

1 Prince George Registry
2 No. 9170

3 IN THE SUPREME COURT OF BRITISH COLUMBIA

4 Prince George, B.C.

5 May 25, 1988

7 BETWEEN:)

8 STARDUST TRANSPORT LTD.,)
9 CLARK REEFER LINES LTD. and)
10 ROBERT W. HERMAN)

11 PLAINTIFFS)

12 AND:)

13 KEN FAWCETT and)
14 CLIFF FAWCETT)

15 DEFENDANTS)

REASONS FOR JUDGMENT

OF THE HONOURABLE

JUDGE LOW, LJSC

16 T.V. COLE, Esq.

for the Plaintiffs

17 D. BYL, Esq. and
18 O. HUI, Esq.

for the Defendants

19 THE COURT: (Oral) On October 1, 1985, a vehicle owned by the
20 plaintiff Stardust Transport Ltd. and driven by the
21 plaintiff Herman was in a collision with two horses owned
22 by the defendants on Highway 16 west of Vanderhoof, B.C.
23 It is admitted by the defendants that Mr. Herman was not
24 negligent. The sole issue to be determined is whether the
25 defendants or either of them are responsible in law for
26 the accident, that is, whether they failed to exercise
27 reasonable care in performing their duty to not let their

1 horses get onto the highway and cause damage to others.

2 The defendants own a farm near Highway 16. In fact,
3 the farm buildings front onto the highway, but at the time
4 of the accident, as I understand the evidence, that portion
5 of the farm was owned by their father. The father's
6 property was south of the highway and extended for one half
7 mile. Immediately to the south of that property, the
8 defendants had a pasture of rough land consisting of some
9 540 acres. To the south of that parcel, they farmed some
10 640 acres of cropland. Toward the southern end of the
11 pasture, a B.C. Hydro power line crossed from east to west
12 and was there some four or five years before the accident.

13 The defendants used the pasture to graze some 250 head
14 of cattle and approximately 20 horses. The pasture was
15 well and securely fenced. I find the defendants took
16 reasonable care to maintain the fences. On the northern
17 boundary of the pasture, a gate gave access to that portion
18 of the farm then owned by the defendants' father. There
19 were gates on the west and east sides of the B.C. Hydro
20 right of way.

21 For some time the defendants had difficulty with
22 intruders, mainly hunters, going onto the property and
23 leaving the east and west gates open. Initially, the
24 gates were locked, but that did not deter many inconsiderate
25 and destructive people who would use 4-by-4 vehicles to
26 rip them out or to take out fence posts to give access to
27 the property. To attempt to deal with that mentality, the

SELLINGER, ROSS & ASSOCIATES

OFFICIAL COURT REPORTERS
315 - 1488 FOURTH AVENUE
PRINCE GEORGE, B.C. V2L 4Y2

1 defendants simply left the gates secure but unlocked;
2 however, trespassers continued to leave the gates open. It
3 should be noted that the gates had to be there to give
4 B.C. Hydro access to the power lines. Signs were posted
5 that read "Please Close Gate."

6 In an attempt to deal with this difficult situation,
7 Mr. Ken Fawcett, who operated the farm, developed a policy
8 of regular inspection of the fence lines and the gates.
9 Throughout the year he checked the gates after weekends and
10 holidays when intruders were most likely to have been on
11 the property. During hunting season he checked the gates
12 every morning except when he was away making grain
13 deliveries. He always checked the gates on weekends during
14 hunting season.

15 The accident occurred during hunting season, on a
16 Tuesday. The previous weekend, on both Saturday and
17 Sunday, Mr. Fawcett drove the fence line and found it
18 secure except that the gates on the power line had been left
19 open. On the Monday he took a load of grain to
20 Williams Lake. The two horses struck by the plaintiffs'
21 vehicle got loose sometime during that day or during the
22 Tuesday prior to the time of the accident. That time was
23 not given in evidence.

