

Claim No. SCCH 266320

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Lombard Insurance Company v. Stock Transportation Ltd., 2007 NSSM 83

BETWEEN:

**LOMBARD INSURANCE COMAPNY**

**R. MACLEAN FORESTRY LIMITED**

Claimant

- and -

**STOCK TRANSPORTATION LTD.**

**MARSHA WYATT**

**RYDER TRUCK RENTAL CANADA LTD.**

**D.H.L. INTERNATIONAL EXPRESS LTD.**

**KENNETH CHISHOLM**

Defendant

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**DECISION AND ORDER**

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**Adjudicator: David T.R. Parker**

**Heard: June 11, 2007**

**Decision: August 19, 2007**

**Revised Decision:** The text of the original decision has been revised to remove addresses of the parties on January 7, 2008. This decision replaces the previously distributed decision.

**Counsel:** Donn Fraser represented Lombard Insurance Company and R. MacLean Forestry Limited  
Lisa Richards represented Stock Transportation Ltd. And Marsha Wyatt  
Barry J. Mason represented Ryder Truck Rental Canada Ltd, DHL International Express Limited and Kenneth Chisholm

**Cases considered:**

R. v. Khelawon [2006] S.C.J. No. 57  
Dye v. Morehouse [1999] B.C.J. No. 2552 (S.C.)  
Roussin v. Bouzenad [2005] B.C.J. No. 2682 (S.C.)  
Bruno v. Danaca Transport Ltee. [2002] O.J. 3486 (C.A.)  
Morris v. Cameron [2006] N.S.J. No. 19 (S.C.)

Parker:-This matter involves three actions which relate to the same motor vehicle accident which came before the Small Claims Court at Halifax, Nova Scotia, on May 28, 2007.

During the hearing an issue arose as to the admissibility of a statement of a deceased Defendant Marshal Wyatt. Marsha Wyatt was the driver of the Defendant Stock Transportation Ltd's bus that was involved in a motor vehicle accident and being the subject of the proceedings. Shortly before the hearing of this matter Marsha Wyatt passed away and due to her untimely demise was unable to appear and provide her version on what took place on the day of the accident, October 24, 2006.

The day after the accident, Marsha Wyatt provided an audio taped statement to an insurance adjuster who was investigating the accident on behalf of Stock Transportation.

During the hearing of May 28, 2007, evidence was heard from Kenneth Chisholm the driver of the Ryder Truck Rental vehicle, Lee Northrup a witness to the event; a constable of the RCMP who assisted the investigating officer and Kevin Connors an insurance adjuster who was investigating the accident on behalf of Ryder Truck Rental.

Towards the end of the hearing the admissibility of the statement of Marsha Wyatt came into question. Barry J. Mason, Counsel for the Defendant Ryder Truck Rental Canada Ltd. et al. argued that the statement should not be admitted. Opposing that view was Counsel Lisa Richards who wished to have the statement admitted into evidence. As a result I invited Counsel to submit written submissions following which a decision would be made as to its admissibility in whole or in part after which I would listen to final submissions on liability.

On June 4, 2004, Counsel Barry J. Mason submitted written submissions on behalf of his client Ryder Trust Rental et al and this was followed on June 11, 2007 by submissions by Counsel Lisa Richards on behalf of her clients Stock Transportation Ltd. and Marsha Wyatt.

I would like to thank both Counsel for their respect submissions which I know were time consuming and in all likelihood increases the expenses in this ongoing litigation for their clients. In some respects this would appear

to be contrary to the intent and purpose of the *Small Claims Court Act* which infers that the process be done informally and inexpensively. However as the Court moves in to higher monetary jurisdiction, now \$25,000.00 and Counsel are often involved, the issues this Court is facing more and more are issues involving procedure and admissibility of evidence which is the case here.

Again, I appreciate Counsel's submissions on the admissibility of an unsworn recorded statement of a now deceased person, who obviously cannot be cross-examined. Because submissions are so thorough on the admissibility of hearsay evidence I intend to refer directly to parts of each Counsel's submissions before I present my analysis.

