SUPREME COURT OF YUKON

Citation: *Wilkinson* v. *Watson Lake Motors Ltd.*, 2010 YKSC 48

Date: 20100903
S.C. No. 09-AP011
Registry: Whitehorse

Between:

JIM WILKINSON

Appellant

And

WATSON LAKE MOTORS LTD and AVIVA CANADA

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Jim Wilkinson	Appearing on his own behalf
Kyle Carruthers	Counsel for the respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] Jim Wilkinson commenced a Small Claims Court action against Watson Lake Motors for damages for breach of bailment resulting in the theft of a motorcycle and other personal belongings.

[2] When Mr. Wilkinson's vehicle broke down on the Alaska Highway, Watson Lake Motors agreed to tow his vehicle into Watson Lake with a tow truck that was coming up the highway. The Watson Lake Motors truck broke down and did not tow Mr. Wilkinson's vehicle. During the approximately 24 hours that the vehicle was left

unattended, Mr. Wilkinson's personal belongings and motorcycle were stolen. Watson Lake Motors "third partied" its insurance company which has now undertaken to defend the company. Mr. Wilkinson represented himself and Watson Lake Motors was represented by counsel.

[3] The issue is whether Mr. Wilkinson's arrangement with Watson Lake Motors created a bailment, and if so, did Watson Lake Motors breach its duty of care, thereby causing or contributing to the damage.

BACKGROUND

[4] On December 23, 2008, Mr. Wilkinson was moving from Whitehorse to Vernon, British Columbia. He was travelling southbound on the Alaska Highway with a number of household and personal items in a pickup truck towing a U-Haul trailer. He had a motorcycle, recently purchased, standing up in the box of the pickup with its two wheels strapped down. Unfortunately, his engine caught fire near Lucky Lake, approximately four kilometres south of Watson Lake. His truck was disabled at this point. It was -42°C.

[5] There was a fire truck on the scene and the RCMP attended. The RCMP assisted in making arrangements for a tow truck to tow the truck and trailer back to Watson Lake.

[6] Watson Lake Motors was contacted to do the job after it was determined that Capital Towing, the other towing company in Watson Lake, was not available. Watson Lake Motors has a flat deck truck that was suitable for the load involved. Mr. Stevenson, the owner of Watson Lake Motors, attended at the scene of the vehicle fire to confirm that the truck engine could not be repaired. He advised Mr. Wilkinson that his flat deck truck was in Fort Nelson and that it would tow the pickup and trailer back to Watson

Lake as soon as it returned. That arrangement was agreed upon, and Mr. Stevenson took Mr. Wilkinson back to the Watson Lake Motors premises. Mr. Wilkinson used his cell phone to make arrangements to rent another truck in Whitehorse to pull his U-Haul trailer.

[7] Mr. Stevenson drove Mr. Wilkinson to the bus station later that evening to go back to Whitehorse. Mr. Wilkinson did not leave any contact information with Mr. Stevenson, nor did Mr. Stevenson ask for any, although he knew that Mr. Wilkinson was contacting Budget Rental and that he was towing a U-Haul trailer rental from Whitehorse.

[8] Mr. Wilkinson testified that when he was dropped off at the bus depot, it was made very clear to him that his truck would be taken care of and would be waiting for him in the Watson Lake Motors' yard the next day. Mr. Stevenson denied that he gave any guarantee that Mr. Wilkinson's truck and trailer would be picked up, but agreed that he said it would be picked up by his truck on its way back from Fort Nelson.

[9] The following is Mr. Wilkinson's evidence on the verbal contract between him and Watson Lake Motors Ltd.:

> "... when I was dropped off at the bus depot, it was made very clear to me that my truck would be taken care of and that it would be in the yard for me waiting, the next day. The – Watson Lake Motors would assist in transferring my motorcycle to the newly rented truck and we would just hook up the U-Haul trailer and I would be on my way."

[10] The following is evidence from the cross-examination of Mr. Stevenson, the owner and operator of Watson Lake Motors:

> "Q So just to – just to clarify then. When you dropped me off at the bus depot, you could have said, "Mr. Wilkinson, we cannot pick up your truck."

> A No, I didn't. I couldn't have said that then. I told you the truth. I told you that my truck was coming back from Fort Nelson, it would pick it up as its passing, and I did not have the phone call yet from the driver that he was broke down. You did not leave me a contact number to call you. You did not call me from Whitehorse to see how everything went. You never made no subsequent phone calls until you appeared the next day, and just like with your motorcycle, you never contacted me at all. You just left the security of your bike in my hands. ..."

