RECKLESSLY AND WITH KNOWLEDGE THAT DAMAGE WOULD PROBABLY RESULT: THE INTERPRETATION OF TERM BEFORE THE CROATIAN COURTS

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I. Introduction

The application of term “recklessly and with knowledge that damage would probably result” before the Croatian courts has not, as of yet, made an impact with regard to the loss of right to limit liability in the maritime related cases.¹ The older case practice (dating to the Yugoslavian jurisprudence) did, however, recognize and apply the term with regard the issue of limitation of liability. The article analyzes older, Yugoslavian case practice, and discusses the impact of that practice on the current Croatian law and practice, especially due to the fact that a number of recent cases, also to be discusses in the article, demonstrate the (negative) impact of the reckless behavior on the loss of marine insurance coverage. The term recklessness is readily interpreted and employed before the Croatian criminal and minor offences courts (usually applied in cases of the breach of statutory norms in general and the breach of traffic regulation with regard the application of mandatory motor vehicle liability insurance). In relation to the maritime related regulation, the reckless behavior standard is regularly utilized within the Croatian Maritime Code,² usually following the ratification and implementation of relevant international law.³ Thus, the term can be found, to name a few examples, in Article 390 in

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¹ This being of no surprise, given the perceived lack of similar case law in other jurisdictions. See, for example, the decision of the Canadian Supreme Court in: Peracom Inc. v. TELUS Communications Co., 2014 SCC 29; and, the opinion of Lord Phillips MR in: Schiffahrtsgesellschaft MS ‘Merkur Sky’ m.b.H. v Ms Leerort Nth Schiffahrts G.m.b.H (‘Leerort’) [2001] 2 Lloyd’s Rep 291, CA, at 294, para 11 and para 13. See, however: Margolle and Another v. Delta Maritime Co. Ltd. and Others (The “Saint Jacques II” and “Gidermes”), [2002] EWHC 2452 (Admlty.).

² Maritime Code (Official Gazette, No. 181/04, 76/07, 146/08, 61/11 i 56/13)

³ For more general information on the Croatian maritime related regulation, see: Mudrić, Mišo “Panorama del derecho comparado: Croacia”, Anuario de derecho maritimo, vol. 29 (2012), at 309 et seq.

2. Overview of Legal Theory

The Croatian legal theory classifies the term “recklessly and with knowledge that damage would probably result” as a type of dolus (intentional behavior) with a subjective element. The recklessness is considered to be an ultimate breach of due diligence (the objective criteria to be determined by the court) with an actor’s awareness that the damage will probably occur. The latter implies that it is necessary to establish a link between the actual damage and the actor’s cognitive recognition, at that precise moment under those precise circumstances, of a strong possibility that such damage will occur (the subjective criteria to be determined by the court). Thus, the reckless behavior is generally perceived as an intentional conduct of a lesser magnitude (dolus eventualis). In comparison to other legal systems, the Croatian theoretical approach predominantly resembles the German theory and practice, where the recklessness is included in the wider definition of intentional conduct (the actor has had knowledge of all the relevant circumstances and a clear understanding of obligations, but was indifferent as regards the consequences of the conduct). The German court practice also recognizes such instances where a gross negligent conduct (grobe Fahrlässigkeit) constitutes such a grave violation of professional duties (grober Verstoß gegen Berufspflichten), that it is automatically presumed that the actor has caused the damage.

The Croatian approach to a certain extent resembles the French theory and practice with regard the instance where the gross negligent conduct (faute

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5 Compare: Peracomo Inc. v. TELUS Communications, supra note 1, where the Canadian Supreme Court argued that the defendant was not aware of the actual loss that has occurred due to his conduct; MSC Mediterranean Shipping Co SA v Delmar BVBA (the “Rosa M”) [2000] 2 Lloyd’s Rep 399; and, Schiffahrtsgesellschaft MS Merkur Sky MBH & Co v MS Leerort Nih Schifahrtsg GmbH & Co KG, supra note 1.


lourde and faute inexcusable) – perceived as an extremely serious negligence – includes the reckless behavior, in which case it is plausible that the court will decide against allowing the right to limit the liability. The English (England and Wales) case practice tends to merge the effects of gross negligent and reckless behavior, as visible from the Hellespont Ardent, where the court determined that a gross negligent conduct is to be understood as a serious negligence consisting of a reckless disregard of the risk involved and the consequences of a specific conduct. The American (United States) approach retains the objective criteria in assessing the reckless behavior. The Third Restatement of Torts defines a reckless behavior as such behavior where an actor has the knowledge that the harm will occur, but fails to adopt such minimal precautions in order to prevent the harm from occurring, thus being indifferent to the harm occurring. American authors predominantly consider the difference between willful, wanton or reckless and gross negligent conduct to be more a question of quality than a degree of lack of care.