#### Inadmissibility of Deceased Person's Statement

Counsel for Ryder Truck Rentals, OHL International Express Limited and Kenneth Chisholm contends that Marsha Wyatt's statement is not reliable. It would be prejudiced to allow answers to leading questions of an adjuster to be entered and they are no probative value.

Counsel in his submissions stated the following:

"The statement in question is clearly hearsay evidence and accordingly, would be admissible only under an exception to the hearsay rule. The Supreme Court of Canada has recently set out the guidelines for determining the admissibility of hearsay statement under the principled case-by-case exception to the hearsay rule based on necessity and

reliability. In *R. v. Khelawon* (2006), 215 C.C.C. (3d) 161 (SCC) Justice Charon, J.J. rendered a decision on the hearsay rule described as a “tour de force” in the annotation.

The circumstances in *Khelawon* were similarly to those in the case at Bar, in that the issue was the admissibility of an unsworn but recorded statement of a deceased witness. The witness was the alleged victim who gave a videotaped statement to police that had been admitted into evidence by the trial judge. On appeal, the court found that the tapes should not have been admitted, stating that although the threshold test of necessity was met due to the death of the witness, the videotaped statement was not sufficiently trustworthy to meet the threshold of reliability.

On appeal to the Supreme Court of Canada, the decision of the Ontario Court of Appeal was upheld. Charon, J.J., speaking unanimously for the Court, stated that:

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

The Court went on to state that there were no adequate substitutes

present, such as the availability of a sworn transcript from another proceeding considering the same issues. The crown could only rely on the “inherent trustworthiness of the statement.” In that regard Charon, J.J. stated that “the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross examination.” (Para 107) For those reasons, the statement was excluded from evidence.”<sup>1</sup>

### Admissibility of Deceased Person’s Statement

“Section 28 of the *Small Claims Court Act*. R.S.N.S., 1989, c. 430 states that an adjudicator may admit as evidence at a hearing, whether or not given under oath or affirmation or admissible as evidence in a court, any oral testimony and any document or thing, subject to relevance, undue repetition, privilege and statutory restrictions. Therefore the Stock Defendants submit that the Adjudicator has the discretion to admit Wyatt’s statement. The Court is not bound by the formal rules of evidence, including the rules relating to hearsay.

In *Morris v. Cameron*, [2006] N.S.J. No. 19 (S.C.), Justice LeBlanc, in considering an appeal from a Small Claims Court decision, considered the application of the hearsay rule in the Small Claims Court contest, specifically, whether the principles of hearsay are relevant when documents are produced in a Small Claims Court proceeding. (para 24)

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<sup>1</sup> From submissions of Barry J. Mason

The Court stated that ‘the principled approach must apply, in relaxed form, in order to determine whether hearsay evidence that a party seeks to adduce before an adjudicator meets the threshold requirement of reliability, and whether it is necessary to admit the evidence in order to prove a fact in issue.’ (para 24)

In the *Morris* decision, Justice LeBlanc stated as follows: ‘Hearsay evidence will continue to be admissible in most cases. An analysis of necessity and reliability will only be required where the evidence, on its face, does not appear to meet these basic requirements.’ The weight to be given to hearsay evidence is in the Adjudicator’s discretion to determine.<sup>2</sup>

### Analysis

Marsha Wyatt’s statement is clearly hearsay and as to its admissibility there are two competing elements which the Court must consider. The first element is encapsulated in section 2 of the *Small Claims Court Act* where it states a claim is intended to be adjudicated in accordance with established principles of law. Those principles of law relating to the admissibility of hearsay are nicely dealt with in *R. v. Khelawon* [2006] S.C.J. No. 57 which I shall deal with shortly.

The second element is section 28 of the *Small Claims Court Act* which allows an adjudicator to admit any oral testimony and any document whether or not it is admissible as evidence in a Court provided it is

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<sup>2</sup> From submissions of Lisa Richards

relevant. There are some limitations as expressed in subsection 2 and 3 of section 28.

