Rf to 114 CLR. 481
APP. 1975 V.R. 949.

[HIGH COURT OF AUSTRALIA.]

DAVIS . . . . . APPELLANT;
PLAINTIFF,

AND

PEARCE PARKING STATION PTY. LTD. . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 28, 29;

SYDNEY, *Sept.* 8.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Contract—Bailment of motor vehicle for reward—Loss—Negligence by bailee—Special clauses exempting bailee from liability for negligence—Construction—"Car garaged at owner's risk" and bailee "not responsible for loss or damage of any description".

The appellant parked her car at a motor car parking station owned by the respondent. Upon parking the car and paying the charges the appellant received a printed document containing two parts, a "delivery ticket" and a "parking check". Printed on the face of the "parking check" were the words "For garaging, subject to the conditions set out on back hereof. This receipt must be exchanged at office for a delivery ticket before the motor vehicle can be obtained". On the back of the document were the words: "Conditions—The motor vehicle mentioned on the other side hereof is garaged at the owner's risk, and Gough's Auto Parking Station will not be responsible for loss or damage of any description. This check must be exchanged for a delivery ticket at office to obtain re-delivery of vehicle. No servant or agent has any authority to waive or modify any of these conditions". The appellant went away leaving her car at the parking station and during her absence the car was stolen owing to the negligence of the respondent's servants. It was subsequently recovered by the police in a badly damaged condition.

Held, that the exemption clause should be construed as excluding liability for negligence, and, accordingly, the respondent was, notwithstanding the negligence of its servants, not liable for the damage sustained by the appellant as a result of the theft of the car.

Held, further, that there could not be implied into the contract of bailment a term that the appellant's motor vehicle could not and would not be obtained

or removed from the respondent's premises save on presentation of the " parking check " and obtaining in exchange therefor a delivery ticket.

Cases relating to the construction and effect of clauses absolving bailees from liability for negligence reviewed. Duty of bailee to notify police or bailor promptly on discovery of theft, considered.

Decision of the Supreme Court of Queensland (*O'Hagan* J.) *Davis* v. *Pearce Parking Station Pty. Ltd.* (1953) Q.S.R. 192 affirmed.

APPEAL from the Supreme Court of Queensland.

This was an action for damages for breach of contract heard before a judge (*O'Hagan* J.) without a jury. The plaintiff, Virgilius Davis, claimed from the defendant, Pearce Parking Station Pty. Ltd., carrying on business under the name or style of " Gough's Auto Parking Station ", the sum of £490 3s. 1d. for loss and damage suffered by the plaintiff to her Holden sedan motor car by reason of the breach by the defendant of a contract of bailment made on 23rd January 1951 whereby the plaintiff garaged her car at the defendant's parking station, paid to the defendant a sum of two shillings and sixpence and obtained from the defendant a receipt or " parking check ". During the absence of the plaintiff the car was stolen from the parking station. In her statement of claim the plaintiff alleged : 3. The following terms and conditions, *inter alia*, were indorsed on the receipt or " parking check " and formed part of the contract of bailment—(a) " This receipt must be exchanged at office for a delivery ticket before the motor vehicle can be obtained " and (b) " This check must be exchanged for a delivery ticket at office to obtain re-delivery of vehicle ", whereby the defendant undertook and agreed that the motor car (could not and) would not be obtained and/or removed from the parking station without the presentation of the said receipt or " parking check " at the defendant's office and, the obtaining in exchange therefor of a delivery ticket. 4. The defendant wrongfully and in breach of the contract (a) failed to take good care of the said motor car ; (b) failed to deliver the same up to the plaintiff when requested to do so pursuant to the said contract at about 4.30 p.m. on the twenty-third day of January one thousand nine hundred and fifty-one ; (c) permitted an unauthorized person to remove the motor car from the parking station between 12.45 p.m. and 4.30 p.m. on the twenty-third day of January one thousand nine hundred and fifty-one ; (d) committed a breach thereof in that between 12.45 p.m. and 4.30 p.m. on the twenty-third day of January one thousand nine hundred and fifty-one the motor car was obtained and removed from the parking station by an

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unauthorized person without his presenting the receipt or " parking check " at the defendant's office and obtaining in exchange therefor a delivery ticket.

By its defence the defendant denied that it " undertook and agreed " in the terms set out in par. 3 of the statement of claim or to the like effect, denied the allegations in pars. 4 (a) and (c) of the statement of claim and with reference to pars. 4 (b) and (d) of the statement of claim the defendant said " that late in the afternoon of 23rd January 1951 without any negligence on the part of the defendant the said motor car was stolen and driven away from the said parking station and the defendant immediately or very shortly after the said stealing and driving away of the said motor car used reasonable diligence to recover the said motor car and forthwith reported the loss thereof to the plaintiff and to the office of the Criminal Investigation Branch at George Street Brisbane."

