position where restrictions on reporting are too severe to be acceptable to citizens who cherish freedom of the press.

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BAILMENT—LOSS OF CHATTEL BAILED—ONUS OF PROOF—WHETHER *RES IPSA LOQUITUR* APPLIES — FRUSTRATION — PLEADINGS

The Supreme Court of Canada has considered and disagreed with the assertion by Laskin, J.A., in the Ontario Court of Appeal in *National Trust Co. Ltd.* v. *Wong Aviation, Ltd. et al.*, that *res ipsa loquitur* has no place in our law of bailment.[1]

That case involved the bailment of an aircraft. The pilot who had rented the aircraft failed to return with it from a flight in marginal weather conditions, was never found, and was presumed dead. The bailor's action against the deceased pilot's estate was framed in tort on the ground of negligence, for the proof of which the bailor relied upon the doctrine expressed in the maxim *res ipsa loquitur*, and in contract on the ground of breach of the common law duty of a bailee to take reasonable care of the bailed goods while in his possession and to return them to the bailor.

As his above assertion suggests, Mr. Justice Laskin regarded only the pleading in contract to be relevant. He held that once a bailor proves bailment and loss of the bailed goods the burden of disproving negligence shifts to the bailee as a principle of law, in contrast to the ordinary case in which the onus of proof remains on the plaintiff throughout. This principle, or "rule of evidence" as Ritchie, J., who delivered the judgment of the Supreme Court of Canada, preferred to call it,was expressed by Lord Justice Atkin in *The "Ruapehu."*[2]

> The bailee knows all about it: he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that the duty has been discharged.

In finding for the bailor the Ontario Court of Appeal had declared that the principles of proof do not vary merely because the bailee and the bailed chattel disappear together. The Supreme Court found, however, that none of the authorities cited by the Court below supported that view and emphatically refused to enlarge the application of *The "Ruapehu"* principle to include cases in which the bailee is not available to explain the loss. Mr. Justice Ritchie said of the principle:[3]

> . . . as it is one which has the practical effect of placing on the bailee the heavy onus of proving a negative (i.e., that he was not negligent) it should, in my opinion, only be invoked in cases where *all* the considerations stipulated by Lord Atkin can be found to be present.

He further said:[4]

> In a case such as this where the bailee is dead, it seems to me to be quite unrealistic to apply a rule, one of the basic considerations for which is that

1 (1969) 3 D.L.R. (3d) 55, *reversing* 56 D.L.R. (2d) 228, *affirming* 51 D.L.R. (2d) 97. See also 4 Alta. Law Rev. 504.
2 (1925) 21 Ll. Law Rep. 310 at 315.
3 *National Trust Co. Ltd.* v. *Wong Aviation Ltd. et al.*, *supra* n. 1 at 62.
4 *Id.*, at 63.

"the bailee knows all about it; he must explain." In this case nobody "knows all about it," indeed, nobody knows anything about it. Both the bailee and the bailed chattel have disappeared and there is no evidence of negligence on the part of the bailee.

The parties to the bailment occupied unenviable positions in this case—the bailor was without the goods and could not explain what happened to them; neither could the bailee's executor explain their loss. From the practical standpoint of the parties, no decision of the Court could be entirely satisfactory in such circumstances. But by refusing to allow the question of liability to be determined on the sole ground that strict rules of evidence regarding the shifting of the onus of proof had not been complied with, and applying instead the general rules governing proof where the performance of a contract has been frustrated by destruction of the subject matter, the Supreme Court of Canada found a reasonable legal solution to the problem. Mr. Justice Ritchie approved the statement of those rules expressed in *Joseph Constantine Steamship Lint, Ltd.* v. *Impehial Smelting Corp., Ltd.*,[5] and incorporated excerpts from the statement in his conclusion:[6]

> As the respondents in the present case have not adduced any evidence to "establish a fault or default in the defendant", the outcome of the bailment action must depend upon whether "the event is of such a nature as of itself to raise a *prima facie* case of fault or default . . ." In other words, the bailor's action depends upon the application of the rule embodied in the maxim *res ipsa loquitur*.

Evidence had been adduced to show that weather conditions at the time of the flight could have caused the loss—an explanation from which it would be just as reasonable for the Court to conclude that the happening occurred without the negligence of the bailee, as with *United Motor Service, Inc.* v. *Hutson*.[7] Thus the maximum was found not to apply, the appeal was allowed and, in result, *res ipsa loquitur* is very much alive in our law of bailment.

There is nothing in the Supreme Court decision to suggest that the maxim applies in cases in which the bailee is available to give an explanation and *does not*, and we therefore may still consider any discussions of *res ipsa loquitur* in those cases to be extraneous, if not erroneous. However, it is possible to imagine cases in which the bailee, although available to make an explanation, is *unable* to explain the loss. If the bailee does not "know all about it," one of the considerations expressed by Atkin, L.J. would be absent; and, if the reasoning of the Supreme Court is to be carried forward, the onus in that type of case might also remain upon the plaintiff bailor throughout.

Also worthy of note is the apparent attitude of the Supreme Court toward the practice of pleading bailment actions alternatively in tort. Although he specifically referred to and ultimately dismissed the claim in tort, Ritchie, J. stated that he did not consider significant the fact that the bailor had pleaded negligence in the alternative—a position parallel to that taken by the Ontario Court of Appeal.

No doubt this will come to be regarded as a leading decision in the law of bailment.

—H. J. LYNDON IRWIN*

5 [1941] 2 All E.R. 165 at 181.
6 *National Trust Co. Ltd.* v. *Wong Aviation et al.*, *supra*. n. 1 at 63 and 64.
7 [1937] 1 D.L.R. 737 at 738.

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