The full reading of the section is as follows:

### **Evidence**

**28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,**

**(a) any oral testimony; and**

**(b) any document or other thing,**

**relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.**

**(2) Nothing is admissible in evidence at a hearing that**

**(a) would be inadmissible in a court by reason of any privilege under the law of evidence; or**

**(b) is inadmissible by any statute.**

**(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings. *R.S., c. 430, s. 28.***

Justice LeBlanc in *Morris v. Cameron* [2006] N.S.J. No. 19 (S.C.) suggests that section 28 still requires an adjudicator to consider relevancy and in doing so must apply the principled approach in a relaxed form. Justice LeBlanc stated an analysis of necessity and reliability will only be required where the evidence, on its face, does not appear to meet these basic requirements.

The question this Court is faced with is does the hearsay evidence of Marsha Wyatt “on its face” meet the principled exceptions of necessity and



reliability? If it does not then an analysis of necessity and reliability will be required to make a determination on whether the statement is admissible.

This Court is somewhat at a disadvantage as I have not seen the statement. However notwithstanding this I shall rely on Counsel's characterizations of the statement which I do not believe are in dispute.

The statement of Ms. Wyatt was taken by means of an audio tape by an adjuster representing the Defendant Stock transportation on October 25, 2005, the day following the motor vehicle accident.

Counsel for the Defendant Stock Transportation Ltd and Marsha Wyatt suggest the statement in general mirrors the evidence of Lee Northrup a witness to the accident and who has already provided testimony to this court. Ms. Wyatt was the driver of the Stock Transportation's vehicle involved in the accident. The first part of the statement is a general dialogue by Ms. Wyatt of what took place on the day of the accident. The latter part of the statement involves questions put to the Defendant Ms. Wyatt by the adjuster and Counsel for the Defendant Ryder is concerned that the statement is compromised by leading questions. Ms. Wyatt passed away just prior to this trial and obviously cannot be cross examined on her statement.

In the *Khelawon* case the statement being considered as to admissibility was from a person who was later deceased, after providing a video taped statement. The Court ruled the threshold of necessity was met.

The next step in the analysis is to determine if the statement threshold reliability is sufficient to overcome the threat that its prejudicial effect would outweigh its probative value as Counsel for Ryder suggests. Again on its face considering the comments of Counsel there is nothing to suggest that Ms. Wyatt's statement is not trustworthy. I discount the fact that she was a named Defendant in the actions as she was the driver of the Defendant's vehicle who would be held responsible for, at least vicariously, for any negligent acts of Ms. Wyatt and having Counsel Ms Wyatt would no doubt have been aware of this. Nor was there any issue raised in this regards. that is, that her version of events would not be trustworthy. Ms. Wyatt's statement can also be tested against others who provided evidence and further assuming Counsel is correct, the hearsay evidence may be admitted on a "striking similarity" basis as Wyatt statement pertains to the same incident as described by the other witnesses. The danger that I see as existing and as raised by both Counsel is that some parts of the statement may have been illicitly by leading questions put to Ms. Wyatt. This problem can be overcome by deleting either through consent or by this Court those parts of the statement that are associated with leading questions.

While hearsay is presumptively inadmissible, Justice LeBlanc in effect has suggested a functional approach and the need for flexibility in dealing with exceptions to the hearsay evidence.

The *Khelawon* case and the *Morris* case came out of the system at the same time and quite possibly Justice Leblanc had it in his mind when he

discussed the principled exception to hearsay evidence in the Small Claims Court.

In summation therefore it is in my view that the statement of Ms. Wyatt, excepting those answers which may have been tainted by leading questions, is admissible. Reliance on that evidence is a different matter and that is something that weighs on me in determining whether any of it can be relied on to decide the issues before this Court.

I have asked the Clerk of the Small Claims Court to obtain a court date for the continuation of this hearing which will involve the presentation of the statement and parts Counsel wish excluded, followed by final submissions.

I wish to thank Counsel again for their considered submissions which have been very helpful in allowing me to make a determination in this matter.

Dated at Halifax, this 19 day of August, 2007.

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David T.R. Parker  
Small Claims Court Adjudicator