

CITATION: *Pratt Plumbing v John Zagorianos* [2011] NTMC 012

PARTIES: PRATT PLUMBING

V

JOHN ZAGORIANOS

TITLE OF COURT: Local Court

JURISDICTION: Small Claims

FILE NO(s): 21028722

DELIVERED ON: 6 April 2011

DELIVERED AT: Darwin

HEARING DATE(s): 29 March 2011

JUDGMENT OF: J Johnson JR

CATCHWORDS:

NEGLIGENCE - STANDARD OF CARE

REPRESENTATION:

Counsel:

Worker: Mr Pratt
Employer: Mr Zagorianos

Solicitors:

Plaintiff: N/A
Defendant: N/A

Judgment category classification: C
Judgment ID number: [2011] NTMC 012
Number of paragraphs: 31

IN THE SMALL CLAIMS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21028722

BETWEEN:

PRATT PLUMBING
Plaintiff

AND:

JOHN ZAGORIANOS
Defendant

REASONS FOR JUDGMENT

(Delivered 6 April 2011)

Mr J JOHNSON JR:

1. In May 2010 the defendant's toilet became blocked. His residential dwelling was, I am told, constructed immediately following "Cyclone Tracy" and, in the rush to provide housing immediately post-cyclone, plumbing and drainage systems were installed and approved which would not comply with present day standards. That circumstance, along with the 35 year age of the overall system, meant that blockages to the defendant's toilet were not an altogether infrequent event.
2. As a result, the defendant had over the years developed a relationship with a particular plumbing company. This company, apparently being familiar with the vagaries of the defendant's aged plumbing scheme, had a well proven methodology for rectifying such blockages in the sewerage system. It involved removing the toilet 'pan' from the floor of the external bathroom toilet, introducing a sewer machine at that point, clearing the blockage, and then reinstalling the toilet pan to the floor.

3. However, on the occasion of the blockage in May 2010, the services of that particular plumber were otherwise engaged and the defendant was advised that he would have to utilise an alternative plumber. The defendant thereupon telephoned the plaintiff who provided a quote of \$150 to clear the blockage and the defendant engaged him upon that basis.
4. On 7 May 2010 two employees of the plaintiff, Mr Chris Anderson and “Aden” attended at the defendant’s premises. Chris Anderson was a third or fourth year apprentice and Aden was a labourer. After first checking for, and not finding, an inspection opening, they immediately went to the overflow relief gully (“the ORG”) at the premises and proceeded to introduce a sewer machine into the ORG as the preferred method of clearing the blockage. The sewer machine uses a “snake” mechanism to navigate through the sewerage pipes, clearing any debris, tree roots and the like, causing the blockage. Unfortunately, on this occasion the snake (or snake “head”) broke off in the sewer. It appears that some attempts were then made to retrieve the snake. The defendant says that the snake broke about 10 minutes after it was introduced and that, notwithstanding being charged for the attendance of 2 men for 2 hours, in fact only Mr Anderson attended on that first day. In the event, attempts at retrieving the severed snake were unsuccessful.
5. The following day (8 May 2010) the 2 men returned to the premises and spent a further 5 hours attempting to retrieve the broken snake, again without success.
6. The 9th of May being a Sunday, there was no attendance but on Monday (10 May 2010) the 2 men again returned to the premises with, from what I could glean from the evidence, an overriding priority to retrieve the broken sewer machine snake. For the next 8 hours, the 2 men, having removed the bath, proceeded to jack hammer through the tiled concrete floor of the bathroom and dig down to gain access to the sewerage pipes and the severed sewer machine snake. The photographs put into evidence by the defendant (Exhibit

- 6) graphically show the extent of excavation that was necessary for that purpose.
7. During the course of the days work on 10 May, the 2 men also cleared the blockage in the sewer by removing the pan of the toilet and introducing a sewer machine as described in paragraph 1 above.
8. There was no attendance on 11 May, but on the following day, 12 May 2010, the 2 men again returned to the premises and spent a further 8 hours digging down to expose and repair the pipes.
9. Finally, on 13 May 2010, after 3 men had spent a further 6 hours at the premises, the broken snake had been retrieved; all pipes were said to have been repaired and declared to be in compliance with the relevant code; and the plaintiff left the premises. However, in doing so the plaintiff failed to reinstate either the bath or the area of tiled concrete flooring in the bathroom which had been jack hammered out. The defendant's toilet had, it is true, been unblocked but he was left with an uncovered dirt depression in his bathroom floor (the dimensions of which were estimated at 1m x 700mm by the plaintiff and 2m x 1m by the defendant) with 2 unconnected pipes sitting atop. That uncovered area of dirt floor space, I am told, remains to this day.
10. For all of that, the plaintiff tax invoiced the defendant for 46 hours of work in total (24 hours for a plumber and 22 hours for a labourer). By the time the cost of machine hire and materials were added, the tax invoice presented to the defendant totalled \$1,982.84 including GST. The plaintiff says that this tax invoice was discounted by not charging his normal hourly rate for a plumber.
11. The defendant has refused to pay that tax invoice and the plaintiff has brought this action in recovery as a result. For his part, the defendant has

brought a counterclaim in the amount of \$9,999.00 for the cost of restoring his bathroom floor and rectifying the plumbing to its original state.