3. Older Case Practice

3.1. Reckless behavior leading to the loss of right to limit liability

During the last 24 years, there is no Croatian maritime related case practice in existence that would demonstrate the application of the term recklessness with regard the loss of right to limit liability. It is, therefore, necessary to examine the older case practice from the Yugoslavian period.

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delivered by the same courts (in terms of jurisdiction and location), but within a (to a certain effect) different maritime legal setting and court order setting. It is important to note that, with regard the older case practice to be discussed in the further text, the Hague-Visby Rules were still not in force. Thus, in order to successfully deny the defendant’s right to limit the liability, it was necessary to prove either the intentional conduct (dolus omnia corumpit) or the gross negligent conduct (Hague Rules standard) on the side of the defendant (concerning the case practice to be analyzed, the courts have, nevertheless, attempted to incorporate a more burdensome standard into their deliberations). Although the Croatian legal system does not apply the Law of Precedence principle, the lower courts and practitioners tend to carefully consider the decisions of higher courts. In addition, it is not unusual to find recent judgments where both the parties and the courts have referred to the older practice, dated before the 1990’s.

3.2. More than gross negligent

In the case Pž-1367/80-2, held before the High Commercial Court in Zagreb in 1981, the consignor (claimant) claimed damages against the carrier (defendant) for the breach of contract of carriage. The consignor contracted the sea carrier to carry the cargo (state owned museum pieces and other artifacts to be show in an exhibition abroad). The carrier issued the Bill of Lading (in further text: B/L), but never actually loaded the cargo on-board. Upon arrival to the port of destination, this was discovered. The consignor – due to the timing of the exhibition – could not afford to await the second voyage of the same carrier’s vessel or an alternative voyage of the same carrier’s other vessel, or contract an alternative sea carrier, but instead contracted a road carrier and an air carrier to deliver the cargo to the place of delivery (location of the exhibition). After the carriage was completed, the consignor (acting as a shipper), demanded compensation from the sea carrier for the road and air carriage costs, which were necessary, as the claimant argued, due to the fact that the sea carrier breached the contract by not delivering the goods in due time. The first instance court held the carrier liable for the damage (the carrier was held to be in the breach of contract for the non-delivery of cargo) and furthermore held that the carrier is not to be allowed to limit his liability. The

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16 The Hague-Visby standard reads as follows: Article IV.4., (e) “Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result”, The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

first instance court refused the defendant’s plea to utilize the right to limit liability, arguing that the road and air carriage related costs did not occur during the sea carriage, thus rendering the maritime related provisions (including the carrier’s right to limit the liability) irrelevant. The second instance court – the High Commercial Court – acting upon the defendant’s appeal, confirmed the first instance court’s decision, but offered an alternative reason with regard the loss of right to limit the liability. The Court argued that the defendant’s conduct was “almost intentional”, stipulating that the carrier was “more than gross negligent”. Although the law in force (Hague Rules), as noted earlier, required the proof of intentional conduct or gross negligent conduct to prevent the defendant from availing the right to limit, the Court found it necessary to highlight the defendant’s lack of proper conduct that constituted an ultimate breach of due diligence and disregard of the expected professional behavior standard. It is likely, although not clearly expressed in the Court’s decision itself, that the adjudicators handling the case were fully aware of the change in the relevant international law (Hague-Visby Rules coming into force, and the significant change of the standard – reckless behavior instead of gross negligent behavior) – expecting this law soon to be ratified and incorporated into the relevant domestic law – and thus, already at that time, making an attempt to reason de lege ferenda. The Court, however, did not offer an explanation on what is meant by the expression “more than gross negligent”, but, instead, pointed to the fact, established before the Court, that the sea carrier was dully informed about the time-frame (and the start) of the exhibition, therefore knowing in advance that the late delivery or non-delivery will cause serious problems to the consignor. The carrier attempted to escape liability by blaming the consignor for failing to oversee the loading operation, but the Court dismissed such claim. Instead, due to the fact that the defendant never actually loaded the cargo on-board, the Court determined that the carrier forged the B/L, exposing himself to the criminal charges and criminal responsibility. It is likely that the Court took into consideration the criminal courts’ and minor offences courts’ practice where such (or similar) behavior has been thoroughly analyzed and classified under the term recklessness.