The learned trial judge found that the defendant's servants had been negligent in two respects : (a) in placing the car near a public street without either keeping it under observation or removing the ignition key, and (b) in not taking immediate steps to notify the police, when all the circumstances pointed to an unauthorized removal.

The learned trial judge also held that the exemption clause on the back of the document was wide enough to protect the defendant against liability for negligence, that no undertaking as set out in par. 3 of the statement of claim could be implied, and that, even if such an undertaking could be implied, there was no delivery of the car to the thief nor was the thief permitted to remove it. The learned trial judge accordingly gave judgment for the defendant.

From this judgment an appeal was brought to the High Court. Grounds 3 and 4 of the Notice of Appeal were as follows : 3. The respondent expressly or impliedly agreed with the appellant—(a) that it would not permit any person to obtain the appellant's motor car unless such person presented the relevant " parking check " at the respondent's office and obtained in exchange therefor a " delivery ticket " ; (b) that no person would obtain the appellant's motor car unless such person presented the said " parking check " at the respondent's office and obtained in exchange therefor a " delivery ticket " and the respondent committed a breach of such agreement whereby the plaintiff suffered damage and such agreement was the basis or one of the bases upon which the parties contracted. 4. After the appellant's motor car was taken from the respondent's premises by an unauthorized person the respondent wrongfully and

in breach of its duty to the appellant failed to use due diligence to recover it whereby the appellant suffered damage.

D. B. O'Sullivan, for the appellant. The respondent is not protected by the exemption clause where damage is caused by breach of a fundamental term : *Bontex Knitting Works Ltd.* v. *St. John's Garage* (1) and on appeal (2) ; *Charlesworth* " *The Law of Negligence* ", 2nd ed. (1947), pp. 615-616 ; *Alexander* v. *Railway Executive* (3) ; *Halsbury's Laws of England*, 3rd ed., vol. 2, pp. 120. Renunciation of the contract is not the test of liability : *London & North Western Railway Co.* v. *Neilson* (4). An implied fundamental term is just as efficacious as an express one. It is not contended that the respondent did permit anyone to obtain the car but there is an implied undertaking that no person would obtain the car without producing a parking check. This was an implied fundamental term and was not fulfilled in that the car was obtained by an unauthorized person who did not produce a parking check. The exemption clause does not protect the respondent in respect of its failure to use due diligence to recover the car. The respondent had two separate and distinct obligations, (1) to take proper care of the car while it was in his custody and (2) to use due diligence to recover it when it was stolen : *Coldman* v. *Hill* (5). The exemption clause is referable only to the first obligation, i.e., it operates only while the car is being " garaged ". Exemption clauses must be construed strictly and *contra preferentem* : *Rutter* v. *Palmer* (6). Clear terms must be used to limit liability in respect of negligence arising after the termination of the bailment.

H. T. Gibbs, for the respondent. Where the only basis of liability is negligence then the exemption clause is construed as covering it : *Alderslade* v. *Hendon Laundry Ltd.* (7) approved in *Canada Steamship Lines Ltd.* v. *The King* (8). No term such as is suggested by the appellant can be implied because it would be inconsistent with the express language of the exemption clause : *Ashby* v. *Tolhurst* (9).

[FULLAGAR J. referred to *Moran* v. *Lipscombe* (10).]

Dicta in that case were not approved in *Crouch* v. *Jeeves* (1938) *Pty. Ltd.* (11). If a term is to be implied it can only be that the respondent undertakes not to voluntarily deliver the car to anyone who

(1) (1943) 2 All E.R. 690.
(2) (1944) 1 All E.R. 381n. ; 60 T.L.R. 253.
(3) (1951) 2 K.B. 882.
(4) (1922) 2 A.C. 263.
(5) (1919) 1 K.B. 443, at p. 449.
(6) (1922) 2 K.B. 87, at p. 92.
(7) (1945) 1 K.B. 189, at p. 192.
(8) (1952) A.C. 192, at pp. 207-208.
(9) (1937) 2 K.B. 242, at pp. 253-254, 258-259.
(10) (1929) V.L.R. 10.
(11) (1946) 46 S.R. (N.S.W.) 242 ; 63 W.N. 147.

