IRVING OIL COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

CANADIAN GENERAL INSURANCE COMPANY (*Plaintiff*) ... RESPONDENT.

1958

*May 26, 27
Jun. 26

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Insurance—Public liability insurance—Exclusions—"Operation or use" of motor vehicle—Delivery of oil from tank-truck.

A servant of the plaintiff company, in delivering fuel-oil to a theatre, negligently allowed oil to escape into the building, which was shortly thereafter destroyed by fire. The owner of the building recovered judgment against the plaintiff based upon a finding that the negligence of the plaintiff's servant had been the cause of the damage.

The plaintiff claimed indemnity from the defendant which had insured it against, *inter alia,* public liability, under a policy that expressly excluded damage resulting from the "operation or use of any . . . motor vehicle".

Held: The action must fail. The case was indistinguishable from *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company,* [1956] S.C.R. 936.

There was no ambiguity in the exclusion, and the fact that another exclusion in a different part of the policy, which also referred to "operation or use" of a motor vehicle, expressly mentioned "the loading or unloading thereof" did not import into the exclusion here in question any ambiguity as to whether "loading or unloading" was included in "operation or use". The differences, both in the language and in the subject-matter of the two clauses, were sufficient to prevent the one from affecting the interpretation of the other.

On the pleadings as drawn in this action, it was not open to the plaintiff to contend that the cause of the damage, as found by the Courts in the original action, included a separate act of negligence of the plaintiff's

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

servant in failing to take steps to nullify the effects of the spillage, and that that negligence was not one arising from or caused by the "operation or use" of the truck.

Per Rand J.: Even if this issue were open on the pleadings, the plaintiff could not succeed since the truck operator's failure to take steps to nullify the consequences of his own negligence was not a violation of an original duty toward the theatre-owner, the breach of which created a new cause of action.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, affirming a judgment of Bridges J. dismissing the action. Appeal dismissed.

A. J. Campbell, Q.C., and *E. Neil McKelvey*, for the defendant, appellant.

A. B. Gilbert, Q.C., and *A. N. Carter, Q.C.*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—Mr. Campbell agrees that his first point has been determined adversely to the appellant by the decision of this Court in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[1], unless, as he contends, there is an ambiguity in the second exception in the property liability endorsement. For the reasons given by Mr. Justice Rand I can find no such ambiguity.

As to Mr. Campbell's second point, my view is that it is not open to him to contend that the cause of the fire, as determined in *F. G. Spencer Co. Ltd. v. Irving Oil Co. Ltd.*[2], included the failure of the tank-truck operator to take some step after he had negligently spilled the oil. A consideration of the pleadings in the present action and of what occurred at the trial leaves no doubt that there was no arrangement whereby all the findings of fact in the original action should be available in the present litigation. The matter of pleadings in the present action was one to which the solicitors for the parties had given careful consideration and even if they had been mistaken as to the effect upon the present respondent of the judgment in the first action there is no doubt that it was agreed that the destruction by fire was caused by the negligence of the appellant's

[1] [1956] S.C.R. 936, 5 D.L.R. (2d) 673.
[2] 28 M.P.R. 320, [1952] 2 D.L.R. 437.

1958

IRVING OIL CO. LTD. v. CAN. GEN. INS. CO.

Kerwin C.J.

employee in delivering the fuel oil in the manner set out in the pleadings, *i.e.*, that he "negligently caused a quantity of such fuel oil to be spilled on the floors of the furnace room in the basement of the said theatre". This is sufficient to dispose of the second contention and I, therefore, express no opinion as to the result if this were not so.

The appeal must be dismissed with costs.

RAND J.:—This appeal arises out of a claim under a policy of liability insurance. The liability insured against was primarily that for personal injury and was provided by four specifically described "insuring agreements". The first of these, denominated no. 1, covered damages for bodily injury, sickness or disease, including death; the second, or no. 2, called for investigation by the insurer of the cause of liability and negotiations for settlement; no. 3, the defence by the insurer on behalf of the insured of suit against the latter and the costs involved, and no. 4, the payment of the premiums on bonds necessary to release attachments and on appeal bonds, costs taxed against the insured in the defence of the suit, expenses incurred by the insurer, interest accruing after entry of judgment for damages and expenses by the insured for imperative and immediate medical and surgical relief at the time of the accident. It was declared that payments made pursuant to agreements nos. 2, 3 and 4 should be in addition to the applicable limit of liability of the policy.

The policy provided further, by a separate and added agreement, that

> Insuring Agreement No. 1 of this policy is extended to indemnify the Insured against loss by reason of the liability imposed upon the Insured by law for damages to or destruction of property . . . [except that belonging to the insured], resulting either directly or indirectly from the business operations of the Insured and caused by accident occurring within the policy period.