[11] Unfortunately, after Mr. Wilkinson left for Whitehorse, the Watson Lake Motors' tow truck broke down in the Toad River area and was not able to tow Mr. Wilkinson's truck and U-Haul trailer as arranged.

[12] At trial, Mr. Stevenson said that he attempted to arrange for Capital Towing, his competitor, to do the tow by calling Larry Hale who worked for Capital Towing in Watson Lake. He said the following:

> "... I called Larry's house and she [his wife] said he was out on a tow and she would have him phone me when he got back. So Larry called me when he got back and he'd been – I – you can't quote me on this, but I believe he'd been down Highway 37 to pick up a tow and he got back to town and he had to go to Whitehorse. So he said, "I can't do it until I get back from Whitehorse, but when I get back, if it's still out there, I'll gladly bring it in, if you can get – somehow get your truck up and running, Just let me know that you got it."

[13] When Mr. Wilkinson returned to Watson Lake the next afternoon, December 24, 2008, he was informed at Watson Lake Motors that his truck and trailer had been left out on the Alaska Highway all night. When he arrived at Lucky Lake, the motorcycle and a number of personal effects had been stolen. The U-Haul trailer and contents had not been disturbed.

[14] On the issue of whether there was some risk in leaving the motorcycle on the highway, Mr. Wilkinson stated that it weighed 800 pounds and could not be removed without some sort of equipment like a picker. Mr. Wilkinson was concerned about the security of the motorcycle and Mr. Stevenson acknowledged that there was a lot of discussion about the motorbike. Mr. Stevenson also said that, in his 18 years of experience, he was not aware of any theft of a motorcycle left on the highway for a day or overnight.

[15] The motorcycle was recovered several days later substantially damaged. It was impounded by the police at Watson Lake Motors who charged $2,000 for storage fees, as Mr. Wilkinson could not arrange proper crating and shipping for several months.

[16] Mr. Wilkinson filed a damage claim for $17,680 that he increased to $25,000 (the maximum amount that could be claimed) on appeal in the Supreme Court of Yukon based upon a repair estimate for parts in the amount of $11,175.04, which was a more accurate figure rather than the estimate of $4,000 when the claim was filed. Mr. Wilkinson purchased the motorcycle for $13,000.

The Trial Judgment

[17] The trial judge decided the case on the issue of bailment, but he specifically declined to make a finding that there was a bailment as he dismissed the claim on the basis that, in any event, Watson Lake Motors had met the requisite duty of care of a bailee for reward.

[18] The trial judge made the following finding of facts:

1. Mr. Stevenson only learned that his tow truck had broken down after Mr. Wilkinson had left for Whitehorse.

2. Mr. Stevenson attempted to arrange for his competitor to tow Mr. Wilkinson's vehicle but after contacting Mr. Hale, Mr. Stevenson was advised that Capital Towing could not do the tow until Mr. Hale returned from Whitehorse.

3. Capital Towing picked up the truck after Mr. Wilkinson had already picked up the U-Haul trailer on December 24, 2008.

4. Mr. Wilkinson was aware that his truck and trailer were not going to be picked up immediately as the only available tow truck was coming from Fort Nelson.

5. Mr. Wilkinson was familiar with the Alaska Highway and knew or ought to have known that it would be several hours at least before the tow truck arrived.

6. The tow truck broke down unforeseeably and there was no opportunity for Mr. Stevenson to get in touch with Mr. Wilkinson to advise him of the problem.

[19] The trial judge set out the law of bailment and assumed for the purpose of his judgment that Watson Lake Motors was a bailee for reward. He stated that a bailee is not an insurer but must exercise the same degree of care that he would exercise over his own goods and in some cases the responsibility is somewhat higher than that. The trial judge stated at para. 9:

> "In a case of this kind, in my view, the bailee's obligation is to exercise the same degree of care towards the preservation of the goods entrusted to him which might reasonably be expected from a skilled operator in the same sort of business, acquainted with the risks to be apprehended either from the character of the business itself or the type of

> storage facility and locality and matters of that kind. They have to take all reasonable precautions to obviate risks which would, or should be, known to them, being prudent operators in that sort of business. I should also say that the onus is on the bailee to establish that they met that duty of care. “

[20] The trial judge concluded that despite the unfortunate loss for Mr. Wilkinson, the defendants were not liable for the loss. In other words, Watson Lake Motors had met the requisite standard of care.

