

Wicks and Harnett ~ A case about Mislaid, Misplaced Garbage



By Brian Madigan LL.B.

This is an annotated version of the decision of the Honourable Mr. Justice Lederer of the Superior Court of Justice. For those who have an interest in the case, this version offers greater detail than my previous articles. I have edited out many of the details for the sake of brevity, so, if you need the complete version, you will have to look it up, or contact me, and I can send it to you.

“Lederer, J:

[1] This is a case about ownership. The question is whether material which is found in what, in the normal course, would be identified as garbage inexorably becomes the property of the person who happens upon it.

Background

[2] Ben Wicks was a cartoonist. For Canadians of a certain age, he obtained a level of notoriety in Toronto and across the country. His output was prodigious. This action concerns the ownership of approximately 2,800 of the many drawings he produced. These originals were discovered in two plastic garbage bags by the defendant, Richard Harnett, as he cleaned out a garage associated with the home his brother, David Harnett, had purchased from Vincent Wicks, who is the son of Ben Wicks.

Order

[3] For the reasons that follow, I find that the cartoons and drawings are owned by the plaintiff, the Estate of Doreen Wicks, and are to be returned to it. The defendant, Richard Harnett, is ordered to pay to the Estate of Doreen Wicks the sum of \$425 for the wrongful conversion of the two cartoons which were sold.

The Facts

[4] There is no substantial disagreement as to the facts.

[6] The evidence is clear he sought to keep them all. His children were given the task of cutting out the cartoons and pasting them into scrapbooks. Originals that were sent to King Features were returned and put into bags and boxes. These boxes and bags contained the product of Ben Wicks' work: manuscripts, paintings and the cartoons. There was no organization or cataloguing of this material.

His friend, David Crombie, testified that he was not a person who threw things out. His colleague, Andy Donato, confirms that, after printing, originals were returned and then placed in a drawer in Ben Wicks' desk. In time, there were too many boxes. They needed to be stored. His daughter explained to the court that he did not want these boxes and bags placed with a storage company. He preferred to leave them with members of his family. She described him as excited when she married, in part, because there would be space in her new home for some of this material. She described a walk-in closet filled with boxes, a crawl space taken up by this material and the storage locker at the condominium purchased by her parents also being fully utilized for this purpose. Some of these boxes, as well as plastic bags, which contained this work product were left in the garage of the home owned by Vincent Wicks and his wife Lori. In time, they divorced and when she gave evidence, she did so under the name Lori Pearson.

[7] The material was not simply left. From time to time, Ben Wicks would seek out and reclaim pieces he required for his work. Among the reasons the cartoons were maintained was their value and utility.

[8] It became possible to donate this work to archives and universities in return for a tax receipt which was another means used by Ben Wicks to realize on the value of the cartoons he produced. He made such contributions to the National Archives and to Ryerson University.

[9] In 1992, Vincent Wicks sold his home to the defendant's brother, David Harnett. The closing was to take place on July 30, 1992. Vincent, Lori and their children moved out a day or two before the closing...

She instructed the movers to take the material in the garage. All the boxes and bags of work material were to be moved to Vancouver. The movers were told "everything in the garage goes with us".

The bags and boxes were not labelled. The fact that there was no labelling informed Lori which boxes and bags originated from the garage and, therefore, where they were to go in the new house in British Columbia.

From the perspective of the Wicks family, there was no expectation other than that all the boxes and bags of material, stored in the garage in Keswick, would be loaded on the truck and moved to British Columbia.

[11] David Harnett and his wife moved into the house. As part of his inspection of the property prior to purchase, he had examined the garage. It was full to the point that he was unable to enter. On July 30, 1992, the day he moved into his new home he visited the garage. He testified, that there were two old televisions, screen door remnants, rusty garden tools, garbage bags and a few boxes. There was considerably less in the garage than there had been on his previous visit.

[12] Some weeks later, probably the week before school started in September (both Richard and David Harnett are schoolteachers), Richard Harnett undertook to clean out the garage. There were approximately twenty plastic garbage bags. He opened three of these. The first and the second contained drawings and some kitchen waste. The drawings piqued his interest and he dropped the ones that were clean and not soiled into a box. The third bag contained maggots. He thought them without value.

[16] The boxes and other bags were delivered to Vancouver. Because they were unlabelled Lori knew to direct them to the crawl space in their new home. This had been identified as the location where the work produced by Ben Wicks was to be stored. In the months that followed, to see her grandchildren, but also to reclaim the material stored in the crawl space.

[18] Ben Wicks died in the year 2000 shortly before Richard Harnett began the process of trying to determine who held the copyright to the works of Ben Wicks.

[20] The Statement of Claim was issued on April 25, 2002 and served shortly thereafter. In the interim, the defendant, Richard Harnett, delivered five of the drawings to a gallery to see if they could be sold. Of the five, two were sold, one for \$200, and the other for \$225. The remaining three are still in the possession of the gallery. It is as a result of this sale that the plaintiff claims for conversion.

[21] plaintiff seeks the return of the cartoons and the \$425 obtained through the sale of two of the drawings found by Richard Harnett when he cleaned out his brother's garage.

The Law

[22] An understanding of the applicable law begins with an appreciation of the importance of ownership. This has been expressed as the duty we owe to our neighbour, who is the owner of goods.