The limit of liability under the property provisions was $1,000 but the costs of the trial and appeal amounted to over $40,000 and this is the principal item of the claim in these proceedings.

To the personal injury insurance there were certain exclusions, those pertinent to the issue here being contained in no. 4:

> This Policy shall have no application with respect to, and shall not extend to nor cover, any claims arising or existing by reason of, any of the following matters:
>
> * * *

4. The possession, ownership, maintenance, operation or use by or for the Insured of (a) aircraft or watercraft, (b) motor vehicles (including trailers) owned, hired or leased by, or in the care, custody or control of, the Insured or employees of the Insured or any motor vehicles (including trailers) away from the premises, (c) other vehicles, or the loading or unloading thereof, dogs, riding, driving or draught animals, or bicycles, while such other vehicles, dogs, animals or bicycles are away from the premises.

To the property liability there were similar exceptions, with the second of which only we are concerned:

2. The existence, ownership, care, maintenance, operation or use of any boat, vessel or other floating equipment, elevator or escalator (including elevator shafts, hoistways, equipment and machinery contained therein), aircraft, motor vehicle, trailer, tractor, locomotive engine or train, or other vehicle or any draught or driving animal.

The facts to which these provisions are to be applied can be shortly stated. In delivering fuel-oil to a theatre the operator of a tank-truck negligently allowed oil to slop over the pipe leading to the basement and to run down a chute through which the pipe passed; the oil reaching the basement through the chute was found to have been the direct cause, within an hour and a half of the spilling, of a fire that destroyed the theatre.

Mr. Campbell puts his case for the appeal on two grounds: first, that the words of the property liability exclusion, no. 2, "operation or use" of a motor vehicle, are to be read as ambiguous in respect of "loading or unloading" such a vehicle; and secondly, that the cause as found by the Courts in the original action included negligence of the tank-truck operator in failing to take steps to nullify the effects of the negligent spillage and that that failure was not one arising from or caused by the "operation or use" of the truck.

The ambiguity in exclusion no. 2 is said to arise from the interpretation of the contract as a whole and in particular from the precise specification in exclusion no. 4 of the primary insurance of the words "loading or unloading" in relation to "other vehicles", whether or not they are applicable to motor vehicles. It is argued that by that express specification the scope of "operation or use" for the purposes of the policy has had subtracted from it "loading or unloading" and that consequently the exclusion of "operation or use" of a motor vehicle in clause no. 2 is at

1958

IRVING OIL CO. LTD. v. CAN. GEN. INS. CO.

Rand J.

least rendered doubtful of its inclusion of "loading or unloading". In that case the ambiguity, it is argued, should be resolved against the insurer.

But the differences both in the general language and in subject-matter of these two clauses are, in my opinion, sufficient in themselves to prevent the one from so affecting the interpretation of the other. The subject-matter of the first, bodily injury and death, is wholly discrete from that of property damage. The phraseology indicates clearly that they were drafted and are to be treated independently of one another. Particularly is that so when the words "operation or use" in relation to property damage, taken alone, admittedly extend to loading or unloading where, as here, those services are part of the function of the vehicle itself, that is, through the working of which they are performed: *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[1]. A distinct and separate clause, to have the qualifying effect suggested, would call for little less than an identity of subject-matter with, and be so bound up with or related in liability to, the other as to require us to seek a means of harmonizing them. Neither of these considerations can be said to be present in the policy before us.

To the second contention two answers are given: first, that the pleadings have limited the cause to the negligence in unloading, and, secondly, that the suggested negligence is not to be taken as an original and independent cause divorced from the original negligence.

Paragraph 7 of the statement of claim alleges the delivery of oil in the ordinary course of the appellant's business to the theatre: para. 8 states that in the action for damages brought against the appellant, liability was alleged for the loss incurred "for the reasons set forth in the Statement of Claim in the said [original] action". Paragraph 9 declares the contestation of that action, its trial and the judgment of liability for the damages claimed. By para. 5 of the defence it is set forth that the servant of the appellant

> delivered the said fuel oil . . . from a motor vehicle to the said F. G. Spencer Company Limited at its theatre in the Town of Kentville, in the Province of Nova Scotia by means of a nozzle, rubber hose and pump, operated by the engine forming part of the said motor vehicle owned by the Plaintiff. The said McIntyre in delivering the said fuel oil in the

[1] [1956] S.C.R. 936, 5 D.L.R. (2d) 673.

manner aforesaid negligently caused a quantity of such fuel oil to be spilled on the floors of the furnace room in the basement of the said theatre.

and para. 6:

As to paragraph 8 of the Plaintiff's Statement of Claim the Defendant admits that about an hour and a half after the aforesaid delivery of fuel oil to the said theatre fire broke out in the said premises which resulted in the total destruction thereof. Such destruction of the said theatre and its contents by fire was directly traceable to and was caused by the said negligence of the Plaintiff's said servant or agent McIntyre, acting in the course of his employment as such, while filling the fuel tanks of the said theatre by means of the said nozzle, rubber hose and pump operated by the engine forming part of the said motor vehicle owned by the Plaintiff.