The New Evidence

[21] Mr. Wilkinson appealed and applied for a new trial. Prior to an amendment to the *Small Claims Court Act*, R.S.Y. 2002, c. 204, all Small Claims appeals (cases under $25,000) were heard as of right as new trials. Section 9 was amended by an *Act to Amend the Small Claims Court Act*, S.Y. 2005, c. 14 to read:

> “An appeal lies to the Supreme Court from a final order of the Small Claims Court on questions of fact and on questions of law, and must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.”

[22] This amendment came into force on April 1, 2006.

[23] The Minister of Justice introduced the amendment and indicated that it reflected the quality of justice received at Small Claims trials presided over by legally-trained judges. It was a compromise between the previous right of appeal by way of a new trial, which is an unusual right, and having the appeal proceed solely on the record from the Small Claims trial. The appeal judge, in the Supreme Court of Yukon, has the discretion to determine how the appeal should be heard; i.e. on the record in Small Claims Court or on some other basis as a new trial.

[24] There are other policy issues in appeals of Small Claims matters. The claims are generally brought by claimants without lawyers. There is a requirement that all cases go through a mediation process before going to trial. They generally go to trial without any form of discovery. Because of the summary procedure in Small Claims Court, there is potential for an incomplete record, particularly for self-represented litigants who do not appreciate the full factual and legal issues until they have heard the evidence at the trial.

[25] On the other hand, there is good reason to have finality in Small Claims Court matters where no injustice has been done, as trials are expensive and time-consuming to the litigants and the court. . It was aptly put by Meredith J.A. in *Caswell* v. *Toronto R.W. Co.* (1911), 24 O.L.R. 339 (C.A.) at 351, that new trials are "necessary evils, when necessary." This reflects the view you only get one trial unless there are some special circumstances.

[26] In a more modern approach, in British Columbia, which has a similar section to Yukon's s. 9, the court in *Pavlovic* v. *Pav's Complete Excavating Services*, [1998] B.C.J. No. 3063 (S.C.), decided that new trials should be granted sparingly (para. 2) but with some flexibility (para. 8). Nevertheless, Lamperson J., in that case, said that the court should be less rigid in applying the traditional rule on fresh evidence. He stated that the appellant must show that:

> "1. That the evidence was not discoverable by reasonable diligence before the end of the trial;
>
> 2. That the evidence was wholly credible; and
>
> 3. That the evidence would be practically conclusive of an issue before the court.

> The burden of demonstrating that these requirements have been met rests upon the person seeking a new trial."

[27] In my view, this approach places an insurmountable burden on most Small Claims Court self-represented litigants.

[28] In contrast, in criminal matters, the Supreme Court of Canada, in *R.* v. *Palmer*, [1980] 1 S.C.J. No. 759, set out the following test for fresh evidence applications under the *Criminal Code*, then s. 610(1)(d) and now s. 683(1)(d):

> "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

[29] In my view, the above principle is a more useful guideline in small claims matters than the principle of law set out in *Pavlovic*. However, there may be harsh justice in applying any principle in a rigid fashion, given the fact that most Small Claims cases proceed without lawyers. In these circumstances, the first realistic appraisal of the facts and law occurs at the Small Claims Court trial. This requires a very flexible approach by the Small Claims Court judge, in the first instance, to ensure that procedural and substantive justice is done. It is also my view that there are alternative remedies for an injustice that may occur, apart from simply ordering a new trial. The point is that there

will be cases brought on appeal from Small Claims Court that may benefit from the admission of fresh evidence. There may be an insufficient record to dispose of the appeal, or other reasons, such as the need to call a witness on an issue that arose during trial. It is, in my opinion, better to apply a flexible approach to hearing fresh evidence than necessitate having a whole new trial, which can be time-consuming and costly.

