of the 1976 Convention.

¹ Burnett, D., "Recovery of Cable Repair Ship Cost Damages from Third Parties That Injure Submarine Cables," 35 Tul. L. Rev 103, 104 (Winter 2010).

Legal Issues

- (1) **Notice.** The court determined that the cable's position was shown on nautical charts and notices to mariners, and that letters had been sent to various fishing associations by the cable owners alerting them to the existence of the cable. Based on these notices, the master had a duty, which he breached, to know of the cable's existence and to consult charts.
- (2) **Cable Burial.** The court accepted the evidence of experts that it was not feasible or required to bury the cable; that a buried cable could become unburied by tidal actions; and that burial in any event would not prevent a ship's anchor from damaging a cable even if buried to a depth of one meter.
- (3) **Limitation of Liability.** In a case of first impression in Canada, the court focused on Article 4 of the 1976 Convention, which states:

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.

The court carefully reviewed earlier English law decisions. In analyzing the Article 4 intent requirement, the court found a helpful analogy in the case of battery. One commits a battery when one intends to push the person. The fact that the push may lead to death or serious injury may not be intended, but the aftereffect of the push is not relevant to the question of the intent to push. In the *Telus* case, the master intended to cut the cable. The fact that he did not intend to cause the damages that resulted because he understood the cable was abandoned does not bear on the intent to cut the cable. With respect to the Article 4 reckless requirement, the court adopted the reasoning of an important English case² and found that Article 4 does not allow the master to turn a "blind eye" to the existence of charted cable. As a result, acting recklessly under Article 4 includes ignoring facts that the master knew or ought to have known at the time he acted with indifference to the risk of his actions in cutting the cable.

- (4) **Voiding Insurance Coverage.** The court, having found that the master acted recklessly with intent to cut the cable, which he knew or should have known was a telecommunications cable, then found this action was willful misconduct under the Marine Insurance Act.³ The result of this finding was that the master lost his insurance coverage and his vessel, and was personally liable for the damages and attorney fees awarded by the court to the cable owners.

The *Telus* decision is a landmark decision. The decision's logic, founded in common law, has wide application to any case involving damage to submarine cables. The well-written decision illuminates the not-uncommon practice by some imprudent mariners of cutting cables that foul their anchors or fishing gear, even when under established international law they are required to sacrifice their gear or anchor to avoid injury to a cable and the cable owners are required to compensate them for their sacrifice.⁴ At the same time, the decision provides a persuasive logical interpretation of the intent and reckless requirements of the 1976 Convention.

² *Compania Maritima San Basilio SA v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The "Eurysthenes")* [1976], 2 Lloyd's Rep 171, 179.

³ Marine Insurance Act, S.C. 1993, c. 23.

⁴ United Nations Law of the Sea Convention, 1982, Art. 115; Geneva Convention on the High Seas, 1958, Art. 29; International Convention for the Protection of Submarine Cables, 1884, Art. 7.

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