06/12; [2012] VSC 48

SUPREME COURT OF VICTORIA

ALL COVERS and ACCESSORIES PTY LTD v SIDAWI

Mukhtar AsJ

6, 23 February 2012

CIVIL PROCEEDINGS – BAILMENT — BAILEE FOR REWARD — GOODS DEPOSITED AT FACTORY WORKSHOP FOR IMPROVEMENT WORKS — FIRE — DESTRUCTION OF ALL GOODS — NO NEGLIGENCE BY BAILEE OR FAILURE TO TAKE REASONABLE PRECAUTIONS — NO INSURANCE HELD BY BAILEE FOR LOSS OF GOODS — BAILEE UNDER NO LEGAL DUTY TO WARN BAILOR OF ABSENCE OF INSURANCE – FINDING BY MAGISTRATE THAT BAILEE UNDER A LEGAL DUTY TO WARN THE BAILOR THAT THE BUSINESS DID NOT HAVE INSURANCE – BAILOR'S CLAIM UPHELD – WHETHER MAGISTRATE IN ERROR.

S. delivered his boat and trailer to ACP/L's factory workshop and place of business to have a canopy and storm cover made and installed. About two weeks later, a fire destroyed the factory premises and everything in it including S.'s boat and trailer. S. then sued ACP/L for the sum of $16,341 which was said to be the market value of the boat and trailer. The Magistrate upheld the claim holding that the bailee was under a legal duty to warn S. that the business did not have insurance and that a duty was imposed by the law as the goods were of an "unusually high value". Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside and the Complaint dismissed.
1. Under the common law, it is established that a bailee is not an insurer of goods and is not under a duty to insure. If the bailee is not an insurer and is under no duty to insure, how can there be a duty to warn about the absence of insurance?

2. In the present case, there were no unusual risks or hazards to the goods whilst they were in the bailee's safekeeping that might possibly have aroused a tortious duty to warn. The bailee was accepted to be blameless for the fire. In those circumstances, there was nothing on the facts of this case giving rise to an obligation on the bailee to warn that it was not insured for the destruction of the goods. The law of bailment called for the dismissal of the claim.

3. The special circumstances exception that the magistrate applied for "unusually high value goods" has no authoritative basis under the Australian law of bailment, and there is no principled basis to find such a general legal proposition. Whilst decisions of the Canadian Court of Appeal like any precedents of other legal systems are not binding, they are to be afforded a status depending on the degree of the persuasiveness of their reasoning. The Magistrate erred in applying the reasoning of *Punch v Savoy's Jewellers Limited* (1986) 26 DLR (4th) 546 because that case stood for no such general proposition. Moreover, what deserved greater attention was the earlier appellate decision in *Mason v Morrow's Moving and Storage Limited* [1977] 2 WWR 738; 87 DLR (3d) at 234 which was squarely on point, and which also illuminated the question of a duty to warn under the general law of negligence.

MUKHTAR AsJ:

1. The opening words of the renowned legal text *Palmer on Bailment*[1] are apposite to this appeal. They say:

> Bailment is one of the commonest transactions of everyday life. Its breadth and diversity are enormous. And yet it is unknown to nonlawyers, and often neglected by lawyers themselves. The result is that a fertile source of legal development has been largely unexplored.

2. Mr Sidawi's boat and trailer were destroyed in a fire at the appellant's workshop. He was shocked, he says, to be told afterwards that the appellant had no insurance to cover the loss. He sued in the Magistrates' Court for a breach of bailment. It is established in the law that the bailment relationship imposes a duty on the appellant as bailee to take care of the goods as was reasonable in the circumstances. Peculiar to that relationship, the law reverses the onus of proof by requiring the bailee to disprove negligence.

3. At trial Mr Sidawi (who was legally unrepresented) conceded unequivocally that the fire

and the loss of the boat was not attributable to the appellant's negligence. As the appellant bailee was innocent of any blame for the fire, it would therefore have expected to be exonerated under the law of bailment. However, Mr Sidawi's case was that he did not think, and was not told, that the boat would be left at the appellant's premises "at his own risk", and he was not told until after the fire that there was no insurance.

4. The magistrate held that the appellant was under a legal duty to warn the customer that the business did not have insurance. His Honour, applying a Canadian case, held that such a duty was imposed by the law where the goods were of an "unusually high value" which he regarded the goods here to be. Had the customer been told that there was no insurance, his Honour reasoned that the customer would then have been able to exercise a choice whether or not to leave the boat there in the first place. There was an order made on the Complaint for $9200, with interest at $1826 and costs of $4506.

5. On this appeal (which can only be on a question of law[2]) the appellant urges that the magistrate made a legal determination which lacked an authoritative or principled basis and imposed upon a bailee a duty which was unjust, commercially unreal and unknown under Australian law. The issue is whether, or in what circumstances, a bailee for reward is under a duty to warn the customer of an absence of insurance. It will be realised immediately that the problem with the broad conclusion of law reached by the magistrate lies in leaving unattended two questions. Is it an absence of insurance for accidental loss (for which the appellant is not liable under the law of bailment)? Or is it insurance for negligent loss as well (for which the appellant would be liable to compensate the owner under the law of bailment)?

6. I think this appeal must be allowed. There is no Australian authority on point, and I shall examine the Canadian authorities which shine light on the question. But at the outset I should state the essence of my reasoning.

7. Under the common law, it is established that a bailee is not an insurer of goods; and is not under a duty to insure. That was accepted by the magistrate and not questioned by the respondent's counsel on appeal. So, as appellant's counsel submitted forcefully on this appeal: if the bailee is not an insurer and is under no duty to insure, how can there be a duty to warn about the absence of insurance?