[30] In the case at bar, the trial took place in Watson Lake. The trial judge heard three witnesses, an RCMP constable, Mr. Wilkinson and Mr. Stevenson. Mr. Wilkinson set out a number of issues in the trial that he now wishes to address in a new trial. The most significant is that Mr. Wilkinson had expected to call Larry Hale, the Capital Towing driver as a witness to testify that he did not receive any call from Mr. Stevenson as set out in para. 12 above. Mr. Wilkinson said Larry Hale had moved out of Watson Lake by the time of the trial and was somewhere in Ontario. I also note that Mr. Wilkinson addressed this issue in his evidence in chief. He testified that he learned the previous evening that Larry Hale had moved to Ontario. He inquired of the trial judge whether he could tell the court what Larry Hale said to him. The trial judge indicated that the Small Claims Court was not bound by the strict rules of evidence and could receive hearsay, but it would not be given as much weight as a statement presented by other means. The trial judge allowed the hearsay evidence but preferred the sworn evidence of Mr. Stevenson.

[31] I conclude that it would not be appropriate to have a new trial, as such a course would be needlessly costly and time consuming, given that the original trial, canvassed the issues quite thoroughly. However, there would be an injustice done to this self-

represented claimant who clearly did not know all the procedural rules and was taken by surprise when he learned his witness Larry Hale had moved. Because Mr. Wilkinson raised the matter at the trial, he should, at the very least, have the opportunity to present an affidavit of Larry Hale. Accordingly, I granted Mr. Wilkinson the right to file an affidavit and Watson Lake Motors the right to reply by affidavit.

The Evidence of Larry Hale

[32] Mr. Hale stated that he was contacted by the RCMP about taking the towing contract but he was en route to Whitehorse and unable to do so. He swore that he had no communication from Mr. Stevenson regarding Mr. Wilkinson's truck on December 23, 2008. He swore that he was not approached by Mr. Stevenson until 3 p.m. on December 24, 2008, when he went to Watson Lake Motors to pick up another vehicle and was then asked by Mr. Stevenson to pick up the Wilkinson truck. When Mr. Hale arrived at the scene, Mr. Wilkinson was connecting the U-Haul trailer to a U-Haul cube van.

[33] Mr. Stevenson responded with an affidavit admitting that he "may be mistaken about how (he) contacted Mr. Hale on the day in question." However, he stated that "I specifically recall making efforts to contact Mr. Hale regarding Mr. Wilkinson's vehicle, and learning that he was in Whitehorse, on his way to Whitehorse, or leaving for Whitehorse."

[34] I have considered Mr. Stevenson's evidence on the record, which was clearly prefaced by "now don't quote me on this" and the affidavit of Larry Hale which was very clear that, except for the call from the RCMP at 4:00 p.m. on December 23, 2008, he was not contacted by Mr. Stevenson until 3:00 p.m. the next day when he immediately

went out to tow Mr. Wilkinson's pickup truck. Mr. Stevenson, in a reply affidavit, acknowledged that Mr. Hale's version was correct but he still maintained that he tried to contact Mr. Hale and learned that he was in Whitehorse.

The Law of Bailment and the Standard of review

[35] The law of bailment, recently expressed in *627360 Saskatchewan Ltd*. v. *Bellrose*, 2007 SKQB 14, by Barclay J., was relied on by both parties. It can be summarized as follows:

1. A bailment, in the traditional sense, arises when the property of one person (the bailor) is placed in the possession of another (the bailee) (para. 13). There are three elements to complete a bailment:

   (a) The voluntary transfer of property from the bailor to the bailee;

   (b) The understanding, express or implied, these goods have been transferred to the bailee for safekeeping;

   (c) The agreement to return the goods to the bailor in their original or altered form, as agreed upon.

   I add that the onus of proof that a bailment has been created lies upon the bailor.

2. When the bailee performs a service such as repairs, towing or simply safekeeping, the bailee is a bailee for reward (para. 13).

3. The duty of the bailee is to take such care of the goods as a prudent owner would take of his own goods (para. 15).

4. The bailee is not an insurer but has a higher degree of care when he is a bailee for reward (para. 15).

5. The onus of proof is on the bailee to show on the balance of probabilities that his negligence did not cause the loss or damage to the goods (para. 17).

[36] The standard of review on an appeal on a question of law is correctness and on a matter of fact, the question is whether the trial judge has made a palpable or overriding error. However, as set out in *Housen* v. *Nicholaisen*, 2002 SCC 33, at para. 37:

> "... "In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law."

[37] In my view, the trial judge has made no error on the evidence before him. However, that assessment must now be reviewed in light of the new evidence received. I also conclude that the trial judge erred in finding that Watson Lake Motors met the requisite standard of care assuming that a bailment occurred. While the trial judge did not make a finding that a bailment occurred, I conclude that there was a bailment in law based upon the law of possession as it relates to bailment.

