

Citation: *Wilkinson v. Watson Lake Motors and Aviva Insurance Company of Canada*,
2010 YKSM 1

Date: 20091007
Docket: 09-WL001
Registry: Watson Lake

SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge Faulkner

BETWEEN:

JAMES R. WILKINSON

Plaintiff

and

WATSON LAKE MOTORS

Defendant

and

AVIVA INSURANCE COMPANY OF CANADA

Third Party

Appearances:
James Wilkinson
Kyle Carruthers

Appearing on his own behalf
Counsel for the Defendant

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): In this case, James Wilkinson sued Watson Lake Motors Limited, claiming damages. The defendant, Watson Lake Motors, third partyed its insurance company, Aviva Insurance. At the time of the pre-trial conference in this matter, the insurers indicated that they undertook to defend and the Third Party Notice was not pursued.

[2] What occurred in this case was that Mr. Wilkinson, who had lived in Whitehorse, was in the process of moving to Vernon, British Columbia, and, I gather, had made more than one trip on the road to move his household effects to Vernon. In any event, on December 23 of 2008 he found himself driving southbound on the Alaska Highway in his pickup truck. He had a number of his household possessions with him and in a U-Haul trailer that he was towing. In particular, he had, in the box of his truck, a motorcycle, which he had fairly recently purchased, and some other household effects contained in a suitcase. Unfortunately, Mr. Wilkinson's truck caught fire just south of Watson Lake near Lucky Lake and was disabled. Mr. Wilkinson was faced with making alternate arrangements, which he ultimately did, but that involved him taking the bus back to Whitehorse and renting another truck, and then returning to Watson Lake.

[3] The police had attended at the scene of the vehicle fire and had made arrangements to have Watson Lake Motors Limited, the defendant, tow the disabled truck and trailer into Watson Lake. I am satisfied that the owner of Watson Lake Motors, Mr. Stevenson, told Mr. Wilkinson that he would arrange for the towing of the vehicle, but I am also satisfied that he told Mr. Wilkinson that the only truck he had which was suitable for the job was then somewhere south of Fort Nelson, British Columbia, and that it would be only when that vehicle returned to Watson Lake that he would have the driver of the tow truck pick up Mr. Wilkinson's vehicle and trailer. With those arrangements in hand, Mr. Wilkinson left to go to Whitehorse to get a new rental vehicle.

[4] Unfortunately, and I am satisfied that this was not foreseen, Mr. Stevenson learned only after Mr. Wilkinson had left for Whitehorse that his tow truck had broken

down in the Toad River area, which is still some considerable distance from Watson Lake. It is to be noted that at the time the temperature was something in the order of minus 42 degrees Celsius and perhaps the breakdown was understandable in that regard.

[5] Mr. Stevenson, I am satisfied, attempted to arrange for the competitive towing company in town, Capital Towing, to tow the vehicle. He was not immediately able to make contact with Capital Towing's driver/operator, but when he eventually did, he was advised that Capital Towing was not available to tow the truck immediately because of other commitments and that they would only be able to tow it once Capital's truck returned from a trip to Whitehorse. That is indeed what happened. Capital Towing eventually picked up the vehicle and towed it to Watson Lake. By then Mr. Wilkinson had returned and hooked up to the trailer.

[6] Unfortunately, thieves had used the opportunity presented by the fact that the vehicle was sitting out on the road to help themselves to Mr. Wilkinson's motorcycle, the suitcase and some other incidental items that were in the back of his pickup truck. The motorcycle was eventually recovered, but it had sustained substantial damages. I gather the other items were never recovered. Mr. Wilkinson has sued on the basis that Watson Lake Motors Limited, being a bailee for reward of the goods, had failed in its duty of care to him.

[7] I will deal first with the question of whether Watson Lake Motors Limited actually became bailee of the goods. It was claimed for the defendant that they were not a bailee because they had not actually taken possession of the truck. It is an interesting

argument, but I think the defendants may stretch the point a bit. In my view, it is not always necessary that a bailee have actual possession of the goods and this may be one of those situations. An example would be when an automobile owner pulls into a hotel and he has the valet park his car and he gives the keys to the valet and goes into the hotel. I think it is pretty clear that at that point in time the hotel is the bailee of the car even though at that point the valet has not actually taken possession of the car to go and park it. This may be a similar situation, although, in my view, it is not necessary to decide that point.

[8] The bailee for reward has a duty of care, and I will return to that. I am going to assume that, for the purpose of deciding the case, that it has been shown that Watson Lake Motors Limited was a bailee for reward. Such a bailee has a duty of care to the person that has placed their goods with the bailee for safekeeping, but the bailee does not act as an insurer of the bailor's goods. So the bailee is not liable for any loss, however it occurs. The bailee is liable where the loss has occurred because of a failure on the part of the bailee to exercise the requisite degree of care.

[9] This degree of care has been discussed in many cases. Often it has been said that the bailee has to exercise the same degree of care it would exercise over its own goods. In some cases the degree of care that needs to be exercised is actually somewhat higher than that. 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.

[10] In this case, I find firstly that Mr. Wilkinson was aware, or should have been aware, that his truck and trailer were not going to be picked up immediately. He had been told that the only available truck was then south of Fort Nelson. It is clear from what Mr. Wilkinson said that he was familiar with the Alaska Highway, he had made some trips along it, and he knew, or ought to have known, that, even at normal speeds, it would be several hours at least before the tow truck arrived.

[11] Unfortunately, as I have already indicated, the only available tow truck broke down and this only occurred after the plaintiff left Watson Lake. So there was not an opportunity to get in touch with Mr. Wilkinson to advise him of this difficulty. Once the defendant, in the form of Mr. Stevenson, was aware that his truck had broken down, he made what efforts he could to get another tow truck company to pick up the truck, but he was unsuccessful in that endeavour, most probably, again, due to the cold weather. Undoubtedly all tow truck operators were busy at the time. So the situation is that, given that the defendant only had one truck, given that it broke down unforeseeably, given that they were unable to contact the plaintiff to advise him of this change of circumstance, and given that they made whatever efforts they could to arrange to have someone else pick up the truck, it is difficult for me to find that there was anything else they could have reasonably done to alleviate the situation.

[12] That being the case, as unfortunate as the loss is for Mr. Wilkinson, in my view,

it is not a case where the defendants are liable for the loss. This is a case where there were basically two innocent parties and the real culprit, who is the thief, is unknown, so one of those innocent parties is left to bear the loss. In this case, unfortunately, it is the plaintiff.

FAULKNER T.C.J.