In the reply the appellant "admits the allegations contained in paragraphs 5 and 6 of the defendant's defence".

It was stated by Mr. Gilbert and not disputed that the pleadings had been the subject of joint discussions between counsel for both parties and that the allegations they contain were carefully phrased for the purpose of agreement on a precise statement of the act of negligence creating liability, and avoiding, what would otherwise have been necessitated, the determination of that question anew. The first action, it should be mentioned, was not defended on behalf of the appellant by the respondent.

At the beginning of the trial a statement was made by counsel for the appellant in these words:

MR. MCKELVEY: Now, your Lordship, it will be necessary to refer, in the course of perhaps this case and certainly the case coming up tomorrow, to this judgment and my learned friend Mr. Gilbert has agreed that we can use the reports of that Nova Scotia judgment in so far as it is necessary to refer to them as evidence, if that is in order with your Lordship. The only other alternative is to file certified copies and it seems more practical to use the printed volume.

To this it was remarked:

MR. GILBERT: My Lord, if I may just interject, the only difference between the certified copies as compared with the printed report is the date on the certified copy, which is July 26, 1951.

Following that, counsel, in his opening, used this language:

In the pleadings the statement of claim sets out various terms of the policy and the defendants in the statement of defence refer to the policy for those terms, so that there is no dispute over anything pertaining to the policy; once the policy is placed in evidence, the thing will speak for itself. There is no dispute either that the question of what happened in the Nova Scotia Courts is also agreed in the pleadings. The statement of defence alleges that the damage was due to the negligence of the operator of a tank-truck owned by Irving Oil in filling the tanks of the theatre

1958

IRVING OIL CO. LTD. v. CAN. GEN. INS. CO.

Rand J.

while he was using a nozzle attached to a rubber hose to pump with, which was on his tank-truck, so there is no dispute over that, and no dispute it was the negligence of this man McIntyre, the driver of the truck.

The first of those statements is said by Mr. Campbell, for the purposes of these proceedings, to make available all findings of fact in the original action and that that was the intent and purpose of the acquiescence by Mr. Gilbert in what was said. But this Mr. Gilbert rejects and I agree with him that the exchange is not to be so interpreted. I find no evidence of an intention to permit reference to the judgments for the purpose of modifying the defined issue of fact settled by the pleadings.

Mr. Campbell is not, then, at liberty to go beyond the statement of the negligence as the cause of the fire expressly admitted in the reply by the appellant. But I cannot see that the restriction to the act of spillage affects, in the slightest degree, the reality in the cause of the fire. The failure of the truck-operator to take steps to nullify the consequences of his own negligence is not a violation of an original duty toward the theatre-owner the breach of which creates a new cause of action. He had been negligent and was aware of it and of the possible consequences that might follow from it; his duty was to himself and to his employer to intercept those consequences; but from the moment of the negligent act of spillage its operation continued to the end as the effective agency and was expressly found to have been the direct cause of the loss. Any duty to take preventive measures was merely incidental to and arose out of the primary negligence; it did not create a new and independent cause superseding the latter as producing the consequences. It would be a novel idea in such an insurance that liability of the insurer could be created by mere inaction by the guilty actor toward the consequences of a negligent cause set in motion by himself excluded by the policy: a premium would be placed on inaction where there was any doubt of the success of preventive action. Even as parallel causes operating together, the first would engage the exclusion. The negligent act and the subsequent disregard of consequences are properly to be looked upon as one act continuing until the possibility of liability for legal, damaging consequences has been exhausted; the act of minimizing of damages by the wrongdoer taken alone is mere retrieving, in his own interest, the fault committed.

1958

IRVING OIL CO. LTD. v. CAN. GEN. INS. CO.

Rand J.

On both these grounds I think the appeal fails and I would dismiss it with costs.

LOCKE J.:—I agree that this appeal should be dismissed with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Rand, subject only to the following reservation.

As I agree that, in view of the manner in which the issues were defined in the pleadings and by counsel at the trial, the appellant is not at liberty to contend that an effective and distinct cause of the fire was the failure of the operator of the truck to take preventive measures following the negligent spilling of the oil, I express no opinion upon the validity of that contention.

I would dispose of the appeal as proposed by my brother Rand.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McKelvey, Macaulay & Machum, Saint John.

Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.