Consideration of the Issues

12. The decision to go directly to the ORG was a controversial one. The evidence of Mr Hadfield was that there was no hard and fast rule and different plumbers would approach the issue in different ways. It appears that the plaintiff as a general rule went straight to the ORG.
13. The evidence as to why the sewerage snake broke off after its introduction into the ORG remains unclear to me. The snake was, I am told, only 3 months into its normal 2 year service life. Perhaps it was caused by the aged design of the ORG in particular or the sewerage system more generally, given that it was installed some 35 years ago. The defendant now says that one of the reasons he chose the services of the plaintiff was that he advertised a “sewer camera” and if there were any doubts, given the age of the system, the plaintiff should have first used this camera to locate any blockage prior to introducing the sewer machine. The plaintiff responded that the camera was not used for that purpose as there was insufficient light in a sewer pipe to see anything. The defendant responded that such cameras were fitted with an artificial light source for exactly that purpose.
14. Notwithstanding, it appears to me that even the most rudimentary standard of care would require a skilled plumber to properly assess the scope and methodology of the work he was about to embark upon. That might include considering the age of the premises; the overall layout of its sewerage system; the location of the various waste fixtures and inspection covers; and, perhaps, discussing those issues with the defendant before making a final decision on the most appropriate way to proceed. Whilst I cannot be entirely sure of the way in which Mr Anderson approached that inquiry, it appears that a quite arbitrary, and ultimately costly, decision was taken to attack the problem directly at the ORG.

15. The defendant's evidence was that he discussed with Mr Anderson the usual methodology of removing the toilet pan to access the system, but Mr Anderson's response was that the pan may be damaged in the process and it was therefore "too expensive". The defendant's response was that it was "okay" because, in that event, he had a replacement on hand.
16. As it turned out, the cost to the defendant was far in excess of the replacement cost of a toilet pan, but the vast majority of that cost was incurred in the retrieval of the broken sewer snake; not in clearing the blockage to the toilet for which the plaintiff's services had been engaged.
17. The decision to enter the system through the ORG was entirely that of the plaintiff. In those circumstances, it seems to me that if an appropriately qualified plumber exercising reasonable care and skill causes damage either to his own equipment or to the system upon which he is working, the appropriate course of action would be to either call upon his insurer or rectify the damage at his own expense.
18. The decision to dig up the bathroom floor was inevitable once it became apparent that it was the only available method of retrieving the broken snake. However, I fail to see how the defendant can properly be held to account for the cost of that retrieval, let alone the cost of replacing the bath and rectifying the excavation site in the bathroom floor.
19. In my opinion a properly skilled plumber, on an assessment of the age of the premises, should have foreseen that attacking the problem at the ORG with little forethought had the potential to cause damage to his equipment or the system itself. If he had mentioned that possibility to the defendant I have no doubt that the defendant would have insisted upon the methodology which up until that time had been successful ie, introducing the sewer machine through the toilet outlet.

20. At the time the work was undertaken, Mr Anderson was a third or fourth year apprentice (he could not recall which) and was required to be under supervision. Part 6 of the *Plumber and Drainers Licensing Act* provides for certain offences if that is not the case. Of relevance here are sections 38(2) and 43 of Part 6 which respectively provide that:

38(2) Subject to section 39, a person who does not hold a registration card or licence shall not carry out plumbing or draining work otherwise than in the employment of an advanced tradesman and under the supervision of an advanced tradesman or a journeyman.

43 Insufficient supervision or control

For work carried out under this Act, an advanced tradesman must not:

(a) fail to exercise any; or

(b) exercise insufficient,

direction over a journeyman, apprentice or other worker employed by him or under his control.

21. Clearly then, Mr Anderson was required to be under direct supervision and control for work carried out under the Act. In my opinion, this was not the case. Whilst Mr Pratt attended the premises for a short time on 8 May 2010 and there was, no doubt, regular telephone contact between them, I am of the view that that falls short of the standard of supervision required by the Act. The critical decision to attack the problem from the ORG; the time taken in attempting to retrieve the severed snake; and the extensive excavation and repair tasks undertaken over a period of 3 days, were for all intents and purposes under the control of Mr Anderson.