8. The search for a principle creating a duty to warn about the absence of insurance for goods of an unusually high value (putting aside the question of risk covered) could only be conceivably attracted on the facts of a particular case where, somehow, insurance was as an aspect of the dealing. As happens in other areas of the law, I suppose omissions or silence might, and I say only might, in a particular setting attract liability depending on the dealings (possibly governed by contractual documentation) between the parties which might also give regard to the nature and value of the goods. Heirloom jewellery is the paradigm example. But, in an ordinary domestic case where goods are left with a repairer or fitter, his Honour's general conclusion that a duty to warn about an absence of insurance is attracted where goods are of an "unusually high value" does not have any authoritative support. The single Canadian authority to which the Magistrate directed himself namely *Punch v Savoy's Jewellers Limited*[3] is not binding in Australia but, of course, coming from a common law legal system, it deserves careful attention according to its persuasive qualities. But on close examination, that Canadian case did not establish such a broad proposition, and was very much confined to its own facts in which the taking out of insurance by the bailee was part of the dealing. Moreover, I am afraid to say his Honour disregarded earlier Court of Appeal authority in Canada which reached a contrary view as a matter of principle.

9. I would not conclude, as the appellant urged, that there is no place in the categorically distinct law of bailment for an application of the duty to warn cases of the sort that are found for example in personal injury cases. Nor would I accept the respondent's submission that the bailee's duty to take reasonable care of the goods under the law of bailment should not be confined to custodial or physical care of the goods, but should extend generally to taking care of the goods by warning of the absence of insurance. That amounts to saying there is a duty to take care of the bailee's economic interests. That is an assumption of a different responsibility and would require special facts. The danger in both arguments lies in their generality.

10. So much will depend on the facts and circumstances of any particular case. But even then, on principle, the duty to warn in a bailment case could only conceivably arise where depending on the particular facts of a case, the bailee knew or could foresee risks or hazards to the goods, or had some other apprehension concerning the safe keeping and preservation of the bailed goods. There might then be a question whether a duty arose to warn the consumer of the unusual risk, and thought might turn to insurance. Or, the question may be whether the bailee's knowledge or foresight of the unusual danger might go to the reasonableness of the preventative steps taken by the bailee to prevent the loss.

11. But in this case there were no unusual risks or hazards to the goods whilst they were in the appellant's safekeeping that might possibly arouse a tortious duty to warn. The appellant was accepted to be blameless for the fire. In my view, there was nothing on the facts of this case giving rise to an obligation on the appellant to warn that it was not insured for the destruction of the goods. The law of bailment called for the dismissal of the claim.

12. I turn now to the facts. They are elementary.

The facts

13. The respondent Mr Sidawi took his recreational boat and trailer to the appellant's office and factory workshop in Chelsea Heights to have a canopy and storm cover made and installed, at a quoted cost of up to $1500. The appellant is in that field of business. About two weeks later, in the evening after the close of business, a fire destroyed the factory premises and everything in it including Mr Sidawi's boat and trailer. He then sued the appellant in the Magistrates' Court for $16,341 of which $14,990 (double the purchase price) was stated to be the market value of the boat and trailer.

14. The Complaint as filed in the Magistrates' Court was prepared by lawyers and formulated as an orthodox breach of bailment case. I need not refer to its contents. Consonant with that being the nature of the case, the appellant's Notice of Defence acknowledged that the boat was stored at its premises to enable the installation of a canopy and storm cover, but said where relevant:

> ...
> 3. The defendant allowed the plaintiff to store the plaintiff's boat at the risk of the plaintiff.
> ...
> 5. The fire was caused by matters outside the defendant's control.
> 6. The defendant was not negligent in causing the fire and is not responsible for any damage which occurred to goods stored by the plaintiff at the defendant's yard.
> 7. The defendant is not liable to the plaintiff in the sum claimed or in any sum.

15. At the trial, Mr Sidawi appeared without legal representation, and brought an interpreter with him. The transcript reveals that Mr Sidawi could converse in English. I think it was more a case of having an interpreter there in case he could not understand the language of the law or things said in the milieu of a court room.

16. The transcript reveals that the magistrate stimulated proceedings to be conducted in an unusual way for a bailment case. I mean no criticism. His Honour was possessed I think of an understandable desire to proceed with expedition in a court of high despatch and maybe with a judicial sense of addressing the imbalance that is felt naturally in any Court when there is a litigant in person opposed to senior and junior counsel. Before any evidence was led, the elements of a cause of action in bailment were explained to his Honour by senior counsel for the bailee. Those principles are established, but it is just as well to restate them by selective adoption from a restatement in *Tottenham Investments Pty Ltd v Carburettor Services Pty Ltd*[4] in this way:

> 1. A bailee for reward such as a bailee for work and labour on a boat, assumes a duty to take such care of the bailed goods as is reasonable in the circumstances. Unless forgiven by the law, the bailee should restore the property bailed to its lawful owner.
> 2. The duty of the bailee is not that of an insurer. Thus, the bailee is not obliged to take every conceivable or possible precaution to prevent loss of the goods. Its duty is simply to act reasonably. It is to take reasonable care such as a person would take in respect of that person's own goods.
> 3. Foreseeability of damage or loss has been described as invoking an "undemanding test". Although this description was used in a context of personal injury litigation framed in negligence, it applies equally to the alleged negligence of a bailee. The test is "undemanding", in the sense that it embraces a duty to take precautions not only for events which are "likely to happen" or "not unlikely to happen" but also for events which are "not unlikely to occur".

> 4. If the bailee, bearing the onus of proof, discharges that onus by establishing that the theft of the bailed goods occurred without negligence on its part, and the evidentiary burden is borne by the bailor to establish the precautions which reasonably could and should have been taken by the bailee to prevent the loss of the goods. It is then for the bailor to adduce evidence of what those further precautions might have been and from which the decision-maker can infer that it was reasonable to expect that they would have been taken having regard to all of the circumstances.