Possession in Bailment

[38] The question is when possession takes place in the context of a bailment. The essence of a bailment is that there is no transfer of title but a transfer of possession for a particular purpose, such as repairs or safekeeping. In the majority of cases, possession occurs when the bailee takes actual possession of the goods. Typically, the bailor delivers the goods to the bailee at the bailee's place of business. It is somewhat different in the case of a tow truck operator who may, as in this case, be taking

possession of a vehicle broken down on the highway for safekeeping until the bailor returns. The crucial issue is when possession is transferred and the bailment commences. Case law has recognized that actual possession does not always occur immediately, as in the situation where a vehicle is left outside the repair premises or nearby (see *Letourneau v. Otto Mobiles Edmonton (1984) Ltd.*, 2002 ABQB 609). In such circumstances, the bailee is being granted a right of possession with actual possession occurring at a later time. Nevertheless, there is a bailment as soon as the right of possession is granted.

[39] The concept of possession as a bundle of rights that includes a right to immediate possession and a deferred right to possession is explored by Professor Norman Palmer in *Palmer on Bailment* (London: Sweet and Maxwell Ltd., 2009) at 1359 – 1363. I am in agreement with the view that a person with a right of possession has both rights and obligations with respect to the property in question. In other words, from a liability perspective, there should be little distinction between the bailee who has the goods in his possession as opposed to the bailee who has a right of possession and the obligation to take possession of the goods. The latter situation is the reality in the situation of most tow truck operators. They receive a call to pick up a vehicle in another location and undertake to do so without any discussion of what happens when they fail to do so.

[40] In this case, Watson Lake Motors agreed to pick up Mr. Wilkinson’s truck and motorcycle. Although it was not a question of immediate possession, but one that would take place when the tow truck arrived from another location, this is not an unusual circumstance. I conclude that the legal obligation of the bailee should be engaged

whether they have possession, a right of immediate possession or a deferred right of possession.

The Standard of Care

[41] The standard of care is that the bailee take such care of the goods as a prudent owner would take of his own goods. The bailee is not an insurer.

[42] I find as a matter of fact that Watson Lake Motors did not take the steps necessary to fulfill their duty of care. I find that Watson Lake Motors was fully aware of the motorcycle both from observing it at the scene and the importance of the security of the motorcycle to Mr. Wilkinson.

[43] The following are the steps that could have been taken by Watson Lake Motors, as a prudent owner, upon being advised that its vehicle would not be picking up the pickup truck and motorcycle that evening:

1. it could have notified the RCMP that it could not take possession as contemplated and to get assistance in reaching Mr. Wilkinson;
2. it could have asked Mr. Wilkinson for his cell phone number;
3. it could have called the U-Haul office in Whitehorse for contact information, as Watson Lake Motors was the U-Haul agent in Watson Lake;
4. it could have used the other equipment it did have to pick up the motorcycle which was apparently not a problem for the thieves;
5. it could have called the other local tow truck operator, Mr. Hale, to do the pickup. I acknowledge that there are some limits to this alternative as it is possible that this could not have saved the motorcycle if the theft had

already occurred. However, this alternative of using the other local operator should have been pursued.

[44] Despite the evidence Mr. Stevenson gave at trial, I find that he did not attempt to call the other local tow truck operator. Mr. Hale only learned of the pickup truck and motorcycle shortly before he actually picked them up the next afternoon, after Mr. Wilkinson had returned to the accident site with a new truck.

[45] I conclude that Watson Lake Motors did not meet the standard of care required of a bailee for reward.

The Damage

[46] Mr. Wilkinson was insured for his pickup truck but not for the motorcycle and personal possessions that were lost. In my view, the only item at issue is the motorcycle because Mr. Wilkinson had an obligation to remove or lock up personal items of value. The motorcycle is another matter, because it could not be removed by him alone and either some kind of picker machine or group effort would be required.

[47] I conclude that Watson Lake Motors should pay Mr. Wilkinson the fair market value of the motorcycle at the time of the theft in the amount of $13,000, plus prejudgment interest according to the *Judicature Act*. Counsel and Mr. Wilkinson may wish to settle the prejudgment interest by a telephone conference call.

[48] There will be no court costs awarded to Mr. Wilkinson as he did not have counsel and out of pocket expenses are not recoverable under the *Small Claims Court Act*.

VEALE J.