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does not present a parking check. There is nothing to suggest that the respondent undertakes that the car will not be taken by anyone without a parking check. If there has been a breach of any implied term there has been no departure from carrying out the contract in the way the parties envisaged but merely a negligent performance: *London & North Western Railway Co.* v. *Neilson* (1). It is not every departure from a bailor's instructions that will render a bailee liable: *Tobin* v. *Murison* (2). To "garage" is defined in *Webster's New International Dictionary*, 2nd ed., (1935) as meaning "to keep or put in a garage". Here the expression "for garaging" means "for putting in a garage". In any event the loss did occur while the car was being garaged. The bailee has one duty, viz. to take reasonable care for the security and delivery of the goods bailed. The duty to use reasonable diligence to recover them if they are stolen is part of the general duty: *Coldman* v. *Hill* (3). This general duty is covered by the exemption clause.

D. B. O'Sullivan, in reply. There was no loss at all while the car was being garaged. Loss occurred later when the car was damaged in Adelaide and was the result of breach of residual duty to use due diligence to recover the car.

Cur. adv. vult.

Sept. 8.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Supreme Court of Queensland (*O'Hagan* J.) in favour of the defendant in an action at law.

The defendant, which carries on business under the trade name of "Gough's Auto Parking Station", is the proprietor of a motor garage and parking station at the corner of Charlotte and Albert Streets in the city of Brisbane. On 23rd January 1951 at about 12.30 p.m. the plaintiff drove her Holden sedan motor car to the defendant's garage, and left it there in the defendant's custody. She paid the sum of two shillings and sixpence to a servant of the defendant, and received a printed document (exhibit 1) in two parts with a perforation between the parts. The first part is headed "Delivery Ticket", and contains nothing that is relevant. The second part is headed "Parking Check". It contains on its face (*inter alia*) the following words: "For garaging, subject to conditions set out on back hereof. This receipt must be exchanged

(1) (1922) 2 A.C. 263, at pp. 272, 273.
(2) (1845) 5 Moore 110, at pp. 127-128 [13 E.R. 431, at pp. 438-439].
(3) (1919) 1 K.B. 443, at pp. 448, 450, 452.

at office for a delivery ticket before the motor vehicle can be obtained". On the back of the document are the words: "Conditions—The motor vehicle mentioned on the other side hereof is garaged at owner's risk, and Gough's Auto Parking Station will not be responsible for loss or damage of any description. This check must be exchanged for a delivery ticket at office to obtain re-delivery of vehicle. No servant or agent has authority to waive or modify any of these conditions".

It has been common ground throughout that the defendant received possession of the car as a bailee for reward, and that the terms of the contract of bailment included the terms set out on the face and back of the "parking check". Both assumptions are, in our opinion, correct. The words "delivery" and "re-delivery", and the reference to the "garaging" of the car, preclude here the view taken on the facts in *Ashby* v. *Tolhurst* (1) that the relation of the parties was merely that of licensor and licensee.

The plaintiff told a servant of the defendant that she would be calling for the car at about 3 p.m., and an entry to that effect was made on the butt from which exhibit 1 had been taken. At about that hour a servant of the defendant named Dorothy Smith moved the plaintiff's car from the position in the garage in which it had been placed, and parked it very close to, and facing, the footpath in Charlotte Street. The ignition key had, as is usual, been left in the switch. In its new position all that anyone who wished to take the car away had to do was to enter the car, start the engine, and drive over the footpath into Charlotte Street. It should be mentioned that Miss Smith was familiar with the plaintiff's car, and was accustomed to refer to it as "Holden 275", those being the last three figures of its registration number.

The plaintiff did not in fact return to take the car until about 4.30 p.m. What happened in the meantime and immediately after her arrival may be narrated in the words of the learned trial judge: "About 4 p.m. that same afternoon Miss Smith was returning to the office from parking a car when she noticed a man, whom she describes in her evidence as a presentable, reasonably dressed man, driving a black Holden sedan car over the footpath into Charlotte Street from the position in which she had parked the plaintiff's car an hour before. She was at the time only a few feet from him and on his driving side. As the car moved slowly across the footpath she asked the driver, who was a stranger to her, if he had handed in his parking ticket at the office. He had a slip of paper in his mouth, and he merely nodded in the direction of the office, which

(1) (1937) 2 K.B. 242.