17. For the purposes of that last proposition, it is worth noting in the context for example of the cases concerning theft from a bailee, that the value of goods bailed may be a relevant circumstance when it comes to assessing whether a bailee took reasonable steps to prevent a theft. That is, when the law requires the bailee to take precautions for events which are foreseeable, the value of the goods can be relevant to the question of the reasonableness of the precautions taken by the bailee to prevent the goods from being stolen. A custodian of the Crown jewels would be expected by the law to take greater precautions, than is the local dry cleaner with clothing.

18. In this case, the phenomenon of the bailment was simply not an issue. The appellant had actually taken possession of the boat and trailer to do the work, and did so for reward. The Magistrate recognised that there was nothing more for Mr Sidawi to do than to prove the value of his loss.

19. The case then proceeded not with the proof of the value of the destroyed boat and trailer, but by allowing counsel for the bailee to go first and call evidence on the question whether the bailee breached a duty to take care of the goods. The respondent's director Mr Neely was called as first witness. In the events that occurred, it is not necessary to rehearse his evidence in any detail. It is enough to say that the respondent's business premises could fit about 30 to 35 boats and that the boats ranged from 14 feet to 35 feet. The premises had a workshop area as well as an external area on which large boats were worked on. In addition, there was an office area, a reception area as well as a conference room occupied by a sub-lessee. Above the premises there was a residence in which Mr Neely lived. He gave evidence about shutting down the workshop on the day in question and the checking of alarms and checking of doors. As he lived on the premises, he gave evidence of the fire alarms going off, the intensity of the flames, his attempts to put the fire out and the arrival of the fire brigade.

20. One part of his evidence was significant in refining the legal issue in the case. There was a sign on the left-hand side of a roller door through which all boats would come into the factory. The evidence is not precise but Mr Neely said the sign was one that "basically" said that "Goods were left at the customer's risk … All care taken". But he accepted that a person may not see that sign, and as the factory was 1600 square metres in area, a customer may not be looking for a sign on the wall. Mr Sidawi cross-examined Mr Neely. The evidence was that as part of their personal dealings, Mr Neely did not hand over any receipt or any other document which said that the customer left the boat in the factory at the customer's own risk. He admitted that there was no conversation in which he told the customer that the boat would be left at his own risk. That is where this evidence rested. There was no questioning about insurance or, specifically at least, no question about the absence of a warning about insurance cover. At that stage it was not relevant.

21. Then, it was the defendant's intention to adduce the expert evidence of Dr Ian Bennetts, a fire safety engineer. His experience was in the behaviour of steel, composite and concrete structures under ambient and fire conditions. He had prepared a report on behalf of the appellant, which had previously been given to Mr Sidawi. Just before that witness was called, the magistrate received from Mr Sidawi an affidavit which was not sworn, nor dated; but counsel for the bailee acknowledged having previously seen it, expecting it to be part of the Mr Sidawi's case which as it turned out did not proceed in the ordinary way because the defendant went first.

22. That three page "affidavit" of Mr Sidawi states the following facts. The boat was purchased on an internet auction site in March 2008 for $7000 and $2200 for the trailer. It was purchased in Sydney and driven back to Melbourne. He says that when he dealt with the defendant, there was never a written quote or any documentation concerning the making and fitting of the canopy and storm cover. Two and a half weeks after leaving the boat with the defendant, the document says that on contacting the workshop, he was told the factory had burnt down to ashes, as did his boat. The affidavit then says:

> She [the receptionist] mentioned to me something about collecting the boat and I asked if they were

> insured. She replied that their insurance doesn't cover anyone else's property.
> I was shocked to hear this and complained to her that no-one had told me this before I left my boat there and had I known I would never have left it with them. ...
> At no time did I ever see on the premises or in the building, a sign warning that property is left at own risk or anything to that effect.

23. Before the defendant's expert report from Mr Bennetts could be adduced into evidence, Mr Sidawi made a statement to the Court that radically changed the course and legal nature of the case. It is important to quote what occurred:

MR SIDAWI:	The thing is that while we are doing these things my whole case is not about the fire, it's not the reason, it's something else.
HIS HONOUR:	What's the something else?
MR SIDAWI:	I took the boat, I left it on the premises, and they were responsible for it. And I wasn't given anything - - -
HIS HONOUR:	So, Mr Sidawi, are you saying that you will not be challenging any evidence by the defendant which is to the effect that this fire occurred without any negligence on his part, you will accept that that is the case?
MR SIDAWI:	I have nothing against the – Mr - - -
HIS HONOUR:	Neely.
MR SIDAWI:	I think the owner of the business, okay. And I have nothing against the fire, all I am talking about is that I left my boat over there and I wasn't told that it's going to be under my own risk. And I wasn't given the terms and conditions and any receipt or anything else. If I was given such things, I wouldn't have left the boat over there, I would have taken the boat somewhere else. Then one - - -
HIS HONOUR:	Just stop. Please. Just a moment. So is your position, Mr Sidawi, that you accept that the defendant did nothing to cause the fire?
MR SIDAWI:	I'm not sure, I wouldn't know if they are – there is any – they have caused it or not.
HIS HONOUR:	Good. Then the next question is do you want to have a court case to examine whether they caused it or not?
MR SIDAWI:	It's not necessary.
HIS HONOUR:	Well, then, this gentleman's evidence [the fire expert] is not necessary.
MR SIDAWI:	I don't think it's necessary, I didn't ask for it.
HIS HONOUR:	It's just that the defendant has to prove in simple terms for you that they didn't cause the fire or do anything at all which was a failure to limit the outcome or consequence of the fire. And if you accept that, then it seems your case is "That doesn't matter, because once they took my boat they became responsible for it, and anything that happened they have to pay for, even if they are not at fault." Is that correct?
MR SIDAWI:	That's the thing that I wasn't told that - - -
HIS HONOUR:	But that's what you're saying?
INTERPRETER:	sorry, I am not interpreting now. Would you like me to explain to him what you exactly said in simpler words?
HIS HONOUR:	Well, let me try to say it again. Is the reason you are here today because you say they must pay for your boat even if they have done nothing wrong?
MR SIDAWI:	[Through interpreter] Yes, Your Honour, that's correct.
HIS HONOUR:	And do you say that because they didn't tell you that they would not be responsible? Is that the whole question?
MR SIDAWI:	Yes.