22. Whilst I accept that Mr Anderson was an “experienced” apprentice and that it would not be productive or realistic for him to be supervised on an hour-by-hour basis, on a job of the complexity and cost which this eventually became, and for which the expectation was that it would all be at the expense of the defendant, I believe that the Act calls for a higher and more

pro-active level of supervision than was here provided. Again, if the defendant had been advised that some decisions in relation to the work and the work itself were to be undertaken by an unsupervised apprentice, he may have chosen an alternative service provider.

23. Finally I should mention that when I queried the parties as to what each expected to be done about the uncovered floor space left in the defendant's bathroom, the plaintiff indicated that he "presumed" the defendant would cover the cost of rectification and that there was agreement to that effect. The defendant vigorously denies any such agreement or liability for the costs of rectification. With the greatest respect, it seems extraordinary to me that a professional plumber of the plaintiff's experience would simply abandon such a state of affairs and sue on his tax invoice.

Findings

24. I find that the plaintiff's duty upon being called to the defendant's premises was to exercise reasonable care and skill in providing the defendant with advice and work on the blocked sewerage system. The standard of reasonable care and skill that the plaintiff was required to exhibit was that of an ordinary skilled plumber.¹
25. In my opinion, the plaintiff failed to exercise the requisite standard of reasonable care and skill imposed by the law. I find so on the basis of my factual conclusions that the plaintiff failed to:
- properly assess the age and particular nuances of the sewerage system before commencing the work;
 - properly supervise the apprentice undertaking the work;
 - properly advise the defendant of the foreseeable scope and cost of the work; and failed to

¹ *Voli v Inglewood Shire Council* [1963] 110 CLR 74 at 84

- leave the bathroom at the premises in an operative state or to make arrangements for it to be returned it to an operative state at the completion of the work.

26. As a consequence, I will dismiss the plaintiff's claim.

The Defendant's Counterclaim

27. In support of his counterclaim the defendant introduced into evidence three quotations for the cost of rectification (Exhibit 4). I should say that the plaintiff objected strongly to that material going into evidence on grounds that the authors were not available for cross examination. I pointed out that the strict rules of evidence do not apply in the small claims jurisdiction² and that, ultimately, it was a matter of the weight which I attributed to such material. That said, I do remind myself that the authors of the quotations have not been tested in cross examination.
28. Of those three quotations, one covered a complete restoration of the bathroom and came in at \$24,540.00. The other two covered "plumbing work only" and made no estimate for the cost of re-instatement of the bathroom floor. One of these came in at \$7,000, the other at \$9,500. With minor amendment to correct typographical errors, I reproduce the higher of those two quotes below. It was provided by Mr Bob Mahony, the Plumbing Manager of All Hours Plumbing and Building Maintenance.

I recently attended the above mentioned property to estimate on repair to external bathroom. On inspection it was found that the bath had been removed and the bathroom floor jackhammered up. It was also noticed that the O.R.G. had been disconnected as well. Some of the drain has been replaced but not connected to the O.R.G or the rest of the drain. The work that had been done is not up to the plumbing code and in my opinion could not have

² Section 12 of the *Small Claims Act*

been done by a licensed plumber. To rectify the plumbing only and not anything to do with the structural work on the floor or building works would cost approx. \$9,500.00. This would not include plumbing fixtures e.g. pan – cistern – bath – taps. Due to the damage done to the floor I would recommend a building certifier be employed to make sure everything is up to code.

29. As far as I can ascertain, this quotation covers only that work which can properly be attributed to the plaintiff's failure to exercise the requisite standard of reasonable care and skill imposed by the law. On its face, it appears sufficiently authoritative and objective to me to allow a Court in this jurisdiction to base determinative findings on it. I should add that I make no findings in relation to the assertion that the work undertaken by the plaintiff was "not up to the plumbing code".
30. Given my findings at paragraph 25 above, in my opinion it is my task to, as best money can, place the defendant in the same position as he was prior to entering into the contract with the plaintiff. The cost to the defendant of rectifying the "plumbing only" has been estimated at between \$7,000 and \$9,500 but there is no estimate of the cost of reinstating the bathroom floor area.
31. In that circumstance, and mindful of the jurisdictional limit of this Court, I have decided to give judgement to the defendant on his counterclaim in the amount of \$9,500.

Orders:

1. The plaintiff's claim is dismissed.
2. Judgement is entered for the defendant on his counterclaim in the amount of \$9,500 and the plaintiff is to pay that amount to the defendant within 30 days of today.

3. No order as to costs.

Dated this 6th day of April 2011

JULIAN JOHNSON
JUDICIAL REGISTRAR