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was some thirty-five yards away, and continued to drive on. Though Miss Smith believed that the car which was being driven away was the plaintiff's, all she did was to proceed to the office and have a search made to ascertain if the plaintiff's parking ticket had been handed in. A seven minute search revealed that it had not. She said in evidence that her attitude of mind up to that stage was that she believed that the car in question was the plaintiff's and that the plaintiff had sent somebody to the defendant's premises to get it for her, but she was not certain that it was the plaintiff's car and that, as a result of the search, she concluded it was someone else's black Holden sedan car that she had seen driven away. No further inquiry or search was made until the arrival of the plaintiff. The plaintiff arrived back at the defendant's premises about ten minutes after Miss Smith's search for her parking check had been completed. It was then about 4.30 p.m. She produced exhibit 1 which was taken by the defendant's foreman, whose name also was Smith. He made a twenty minute search of the premises without, of course, finding the plaintiff's car. He then informed the plaintiff that her car had been stolen. That was the first intimation the plaintiff had received that her car was not safely in the defendant's custody in its parking station. Smith informed the Criminal Investigation Department of the theft, but it was then about 5 p.m. and the car had been stolen an hour before." The car was subsequently recovered by the police in Adelaide in a badly damaged condition, and the thief was convicted and sentenced to a term of imprisonment.

His Honour correctly defined the duty which rests at common law on a bailee in the position of the defendant. His duty is to exercise reasonable care in and about the custody of the goods placed in his hands. In particular, he is bound to take reasonable care to safeguard the property against theft. Moreover, if the property is stolen, he is bound, as soon as he becomes aware of that fact, to notify the bailor or the police, so that immediate steps may be taken towards its recovery. If the property is lost, stolen, damaged or destroyed, the burden lies on the bailee of proving that the loss, theft, damage or destruction has not been caused by any failure on his part to exercise reasonable care. In particular, if the property is stolen, and he does not promptly after discovery of the theft notify the bailor or the police of that fact, the burden lies on him of proving that prompt notification to the bailor or to the police would not have led to the recovery of the goods undamaged : see *Coldman* v. *Hill* (1).

(1) (1919) 1 K.B. 443.

His Honour then found that the defendant's servants had been negligent in two respects. He found that it was negligent to place the car in the position in which it was placed, immediately adjacent to Charlotte Street, without either keeping it under observation or removing the ignition key. He also found that, while Miss Smith could hardly have been expected to attempt to interfere physically with the man who was driving the car away, yet all the circumstances pointed to the conclusion that the car had been stolen, and immediate steps should have been taken to notify the police. As things were, no steps were taken until nearly an hour later, and clearly, in his Honour's view, it could not be maintained that, if immediate steps had been taken, the thief would not have been intercepted before the car was damaged.

These findings were not challenged, and could not, we think, have been successfully challenged, by the respondent. A prima facie case of liability being thus established, it became necessary for his Honour to consider whether the defendant was exonerated by the exempting clause on the back of the parking check. His Honour held that that clause had the effect of exonerating the defendant from liability. That view is, in our opinion, correct. That provision has been set out above. It is a two-fold provision. It says, in the first place, that the car " is garaged at owner's risk." It says, in the second place, that the defendant " will not be responsible for loss or damage of any description."

The effect of more or less similar provisions in various classes of contracts of bailment has been considered in a quite remarkable number of cases. It has never been doubted that a bailee may exempt himself by express contract from the consequences of negligence on the part of himself or his servants. But it has been repeatedly said that an exempting clause must be construed strictly, and that clear words are necessary to exclude liability for negligence. In *Price & Co.* v. *Union Lighterage Co.* (1) *Walton* J. said :—" The law of England . . . does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants ; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms " (2). The decision of *Walton* J. in that case was that the bailee had failed to exclude liability for negligence, and his decision was affirmed by the Court of Appeal (3).

The difficulties to which the requirement of " strict construction " has given rise are well illustrated by the differences of judicial

(1) (1903) 1 K.B. 750.
(2) (1903) 1 K.B., at p. 752.
(3) (1904) 1 K.B. 412.