24. The fire expert was then excused without having to continue his evidence. And, as the magistrate saw it, the case was that the defendant did not tell the plaintiff that the defendant was not insured. The magistrate, looking I think to do justice by identifying the legal issue for determination, conceived the plaintiff's case to be a duty to warn case, in this way:[5]

> No, no, he [the plaintiff] has asked me to go further and say "Yes, but you did do something wrong. What you did was as a bailee to take my goods, extremely valuable goods, without warning me that you had not had an insurance in place to cover them should they be damaged, however damaged, in your possession. Had you done so, I would have had the option of insuring myself or taking the goods to another tradesman to do the job there that did have such insurance.

25. As the issue came to be refined, the question of the legal effect of the signage at the roller door disappeared. On the evidence from Mr Neely, there seemed to be real doubt whether it was sufficiently conspicuous anyway. As there was no contractual terms governing the bailment, the question became purely whether there was in the circumstances as I have exposed them a duty on the defendant to inform the plaintiff that there was no insurance to cover the boat.

26. As I have said already, the conception of the issue was to my mind troublesome in its generality. As bailee, the appellant was as a matter of law, liable or "at risk" to the bailor unless he could disprove that the destruction of the goods was caused by his own failure to take reasonable precaution. Thus, Mr Sidawi had the protection of the law of bailment which would make the appellant liable if there was a lack of proper care. On proper analysis, the question was whether there was a duty on the appellant to warn Mr Sidawi that there was no insurance covering the boat for truly accidental loss, that is, loss in no way attributable to a lack of care or precaution by the bailee. Mr Sidawi seemed to be saying: "I assumed you took the risk. You should have told me that even if my boat is destroyed in circumstances that make you completely blameless, there was no insurance policy to pay for the value of my destroyed boat."

The Magistrate's reasons

27. His Honour recited that the facts of the case "are derived from an affidavit that he [Sidawi] swore which was tendered to me without demurrer, and I received without any objection, as I have already said, or any desire to cross-examine on it." Although this appeal does not turn in any way on the conduct of the case, I think it more correct to say that the appellant came to court to meet an ordinary breach of bailment case and came to be surprised when Mr Sidawi revealed he was not asserting any lack of care in preventing the loss of the boat. In order for the magistrate to understand what Mr Sidawi's real complaint was, the magistrate for himself read the affidavit, which was not signed and certainly not sworn. It was in that sense that the so-called affidavit was received without any objection or without any cross-examination on it.

28. In his reasons, this is how his Honour conceived of the question for determination:

> ... The defendant had breached its duty of care to him in the circumstances by failing to tell him that the defendant did not insure against fire or other accidental damage for boats it took into its care and control, and by failing to tell him that if he wished insurance he would need to attend to it on his own behalf.
>
> Having made that claim, a discussion then ensued as to how this trial should in fact proceed, and all parties agreed that there was no further evidence that the Court would need to hear from either side, but rather it was a question of law as to whether there is in the law such a duty as Mr Sidawi was asserting.

29. His Honour went on to say this:

> The argument of law that I am asked to deal with as a result of that is a very narrow one. Mr Sidawi did not challenge the submission made by [the defendant's counsel] that the bailee's duty of care does not ordinarily include an obligation to insure the goods. Nor did he challenge a submission made by [defendant's counsel] based, as it is, upon a statement of law to be found in *Laws of Australia*, to the effect that the bailee was not even under a duty to warn the bailor that the goods were not insured.

30. The brief statement of law in the online service of *The Laws of Australia*, which the magistrate placed decisive reliance on, said this (omitting footnotes for the moment):

> The bailee's duty of care does not ordinarily include an obligation to insure the goods or to warn the bailor that they are not insured. Special circumstances (such as an express promise, special trade custom or the unusually high value of the goods) may justify a contrary conclusion.[6]

31. The first proposition is not challenged in this appeal. The authority cited for that proposition is a decision of the British Columbia Court of Appeal in 1978 in *Mason v Morrow's Moving and Storage Limited*.[7] That decision, as I will expose later, decided unequivocally that as a matter of Canadian law a bailee was not obliged to warn the bailor that goods were not insured. The controversy lies in the second proposition. As authority for that, the editors of the legal commentary cite two authorities: *Punch v Savoy's Jewellers Limited*, a 1986 decision of the Ontario Court of Appeal[8] and the English decision of *Firmin & Collins Limited v Allied Shippers Limited*.[9] Reference to *Firmin* can be disregarded as the respondent's counsel in this appeal conceded that the case does not stand for the proposition as asserted.

32. The magistrate determined that the facts of the present case were indistinguishable from *Punch*. I shall analyse *Punch* later but it is sufficient to say that was a theft of valuable jewellery in the course of transport to a sub-bailee where insurance was a term of the contract or a feature of the dealing. The magistrate held that where the bailed goods are of an unusually high value, that justifies a departure from the ordinary principle that a bailee's duty of care does not include an obligation to warn the bailor that they are not insured.