At common law, one's duty to one's neighbour, who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods, which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril. It is incumbent upon the plaintiff to prove the goods belong to it...

[23] Nonetheless, ownership can be lost where the owner abandons the goods. Abandonment has been defined as:

Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the

owner with the specific intent of desertion and relinquishment casts away or leaves behind his property...

[24] This definition, expressed in this way, makes clear that there must be a finding of a specific intention to abandon the goods before ownership can be lost...or when after a casual and unintentional loss, all purpose further to seek and reclaim the lost property is given up.

[25] This should not be taken as detracting from the requirement that intention is a necessary constituent of abandonment. Intention may be express or it may be implied. In their text, the authors continue:

See *The Law of Personal Property* (3rd ed., W. Raushenbush, 1975), s. 1.6. While the idea of abandonment can thus be clearly expressed, its application to a particular case, as Professor Brown goes on to explain, can be more difficult.

The question, whether there is an abandonment or not, thus turns on the fact of intent to be determined in the light of all the circumstances. Without the intent there can be no abandonment... the intent to abandon, or not, is harder to determine, however, when there is no positive evidence there, and the finding as to intent depends upon the prior owner's failure after a lapse of time to take steps to reclaim his property. The only reasonable generalization which can be distilled from the decided cases is one often heard by, and often frustrating to, law students: "It depends on the facts".

[26] Failure to look for property that has been unintentionally lost is one factor that, depending on the particular facts, may contribute to the inference of an intention to abandon.

[27] Once ownership has been established, the onus of proving abandonment rests with the defendant:

The respondents, having raised the defence of neglect and abandonment, had the burden of establishing, on the balance of probabilities, that the appellant had indeed abandoned the (property)....

[28] Simply stated, the questions of law raised by this case are whether the plaintiff has established ownership of the cartoons and if it has, whether the defendant has demonstrated an intention, either express or implied, that they were to be abandoned. The answer depends on the facts and how they are to be interpreted within this legal framework.

Analysis

[29] Ownership is not in dispute in any substantive way. The cartoons were produced by Ben Wicks and were owned by him. When he died, ownership passed to his wife, Doreen. When she died, ownership passed to, and continues to

be owned by, her estate. An order was produced demonstrating that this action was continued in the name of the Estate of Doreen Wicks. In his submissions, counsel for the defendant, suggested that ownership was transferred to Vincent Wicks. There is no evidence to support this contention and counsel did not press this proposition. Ben Wicks, while he was alive, continued to make use of and reclaim the cartoons as he needed them for his work or as he donated them to the National Archives and Ryerson University. Upon hearing of the separation of his son, his wife travelled to Vancouver for the purpose of having the material stored there returned to Toronto.

[30] It was acknowledged by the parties that there was no express demonstration of an intention to abandon these cartoons.

"societal norms". Intention should be inferred because people generally finding material in the garbage would determine that it had been abandoned. This misses the point. It is the intention of Ben Wicks which lies at the core of this determination. It is his actions and the actions of the other members of his family from which that intention is to be inferred. This is consistent with a policy determination that is based on the idea that ownership is to be respected and that others are not to be easily enriched at the cost of the true owner.

[31] The actions of Ben Wicks and his family demonstrate an intent to maintain rather than abandon ownership. While it could have been catalogued and organized, the fact remains the material was gathered together and stored in a variety of locations. Ben Wicks continued to demonstrate his intention to maintain ownership of his work product by, from time to time, retrieving and making use of some of his cartoons and drawings. The instructions provided to the movers were clear and unequivocal, all the boxes and bags, in the garage were to be delivered to Vancouver. Upon learning of their son's separation, the material stored in the home he shared with his wife was claimed by Ben Wicks' wife, Doreen Wicks.

[32] At no time during the conversations the defendant had with Doreen Wicks, Vincent Wicks or Matie Molinaro did any of them suggest that ownership to the cartoons had been given up. While Vincent Wicks was slow to respond to the contacts made by the defendant, the fact remains that within a short time of learning of the volume of material in the possession of the defendant, a demand for the return of the drawings was made.

[33] The evidence, taken as a whole, does not, on a balance of probabilities, demonstrate any implied intention to abandon this material.

[34] The prima facie case is made out by the appearance of the drawings in bags with garbage. There is too much evidence concerning the continued ownership of this material by Ben Wicks, his wife and her estate for it all to be set aside by the adverse inference proposed.

[35] The drawings are to be returned. It is only after the letter demanding the return of the drawings, a letter that sets out the legal basis for the return, that the defendant delivered the five cartoons to the gallery and sold two of them. He knew the risk but nonetheless went ahead. The money which he received for the sale (\$425) is ordered to be paid to the plaintiff, the Estate of Doreen Wicks.

Costs

[36] No submissions were made as to costs. Counsel indicated that they had discussed this issue and may be able to come to some agreement. In the event that they cannot, I will receive submissions, in writing, on the following terms: on behalf the plaintiff within fifteen days of the release of these reasons and from the defendant ten days thereafter. In any event, such submissions are to be no longer than three pages.

LEDERER J.”

COMMENT

While this case deals with ownership and the rights of the original owner, there are other cases which deal with the issue of privacy and the right to search garbage bags and their contents by the police and others.

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