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opinion which arose in *Rosin & Turpentine Import Co. Ltd.* v. *Jacob & Sons Ltd.* (1) a case in which negligence was expressly mentioned in the exemption clause, and in which the final decision (in the House of Lords) was, with one dissentient, in favour of the bailee. Contrast also *Moran* v. *Lipscombe* (2) with *Crouch* v. *Jeeves Pty. Ltd.* (3). It is hardly possible to reconcile all the cases. There are perhaps reasons for the adoption of a different approach to contracts for the carriage of goods by sea from that adopted where other classes of bailment—including contracts for the carriage of goods by land—are involved. According to *Halsbury's Laws of England* (2nd ed., vol. XXX, p. 332) an exemption clause in a contract for the carriage of goods by sea, if it is to protect against the consequences of negligence, " must expressly refer to negligence, since it is always strictly construed against the shipowner." And reference is made to *Leuw* v. *Dudgeon* (4); *Price* v. *Union Lighterage Co.* (5) and *The Pearlmoor* (6). But in *Travers & Sons Ltd.* v. *Cooper* (7) (a case of a warehouseman) a clause exempting from liability " for any damage however caused which can be covered by insurance " was held by the Court of Appeal (*Buckley* L.J. dissenting) to exempt from liability for negligence; cf. *Pyman S.S. Co.* v. *Hull & Barnsley Railway Co.* (8) (" damage however caused "). Both these decisions were based on the words " however caused ", and a distinction was drawn between general references to *kind* of damage (such as occur in the present case) and general references to *cause* of damage. A similar view had been taken in *Manchester Sheffield & Lincolnshire Railway Co.* v. *Brown* (9) where the contract was for the carriage of goods by rail. In that case Lord *Blackburn* said that, when a man says he will not be responsible for damage however caused, that ought not to be " cut down and made, contrary to the intention of the parties, not to include the negligence of his servants " (10): cf. *Carr* v. *Lancashire & Yorkshire Railway Co.* (11); *Austin* v. *Manchester, Sheffield & Lincolnshire Railway Co.* (12) and cases cited by *Kennedy* L.J. in *Travers* v. *Cooper* (13).

In some cases a distinction has been drawn between cases, such as that of a common carrier, in which the responsibility of the bailee, apart from special contract, is that of an insurer, and cases, such as that of a warehouseman, in which, apart from special contract, there is no liability in the absence of negligence. It has

(1) (1910) 100 L.T. 366; 101 L.T. 56; 102 L.T. 81.
(2) (1929) V.L.R. 10.
(3) (1946) 46 S.R. (N.S.W.) 242; 63 W.N. 147.
(4) (1867) L.R. 3 C.P. 17 (n.).
(5) (1904) 1 K.B. 412.
(6) (1904) P. 286.
(7) (1915) 1 K.B. 73.
(8) (1915) 2 K.B. 729.
(9) (1883) 8 A.C. 703.
(10) (1883) 8 A.C., at p. 710.
(11) (1852) 7 Ex. 707 [155 E.R. 1133].
(12) (1850) 10 C.B. 454.
(13) (1915) 1 K.B., at p. 94.

been said that in the former class of case general words may be apt to exclude the liability of an insurer but not liability for negligence, whereas in the latter class of case similar words may be held to exclude liability for negligence on the ground that on any other view they would be entirely without effect. The distinction is logical, and has high authority to support it, though it is possibly open to criticism on the ground that the bailor at any rate is not likely to have had in mind at all the difference between liability for negligence and liability without fault. If we put cases of the carriage of goods by sea on one side, it is only by virtue of a somewhat artificial analysis that he is taken to be bound by a provision which is, in the typical case, printed on a ticket. On the other hand, if he actually read such a clause as that which came in question in *Brown's Case* (1) he would most probably think it meant that he could have no claim in any event, though, if he were asked, he would probably say that wilful damage was not within the protection of the clause. Such considerations seem to have been what Lord *Blackburn* had in mind in the passage cited above from *Brown's Case* (2).

The present case is a case in which general words are used, and there is no special reference to any manner in which loss or damage may be caused. On the other hand, the case is clearly one in which the bailee would not, apart from special contract, be liable for loss or damage occurring without negligence. And there is, in our opinion, ample authority to justify construing the exemption clause as excluding liability for negligence.

In *McCawley* v. *Furness Railway Co.* (3) a passenger had sustained personal injury in a railway accident. A plea that he had agreed to travel " at his own risk " was held good, and a replication alleging negligence was held bad. (The railway company was, of course, not a common carrier of passengers). A precisely similar case was *Gallin* v. *London & North Western Railway Co.* (4). The case of *Mitchell* v. *Lancashire & Yorkshire Railway Co.* (5) might be thought to tend in the opposite direction, but the contract in that case was of a very special character. So also was the contract in *Canada Steamship Lines Ltd.* v. *The King* (6). In *Rutter* v. *Palmer* (7) the defendant bailee relied on the words " Cars driven at customer's sole risk ", and it was held by the Court of Appeal that he was protected from liability for negligence. No valid distinction can be drawn between " customer's risk " and " customer's sole risk " : cf. *Ashby* v. *Tolhurst* (8). Again there are

(1) (1883) 8 App. Cas. 703.
(2) (1883) 8 A.C., at p. 710.
(3) (1872) L.R. 8 Q.B. 57.
(4) (1875) L.R. 10 Q.B. 212.
(5) (1875) L.R. 10 Q.B. 256.
(6) (1952) A.C. 192.
(7) (1922) 2 K.B. 87.
(8) (1937) 2 K.B. 242.