33. His Honour then determined that the boat and trailer in this case were of an "unusually high value". Beyond knowing the purchase price, there came to be no exploration of that issue in the course of the trial. His Honour's conclusion was that if Mr Sidawi had been asked been asked whether he wished to insure the boat, he "would have said" that he did not wish to insure it himself and that he would take his boat and trailer somewhere else where it would be insured by the bailee. His Honour reached that conclusion for himself because of some statement in the affidavit that the boat, which was purchased in Sydney, was transported by him from Sydney to Melbourne without insurance.

34. Then his Honour went further to say this (with my emphasis):

> There is the added feature of this case that is relevant to this question of what was reasonable and what should have been done. There is the fact that the defendant itself saw fit, saw the need to make a sign informing its customers that goods left by them would be at their risk. This is a most telling fact in this case. What that says is the defendant recognised the need to warn his customers.

35. Pausing there, I cannot see how or in what way the presence of the sign (the precise content of which was not clear on the evidence) amounts to evidence that the appellant recognised a need to warn about the absence of insurance. The sign was pleaded by the bailee as a basis to exclude liability, but as it turned out, it formed no part of the bailee's case because the issue became whether a duty to warn arose if the goods were of an unusually high value. The narrow body of facts which informed the question of whether there was duty to warn was nothing more than the handing over of possession of the boat and the trailer to the appellant defendant for the fitting of the cover. Liability for a failure to warn was imposed because the goods were regarded by the magistrate as being of an unusually high value.

36. In my view, the special circumstances exception that the magistrate applied for "unusually high value goods" has no authoritative basis under the Australian law of bailment, and I do not see a principled basis to find such a general legal proposition. Of course, decisions of the Canadian Court of Appeal like any precedents of other legal systems are not binding, but they are to be afforded a status depending on the degree of the persuasiveness of their reasoning.[10] But I think his Honour erred in applying *Punch* because that case stands for no such general proposition. Moreover, I think what deserved greater attention was the earlier appellate decision in *Mason* which was squarely on point, and which also illuminates the question of a duty to warn under the general law of negligence. And that is where I shall start.

The decision in Mason

37. In *Mason* the bailee's warehouse was destroyed by fire which consumed two lots of household goods stored there by the bailor. The bailors sued in bailment, alternatively for breach of contract, and further in negligence in failing to provide safe storage. More pertinently, they also alleged that there was negligence in failing to warn them that the bailee was not providing fire insurance coverage, which resulted in the loss being uninsured against the risk of fire. The fire was started on a Sunday evening by an employee who was temporarily off work owing to an injury which put him on compensation. At the employee's trial on a charge of wilfully setting fire to a business premises, he was found not guilty on account of insanity.

38. The evidence was that in the ordinary course of business, the customer would be asked to sign a warehouse receipt and would normally be told that it was the customer's responsibility to place allrisk insurance, which could be provided immediately through an agent who specialised in storage insurance. The evidence was that, on this occasion, the customer was not told that. Nor did the bailee properly draw to the customer's attention some printed terms and conditions on the reverse side of a warehouse receipt which said in effect that all goods were stored at the owner's risk in case of fire and that storage rates do not include insurance. Nor did the bailors have their attention specifically drawn to a sign on the office saying that the responsibility to place insurance was upon the property owner.

39. As in the present case, in *Mason* the bailors took it for granted that the warehouse would keep their goods safely and return them intact, and they did not think about insurance specifically because they took it for granted that the warehouse was fully responsible for safe storage and safe return.

40. The trial judge, McKenzie J, identified the only real issue as being whether or not the

warehouseman was negligent in failing to ensure that the plaintiffs knew there would be no fire insurance unless they placed it themselves.[11] In that case, as in this case, the court was assured that despite diligent search there was no legal authority deciding that question either way. As in the present case, it was recognised as being a distinct question from whether or not the warehouseman was an insurer or whether he had a duty to insure.

41. McKenzie J therefore had recourse to first principles. The evidence was that it was the bailee's practice to fully elucidate the insurance situation to each customer (as there was a commission obtained on the sale of each policy), that the employees were made aware of the importance of each customer being fully informed, and that the warehouse receipt carried the message about insurance clearly as its first condition. The problem in the case was that none of the usual modes of informing the customer were used and the plaintiffs never saw the sign. The question as McKenzie J saw it was whether the plaintiffs were exposed to an unusual risk of harm by the defendant's failure to inform. His Honour held that the customers should have had their minds directed to the question of whether or not to purchase insurance, saying:[12]

> While everybody might not choose to insure against fire, the prudent person does. The plaintiffs should have had their minds directed to the question of whether or not to purchase insurance. If that had happened I do not think they would have been deterred by its cost. They may have been, but then they would have made a choice and any loss would lie on their own head.

42. The powerful evidence for the trial Judge, as I read the case, was that the bailee's business practice involved conveying a positive message to any customer that insurance was the customer's responsibility, but on this case, the message was not transmitted. His Honour said:[13]

> Were the plaintiffs entitled to take it for granted that their goods were safe and secure and that this blanket of safety and security was covered by fire insurance? In the singular circumstances which prevailed here, I hold that the plaintiffs' passive assumptions were reasonably held and that they were lulled into a false belief that the defendant would respond in the event of any loss by making good the damage, and that they left the whole matter of protection, including fire insurance protection, in his hands. They expected to pay for that protection as part of the gross storage charges.

43. In the result, the court held that the bailee had discharged the onus of disproving negligence under the law of bailment, but was liable in negligence on the issue of failing to inform of the need for insurance.