3.3. Carrier knew and had to know that the damage will most probably result

Several years later, the same Court delivered a definitive explanation on what is to be understood by the phrase “more than gross negligent”. In the case Pž-3312/87-2, held before the High Commercial Court in Zagreb in

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1988, the three insurers (claimants), who insured the cargo during carriage, claimed damages against the carrier (defendant) for the breach of contract of carriage. The carrier issued the B/L and promised to carry the cargo of jute (natural fiber) from the port of Calcutta (India), via port of Rijeka (at that time Yugoslavia, today Croatia), to the port of Valparaiso (Chile). The port of Valparaiso was a named port of delivery in the B/L. The sea voyage consisted of three major routes: the Indian Ocean, the Mediterranean Sea and the South Atlantic Ocean. Upon arriving to the South America, instead of circumnavigating the continent, the carrier discharged the cargo at the port of San Antonio (Argentina), this being a usual port of discharge (both for the operation of said carrier, and in general) when goods are delivered to Chile from the Atlantic approach to the South American continent. Following the discharge of the cargo, the carrier has first arranged for the cargo to be stored in the customs warehouse (customs was contracted as a storekeeper), and then contracted a road carrier to deliver the cargo to the port of delivery. Both the customs and the road carrier declared the cargo damaged. The packages of jute have been reported wet, with obvious damage to the goods themselves, and when the packages were opened at the port of delivery, it was found that more than 50% of the goods were completely lost.

The following points were disputed between the parties of the claim: (a) whether the carrier has notified the consignee of the discharge and whether such a notification is relevant for the case, (b) whether the carrier is liable for the cargo until it is delivered to the port of delivery, and, (c) whether the carrier can avail the right to limit the liability in case he is held liable for the breach of contract of carriage. The first instance court (P 398/82-31) held the carrier liable for the damage to cargo, and further held that the carrier is not to be allowed to limit the liability. The High Commercial Court, following the defendant’s appeal, (fully) reconfirmed the position of the first instance court, and provided a very detailed explanation of the first instance court’s decision. The defendant claimed that he has notified the consignee that the cargo is discharged at the port of discharge (San Antonio), and that from that point on, he is no longer to be held responsible for the risk of damage and/or loss of the cargo. The Court held that the defendant failed to prove that the consignee was actually informed of the fact that the cargo was discharged at the port of San Antonio. Nevertheless, as the Court explained, the consignee, unless specifically stipulated by the parties in the B/L, has a duty to receive the cargo at the B/L stipulated port of delivery (and not, as the defendant argued, at any point before the cargo is delivered to the said port). Therefore, even if the

19 Articles 470-472 and 530, Maritime and Internal Waterways Navigation Act (Official Gazette SFRY, No. 22/77, 13/82 and 30/85). The corresponding norms in the Croatian Maritime Code are Articles 526 et seq.
consignee has been notified, this would have been irrelevant with regard to the issue of carrier’s liability for the damage on cargo occurring before the cargo is delivered at the port of delivery. The Court further held the carrier liable for the cargo until the same is delivered at the port of Valparaiso (the B/L stipulated port of delivery). Thus, the Court held the carrier in breach of contract for failing to deliver undamaged cargo to the final destination. With regard the fact that the cargo was stored in (customs) warehouse, the Court held that the carrier is responsible both for the choice and work of the storekeeper. The carrier attempted to escape liability by claiming that his responsibility for the damage to or loss of the cargo ended at the point when the cargo was delivered to the storekeeper. The carrier argued that, in accordance with the law, he was responsible for the choice of the storekeeper, and not the work of the storekeeper. The Court denied the defendant’s claim, stating that such a rule is applicable only in particular circumstances. In accordance with the law, if the cargo is stored at the port of discharge, the carrier will be liable both for the choice and work of the storekeeper, and remain liable until the cargo is delivered to the port of delivery. The carrier will only be liable for the choice of storekeeper if the cargo has been delivered to the storekeeper at the port of delivery if: (a) the consignee did not appear at the port of delivery to receive the cargo after being notified, (b) the consignee could not be found, (c) the consignee refuses or is unable to receive the cargo, or, (d) several persons are claiming to be the valid consignee. In such circumstances, the carrier must seek advice from the consignor with regard the cargo, and only if no such instruction is received, or the instructions cannot be followed, the carrier has a right to store the cargo, being liable for the choice of the storekeeper, without being liable for the work of the storekeeper. Due to the fact that, in the present case, the cargo was stored at the port of discharge (and not the port of delivery), the Court found that the

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20 Article 529, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 547.