24 Mr. Fawcett returned home the day after the accident
25 and inspected the fence and gates. The east and west gates
26 were open. There were fresh 4-by-4 tracks made by tires
27 with mud grip treads different from the tread on

SELLINGER, ROSS & ASSOCIATES

OFFICIAL COURT REPORTERS
315 - 1488 FOURTH AVENUE
PRINCE GEORGE, B.C. V2L 4Y2

1 Mr. Fawcett's 4-by-4. There were empty beer bottles in the
2 vicinity. The tracks and the beer bottles had not been
3 there during Mr. Fawcett's inspection the previous Sunday.
4 He concluded, rightly I think, that hunters had come onto
5 the property during his absence and left the gates open.
6 The fences were intact, and the gates being left open by
7 intruders probably on the Monday is a likely, and on the
8 evidence, the only explanation for the escape of the horses
9 from the pasture.

10 The plaintiffs base their case on Section 10(1) of the
11 Livestock Act, enacted in 1980. The defendants base their
12 defence on Section 10(2) of that statute. Those sections
13 read as follows:

14 10. (1) Subject to subsection (3), the
15 owner of livestock is liable for damage caused
16 by the livestock while the livestock is at large
17 contrary to this Act or the regulations or any
18 other enactment, and for the purpose of this
19 subsection, livestock shall be deemed at large
20 notwithstanding that it is tethered.

21 (2) Subsection (1) does not apply where an
22 owner establishes that his livestock was at
23 large as a result of an act or omission of a
24 person over whom he had no control or that he
25 took reasonable care to ensure that his livestock
26 was not capable of escaping and being at large
27 contrary to this Act, the regulations or any
other enactment.

28 The defendants admit the horses were at large contrary
29 to the Act. They say, firstly, that the horses were at
30 large because of the acts of a person or persons over whom
31 they had no control; and secondly, that they took
32 reasonable steps to prevent the livestock escaping and
33 being at large. Those two facets of Section 10(2) are

SELLINGER, ROSS & ASSOCIATES

OFFICIAL COURT REPORTERS
315 - 1488 FOURTH AVENUE
PRINCE GEORGE, B.C. V2L 4Y2

1 expressed disjunctively, and I accept the defence argument
2 that proof of the intervention by third party strangers is
3 a complete defence even if reasonable care was not
4 otherwise taken to keep the livestock enclosed.

5 However, in the event I am wrong in treating the two
6 parts of Section 10(2) disjunctively, I am satisfied that
7 Mr. Fawcett took reasonable care to ensure that a third
8 party stranger would not permit the livestock to escape.
9 He made regular and frequent inspections of the fence and
10 gates, particularly at times when intruders were most
11 likely to have been on the property. He had good fences
12 and gates and made repairs promptly, and he had signs
13 posted requesting that the gates be kept closed. It is
14 unfortunate that some people cannot act properly and
15 courteously when using or crossing the land of others, but
16 I do not know what additional steps the defendants could
17 reasonably have taken to deal with such people.

18 It has been suggested that a southern boundary fence
19 could have been put along the north edge of the Hydro
20 right of way, but I do not think it is reasonable to expect
21 the defendants to give up 40 acres of pasture to do that.
22 In any event, as Mr. Fawcett pointed out during his
23 evidence, hunters would leave open any gate in such a
24 fence or remove portions of the fence to get at those parts
25 of the pasture north of the right of way which are good
26 for bird hunting. It would not be a solution at all; it
27 would simply relocate the problem.

SELLINGER, ROSS & ASSOCIATES

OFFICIAL COURT REPORTERS
315 - 1488 FOURTH AVENUE
PRINCE GEORGE, B.C. V2L 4Y2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I find the defendants took reasonable steps to deal with a difficult situation and did not fail to do anything that could reasonably have been done in the circumstances. Their defence under Section 10(2) is made out.

The action is dismissed with costs.

SELLINGER, ROSS & ASSOCIATES

OFFICIAL COURT REPORTERS
315 - 1488 FOURTH AVENUE
PRINCE GEORGE, B.C. V2L 4Y2