44. On appeal, the trial judge's decision was set aside as lacking any authoritative basis. The judgment of the British Columbia Court of Appeal was delivered by Carrothers JA and on this issue, it started[14]

> Without citing any authority for the proposition that there was a legal duty on the part of a warehouseman either to inform the owner of goods placed in storage that the fire risk lay with such owner or, alternatively, to ascertain that such owner was aware that the risk was his, the trial Judge found the appellant "negligent in failing to assure that the plaintiffs (respondents) knew that there would be no fire insurance unless they placed it themselves". [citations omitted] He found that the appellant's "obligation to inform eluded them" and went on to hold that "on the issue of failing to inform of the need for insurance, the plaintiffs (respondents) have met the onus of proving negligence" and that the appellant was therefore liable for the respondents' fire loss. [citation omitted]

45. There then followed this important passage:[15]

> In my view that finding is unsupportable. There appears to be no authority for it. The respondents have sought to support this finding on the ground that here there was an exceptional risk because of the low standard of fire detection, prevention and suppression employed by the appellant and, relying upon the line of cases obligating owners to warn others of known hazards, suggest that, although it might not amount to negligence for the appellant to fail to use more fire detection, prevention and suppression devices than was in fact the case, here there was a duty on the appellant to apprise the respondents of unusual factors or elements affecting the fire risk and of which the respondents, as the persons deciding on the insurance cover, ought to have been made aware. Specifically, the respondents complain that the appellant contained no watchman service whatever, had no fire alarm system, had no heat or smoke detection system, had no sprinkler or fire suppression system, maintained minimum security and stored packaged goods of others which might well contain combustible materials.
>
> It is important to note the precise nature of the negligence imputed to the appellant, that is, failure to warn of an alleged exceptional risk of fire due to minimum precautions on the part of the warehouseman. In my view there was no duty to warn of a conceived risk which has not been shown, either with foresight or by hindsight, to be in reality a risk at all.

46. It appears that the respondents in the *Mason* appeal, put an argument that was not put at first instance. The case on appeal came to turn upon the broader notion of a duty to warn about known hazards. But to my mind the approach of the Court of Appeal properly and persuasively assimilates the common law of bailment which relieves the bailee of a duty to insure, with the body of common law in negligence concerning a duty to warn about know hazards in the safekeeping of property. In other words, if there is to be a duty imposed on a bailee to warn a bailor about risk or who is to take out insurance, it can only possibly arise where the bailee knows of some unusual danger which might affect the safe custody of the goods or might expose the goods to some peril. In that situation the common law might turn its attention to whether a duty thereby arose on the bailee to warn that there was no insurance over the goods be it insurance to cover negligent loss or accidental loss. That approach appears in the following passage in *Mason:*[16]

> The evidence is clear that in the ordinary course of business the appellant took reasonable steps to make known to a depositor of goods that the fire risk of such goods lay with the owner and it is equally clear that this message did not get across to the respondent. But here we do not have a danger of the nature or kind in respect of which the courts have attributed liability to the possessor of knowledge of the potential danger founded in negligence or breach of duty to warn. To begin with it does not, as already mentioned, have the element of foreseeability. The law does not impose a duty to warn of every conceivable risk, but only where a risk is one of a known and specific unusual danger. … The respondents were not exposed to any known or specific unusual risk or harm by virtue solely of not being informed or warned thereof by the appellant.

47. To my mind, that is the principled approach for this case. If the bailee is not an insurer of the goods, and is under no duty to insure goods, then the question whether he was bound to warn that there was no insurance can only arise in the same way as the law of negligence ordinarily considers cases where there is an alleged failure to warn (or an inadequate warning) about a foreseeable or unreasonable risk to person or property. This has arisen frequently in the context of cases concerning inadequate warnings given by public authorities to people on land used for recreation or leisure purposes such as swimming in shallow dams and creeks: see for example *Romeo v Conservation Commission,*[17] *Mulligan v Coffs Harbour City Council*,[18] *Vairy v Wyong Shire Council*,[19] and *Wyong Shire Council v Shirt.*[20] In those cases, when the law of negligence comes to ask what standard is demanded for the protection of others against reasonable risk of harm, then the gravity, frequency and imminence of the recognisable risk are the most important factors in the balance: see generally Sappideen and Vines, *Fleming's the Law of Torts*.[21] In that context, reference is often made to the "calculus" in *Wyong Shire Council v Shirt* in which Mason J said:[22]

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

48. One such alleviating action of course will be the giving of a warning.

49. Thus as I see it, when it comes to considering whether a bailee is under a duty to warn about insurance cover, then absent any authority on the question, it can attract analogically or deductively the principles concerning duty to warn in tort cases. It may well be that if a bailee is aware of some unusual risk or danger that might somehow imperil the bailed goods such that the reasonable person of ordinary prudence would tell the bailor about the desirability of obtaining insurance or about the insurance situation generally, then a duty to warn might arise. So much will depend on the facts of the dealing. Where the unusual danger might be of a kind where goods may be destroyed despite the exercise of reasonable care by the bailee, it might indeed be a case where a bailor is warned that it would be in his interest to take out insurance for accidental loss.

50. That is the significance, I think, of the decision in *Mason*. There is a risk that even with the greatest care goods will be destroyed. But the law does not impose upon the defendant a duty to warn of every conceivable risk, including the risk of accidental loss. What the law requires,

broadly speaking, is a risk of a known and specific unusual danger or some such description. In that situation, where the bailee knows of such a thing, it might be reasonable, depending on all of the facts, to expect a warning to be given about the insurance position.

51. To that extent, I resist accepting accept Dr Wilson's submission that the relationship between the parties here was governed by nothing more than the content of the law of bailment. That is, upon the concession made by Mr Sidawi that the fire was not in any way attributable to the carelessness of the appellant, then that should have been the end of the case. That is so, he submitted, because it was established and not disputed that a bailee is not an insurer, and, is under no duty to insure.