21 In accordance with Article 523, paragraphs 1 and 2, Maritime and Internal Waterways Navigation Act, the carrier is required to complete the carriage in the contracted route, and in the absence of a contracted route, in a usual route. Any deviation, absent of justifiable reasons, and resulting in damage or late delivery of the cargo, falls under the carrier’s responsibility. The corresponding norm in the Croatian Maritime Code is Article 521. The rules on carrier’s right to release the cargo to the storekeeper have not substantially changed in the Croatian Maritime Code.

22 Article 545, Maritime and Internal Waterways Navigation Act. The corresponding norms in the Croatian Maritime Code are Articles 536 and 540.

23 Article 544, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 543.

24 Article 546, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 550, paragraph (1) – referring to the carrier’s responsibility for all persons working for him (absent of the special preconditions as noted in previous text).
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carrier continued to be liable for all damage occurring prior to the delivery of the cargo to the consignee at the B/L stipulated port of delivery. Furthermore, irrespective of the fact that the cargo in question (jute) was extremely sensitive to the elements, and necessitated a diligent care and special storage requirements (an in-door storage facility), the cargo was, upon discharge and delivery to the customs for storekeeping, kept in open, due to the scarce in-doors facilities available at the customs warehouse in San Antonio port. The claimant provided a witness testimony stating that the carrier was aware of the conditions and the capacity of the customs warehouse in San Antonio, as the carrier had previously carried the same or similar cargo to (or via) the same port, and had similar issues with regard the damage on the cargo occurring during the storekeeping. The Court accepted the witness testimony, and held that, due to the fact that the carrier had previous knowledge of the warehouse capacity (and the noted lack of proper capacity) in the port of discharge, the carrier was not just in breach of due diligence, but also in breach of the general duty of fairness and diligent conduct, as well as in breach of a general duty to act in accordance with the fair trade customs.

In accordance with the law at that time, the carrier could not avail the right to limit the liability if the damage occurred as a result of his personal intentional conduct or gross negligent conduct. The Court summarized the findings, and provided the following logical progression of the decision held. The carrier, first of all, knew (based on the previous experience in the same port) that the in-door storage capacity of the customs warehouse in San Antonio port is small, and that, therefore, the discharged cargo will be kept in open. The carrier, furthermore, knew that the nature of the cargo demands in-door storage in order to prevent the damage to the cargo. And finally, the carrier knew that keeping the cargo in open creates a real and high possibility of the damage occurring. Thus, the Court held that the carrier knew and had to know that the damage would most probably occur, and nevertheless acted in a way that obviously exposed the cargo to the danger and the consequent damage. Therefore, the carrier was not allowed to avail the right to limit his

25 Article 553, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 549.
27 Article 21, Obligations Act. The corresponding norm in the Croatian Obligations Act is Article 12.
29 Article 570, paragraph 1, Maritime and Internal Waterways Navigation Act, based on the Hague rules. The corresponding norm in the Croatian Maritime Code is Article 566, incorporating the Hague-Visby standard.
liability for the damaged cargo. Such finding of the Court perfectly adheres to the reckless behavior threshold as established by the Hague-Visby rules, and represents an important, ground-breaking decision to be followed in future cases.

4. Recent Case Practice

4.1. Unseaworthiness

More recent court practice recognizes instances where the unseaworthiness of the vessel has led to the inability of the owner to avail the right to limit the liability. The following two cases, to be briefly noted, refer to a breach of statutory norms concerning the safety of navigation and a breach of due diligence in selecting the appropriate crew (choice of crew), leading to a direct loss of right to limit the liability. In the case Pž-2542/90, held before the High Commercial Court in Zagreb in 1990, it was held that, following the collision of two vessels, due to the fact that the defendant failed to ensure the seaworthiness of his vessel (the lack of the required number of crew aboard, including the steering master), the vessel in blame is personally responsible for the collision, thus not being allowed to avail the right to limit the liability. In the case Pž-2187/96, held before the High Commercial Court in Zagreb in 1997, the Court held the members of the crew guilty for stealing the goods on-board (case of theft on-board), and additionally held the owner liable for the poor choice of crew (culpa in eligendo), determining such conduct to be gross negligent, and not allowing the owner to avail the right to limit the liability.