52. I would hold, that although the common law liabilities of a bailee might be said to be both independent of, or different from, those that would apply under the general law of tort,[23] and although there are distinctions between bailment and tort relating both to the creation of particular duties and to the machinery of their enforcement, it may be possible for the laws of negligence concerning the necessity to warn to apply. It has to be put as general as that because so much will depend on the facts of any particular case. I think it reasonable to suppose that a situation can arise where a bailee knowing of some particular risk or hazard that might affect the preservation of the bailed goods, for which he may or may not be liable as bailee might nevertheless be regarded as bound to warn the bailor that there is no insurance policy. Or, it may be that the knowledge of that particular risk or hazard may go to the steps or precautions that might be regarded as reasonably necessary to properly protect and keep the goods.

53. That seems to have been the approach of the only decision in an Australian court where the matter was considered: see *O'Neill v McCormack*.[24] But the case had nothing to do with insurance, so is not on point. In that case an immigrant upon a ship which had just arrived from overseas engaged the bailee to take certain luggage ashore for him and to deliver it to a certain address. The bailee was aware, but the plaintiff was not, that the luggage would for a time be in charge of another authority, but before then, the luggage would be left unattended on the ship. The Full Court of the Supreme Court of Western Australia held that on the facts as they were, the bailee was liable in bailment for their negligence in failing to warn the plaintiff of the fact that the goods would be left unattended. Burnside J regarded it as the bailee's duty to inform the plaintiff that the luggage would be left unattended in order that the plaintiff could make provision for the safe custody and protection of his luggage during the time that he or the bailor could not do so.

54. I cannot be sure this case was decided as a failure to warn case because ultimately it seems to have been decided on the orthodox basis of whether the bailee had disproved negligence. The finding was that the bailee was guilty of neglect in not taking sufficient steps to protect them during such time as they were left lying at the mercy of anybody, on the deck of the ship or anywhere else. The question of failure to warn and whether the bailee has disproved negligence in a general sense are sometimes not easy to separate. I think *O'Neill* could well be viewed as an example where a bailee knowing of a particular or peculiar risk (that is, that luggage would be left unattended) should have informed the passenger of that risk, and that the very risk about which the bailee failed to warn came to eventuate.

The subsequent decision in Punch v Savoy's Jewellers

55. The facts of *Punch* are important to an understanding of the decision and an analysis of what the case stands for. The bailor had an antique ring of considerable value which was in need of repair. It was a family heirloom. The owner took it to Savoy's Jewellers. Savoy was unable to carry out the repairs on its premises, so it sent the ring to another business in Toronto, C N Walker, by registered mail with a value of $100 shown for insurance purposes. That was the practice in the jewellery trade and that was the method of transmitting jewellery used by Savoy for 25 years. Walker (who the law would categorise as a sub-bailee) carried out the repairs. But the ring could not be returned by registered mail because a postal strike had intervened. Savoy agreed that the ring could be sent back by means of another carrier known as Rapidex. When Rapidex was preparing the bill of lading for the return of the ring to Savoy, the value of the ring was shown as at $100, the same as was usually shown when using registered mail. The ring was never delivered by Rapidex to Savoy. At trial, Rapidex gave no explanation for the loss of the ring, admitted that the loss could have been due to the theft of the ring by its driver, and conceded that it was aware of the driver's address but did not see fit to call him. The bailor sued both Savoy and Walker in bailment.

56. The trial judge found that Walker, as sub-bailee, failed to discuss the terms and conditions of the shipment with Savoy. The trial judge also found that Walker failed to take proper care of the ring by not insuring it against loss for its true value and by setting a grossly inadequate valuation of the ring on the bill of lading. The trial judge also found that an exemption clause relied upon by the sub-bailee was not properly incorporated into the dealing and had not taken reasonable measures to draw the conditions to Walker's attention. Walker was found liable as was Rapidex. But the claim against Savoy was dismissed.

57. On appeal, the Ontario Court of Appeal affirmed the judgment against Walker. The Court said that a prudent owner would wish to make certain that a valuable antique ring was transported and carried in the safest possible manner. This bailment, unlike the static bailment in the instant case, involves the transport of a ring and the handling by others in which case there is always the greater risk of theft or loss. Thus, Walker was "clearly remiss" in not discussing with Savoy the manner of carriage and the possibility of obtaining insurance. Walker negligently and falsely fixed the value of the ring at only $100 when it arranged for its shipment. That was an act to demonstrate that Walker did not take such care of a valuable ring as would a reasonable and prudent owner.

58. As for the case against Savoy, the court observed that Savoy, without consulting the owner, accepted a new method of carriage without enquiring as to the feasibility and cost of obtaining insurance coverage on the goods during their transportation. Although there was no duty on a bailee to insure goods, in this case, the court reasoned, insurance for the value of the goods was, in essence, a term and condition of their transportation. I regard that as a critical legal feature. The court held:[25]

> Any prudent owner of a ring such as this would make certain that insurance coverage was available for its true value. This step would be taken *not* only to provide insurance *qua* insurance but primarily to ensure that adequate and proper care was taken in the transportation of a valuable belonging. This would be a particularly important factor when employing an untried carrier. I would characterise the provision of insurance as an essential term of this contract of carriage. It is a minimal step that a prudent owner would take for goods of this type. Savoy was, on the facts of this case, in breach of its duty to the owner of the ring.

59. In the result, both bailee and sub-bailee were liable to the bailor for breach of bailment. The breach occurred in failing to obtain instructions from the owner as to the means of carriage in light of the postal strike; by failure to give a proper evaluation of the ring to the carrier, and by failure to stipulate as a term of the carriage insurance coverage for the true value of the ring itself. Rapidex was liable for the unexplained loss of the ring.

60. Properly understood, *Punch* was not a case concerning a duty to warn, at least not by Savoy the bailee. I am firmly of the view that it does not stand for the proposition that (picking up on the phraseology in the legal commentary relied upon by the magistrate in this case) a bailee who "ordinarily" is not an insurer and "ordinarily" has no duty to warn about insurance might as a "special circumstance" be obliged to give such a warning where the goods are of an "unusually high value". The ring in *Punch* was a valuable heirloom. The bailee assumed the responsibility of insuring it. Indeed the Court characterised insurance as an "essential term of the contract" as a manifestation of the care required. But it was only insured for $100 by both Savoy and Walker, and in the latter case, by an untried carrier. The carelessness as bailee was not insuring such a valuable thing for enough. I doubt whether *Punch* truly is a duty to warn case. It is a duty to insure for the proper amount having taken on the responsibility to insure and the high value of the goods. The case turns on its peculiar facts.

Conclusion

61. On this appeal the respondent's submission was that the so-called *Wyong* "calculus"[26] means the court must look into the elements of reasonableness when it comes to assessing the existence and reasonable extent of a warning to be given. If the there is a duty to warn about such things as the inadequacy of the premises or something else that might pose a risk to the safe keeping of the goods then, by extension, that should include a duty to warn about the absence of insurance especially as the customer could not be expected to know and it was hardly a burden to impose on a bailee. The respondent's thesis was that the notion of reasonable care for the bailed goods goes beyond the physical care and protection of the goods, especially where the goods were of an unusually high value. The notion of reasonable care can, it was submitted, extend to steps necessary generally to looking after the bailor's interests.

62. In my view that is far too broad an extension to countenance. There is, as I have endeavoured to show, no authority to support it and *Mason* is against it. It clashes with the settled law that a bailee is not an insurer and is under no duty to ensure. Nor do I see a principled basis to make the extension, certainly not on the exiguous facts of this case. Even accepting that circumstances may arise arousing a duty to warn in a bailment case under the general laws of negligence, then consistently with the duties of bailee, it would be a duty to warn about hazards to the goods, for to go beyond that and require the bailee to warn about matters affecting the bailor's interests in the goods imposes an assumption of responsibility by the bailee for something more than the goods as bailed. That can only be regarded as reasonable when there are facts as were present in *Punch* which show that insurance was a feature of the bailment dealing.

63. Moreover, I am by no means sure that the burden of requiring a warning is undemanding, if the warning is to have any real legal meaning. Unless insurance is a feature of the dealing as in *Punch*, there would be commercial inconveniences and problems in trade or commerce for business, big and small. To administer a warning could be problematic or unreal in practice and could open up all sorts of inquisition and uncertainty in an every day dealing. A business might have some form of insurance and it may not cover the apprehended risk and even then it might be subject to exclusions or conditions. These are matters that operators or staff of a business should not be expected to know over the counter. Furthermore there are inherent problems with a measure of liability which depends on a test of goods being of an "unusually high value". That may be obvious in some cases but otherwise there may be value or normative judgments to be made.

64. In closing, I should say that I do not see the law working an injustice on the facts of this case. The bailee took custody of the goods and was required to take reasonable care of them. That is the assumption of responsibility as custodian. Through no carelessness of the bailee, the goods were destroyed by fire. The bailee cannot be liable for breach of bailment. Insurance is a measure taken by one who wishes to be indemnified for exposure to a liability. To say there was duty to warn about insurance is to resemble a duty to advise a bailor as to what might be in the bailor's interests in the event that loss of the goods was due to an accident. That introduces an assumption of responsibility or something resembling a duty to advise that goes beyond the essential nature of the bailment relationship.

65. For the above reasons this appeal should be allowed. The order of the magistrate ought be set aside and its place there be an order dismissing the Complaint.

---

[1] (3rd ed, Sweet & Maxwell, 2009).
[2] See s109 of the *Magistrates Court Act.*
[3] (1986) 26 DLR (4th) 546
[4] (1994) Aust Torts Reports 81-292 per Kirby P.
[5] Transcript at p 48.
[6] at [8.5.920]
[7] [1977] 2 WWR 738 (at first instance); 87 DLR (3d) at 234 (on appeal).
[8] (1986) 26 DLR (4th) 546 at 533 (an erroneous page reference; it should be 553).
[9] [1967] 1 Lloyds Report 633.
[10] See *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376 at 390.
[11] At 748.
[12] [1977]2 WWR 738 at 749.
[13] [1977]2 WWR 738 at 749-50.
[14] 87 DLR 234 at 236.
[15] 87 DLR 234 at 236-70.
[16] 87 DLR 234 at 238.
[17] (1998) 192 CLR 431.
[18] [2005] HCA 63; (2005) 223 CLR 486.
[19] [2005] HCA 62; (2005) 223 CLR 422.
[20] [1980] HCA 12; (1980) 146 CLR 40.
[21] 10th ed at 7.90 ff.
[22] [1980] HCA 12; (1979) 146 CLR 40 at 47.
[23] See generally, *Palmer on Bailment* at p 48.
[24] (1913) 15 WAR 33.
[25] 26 DLR(4th) 546 at 553.
[26] An expression described as "unfortunate" in *Mulligan v Coff's Harbour City Council* [2005] HCA 63; (2005) 223 CLR 486 at 490 {2}.

APPEARANCES: For the appellant All Covers and Accessories Pty Ltd: Dr JD Wilson SC with Mr JX Wilkinson, counsel. Hunt and Hunt, solicitors. For the respondent Sidawi: Mr RA Harris, counsel. Ram and Associates, solicitors.