4.2. Loss of Marine Insurance Cover

In the case Revt-116/06-2, held before the Supreme Court of Republic of Croatia in 2006, following an incident at sea resulting in the loss of life aboard and the sinking of the vessel, the owner of the vessel (claimant) claimed the insurance payment (loss of vessel), whereas the insurer (defendant) denied the insurance coverage on the basis of improper behavior of the insured. In accordance with the Maritime Code, the insurance coverage is excluded if the insured intentionally or gross negligently fails to act in due diligence. The general insurance terms and conditions, that were relevant for the case, indicate several reasons for coverage exclusion: the inadequate technical equipping of the vessel, the lack of a required number of and properly trained

30 Pž-2542/90, High Commercial Court, 1990.
33 Revt-116/06-2, Supreme Court, 2006.
34 Article 719, paragraph (2), point 1), and paragraph 3, Croatian Maritime Code.
crew, irregular or excessive loading of the cargo, and etc. In accordance with
the decision of the High Commercial Court (Pž-523/05-3) in 2005, in the same
case, based on the findings of independent surveyor, and the official
investigation of the local port authority and the relevant Ministry (for maritime
affairs), (a) the owner of the vessel failed to procure all the necessary
requirements to ensure the seaworthiness of the vessel (the lack of the required
number of crew aboard)\textsuperscript{35} and the cargoworthiness (the cargo was not properly
stored and secured),\textsuperscript{36} (b) the single crew member present at the bridge during
the accident failed to take proper measures to prevent the accident, and, (c) the
captain of the vessel continuously and relentlessly committed various maritime
offences (multiple entries and exits from various ports despite clear
prohibition, being sanctioned several times for such behavior). The Supreme
Court reconfirmed the decision of the High Commercial Court, and denied
the claimant’s right to receive insurance payment. The Court argued that the
said captain was evidently unfit (element of social irresponsibility) to perform
the Master’s duties, especially with regard to ensuring the safety and security
of the vessel, its crew, and cargo on-board. The Court further held that, in
accordance with the law – which allows a court determination of a reason
justifying the unseaworthiness of the vessel\textsuperscript{37} – the decision of the owner of
the vessel to employ and retain such a person as the Master of the vessel,
despite all the noted offences and lack of proper behavior, definitively
corresponds to the classification of unseaworthiness. The Court argued that the
noted behavior of the captain (and the vessel) could not be prolonged
indefinitely without serious repercussions for the vessel, the crew, the cargo
on-board and (possibly) third parties. The fact that, after around 20 voyages on
the same route, with the same kind of misbehavior, the accident has ultimately
occurred, points to the fact that this was not an occurrence of an Act of Good
\textit{vis major}, a blameless incident or a bad luck, but a foreseeable consequence
of intentional and continuous violation of the safety of navigation regulation.
Due to the fact that the insurance contract, the Court concluded, is based on
good faith between the contracting parties, the insured is under an obligation
to perform to his best abilities to prevent the occurrence of an insured peril.
In this case, this was obviously not the case.\textsuperscript{38} Therefore, the Court denied the
insurance coverage.

As the Canadian Supreme Court’s decision in the \textit{Peracomo}

\textsuperscript{35} Articles 147 and 148, Croatian Maritime Code.

\textsuperscript{36} Article 110, Croatian Maritime Code

\textsuperscript{37} Article 427, Croatian Maritime Code.

\textsuperscript{38} Compare: \textit{Peracomo Inc. v. TELUS} Communications, supra note 1, where the Court
held that, for the purpose of denying the insurance coverage, it was sufficient to prove willful
misconduct without having to proving the actor’s subjective knowledge of that fact that the damage
would occur.
demonstrates, the loss of insurance coverage does not directly lead to the loss of the right to limit the liability. The Canadian decision, although recognizing the reckless behavior on the side of the insured, required establishing a clear link between the awareness of the actor that a particular (“such”) loss will occur as a result of the noted behavior, in order to prevent the utilization of the right to limit liability. The question that comes to mind with regard the last analyzed case is whether the hiring and/or retaining such a Master constitutes a serious breach of due diligence and a reckless behavior on the part of the owner of the vessel (or a designated person/an alter ego acting on behalf of a shipping company). In the previously examined case Pż-2542/90, the High Commercial Court held that the absence of a steering master is directly linked to the resulting collision, and that the owner of the vessel had to know that the absence of a steering master is likely to (will most probably) result in such an event. It could be argued that, in connection to the last analyzed case, the owner’s knowledge of Master’s behavior – continuous breach of the safety of navigation and the security of the vessel, most probably leading to a serious damage (including collision, sinking, damage to the cargo, and probable loss of life) – constitutes a reckless behavior (not actually wanting the damage to occur, but being aware of the high possibility of such occurrence, and being indifferent about it). Such a claim, however, never appeared before a court, and remains open for further consideration.

39 See: supra note 5.